

RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM
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ABSTRACT

Rape and sexual assault laws are complex and evolving. Rape originated as a crime against property, not a crime against a person. As such, the crime related to patriarchal inheritance rights and a female's reproductive capacity and therefore was limited to a crime against unmarried virgins and included only forcible penile/vaginal penetration. These laws have evolved but retain vestiges of their archaic origins. The result is inconsistency and variability in sex crime terminology and elements from state to state as well as anomalies. It is now well-established in the laws of all states that the sexual penetration of men and married women is a serious sex crime. It has also been recognized that penetration of orifices other than the vagina constitutes a serious sex crime. Issues of force and consent continue to change but clear trends in the evolution of the law are identifiable. The definition of force is broadening beyond overt physical force to include other modes of coercion. There is an increasing recognition that penetration without consent or any additional force beyond penetration is rape. These trends demonstrate the growing understanding that unwanted and unconsented to bodily invasion is the core wrong that sex crimes laws must address. The FBI's broadening of the Uniform Crime Report (UCR) definition of rape to include penetration without consent and without force reflects these trends. It is important to understand however, that the biased perspective that continues to pervade the justice system's response to sex crimes plays a crucial role in an individual victim's perception of whether or not she/he was the victim of a crime² and whether she believes that she will receive some measure of justice in the legal system. These victim perceptions affect whether victims are willing to report to law enforcement or cooperate in investigations and prosecutions.

INTRODUCTION

The National Academy of Sciences asked the Women's Law Project (WLP) and AEquitas: The Prosecutor's Resource on Violence Against Women (AEquitas) to examine the definitions of rape and other sexual assaults in the legal system, providing the text of

¹ Significant contributions were also made by Viktoria Kristiansson, Attorney Advisor, AEquitas and Christopher Mallios, Attorney Advisor, AEquitas.

² Michael R. Rand & Callie Marie Rennison, *Bigger is not Necessarily Better: An Analysis of Violence Against Women Estimates from the National Crime Victimization Survey and the National Violence Against Women Survey*, 20 J. OF QUANTITATIVE CRIMINOLOGY 10 (2005).

state laws and comparing terminology used. The purpose of this paper is to assist in improving techniques for measuring rape and sexual assault in Bureau of Justice Statistics surveys, including best methods for representing the legal definitions in survey instruments.

AEquitas' mission is to improve the quality of justice in sexual assault, domestic violence, stalking, human trafficking, and dating violence cases by developing, evaluating, and refining prosecution practices that increase victim safety and offender accountability. AEquitas staff includes six former prosecutors specializing in the prosecution of these crimes in various jurisdictions in the United States. AEquitas Attorney Advisors provide specialized assistance including, but not limited to, case consultation, legal research, identification of expert witnesses, recommendations for policy and protocol development, responses to media inquiries, and peer review of articles and other legal resources. In addition to providing technical assistance, AEquitas provides training and develops substantive resources related to the investigation and prosecution of gender-based violence.

The WLP is a Pennsylvania-based non-profit law firm that engages in impact litigation, policy advocacy, individual counseling, and education to create a more just and equitable society by advancing the rights and status of all women. The WLP has worked for more than ten years to improve law enforcement response to sex crimes in Philadelphia. The WLP testified before the Senate Judiciary Subcommittee on Crime & Drugs in September, 2010 about the chronic and systemic failure of police to investigate sex crimes throughout the United States. As explained fully, later in this paper, WLP began working on improving police response to rape and sexual assault in Philadelphia in 2000. While doing that work, the WLP discovered the definition of rape used in the Federal Bureau of Investigation's (FBI's) Uniform Crime Reporting (UCR) system had not been updated since 1929 and was inconsistent with current state crime code definitions. The WLP initiated a campaign to expand the UCR definition of rape, which the FBI approved in December 2011.

This paper describes the common elements of rape and other sexual assault laws used in the states and territories as well as the federal government and Uniform Code of Military Justice (UCMJ). Accompanying this paper is a compilation of rape and sexual assault laws and a number of detailed charts providing profiles of the elements of sex crimes in state, territory, and federal laws, an extraordinary resource prepared by AEquitas.

To fully understand the elements of sex crime laws, however, it is critical to understand both the historical context in which these laws have evolved as well as the dynamics of sexual violence. This historical context influences the way sex crime laws are written by lawmakers and enforced by law enforcement, and, in cases arising under those laws, how police decide whether to arrest, how prosecutors decide whether to take the cases to court, and how judges and juries make ultimate decisions as to whether to convict. The system's response in turn impacts whether victims perceive themselves as crime victims and whether they view the criminal justice system as one that recognizes them as crime victims. One consequence of the system's negative impact on victims is

that it reduces victim reporting to and cooperation with police. Understanding this background will help in developing both survey instructions and questions that are more effective at capturing the prevalence and incidence of rape and sexual assault. It will also assist in understanding that the data collected may be limited to the extent that victim reporting—even to surveys—may be impeded by inaccurate societal notions about rape and sexual assault.

Part I of this paper provides the context in which the content and enforcement of rape and sexual assault laws have developed and continue to evolve. Part II provides a description and analysis of current laws.

Part I: The Context

The Complexity and Evolution of Sex Crime Laws

Rape and sexual assault laws can be complex and confusing. Terminology is confusing because terms such as rape, sexual abuse, sexual assault, and others have different meanings in different jurisdictions; significantly, even the term “consent” is defined differently in each state. Across the states, sex crimes are named and defined differently and range from sexual penetration to acts of sexual violence that do not involve penetration, such as sexual contact and exposure. In some states, special terminology has been applied to refer to the sexual penetration of men and anal penetration of women, including sodomy and deviate sexual intercourse.

There is often significant disparity between the legal definition of crimes and the common understandings of researchers or lay people about what conduct is encompassed in a particular sex crime. More than ten years ago, the WLP encountered this disconnect with respect to the term “rape” when it began working to improve the response of the Philadelphia Police Department (PPD) to rape and other sexual offenses.³ In reviewing data on the incidence of rape in Philadelphia, the WLP learned that the PPD collected data on rape using the FBI’s definition of rape in the UCR which only included forceful penile penetration of a woman’s vagina by a man.⁴ The WLP was using the Pennsylvania Crimes Code definitions which covered vaginal and anal penetration by a body part or object and oral penetration by a sex organ of either a man or a woman.

³ The WLP became involved in advocacy to reform police response to sex crimes after the Philadelphia Inquirer published a series in 1999 uncovering a police scandal of epic proportions. The Philadelphia Police Department (PPD) had buried almost one-third of all sex crime complaints from the mid-1980’s through 1998 in a non-crime code—2701—Investigation of Person. Following City Council hearings and a strong response from the advocacy community led by the WLP, the PPD eliminated the 2701 code for sex crimes, and reviewed all cases coded 2701 for the previous five years, finding 681 cases that should have been classified and investigated as rape – a first degree felony—and over 1700 additional cases that should have been classified and investigated as other sex crimes. The PPD reinvestigated these cases and were able to make some arrests. The PPD also instituted reforms in the Special Victims Unit (the PPD unit that investigates sex crimes) and invited the WLP and other advocacy groups to conduct an unprecedented annual review of its sex crime files. Mark Fazlollah et al., *Women Victimized Twice in Police Game of Numbers*, PHILA. INQUIRER, Oct. 17, 1999, at A1.

Subsequent research by the WLP showed that the UCR had not updated its definition of rape since 1929. The UCR definition thus did not reflect major changes in state laws or the public's understanding of rape and consequently misled the public about the true incidence of rape. Thereafter, the WLP commenced a campaign to expand the UCR definition. In December, 2011, the FBI approved an expansion of the UCR definition of rape to include: *penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim*. The UCR definition of rape is now consistent with the trend in state law recognizing that rape includes penetration without consent and without force (other than the act of penetration itself).

Throughout Part I of this paper, the authors use "rape" consistent with the new FBI definition, which includes penetration of any orifice without consent and regardless of gender.

Context of Rape Jurisprudence

The complexity of sex crime laws derives from a historical background of bias against women. The legal history of rape is particularly ignominious. Under English common law—from which our laws developed—rape was a crime against property, not person.⁵ A woman's reproductive capacity, in the form of her chastity, was considered property and was essential to establishing patriarchal inheritance rights.⁶ A woman's sexuality was owned by her father and transferred to the man who became her husband. Rape laws protected the economic interests of men; therefore, rape was originally considered the theft of this property. The bodily integrity of the woman was irrelevant.

The consequences of the underpinnings of rape law were that (1) unmarried women could only be considered to have been raped if they were virgins; and (2) rape of married women by their spouses was not a crime because the law presumed a broad notion of consent to all of a wife's sexual activity with her husband through her wedding vows.⁷ Under these theories, men could not be raped, rape of orifices other than the vagina was not legally recognized, and rape of non-virginal women was not a crime.

As incorporated in American jurisprudence, the basic elements of rape were generally: carnal knowledge (male (penile)-female (vaginal) penetration), use of force beyond the rape itself, and "against her will" (lack of consent).⁸ In order to establish that the act was against the will of the woman, it was necessary to establish that force was used, and to establish force, it was necessary to show how much a woman resisted.

⁵ Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1478 (2003).

⁶ See, Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 656 (2010).

⁷ *Id.* at 658-59.

⁸ State in Interest of M.T.S., 129 N.J. 422, 432 (1992).

This historical view of rape and its categorization as a property crime also perpetuated the belief that women lie about being raped.⁹ Sex crime statutes were enacted that incorporated the historic goal of protecting male interests and led to numerous procedural anomalies unique to rape. These included: requiring prompt complaint to law enforcement; requiring the corroboration of the victim's testimony by independent testimony and/or evidence of serious physical injury; allowing information regarding the victim's past sexual history and character to be admitted into evidence; and permitting cautionary instructions which impugned the victim's credibility to juries. These rules and requirements, imposed only in rape and sexual assault cases, severely disadvantaged and stigmatized rape complainants and rendered a successful prosecution extraordinarily difficult.

The legal system's hostile treatment of rape cases and rape victims was unique and in marked contrast to its response to other assault crimes. With respect to rape, the legal system emphasized the victim's character, behavior, and words in order to ascertain whether the victim consented. For other assault crimes, however, the legal system focuses only on the actions of the accused to establish criminal activity. For example, the crime of battery (e.g. a punch) is established based solely on the perpetrator's actions and/or intent and the victim's response to being punched is irrelevant. The victim need not resist nor express unwillingness to being punched to establish a crime, nor is a victim's history of being punched relevant. Lack of consent is assumed. Rape, on the other hand, under the traditional view, occurred not because of the action of the assailant, but on the basis of the victim's perceived influence upon and response to the perpetrator's action.

The Model Penal Code (MPC), which was drafted by the American Law Institute (ALI) with the intent of providing legislatures with the best thinking on crimes code provisions, perpetuated many of these historical sex crime provisions. Written in 1962, the MPC defines rape as "sexual intercourse with a female not his wife" by force or threat of severe harm.¹⁰ Under the MPC's terms, rape is not a felony of the first degree if there is no serious bodily harm or if the victim was a voluntary social companion and had previously permitted "sexual liberties."¹¹ The MPC includes the long outdated requirements of resistance, reporting of the sex crime to the police within three months, and corroboration of a victim's testimony as well as age-related provisions that are inconsistent with contemporary understanding of adolescent sexual abuse.¹²

Sweeping sex crime law reform began in the 1970s.¹³ Feminists rejected the notion that women are the property of men without independent legal status or rights

⁹ *Id.* at 433.

¹⁰ MODEL PENAL CODE § 213.1 (1980).

¹¹ *Id.*

¹² MODEL PENAL CODE §§ 213.1, 213.6 (1980).

¹³ *See*, Brief of *Amici Curiae* of Thirty-Nine Organizations Dedicated to Improving the Criminal Justice System's Response to Violence Against Women in Support of Appellant and Requesting Reversal, *Reedy v. Evanson*, 615 F.3d 197 (3d Cir. 2010) (No. 2:06-cv-1080), at 19-21, *available at* http://www.womenslawproject.org/Briefs/Reedy_Amici_Spt_Appellant.pdf [hereinafter Brief of *Amici Curiae*, *Reedy v. Evanson*].

and demanded changes in the laws. As a result of this activism, most states have expanded the definitions of sex crimes to eliminate disparities based on gender and marital status. They have also rescinded the requirements of resistance, corroboration, and reporting requirements and prohibited introduction of a woman's past sexual history.¹⁴ It is now well-established that penetration of orifices other than the vagina is a felony. Issues of force and consent continue to change but clear trends in the evolution of the law are identifiable. The definition of force is broadening beyond overt physical force alone to include other modes of coercion. There is an increasing recognition that penetration without consent or any additional force beyond penetration is a serious sexual offense.¹⁵ These trends demonstrate the growing understanding that unwanted and unconsented to bodily invasion is the core wrong that sex crimes laws must address.¹⁶ The FBI's broadening of the UCR definition of rape to include penetration without consent and without force reflects these trends. Updating the MPC sex crime provisions is also under serious consideration.¹⁷

Additional law reform is needed. Vestiges of archaic requirements remain in some laws and hamper prosecution of rape. All jurisdictions retain a crime of penetration with force, but some still do not recognize rape without force and without consent. Some jurisdictions allow consideration of promptness of complaint, resistance, and physical injury for some purposes, such as determining the credibility of the victim. While marital rape is now a crime in all jurisdictions, differences in treatment persist with regard to both rape of spouses and intimate partners. In addition, consideration of prior sexual history with the accused is allowed in some jurisdictions. Such provisions reflect the persistent but erroneous notion that rape is about a sexual relationship and not about an unwanted, nonconsensual bodily invasion. These provisions and erroneous beliefs about victims and about the nature of rape distract lawmakers from the real harm that criminal law must address—the invasion of bodily integrity—and the dynamics of rape that must be recognized by the law. Rape law is not about regulating normative sexual relations but about regulating crime.

Sex Crime Laws Do Not Reflect the Dynamics of Rape and Sexual Assault

The myths about rape and sexual assault perpetuate the idea that “real rape” only happens when the rapist is a stranger who raped the victim in a vacant lot, the rape is perpetrated through use of force or a weapon, and the victim suffered serious physical injuries in addition to the penetration, resisted the attack strenuously, and promptly complained to authorities. The reality is that victims more often than not are assaulted by people they know,¹⁸ are raped in their own home or the home of a relative or friend,¹⁹

¹⁴ These laws are known as “rape shield” laws and prohibit the introduction of the victim's past sexual history unless it is with the accused.

¹⁵ *E.g.*, CAL. PENAL CODE § 263; OKLA. STAT. ANN. tit. 21, 1113.

¹⁶ *See e.g.*, *State in Interest of M.T.S.*, 129 N.J. at 433-34.

¹⁷ This is significant because the MPC sex crime provisions continue to be taught in law schools as the common framework for understanding sex crimes.

¹⁸ CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION 2000, CHANGES 1999-2000 WITH TRENDS 1993-2000, 8 (June 2001), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv00.pdf>; PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUST. SPECIAL REPORT, EXTENT, NATURE, AND CONSEQUENCES OF RAPE

are not likely to face force or an armed offender,²⁰ are not seriously physically injured other than the rape itself,²¹ and do not report the assault to authorities.

Research demonstrates that most rapes are committed by someone the victim knows. The 2010 National Intimate Partner and Sexual Violence Survey (NISVS), which was conducted by the Centers for Disease Control and published in November, 2011, found that the majority of both female and male victims knew their perpetrators.²² Only 13.8 percent of female rape victims reported being raped by a stranger; most female victims reported being raped by a current or former intimate partner (51.1 percent), acquaintance (40.8 percent), or family member (12.5 percent).²³ Male victims similarly reported a low number of stranger victimizations (15.1 percent) and a high number of acquaintance perpetrators (52.4 percent).²⁴ With respect to sexual assault other than rape, a majority of victims reported sexual coercion and unwanted sexual contact by known perpetrators.²⁵

Most rapes do not involve physical force or use of a weapon.²⁶ About a third of victims reported any of the following physical assaults by a rapist: being slapped or hit (31.4 percent), beat up (19.4 percent), kicked or bit (10.6 percent), choked or attempted to drown (13.4 percent), and hit with an object (6.6 percent). 10.8 percent of women and 8.1 percent of men reported that the rapist used a weapon.²⁷

Rape does not generally result in serious physical injury other than the rape itself. The research shows that only 31.5 percent of female rape victims incur an injury (other than the penetration itself) and that most of them suffered “relatively minor injuries such as scratches, bruises, and welts.”²⁸ In a survey of college students, only 20 percent of the victims of attempted and completed rape reported injuries, which were most often described as “bruises, black-eye, cuts, scratches, swelling, or chipped teeth.”²⁹

VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, 21-22 (2006), *available at* <http://www.ncjrs.gov/pdffiles1/nij/210346.pdf>.

¹⁹ LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 3 (Feb. 1997), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF>.

²⁰ RENNISON, *supra* note 18.

²¹ TJADEN & THOENNES, *supra* note 18, at 29.

²² M.C. BLACK, ET AL., CTR. FOR DISEASE CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 21 (2011), *available at* http://www.cdc.gov/violenceprevention/pdf/nisvs_executive_summary-a.pdf. Please note, that the combined results exceed 100% because some respondents reported multiple perpetrators.

²³ *Id.* at 21-22.

²⁴ *Id.* at 22-23.

²⁵ *Id.*

²⁶ TJADEN & THOENNES, *supra* note 18, at 26.

²⁷ *Id.*

²⁸ *Id.*, *supra* note 18, at 29-30.

²⁹ BONNIE S. FISHER, ET AL., DEP'T. OF JUSTICE NATIONAL INST. OF JUSTICE, BUREAU JUSTICE STATISTICS, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 22 (2000), *available at* <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

In addition, many victims cannot or do not resist a rape or other sexual assault. There are several reasons. Many victims fear serious injury or death.³⁰ In fact, the media and the police warn women against resistance to avoid serious injury or death and instead encourage them to “play along or try to talk their way out of rapes.”³¹ In addition, the trauma that is associated with rape and sexual assault may prevent a victim from actively resisting an attacker. Events that are traumatic and overwhelming cause some victims to “freeze with fright” and become immobilized.³² Some people “dissociate” and experience a detachment from their mind or body that results in an involuntary disruption of normal functioning and control.³³

The expectation that rape victims must report to authorities promptly or be disbelieved is unrealistic and inconsistent with research regarding the impact of rape on a victim. Decades of research has documented that only about 15-20 percent of rape victims report the crime to police.³⁴ This gap in reporting is unique to sex crimes. There are many reasons for not reporting or delaying a report. Victims are faced with the decision to contact the police in the immediate aftermath of a rape, when they may be traumatized and trying to make sense of what happened. In the aftermath of a rape, victims experience a wide range of physical, psychological, and emotional symptoms both immediately and in the long-term.³⁵ These symptoms may include fear, anxiety, anger, self-blame, dissociation, guilt, loss of trust, flashbacks, PTSD, depression, phobias, panic disorder, and obsessive compulsive disorder.³⁶ A rape survivor may experience all, some or none of these reactions.³⁷ As a consequence, victims may experience great difficulty making sense of what happened to them,³⁸ and therefore may behave in a manner that appears counterintuitive, but is in fact merely a normal expression of the victim’s unique strategy for coping with the overwhelming stress of the assault.³⁹ These counterintuitive

³⁰ See, e.g., DEAN G. KILPATRICK, ET AL., NAT’L VICTIM CENTER/CRIME VICTIMS RESEARCH AND TREATMENT CENTER, RAPE IN AMERICA 4 (1992) [hereinafter Kilpatrick, et al., *Rape in America*], available at http://www.musc.edu/nvcv/resources_prof/rape_in_america.pdf; Tjaden & Thoennes, *supra* note 18, at 27.

³¹ Sarah E. Ullman, *A 10-Year Update of Review and Critique of Empirical Studies of Rape Avoidance*, 34 CRIM. JUST. & BEHAV. 411, 412 (2007); Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 986-87 (1998).

³² See ULLMAN, *supra* note 31, at 414-15; Grace Galliano, et al., *Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates*, 8 J. OF INTERPERSONAL VIOLENCE 109-10 (1993).

³³ David Spiegel, et al., *Dissociative Disorders in DSM -5*, DEPRESSION AND ANXIETY 824, 825-26, 830-32 (2011).

³⁴ TJADEN & THOENNES, *supra* note 18, at 33-34; Kilpatrick, et al., *Rape in America*, *supra* note 30, at 5-6.

³⁵ PATRICIA L. FANFLIK, NAT’L DISTRICT ATTORNEYS ASS’N, VICTIM RESPONSES TO SEXUAL ASSAULT: COUNTERINTUITIVE OR SIMPLY ADAPTIVE? 5 (2007) (citing Patricia Frazier, *The Role of Attributions and Perceived Control in Recovery from Rape*, 5 J. OF PERS. & INTERPERSONAL LOSS 203, 204 (2000)); SHIRLEY KOHSIN WANG, ET AL., WORLD HEALTH ORGANIZATION/SEXUAL VIOLENCE RESEARCH INITIATIVE, RESEARCH SUMMARY: RAPE: HOW WOMEN, THE COMMUNITY AND THE HEALTH SECTOR RESPOND 2 (2007).

³⁶ WANG, ET AL., *supra* note 35.

³⁷ See FANFLIK, *supra* note 35, at 5.

³⁸ *Id.* at 19 (citing V.E. White Kress, et al., *Responding to Sexual Assault Victims: Considerations for College Counselors*, 6 J. COLLEGE COUNSELING 124, 125 (2003)).

³⁹ See Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, 1 THE VOICE 1 (2006); Kimberly A. Lonsway, *The Use of Expert Witnesses in Cases Involving Sexual Assault*, Violence Against Women Online Resources (2005), available at

behaviors may include avoidance strategies to manage the negative impact of the victimization, including denying that the event occurred and avoiding thinking about it.⁴⁰

In addition, many victims are afraid, unsure of whom to tell, fearful of retaliation from the rapist, and wary of exposing themselves to a system that they do not trust and that may further invade their privacy and cause additional trauma.⁴¹ Victims also refrain from reporting to police because they are ashamed or embarrassed, or fear that the police will blame or disbelieve them. Victims might not understand that their experience is a police matter, or think the police cannot do anything.⁴² A significant number of victims of drug facilitated/incapacitated rape do not classify what happened to them as a crime or as the crime of rape.⁴³ Almost 50 percent of surveyed college students who had been determined to have been raped, based on the behavior they described, stated that they did not consider what happened to them to be rape.⁴⁴

The Impact of Bias and Myths in the Criminal Justice System's Treatment of Rape

The persistence of myths and biases about rape and sexual assault that are inconsistent with the true dynamics of sex crimes influence how police, prosecutors, judges, and juries enforce and interpret laws. Prosecutors and law enforcement who are influenced by outdated laws and the myths that surround rape and sexual assault may approach these crimes differently from the way they approach other crimes.⁴⁵ Police detectives may interrogate victims as if they are the suspects, and subject them to unreliable and humiliating polygraph exams and arrests or threats of arrest for alleged false reporting. They may doubt and revictimize victims by closely scrutinizing their lives in search of evidence to charge the victim, without even investigating the rape allegations.⁴⁶ Studies show that about one half of rape victims report being revictimized by police.⁴⁷ One study that interviewed police officers as well as victims found a correlation between victim and police reports of how victims were treated; similar

<http://www.mincava.umn.edu/documents/commissioned/svandexpertwitnesses/svandexpertwitnesses.pdf>.

⁴⁰ FANFLIK, *supra* note 35, at 15.

⁴¹ *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Senate Committee on the Judiciary Subcommittee on Crime and Drugs*, 111th Cong. 7 (2010) (testimony of Dean G. Kilpatrick), available at <http://judiciary.senate.gov/pdf/10-09-14KilpatrickTestimony.pdf>; Kimberly Lonsway & Joanne Archambault, *The Earthquake in Sexual Assault Response: Police Leadership Can Increase Victim Reporting to Hold More Perpetrators Accountable*, 77 THE POLICE CHIEF 50 (2010), available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=2201&issue_id=92010; Tjaden & Thoennes, *supra* note 18, at 33.

⁴² TJADEN & THOENNES, *supra* note 18, at 35.

⁴³ DEAN G. KILPATRICK, ET AL., NAT'L VICTIM CENTER/CRIME VICTIMS RESEARCH AND TREATMENT CENTER, DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY 41 (Feb. 2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf>.

⁴⁴ FISHER, *supra* note 29, at 15.

⁴⁵ See SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE 115 (Columbia University Press 2009).

⁴⁶ See, e.g., *Reedy v. Evanson*, 615 F.3d 197 (3d Cir. 2010).

⁴⁷ Debra Patterson, *The Linkage Between Secondary Victimization by Law Enforcement and Rape Case Outcomes*, 26 J. INTERPERSONAL VIOLENCE 328-29 (2011).

percentages of victims and police, for example, reported questioning by police about sexual history.⁴⁸ This treatment may lead to recantations made solely to avoid participating in the criminal justice system. It may also lead to cases that are inadequately investigated and that cannot be prosecuted.

A recent study shows that the manner in which detectives interview complainants has an effect on the extent to which the complainant discloses what happened and potentially on the outcome of a criminal prosecution.⁴⁹ Complainants whose cases were prosecuted described detectives as consoling, questioning them at a gentle pace, and giving them an overall feeling of being believed. Complainants whose cases were not prosecuted describe rapid and forceful questioning and victim blaming, communicating implicitly or explicitly their disbelief.⁵⁰ To the extent that a negative experience with a detective results in an inadequate victim statement, it may impact whether a case is prosecuted and whether prosecution ultimately results in a conviction.⁵¹

An emerging body of research finds that police treatment is also a critical element in both advancing and impeding victim recovery. Given police power and authority and the extreme vulnerability of and trauma experienced by rape and sexual assault victims, the way the police treat the victim will either be an empowering first step toward her safety and healing or a devastating betrayal of trust, a second trauma. Two independent studies of rape victims' experiences in the police reporting processes—in England and New Zealand—reported strikingly similar findings and conclusions.⁵² Both studies found a strong polarity in victims' experiences, with many feeling either well treated or profoundly mistreated by police.⁵³ Both found that when police demonstrate respect and concern for the victim and belief in her recitation of events, it has a powerfully positive impact: women who felt well treated were empowered by their police interactions.⁵⁴ Conversely, both studies found that when police lack empathy, challenge a victim's credibility, or judge her behavior, they re-traumatize her. Women who felt ill-treated by police were devastated by their interactions.⁵⁵

Criminal justice professionals and other participants in the judicial process are not immune from bias in their handling of rape and sexual assault. In the past few decades, researchers, state task forces, and judicial organizations have studied and made findings

⁴⁸ *Id.* (citing Rebecca Campbell, *What Really Happened? A Validation Study of Rape Survivors' Help-Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 55-68 (2005)).

⁴⁹ Debra Patterson, *The Impact of Detectives' Manner of Questioning on Rape Victims' Disclosure*, 17 VIOLENCE AGAINST WOMEN, 1349, 1355-1364 (2011).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Jan Jordan, *Worlds Apart? Women, Rape, and the Police Reporting Process*, 41 BRITISH J. OF CRIMINOLOGY 679 (2001); Jennifer Temkin, *Plus ça Change: Reporting Rape in the 1990s*, 37 BRITISH J. OF CRIMINOLOGY 507 (1997).

⁵³ JORDAN, *supra* note 52, at 694; TEMKIN, *supra* note 52, at 513-514.

⁵⁴ JORDAN, note 52, at 694-97; TEMKIN, *supra* note 52, at 519.

⁵⁵ JORDAN, *supra* note 52, at 694-97; TEMKIN, *supra* note 52, at 522.

about gender bias in the court system.⁵⁶ They have found evidence of judges, court officers, prosecutors, and juries who displayed stereotypical views, insensitivity to, and ignorance about sex crime victims, and disbelieved and blamed victims, most frequently when the victim knew the perpetrator⁵⁷—a circumstance that is true of the vast majority of sex crimes.⁵⁸ Researchers have found that jurors have inaccurate understandings of rape victim behavior that influence their decisions.⁵⁹ Many judges and jurors expect proof of resistance and injury to overcome a consent defense, even when the law requires neither resistance nor corroboration.⁶⁰ Victims are viewed as more credible if weapons are used or victims are injured, even though these factors are not present in most rapes.⁶¹ As a result of these biases, jurors often fail to convict intimate partner rapists.⁶²

Confronting judges and juries with the same biases held by police, prosecutors face a daunting task in achieving convictions.⁶³ Rape cases can be difficult to prove and alcohol and drug-facilitated rapes may involve impaired memory and observation as well as biases against intoxicated victims.⁶⁴ Rather than try to overcome the misconceptions and challenges, prosecutors often decide not to prosecute.⁶⁵

The mishandling of rape and other sex crimes puts victims at a unique disadvantage in the criminal justice system, decreasing the rate of reporting rape and other sex crimes and increasing the rate of claims withdrawn by victims.⁶⁶ Further, distrust of police and interrogation of victims of rape and other sex crimes create seemingly uncooperative victims, feed the misperception that uncooperative victims are lying, and discourage future victims from reporting to police.⁶⁷

⁵⁶ See *Addressing Gender Bias in the Courts*, LEGAL MOMENTUM, <http://www.legalmomentum.org/our-work/njep/njep-task-forces.html> (last visited May 24, 2012).

⁵⁷ FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM, 422-52 (2003), available at http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf.

⁵⁸ TJADEN & THOENNES, *supra* note 18, at 21-22.

⁵⁹ See Louise Ellison & Vanessa E. Munroe, *Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials*, 49 BRIT. J. CRIMINOLOGY 363 (2009); Louise Ellison & Vanessa E. Munroe, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 BRIT. J. CRIMINOLOGY 202 (2009).

⁶⁰ PATTERSON *supra* note 49, at 1350; see, e.g., *Commonwealth v. Claybrook*, Clay & Lewis, Nos. 1926, 1835, 1762 EDA 210 (Pennsylvania Superior Court non-precedential opinion overturning convictions for sexual assault and indecent assault based on lack of sufficient resistance and injury and other misconceptions about victim behavior).

⁶¹ PATTERSON, *supra* note 49, at 1350.

⁶² Jennifer Gentile Long, *Prosecuting Intimate Partner Sexual Assault*, 3 FAMILY & INTIMATE PARTNER VIOLENCE 353-54 (2011).

⁶³ See, e.g., *Commonwealth v. Emge*, 381 Pa. Super. 139, 144 (1988); Christopher Mallios, *Landmark MN Decision on Expert Testimony*, 15 SEXUAL ASSAULT REPORTER 1 (Sept./Oct. 2011).

⁶⁴ TERESA SCALZO, NAT'L DISTRICT ATTORNEYS ASS'N, PROSECUTING ALCOHOL FACILITATED SEXUAL ASSAULT, 1 (2007), available at http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf.

⁶⁵ Julia Dahl, *Is Rape a "Crime Without Consequence?"*, THE CRIME REPORT, Nov. 7, 2010, <http://www.thecrimereport.org/archive/is-rape-a-crime-without-consequence/> (last visited May 24, 2012); Christopher Mallios & Toolsi Meisner, *Educating Juries in Sexual Assault Cases*, 2 STRATEGIES (July 2010), available at <http://www.aequitasresource.org/library.cfm>.

⁶⁶ TJADEN & THOENNES, *supra* note 18, at 35.

⁶⁷ Brief of *Amici Curiae*, *Reedy v. Evanson*, *supra* note 13, at 13-17.

Allowing Bias and Myths to Infect the Justice System Leads to More Rapes

When the criminal justice system refuses to respond adequately to a complaint of rape because myths lead them to disbelieve victims, victims do not report, rapists are not caught, arrested, or prosecuted, and perpetrators are likely to reoffend. Research shows that not only do an alarmingly high number of perpetrators of rape reoffend, but also that repeat offenders commit the vast majority of rapes.⁶⁸ In their 2002 study, David Lisak and Paul H. Miller found that 120 rapists were responsible for 1,225 separate acts of interpersonal violence, including rape, battery, and child physical and sexual abuse, and that repeat rapists averaged 5.8 rapes each.⁶⁹ Police mishandling of rape complaints has allowed serial rapists like those in Lisak and Miller’s research to perpetrate again and again without detection.

Part II Rape and Sexual Assault Laws

As discussed in Section I, there has been an evolution in the understanding of rape and sexual assault dynamics as most recently reflected in the new UCR definition, which removes the force requirement for reportable sexual offenses and also expands the definition to encompass the penetration of the mouth and anus. Some jurisdictions’ laws also have evolved to incorporate the ever-expanding research about sex crimes and offender behaviors. For example, there are 18 jurisdictions that do not require the use—or threat—of force in either their rape or other sexual assault statutes addressing penetration crimes. Still more jurisdictions do not require force in sex crime statutes addressing contact and exposure crimes. In other jurisdictions, however, the laws remain sadly outdated in either language or content. The disconnect between the law and dynamics of rape and sexual assault can play a crucial role in individual victims’ perception of whether or not they were the victims of a crime⁷⁰ and whether they believe they will receive some measure of justice in the legal system.

This section reviews sex crime statutes⁷¹ in all 50 states, the District of Columbia, the U.S. Territories, federal jurisdictions and the Uniform Code of Military Justice (UCMJ)—a total of 58 jurisdictions. It shows that jurisdictions differ in their terminology, gradation,⁷² and their interpretation of the proscribed conduct. In order to adequately compare the different laws, the analysis focuses on the individual elements of each statute and their relevant definitions, rather than the terms used to describe the crimes, since these vary greatly and provide little guidance to the conduct they cover. For example, conduct defined as “rape” in one jurisdiction may be termed “sexual assault,”

⁶⁸ See generally David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002).

⁶⁹ *Id.* at 78.

⁷⁰ RAND & RENNISON, *supra* note 2.

⁷¹ The sex crimes laws discussed in this paper focus on sex crimes against adults. The only exceptions are statutes that relate to capacity-to-consent that address age, and child sex abuse statutes. When information refers to child abuse statutes, it is indicated in an explanatory footnote.

⁷² The grade of a crime corresponds to its seriousness, for example, Felony of the First Degree, Class A Felony. The terminology used to grade offenses is not uniform throughout the nation.

“sexual abuse,” or “sexual battery” in other jurisdictions. By focusing on the elements rather than the terms, similarities and distinctions become apparent.

Notwithstanding the complexity of this analysis, jurisdictions can be grouped and analyzed based on the following elements:

- The range of covered conduct, specifically penetration, contact (non-penetration), or exposure,
- The use of force,
- The absence of consent,
- The victim’s capacity to consent, and
- Whether the conduct was for the purpose of sexual arousal or degradation.

Although there is some overlap in the elements of penetration, contact, and exposure crimes, there are significant differences between the elements of penetration crimes versus contact and exposure crimes. As a result, this paper will first address penetration crimes and describe the conduct covered and the elements that make the conduct unlawful. Then it will address contact and exposure crimes in the same manner.

The figure below is intended to provide a big picture understanding of the types of rape and sexual assault crimes, their gradation, and the prohibited conduct relevant to those crimes. The figure begins with a line connecting the felony and misdemeanor crimes on a continuum depicting the differences in how these crimes are graded (i.e., the severity of the offenses). Below that line, the figure groups the type of conduct by penetration, non-penetrative contact, and exposure. As the type of contact moves from penetration to exposure, the severity of the penalty and grading decrease as well. The figure below the conduct boxes depicts the number of jurisdictions requiring the additional elements of sexual arousal, degradation, or humiliation for each type of contact addressed in this paper. For example, in 15 jurisdictions, some penetration crimes also require sexual arousal and/or gratification, with 5 of those also criminalizing conduct committed for the purpose of degradation or humiliation. The final critical element is whether force was used and whether consent was absent. The jurisdictions are divided into those that require force and nonconsent and those that simply require nonconsent.

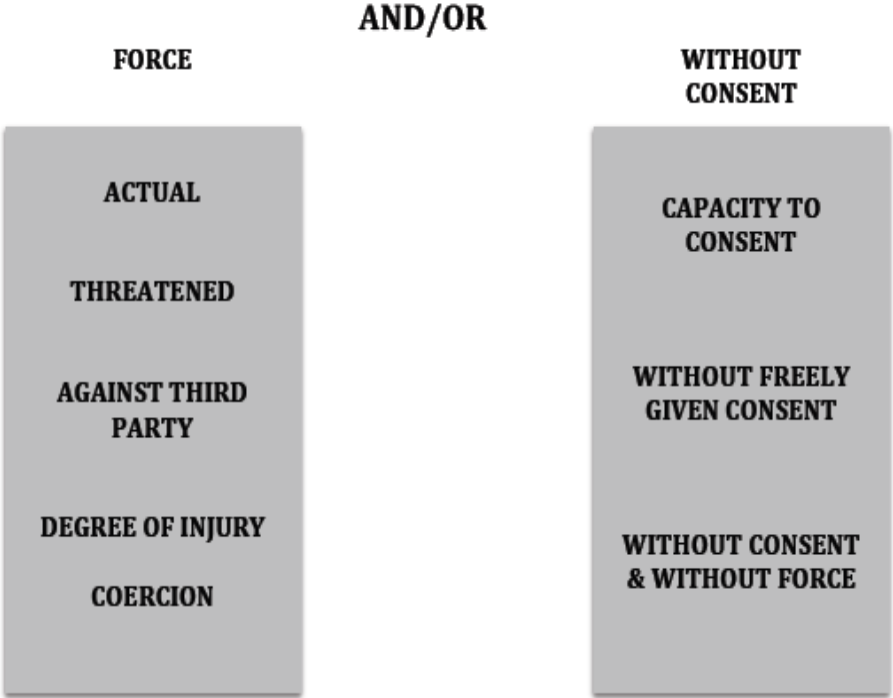
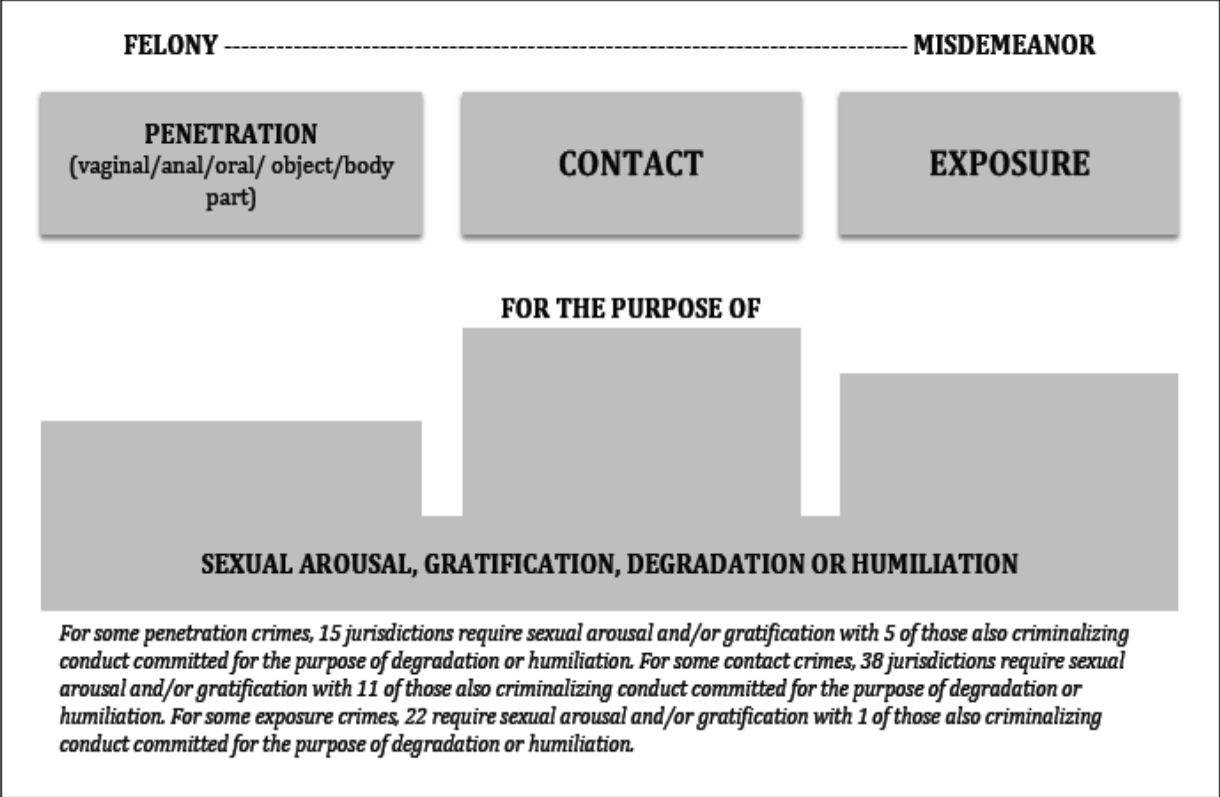


Figure 1. This visual is intended to provide a big picture understanding of the types of rape and sexual assault crimes, their gradation, and the conduct prohibited.

Penetration Crimes

Conduct

Sexual penetration crimes may include penetration of the vagina, anus, or mouth⁷³ by the penis or other body part, or penetration of the vagina or anus by an object.⁷⁴ The following circumstances determine the appropriate statute that criminalizes the conduct:

- The object or body part that the perpetrator uses to penetrate; and
- The orifice or body part of the victim that the perpetrator penetrates.

Crimes involving forced penile penetration of the vagina are always the most seriously graded sex crimes in all jurisdictions. Crimes involving other types of penetration as well as non-penetration crimes *may* be graded less seriously than other sex crimes in a jurisdiction. Other factors impacting the grade level of the offense include whether a weapon or force was used in commission of the crime.

The terminology utilized for crimes involving penile/vaginal penetration may include: “rape,” “sexual assault,” “sexual abuse,” and “sexual battery,” all of which may be further defined as “carnal knowledge,” “sexual intercourse,” “sexual penetration,” or “sexual act.” Names for crimes involving penile and other body part or object penetration of orifices other than the vagina (anus or mouth) may include: “sexual assault,” “sexual battery,” “deviate sexual assault,” and “sexual torture.” Only one jurisdiction, Idaho, uses gender-specific terminology to address sexual penetration of a male by a male.⁷⁵

The statutory elements in each jurisdiction are not defined identically, and even slight variations among these definitions impact whether or not the penetration is *criminal*.⁷⁶ It is important, therefore, to look at the “definitions” sections of each statute or criminal code, as well as to the court decisions (case law), for clarification. Significantly, the same term may have various definitions among jurisdictions, which are also likely to differ from the BJS survey subjects’ colloquial understanding of the term.

⁷³ Some jurisdictions use the term “os” to describe the mouth. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 3101 (2012).

⁷⁴ All jurisdictions except Louisiana and American Samoa include penetration with an object in their rape and sexual assault crimes. Alabama and New Hampshire include a provision addressing penetration of the mouth with an inanimate object in its sexual offenses. ALA. CODE § 13A-6-65.1 (2012); N.H. REV. STAT. ANN. § 632-A:1(V)(a)(6)(2012). Most states, however, do not. *See, e.g.*, N.J. STAT. ANN. § 2C: 14-1(c) (“Sexual penetration’ means vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the *anus* or vagina either by the actor or upon the actor’s instruction. The depth of the insertion shall not be relevant as to the question of commission of the crime;”) (emphasis added). Since penetration of the mouth by an inanimate object is not specifically described in the rape and sexual assault statutes in most jurisdictions, charges involving these circumstances would be filed under other assault-related crimes or under a provision for a sexually motivated felony if the circumstances of the crime satisfy the required elements of one of the enumerated crimes. For an example of a statute addressing sexually motivated felonies *see* N.Y. PENAL LAW § 130.91 (McKinney 2011).

⁷⁵ IDAHO CODE ANN. §18-6108 (2012).

⁷⁶ For example, provisions related to intoxication may be more strictly construed, based on whether or not the victim’s intoxication was voluntary or involuntary.

Most jurisdictions do not require more than slight penetration to establish the penetration crime. Some jurisdictions do not employ the term “however slight” in their statutes. They are: Arizona, Florida, Georgia, Indiana, Maine, Massachusetts, Mississippi, Texas, Virginia. A review of case law in these jurisdictions, however, reveals that no jurisdiction requires more than slight penetration.⁷⁷ Slight penetration is achieved when the penis or other body part/object enters either the anterior of the female genital organ known as the labia majora or vulva,⁷⁸ the lips of a victim’s mouth,⁷⁹ or the anal opening.⁸⁰ Penetration has also been established by the act of licking a penis.⁸¹ Significantly, penetration through clothing has also been held sufficient under federal law.⁸² At least one court, however, has determined that penetration of the buttocks is insufficient to establish sexual intercourse.⁸³ There is also persistent confusion among individuals (e.g., victims) over what constitutes penetration of the vagina, anus, or mouth.

No jurisdictions require emission.

Unlawfulness

Penetration by itself is not criminal, unless it occurs by force, without consent, or where the victim lacked the capacity to consent. In some jurisdictions, there is an additional requirement that the act be committed for the purpose of sexual arousal or gratification, abuse, degradation, or humiliation. These elements have different weight in each jurisdiction, and the distinctions may impact the grading of the sex crime, sentencing, or court decision.⁸⁴

The elements—particularly those around force and consent—are further refined, qualified, and defined inconsistently among the jurisdictions, and sometimes do not follow their respective colloquial meanings.⁸⁵ For example, a review of the statutes indicates wide variations of what may constitute one’s capacity to consent, specifically: a) whether the victim had the capacity to consent and, if so, b) whether the consent was freely given. In reality, many factors *may* impact an individual’s capacity to consent: age, relationship with the perpetrator, intoxication, disability (mental/physical), physical capacity, and consciousness.

⁷⁷ See, e.g., *State v. Torres*, 105 Ariz. 361 (1970); *Richards v. State*, 738 So.2d 415 (Fla. Dist. Ct. App. 2011); *State v. Pratt*, 309 A.2d 864 (Me. 1973).

⁷⁸ James L. Rigelhaupt, Jr., Annotation, *What Constitutes Penetration in Prosecution for Rape or Statutory Rape*, 76 A.L.R. 3d 163, § 3 (1977).

⁷⁹ See, e.g., *Commonwealth v. K.M.*, 452 Pa. Super. 7, 15 (1996)(a case involving the rape of a child, where female defendant’s use of her lips to penetrate her daughter’s vagina was sufficient to establish rape.)

⁸⁰ See RIGELHAUPT, *supra* note 78.

⁸¹ *Id.* (citing *Commonwealth v. King*, 445 Mass. 217, 834 N.E.2d 1175 (2005)).

⁸² See, e.g., *id.* at § 6.5 (citing *United States v. Norman T.*, 129 F.3d 1099(10th Cir. 1997)).

⁸³ *State v. A.M.*, 163 Wash. App. 414 (2011) (addressing child rape in the first degree but relying on definition of sexual intercourse in sex offenses part of statute which is applicable to adult victims as well.

⁸⁴ See, e.g., *Clayton v. State*, 695 P.2d 3 (Okla. Crim. App. 1984).

⁸⁵ See, e.g., MONT. CODE ANN. § 45-5-501 (2011)(defining lack of consent as when “the victim is compelled to submit by force against the victim or another”).

The range of definitions and a discussion of force, consent, sexual arousal, gratification or abuse, degradation, and humiliation are set forth below.

Force

The element of force, and how it is defined, is crucial to determining the criminality of conduct when looking at rape and sexual assault laws. Force has a broad range of definitions, as explained below, and some jurisdictions even incorporate descriptions of force in their statutory definitions of consent. The overlap can complicate interpretation of these laws because the element of force generally pertains to the offender's conduct, while the issue of consent pertains to the victim's conduct. It is, therefore, important to understand the relationship between force and consent and how it affects application of the laws separately and together. Significantly, in the majority of jurisdictions, the absence of force *may* preclude a sex crime charge. Further, while, the element of consent may not be included in a particular statute, it is almost always an issue in rape and sexual assault prosecutions and is most commonly raised by a defendant's attack on the credibility of the victim.⁸⁶

All jurisdictions criminalize attempted and completed forcible sexual penetration,⁸⁷ but there are also significant variations in how force is analyzed among the rape and sexual assault laws of different jurisdictions. Statutory definitions of force include physical force, violence, force required to overcome victim resistance, or stated or implied threats that place an individual in fear of immediate death or (serious) physical injury to the individual or to a third party, or retaliation. Definitions of force may also include kidnapping; use, threat, or showing a deadly weapon or other dangerous instrument; duress; menace or violence; overcoming the victim by superior strength, physical restraint, or physical confinement; threat of extortion; express or implied intimidation⁸⁸ and coercion;⁸⁹ and overcoming the victim by concealment or surprise (e.g. where a perpetrator pretends to be the victim's husband).⁹⁰ Courts interpreting these statutes, however, look to the context of the assault in order to determine if the evidence establishes the force requirement. The trend is towards a more expansive definition that goes beyond overt physical force. This trend is reflected in human trafficking legislation in which coercion is codified as a fundamental legal element of the crime.⁹¹

This trend is further reflected in the laws of two jurisdictions, which addressed the definition of force required in their statutes in the early 1990's. In New Jersey, the state supreme court held in *State in Interest of M.T.S.* that "physical force beyond what is needed to accomplish penetration is not required."⁹² The *M.T.S.* court concluded that "to

⁸⁶ See, e.g., Teresa Scalzo, *Overcoming the Consent Defense*, 1(7) THE VOICE (2006).

⁸⁷ Jurisdictions with laws that also criminalize penetration without force and without consent will be discussed below.

⁸⁸ See, e.g., W. VA. CODE ANN. § 61-8B-1 (2011).

⁸⁹ See, e.g., MICH. COMP. LAWS ANN. § 750.520C (2012).

⁹⁰ See, e.g., MICH. COMP. LAWS ANN. § 750.520B(1)(f)(v) (2012); LA. REV. STAT. ANN. § 14:43(3) (2010).

⁹¹ Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011).

⁹² *State in Interest of M.T.S.*, 129 N.J. at 443.

require physical force in addition to that entailed in an act of involuntary or unwanted sexual penetration would be fundamentally inconsistent with the legislative purpose to eliminate any consideration of whether the victim resisted or expressed non-consent.”⁹³ The court reached this conclusion after examining a recent amendment to a New Jersey sexual assault statute that had eliminated any focus on victim behavior, including any requirement that the victim resist, and did not provide any definition of physical force, in part to deter interpretations that would limit force to specified examples. The court further found that “permission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances.”⁹⁴ In *Commonwealth v. Berkowitz*, however, the Pennsylvania Supreme Court determined that for the prosecution to prove that penetration was forced, it must establish more than the victim stating, “No.”⁹⁵ Following this decision, the legislature enacted a statute criminalizing sexual intercourse to which the victim did not consent.⁹⁶ There have also been several decisions recognizing the broad definition of force, which can be accomplished through holding a victim down, size differential, and relationship.⁹⁷ In addition, several jurisdictions define force to include coercion as an alternative to overt physical force.⁹⁸

Analysis of the Use of Force Requirement	
Force	Jurisdiction
Actual Force	All
Threatened force	All
Force Against a Third Party (Where the force or threat of force used by the perpetrator is directed at a third party to commit a rape or other sexual assault against the victim.)	All except Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Massachusetts, Mississippi, Missouri, New Jersey, Ohio, Oklahoma, Tennessee, Vermont, Wisconsin, Puerto Rico, Virgin Islands
Injury required as part of the forcible offenses	District of Columbia, Iowa, New Mexico, North Carolina, Vermont, Washington, West Virginia, Wisconsin, Virgin Islands, UCMJ ⁹⁹

Figure 2: Most states include provisions criminalizing rape and sexual assault with actual or threatened force. With a few exceptions, threatened force directed against a third party rather than the victim is also criminal. Also, there are 11 jurisdictions that require injury to establish rape or sexual assault under their statutes.

⁹³ *Id.* at 443.

⁹⁴ *Id.* at 444.

⁹⁵ *Commonwealth v. Berkowitz*, 537 Pa. 143 (1994).

⁹⁶ *See* 18 PA. CONS. STAT. ANN. § 3124.1 (2012).

⁹⁷ *See, e.g.*, *People v. Lee*, 51 Cal. 4th 620 (2011); *People v. Keene*, 226 P.3d 1140 (Colo. Ct. App. 2009).

⁹⁸ *See, e.g.*, NEB. REV. STAT. § 28-318(8) (2011) (defining “without consent” to include submission due to the use of force or threat of force or coercion, where the victim expresses a lack of consent through words or conduct, or the consent was given as a result of the actor’s deception).

⁹⁹ The District of Columbia, Vermont, and the Virgin Islands require bodily injury for their aggravated sexual assault crimes. New Mexico requires injury for third degree criminal penetration.

The statutes of some jurisdictions define sexual offenses by combining a force element with additional aggravating factors, such as the elements of severe personal injury to the victim, committing the crime in the course of committing another crime, repeated assaults, use of a deadly weapon or firearm, being aided or abetted by another person, intent to transmit sexually transmitted infections (STIs), or facilitating the assault by drugging or intoxicating the victim.¹⁰⁰ The existence of one or more of these factors may increase the penalty for a crime.¹⁰¹

Only a minority of jurisdictions, Alabama, Idaho, Kentucky, Nebraska, West Virginia, and the Virgin Islands, require resistance to some degree to prove forcible rape or sexual assault. The language of these statutes requires that the victim offered earnest resistance or made his/her resistance reasonably known to the perpetrator and it was overcome by force. The following jurisdictions expressly state that no resistance is required: Delaware, Iowa, Maine, Michigan, Montana, New Jersey, Ohio, Pennsylvania, and Guam. Some jurisdictions even include provisions that a victim's lack of verbal or physical resistance does not constitute consent or the absence of force. They are: District of Columbia, Florida, Illinois, Minnesota, New Mexico, Oregon, and UCMJ.

Consent

The element of consent is critical in determining whether conduct addressed by rape and sexual assault statutes is criminal.¹⁰² Nonconsent is further divided into factors related to the circumstances of the assault, e.g., victim's communication of her unwillingness to participate in sexual activity, and factors related to the victim or perpetrator themselves, such as age and relationship. The analysis is complex and discussed in more detail below.

Freely given

The definition of consent differs across jurisdictions and statutory definitions generally identify two different factors: whether the individual freely consented and whether the individual had the capacity to consent. For example, consent is defined in various statutes as: conveying permission,¹⁰³ positive cooperation in an act or an attitude pursuant to an exercise of free will and with knowledge of the nature of the act.¹⁰⁴ Lack

¹⁰⁰ The impact of intoxication on the evaluation of rape and sexual assault crimes is discussed later in this paper.

¹⁰¹ See, e.g., N.J. STAT. ANN. § 2C: 14-2 (2011) (an actor is guilty of aggravated sexual assault, a crime of the first degree, where the act is committed during the commission, or attempted commission of an enumerated crime or where the actor is armed with a weapon).

¹⁰² The concept of consent is at the heart of nearly every defense in rape and sexual assault prosecutions (i.e., the consent defense). Notwithstanding the elements of the crime charged, the most common defense strategy is to break down victims' credibility so that juries believe that, regardless of their testimony, they consented to the conduct for which the perpetrator is on trial. This general concept of "consent defense" is distinct from the legal elements related to consent.

¹⁰³ D.C. CODE § 22-3006 (2011).

¹⁰⁴ See, e.g., CAL PENAL CODE § 261.6 (2012); COL. REV. STAT. ANN. § 18-3-401 (2011).

of consent has been defined as “consent induced by fraud,”¹⁰⁵ “compulsion,”¹⁰⁶ or “compulsion to submit due to use of force or threat of force or coercion.”¹⁰⁷

Some jurisdictions require that the perpetrator knowingly, knew, or had reason to know that the victim did not consent.¹⁰⁸ Some statutes explicitly state that the victim’s lack of resistance or the victim’s current or prior “social” relationship, or “manner of dress”¹⁰⁹ with the perpetrator shall not constitute consent.¹¹⁰

Some jurisdictions specify that if the offender obtains the victim’s consent by fraud, then the consent is not valid.¹¹¹ Louisiana, for example, defines non-consent as including penetration that was induced by conduct that led the victim to believe she was having sexual intercourse with her husband.¹¹² However, in other jurisdictions, obtaining consent by fraud may not vitiate the consent to the act, thereby resulting in the act not being criminal.

Affirmative consent

A minority of jurisdictions, including the District of Columbia, Minnesota, New Jersey, Washington, and Wisconsin, require words or overt actions indicating agreement for sexual intercourse or acts to be considered consensual. These jurisdictions define “consent” by statute or case law, generally, as words or overt actions indicating a freely given agreement to have sexual intercourse or contact.¹¹³

¹⁰⁵ See, e.g., ALA. CODE § 13A-6-65 (2012).

¹⁰⁶ See, e.g., HAW. REV. STAT. § 707-700 (2011).

¹⁰⁷ See, e.g., NEB. REV. STAT. ANN. § 28-318 (2011).

¹⁰⁸ See, e.g., D.C. CODE § 22-3001(4) (2012); KAN. CRIM. CODE ANN. § 21-5503 (2010); MO. ANN. STAT. § 566.020 (2011); TENN. CODE ANN. § 39-13-503 (2011); *State v. Bolsinger*, 709 N.W.2d 560, 562 (Iowa 2006)(doctor at school for delinquent high school students found guilty of saying he was checking for bruises, scratches, hernias, and testicular cancer); *State v. Vander Esch*, 662 N.W.2d 689, 691 (Iowa Ct. App. 2002)(business owners found guilty of sexual assault when engaging in sexual acts with two employees telling them that he would use their semen for a scientific research project when there was no such project); *State v. Klaudt*, 772 N.W.2d 117, 130 (S.D. 2009)(defendant found guilty of rape when he convinced teenage girl in foster care that he was performing a test on her to evaluate if she qualified for egg donation); *Suliveres v. Commonwealth*, 449 Mass. 112, 118 (2007)(defendant engaged in intercourse with twin brother’s girlfriend while pretending to be his twin brother).

¹⁰⁹ UCMJ §920 ART. 120(t)(15) (2012).

¹¹⁰ See, e.g., D.C. CODE § 22-3001(4) (2012); D.C. CODE § 22-3019 (2012); FLA. STAT. ANN. § 794.011(1)(a) (2012); MINN. STAT. ANN. § 609.341 (2011).

¹¹¹ See, e.g., ALA. CODE § 13A-6-65 (2012), CAL. PENAL CODE § 261 (2012), HAW. REV. STAT. § 707-700 (2011), TENN. CODE ANN. § 39-13-503 (2012), LA. REV. STAT. ANN. § 14:43 (2011), NEB. REV. STAT. § 28-318 (2011), OKLA. STAT. ANN. TIT 21, § 1111 (2012), P.R. LAWS ANN. TIT. 33 § 4061 (2012). Other terms used are “deception” or language related to the victim’s belief.

¹¹² LA. REV. STAT. ANN. § 14:43 (A)(3) (2011).

¹¹³ See, e.g., D.C. CODE ANN. §22-3001(4); MINN. STAT. §609.341(4)(a); *State in Interest of M.T.S.*, 129 N.J. at 443; WASH. REV. CODE ANN. § 9A.44.010(7); WIS. STAT. ANN. §940.225(4). Some schools have adopted policies and some advocates have pressed for a requirement that for sex to be considered consensual, it must have been consented to by the parties in advance. In short, if the instigator of a sexual interaction wishes to do anything, he or she must inquire whether his or her partner wishes that to be done, and that partner must receive freely given consent to continue. See, e.g., Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1343 (2005).

Capacity to consent

Laws that govern whether individuals have the capacity to consent to sexual penetration and contact involve a number of variables. These include: age, mental incapacity, physical incapacity, unconsciousness, and/or drug/alcohol impairment.¹¹⁴ Different jurisdictions take varying approaches to how they incorporate these issues into their laws.¹¹⁵ While some jurisdictions may include these variables in a single statutory provision describing the elements of penetration and contact crimes, others have separate statutory provisions that describe crimes involving incapacity. For example, some age-related incapacity sex crimes are commonly labeled as “statutory rape.”¹¹⁶

a. Age

Age-related sex crime statutes fall into two categories: “per se” age of consent laws and statutory sexual assault laws. In “per se” age of consent laws, the prohibition is defined by the age of the victim but in statutory sexual assault laws, it is defined by both the age of the victim and a specified age difference between the victim and offender.¹¹⁷ All jurisdictions have statutes establishing an age of consent and providing that an actor will be found guilty of a crime if the child is below the specified age regardless of whether the child “consented.” Where the perpetrator is above the age of consent, these statutes impose criminal liability based solely on the age of the victim and the age of the perpetrator. The rationale behind those crimes is that children lack maturity to consent to sexual activity and these offenders use the children’s lack of maturity as a tool to coerce, control, or manipulate them.¹¹⁸ The MPC provisions set this age at 10.¹¹⁹ Most statutes currently set the age of consent at 12 or older. In some jurisdictions, it is a defense if the victim and perpetrator are married.¹²⁰

¹¹⁴ These elements may impact whether a crime was committed. For example, statutory requirements related to this element may distinguish circumstances where the victim was voluntarily intoxicated versus involuntarily intoxicated and may also consider the perpetrator’s role in facilitating that intoxication.

¹¹⁵ *E.g.*, PA. CONS. STAT. ANN. 18 § 3122.1 (2012); N.C. GEN. STAT. ANN. § 14-27.7A (2011).

¹¹⁶ *See, e.g.*, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS, <http://aspe.hhs.gov/hsp/08/SR/StateLaws/summary.shtml> (last visited July 20, 2012)[hereinafter A Guide to State Law].

¹¹⁷ *Id.*

¹¹⁸ *See, e.g.*, In the Matter of B.W., 313 S.W.3d 818 (Tex. 2010). However, in several jurisdictions adolescents under the age of consent are routinely arrested for prostitution related offenses covering activity to which they cannot legally consent. *See, e.g.*, U.S. Department of Justice, FBI, Uniform Crime Reports, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl38.xls> (last visited July 20, 2012).

¹¹⁹ *See* MPC, *supra* note 10.

¹²⁰ *See, e.g.*, ALASKA STAT. § 11.41.432 (2012).

Minimum Age for Consent	
AGE	STATE
10	Georgia
12	Alabama, Florida, Iowa, Maine, Missouri, Nebraska, Wisconsin, UCMJ
13	Connecticut, Illinois, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, South Dakota, Tennessee, Virginia, Virgin Islands, Wisconsin
14	Arizona, California, Hawaii, Kansas, Massachusetts , Mississippi, Nevada, Texas , Utah, American Samoa, Guam, Puerto Rico
15	Colorado, Louisiana, North Dakota, Vermont
16	Arkansas, Delaware, District of Columbia, Georgia , Idaho, Massachusetts , Montana, Oklahoma, Rhode Island, West Virginia, Wisconsin, American Samoa, UCMJ
17	New York, Texas
18	Oregon, Northern Mariana Islands

*Figure 3. The jurisdictions vary on their minimum age for consent with some states having multiple ages of consent, as indicated above by **bolding**. The states represented above do not have statutes with specified perpetrator-victim age differences, referred to as statutory sexual assault laws.*

The majority of jurisdictions have some version of a statutory sexual assault law that applies where the victim is a child of a certain age and there is a specified age difference between the victim and the offender. Although these laws are also intended to criminalize adult exploitative sexual activity with children, these offenders are often minimized. It is important to note, however, that perpetrators of statutory sexual assault often commit their crimes using coercion facilitated by exploitation of the victim’s young age and lack of maturity. According to the U.S. Department of Health and Human Services “adolescents who are sexually active at a young age are more likely than other adolescents to have experienced coercive sex. [Significantly] almost three quarters of the women who had sex before the age of 14 and 60 percent of women who had sex before the age of 15 reported having a forced sexual experience.”¹²¹

¹²¹ A Guide to State Law, *supra* note 116 (citing THE ALAN GUTTMACHER INSTITUTE SEX AND AMERICA’S TEENAGERS (1994)). Please note, this resource uses the term “statutory rape” to cover all age-related sex crime. By contrast, the definition of “statutory rape” utilized colloquially, by most criminal justice professionals and throughout this document specifically refers to sexual activity between persons of a specified age difference.

Statutory Sexual Assault: Specified Perpetrator – Victim Age Differences	
Penetration	ALL jurisdictions, <i>except</i> Georgia, Massachusetts, Texas, Wisconsin, American Samoa, Northern Mariana Islands, Puerto Rico, and the UCMJ include specified perpetrator-victim age differences in their penetration crimes.
Contact	ALL jurisdictions <i>except</i> Georgia, Indiana, Kentucky, Mississippi, New Hampshire, Texas, Wisconsin, Guam, Northern Mariana Islands, Puerto Rico, and the UCMJ provide for statutory sexual assault laws for contact crimes.

Figure 4. *The jurisdictions included in this table criminalize sexual penetration and/or sexual contact between persons of a certain age or range with an actor who is a specified number of years older or where there is particular age difference.*

b. Vulnerable Adults

Several jurisdictions address assaults targeting adults in later life by including the victim’s advanced age as an aggravating factor for sentencing.¹²² Unlike statutes addressing the age of child victims, no state has a specified age at which an adult cannot consent.

c. Developmental Disability or Mental Incapacity

Individuals with developmental disabilities are provided special protection in rape and sexual assault statutes. These statutes address a victim’s inability to understand the consequences of his/her actions, generally due to an injury, condition, or disability and not as a result of intoxication.”¹²³ Significantly, a victim with a developmental disability or other condition will **not** automatically be determined to be mentally incapacitated or rendered incapable of giving consent in all jurisdictions.

d. Physical Disability, Incapacity or Helplessness

This is a broad category that includes a victim’s inability or incapability to express unwillingness. Physical incapacity can also be termed physical helplessness and can apply to cases in which a victim is impaired or unconscious as a result of his/her intoxication. In some jurisdictions, physical disability is an aggravating factor.¹²⁴ In many states, a victim’s physical disability can be considered in determining whether he/she had the capacity to consent.¹²⁵ No jurisdiction provides that physical disability alone renders a person incapable of consent; rather, it is a factor to be considered in

¹²² See, e.g., ILL. COMP. STAT. ANN. 5/11-1.30 (2011)(providing that the victim’s age, if 60 years or older, is an aggravating factor for sentencing criminal sexual assault).

¹²³ There are, however, some exceptions that include intoxication or other causes. See, e.g., LA. REV. STAT. ANN. § 14:43 (2010)(determining capacity to consent based on the victim’s inability to resist or understand the nature of the act “by reason of stupor or abnormal condition of mind produced by ... any cause”); see also ALA. CODE § 13A-6-60 (2012) (incapacity based on victim being “temporarily incapable . . . owing to the influence of a narcotic”).

¹²⁴ See, e.g., ILL. COMP. STAT. ANN. 5/11-1.30(2011) (stating it is an aggravating factor if the victim is “physically handicapped”).

¹²⁵ See *Capacity to Consent* chart in “Rape and Sexual Assault Compilation.”

assessing capacity to consent in some jurisdictions. Because of the particular vulnerabilities of these individuals, however, many jurisdictions' rape and sexual assault statutes include provisions criminalizing sexual activity between caretakers and those under their care.¹²⁶ This is a broad category that includes a victim's inability or unwillingness to express consent. Physical incapacity can also be termed physical helplessness, and can cover cases in which a victim is impaired or unconscious as a result of her intoxication.

e. Unconsciousness

All jurisdictions recognize—either by statute or court decision—that unconsciousness renders a person incapable of giving consent. Unconsciousness can encompass a sleeping victim¹²⁷ as well as one who is unconscious due to intoxication, sedation, strangulation, or physical trauma.¹²⁸ The practical implications of a rape effectuated under these circumstances is that many victims—regardless of their intuitive feeling that they were assaulted—will not be able to report specific crimes against them because they do not know the details of what happened to them while they were unconscious.¹²⁹ The crime can, however, be established through physical or forensic evidence, other witnesses, and, sometimes, the perpetrator's confession.

f. Intoxication

Many offenders commit sexual offenses against victims who are intoxicated. Intoxication impacts a victim's ability to appraise danger, ability to resist an attack, and capacity to consent:

If recreational drugs were tools, alcohol would be a sledgehammer. Few cognitive functions or behaviors escape the impact of alcohol, a fact that has long been recognized in the literature. Alcohol is a central nervous system (CNS) depressant. As the consumption of alcohol increases, its effect increases as well. A small amount of alcohol eases tension, a large amount removes inhibitions, and a still larger amount prevents the potential victim from resisting the aggressor.¹³⁰

All but two jurisdictions' rape and sexual assault statutes criminalizes nonforcible rape and sexual assault of victims who are intoxicated.¹³¹ These intoxication statutes

¹²⁶ See, e.g., WASH. REV. CODE ANN. § 9a.44.050(1)(c-e)(2011); WASH. REV. CODE ANN. § 9a.44.100(1)(c-e)(2011).

¹²⁷ See, e.g., Commonwealth v. Wall, 953 A.2d 581 (Pa. Super. 2008); King v. State, 978 P.2d 1278 (Alaska Ct. App. 1999).

¹²⁸ Georgia, Utah, and Virginia do not include specific provisions covering physical capacity to consent but criminalize sexual activity where the victim is unconscious at the time. See, Baker v. State, 270 Ga. App. 762 (2004); State v. Cude, 784 P.2d 1197 (Utah 1989); Molina v. Commonwealth, 47 Va. App. 338, 358 (2006).

¹²⁹ Having been unconscious may also impact the victim's ability to answer Bureau of Justice Statistics household survey questions.

¹³⁰ SCALZO, *supra* note 64.

address drug and alcohol-facilitated rape and sexual assault in two ways: either by focusing on the cause (i.e., intoxication) of a victim's inability to consent or by focusing on the effects of a victim's inability to appraise the circumstances of an incident, i.e., inability to consent, regardless of the cause. In addition, some jurisdictions specify criminal conduct based on the manner in which the victim became intoxicated. A victim's intoxication may be voluntary (i.e., an offender takes advantage of a victim's pre-existing intoxication) or involuntary (i.e., an offender surreptitiously or forcefully causes the victim's intoxication).

Ten (10) jurisdictions with statutes that apply to the rape or sexual assault of an intoxicated person and specifically use the term "intoxication" cover victims who are involuntarily intoxicated as well as those who are voluntarily intoxicated to the extent that they are incapable of consenting to sexual activity.¹³² Forty (40) additional jurisdictions that use the term "intoxication" require a victim to be involuntarily intoxicated in order to be covered by any of its provisions.¹³³ Of those 40 jurisdictions, thirty eight (38) protect victims who are too intoxicated to consent because of voluntary intoxication under statutes that do not include intoxication language, but instead use language that describes typical characteristics of intoxicated victims, i.e., incapacitation or inability to appraise or control conduct, or communicate their unwillingness to participate in conduct.¹³⁴

With respect to states that do not have a specific sex crime intoxication provision, traditional rape and sexual assault statutes, i.e., those involving force or lack of consent, may also criminalize sexual activity with incapacitated intoxicated victims.

Statutes specifically addressing drug and alcohol-facilitated rape and sexual assault do not include clear legal standards for determining the commission of a crime. For example, some jurisdictions have enacted statutes prohibiting sexual activity with an individual who is too intoxicated to consent. None, however, set forth clear guidelines or specific factors to determine whether a victim's level of intoxication precludes consent or

¹³¹ There are no statutes in American Samoa with language covering alcohol or drug facilitated sexual assault. In Georgia, however, there is long-standing case law holding that "sexual intercourse with a woman whose will is temporarily lost from intoxication, or unconsciousness arising from using drugs or other cause, or sleep, is rape." *Paul v. State*, 240 S.E.2d 600, 602 (1977)(affirming conviction for rape committed by defendant while victim was drunk).

¹³² Arizona, California, Idaho, Kansas, Louisiana, Montana, South Carolina, Washington, Wisconsin, and the Virgin Islands.

¹³³ Alabama, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wyoming, Guam, Northern Mariana Islands, Puerto Rico, Federal, and UCMJ.

¹³⁴ Alabama, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wyoming, Guam, Northern Mariana Islands, Puerto Rico, Federal, UCMJ.

has reached a particular level of impairment.¹³⁵ To determine whether a victim was too impaired to consent, courts evaluate the totality of the circumstances of each case. They routinely look to objective factors that establish that the victim's impairment was so great, he/she could not exercise reasonable judgment,¹³⁶ including the degree of the victim's motor control, whether the victim vomited before or during the incident, whether the victim lost consciousness, or whether he/she urinated or defecated before or during the incident. Even where intoxication is not included as a specific element of an offense, a court may still have to evaluate a victim's degree of intoxication because it may nevertheless be relevant to whether he/she consented, was conscious, or was aware the sexual activity was occurring.

Some jurisdictions have rape and sexual assault statutes that also require the perpetrator to know that the victim was incapable of consenting due to intoxication as defined by the statute. In these cases courts will look to the evidence of the victim's level of intoxication, e.g., whether the offender provided the victim with drugs or alcohol or was aware of the quantity the victim ingested, whether the victim's motor functions or speech was impaired, and whether the victim became sick, to determine if this element was met.

As a result of the variability of sex crime statutes relating to nonforcible conduct involving intoxicated victims, prosecutors sometimes charge these crimes as violations of sex crime statutes that do not address intoxication. Rather these statutes relate to victim incapacity or other inability to communicate unwillingness to participate in sexual activity.¹³⁷

A defendant's voluntary intoxication is not a defense (e.g., it does not impact his culpability) to rape or sexual assault crimes when they are general intent¹³⁸ crimes. Voluntary intoxication may impact a defendant's culpability for specific intent¹³⁹ crimes such as in sex offenses which require the act be committed for the purpose of sexual arousal, gratification, etc.¹⁴⁰ Most attempt offenses are also considered specific intent crimes, and as such, voluntary intoxication might be a defense to those crimes.

g. Relationship

An individual's familial blood or other duty-related relationship to the victim, such as sexual relations with corrections officers and teachers, can also impact a victim's capacity to consent by either rendering them incapable of consent¹⁴¹ or acting as an

¹³⁵ SCALZO, *supra* note 64, for a detailed discussion in establishing victims' levels of intoxication.

¹³⁶ *See, e.g.*, *People v. Giardino*, 98 Cal.Rptr.2d 315 (Cal. Ct. App. 2000).

¹³⁷ Note that there are limitations to the application of the physically helpless or incapacitated statutes. Contact AEQUITAS for additional resources and consultation.

¹³⁸ *See, e.g.*, 18 PA. CONST. STAT. ANN. § 3121 (2011). General intent is "[t]he intent to perform an act even though the actor does not desire the consequences that result." BLACK'S LAW DICTIONARY (9th ed. 2009).

¹³⁹ Specific intent is "[t]he intent to accomplish the precise criminal act that one is later charged with," BLACK'S LAW DICTIONARY (9th ed.2009).

¹⁴⁰ *See, e.g.*, MONT. CODE ANN. § 45-5-503 (2011); MONT. CODE ANN. § 45-2-101(2011).

¹⁴¹ *See, e.g.*, IDAHO CODE ANN. § 18-6602 (2011).

aggravating factor.¹⁴² The term commonly used for all of these duty relationships is that the perpetrator was in a “position of authority” to the victim.

Victim Perpetrator Relationships	
Incest-blood	ALL jurisdictions except, South Carolina, UCMJ
Correctional	ALL jurisdictions except Alabama, Indiana, Louisiana, Nevada, Oregon, South Carolina, Tennessee, Washington, American Samoa, Guam, UCMJ
Other special relationships	Additional special relationships protected under rape and sexual assault laws include educator-student, medical professional-patient, and employer-employee. See “Victim Perpetrator Relationship” chart for jurisdiction specific provisions.

Figure 5. This table shows the three general relationships in which sexual activity between individuals is prohibited, including blood relations, correction officers and inmates, and other special relationships such as those involving educators and medical or health care professionals.¹⁴³

Sexual Arousal, Gratification, Degradation, Humiliation or Abuse Requirement

Some jurisdictions have sexual penetration crimes that require that the act be committed for the purpose of sexual arousal or gratification. Since direct evidence of a perpetrator’s mental state is rarely available (i.e., most offenders do not state why they are committing crimes), court decisions look at the circumstantial evidence of intent.¹⁴⁴ Some jurisdictions, such as Alabama, provide for a more lenient standard, specifically the “intent to gratify the desire of either party may be inferred by the finder of fact from the act itself.”¹⁴⁵ A review of court decisions across the country supports this interpretation.¹⁴⁶

The sexual arousal or gratification requirement is present, almost exclusively, with respect to sexual penetration by an object or body part in jurisdictions represented in the figure below. Alabama requires sexual arousal for anal penetration; this requirement is relevant to anal, oral and object penetration in Arkansas. There is one exception,

¹⁴² See, e.g., ME. REV. STAT. ANN. TIT. 17-A, § 253 (2)(H) (2011)(imposition of an increased penalty and gradation for an offense committed where the actor is a parent, step parent, guardian or other similar person responsible for the victim).

¹⁴³ William V. Phelps, *Assimilation, Under Assimilative Crimes Act (18 U.S.C.A. § 13), of State Statutes Relating to Driving While Intoxicated or under the Influence of Alcohol*, 175 A.L.R. FED. 293 (2002); see also, *United States v. Mariea*, 795 F.2d 1094 (1st Cir. 1986).

¹⁴⁴ *State v. Jensen*, 184 S.W.3d 586 (Mo. Ct. App. 2006)(stating that permissible inferences are allowed).

¹⁴⁵ *A.B.T. v. State*, 620 So.2d 120, 122 (Ala.Crim.App. 1992); *Marshall v. State*, 992 So.2d 762 (Ala. Crim. App. 2007).

¹⁴⁶ See, e.g., *In re Jason S.*, 117 Conn. App. 582 (2009); *Scott v. State*, 202 S.W.3d 405 (Tex. Crim. App. 2006)(holding that intent to arouse or gratify sexual desire may be inferred from conduct alone no oral expression of intent or visible evidence of sexual arousal is necessary); *In re D.H.*, 381 Ill. App. 3d 737 (2008); *People ex rel. W.T.M.*, 785 N.W.2d 264 (S.D. 2010); *In re Matthew K.*, 355 Ill. App. 3d 652 (2005)(holding that purpose of sexual arousal or gratification can be inferred from the act itself, except where the offender is also a minor, then no inference); *In re J.W.*, 194 N.C. App. 200 (2008).

Montana, which defines sexual intercourse to include penetration for the purpose of sexual arousal or gratification.¹⁴⁷

Penetration Crimes that Require Sexual Arousal, Gratification, Degradation or Humiliation			
State	Statute	Sexual Arousal Requirement	Degradation/Humiliation
Alabama	Sodomy 1 st Degree; Sodomy 2 nd Degree	•	
Arkansas	Rape; Sexual Assault 1 st Degree; Sexual Assault 3 rd Degree; Sexual Assault 4 th Degree	•	
California	Forcible Acts of Sexual Penetration, by a Foreign or Unknown Object	•	
Colorado	Sexual Assault	•	
District of Columbia	First Degree Sexual Abuse; Second Degree Sexual Abuse; Misdemeanor Sexual Abuse; First Degree Sexual Abuse of a Ward; First Degree Sexual Abuse of a Patient or Client;	•	•
Idaho	Male Rape; Forcible Sexual Penetration by Use of a Foreign Object	•	
Maryland	Penetration by an Object : Sexual Offense 1 st Degree; Sexual Offense 2 nd Degree; Sexual Offense 3 rd Degree; Sexual Offense 4 th Degree;	•	
Montana	Sexual Intercourse without Consent; Incest	•	•
Nevada	Statutory Sexual Seduction	•	
Utah	Object Rape	•	
West Virginia	Sexual Assault 1 st Degree; Sexual Assault 2 nd Degree; Sexual Assault 3 rd Degree; Incest	•	•
Wyoming	Sexual Assault 1 st Degree; Sexual Assault 2 nd Degree; Sexual Assault 3 rd Degree; Incest	•	
Federal	Aggravated Sexual Abuse; sexual abuse; Sexual Abuse of a Minor or Ward	•	•
Military	Rape and Sexual Assault Generally ¹⁴⁸	•	•

Figure 6. The above 15 jurisdictions include within some of their penetration crimes the requirement that the prohibited activity was done for the purpose of sexual arousal, gratification, degradation or humiliation of the victim or offender. Where both columns are marked, that indicates the state criminalizes conduct committed for either sexual arousal, gratification, degradation or humiliation.

¹⁴⁷ MONT. CODE ANN. §45-2-101 (2011).

¹⁴⁸ The element of sexual arousal or degradation/humiliation is required by the Military code, for crimes involving prohibited “sexual contact” when the contact is the touching of the genitalia, anus, groin, breast, inner thigh or buttocks and for crimes involving a “sexual act” defined as “the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object.” UCMJ § 920 Art. 120(g)(1)(B) & (2). When “sexual contact” is the touching of any body part, the elements of sexual arousal is required.

Interrelationship of Common Elements

Penetration without consent and with force

All jurisdictions criminalize forced penile/vagina, penile/anal, and penile/oral¹⁴⁹ penetration where the victim has not consented and the perpetrator has used force,¹⁵⁰ although in some jurisdictions, there is also a requirement that the conduct be for sexual arousal, gratification, abuse, degradation, or humiliation, as described above. Some jurisdictions have offenses that include force to be directed at third parties.¹⁵¹

Forcible penile penetration in the vagina, anus, or mouth is graded as the most serious sex crime in all jurisdictions, and penetration by other body part or object may be graded equally or as a less serious offense.¹⁵² Specifically, five jurisdictions criminalize object penetration to a lesser degree than they penalize penile penetration: California, Delaware, Georgia, Missouri, and Puerto Rico. Ten jurisdictions criminalize object penetration as a separate crime but still graded at the same felony level as penile/vagina penetration crimes: Alabama, Indiana, Maryland, New York, North Carolina, Oregon, Pennsylvania, Idaho, Utah, and Virginia. Only Louisiana, American Samoa, and the Northern Mariana Islands do not specifically criminalize object penetration at all.

Many jurisdictions criminalize penetration with a body part other than the penis, most commonly digital, to a lesser degree. For example, under Pennsylvania law, digital penetration is a second degree felony unless it is committed against a child. Five jurisdictions do not criminalize other body part penetration, as a specific offense but might criminalize the behavior as indecent contact: Louisiana, Idaho, Kentucky, and the Northern Mariana Islands. In 15 jurisdictions, body part penetration is defined under the object penetration statute: California, Connecticut, Delaware, Georgia, Indiana, Kentucky, Maine, Massachusetts, New Mexico, North Carolina, Oregon, South Dakota, Texas, Virginia, and West Virginia.

¹⁴⁹ Clayton v. State, 695 P.2d 3 (Okla. Crim. App. 1984). (Oklahoma criminalizes forced penile/oral penetration as “oral sodomy” under the provision for Crimes Against Nature. OKLA. STAT. ANN. tit. 21, § 886 (2012)).

¹⁵⁰ All jurisdictions criminalize forced penile/vagina, penile/anal, and penile/oral penetration, regardless of the victim’s gender. However, some jurisdictions have statutes that require the perpetrator and victim to be of a different gender. ALA. CODE § 13a-6-61 (2012), ALA. CODE § 13a-6-62 (2012); GA. CODE ANN. § 16-6-1 (2011); IDAHO CODE ANN. § 18-6101 (2012); IND. CODE ANN. § 35-42-4-1 (2012); N.C. GEN. STAT. ANN. § 14-27.2 (2011); 33 LAWS OF PUERTO RICO ANN. § 4061 (2012).

¹⁵¹ *E.g.*, NEB. REV. STAT. § 28-318(9) (2011).

¹⁵² *See, e.g.*, ALA. CODE § 13A-6-65.1 (2012)(for object penetration); GA. CODE ANN. § 16-6-22.2 (2011)(for other body part penetration).

Gradation Among Penetration Crimes Requiring Force		
Forced Penetration	Jurisdiction	Offense Grade
Penile/Vaginal	All	Highest level sex offense
Penile/Anal	All	Highest level sex offense EXCEPT Kansas
Penile/Oral	All	Highest level sex offense EXCEPT Oklahoma ¹⁵³
Object (Body part penetration not included)	All EXCEPT Louisiana, American Samoa, and Northern Mariana Islands	Highest level sex offense: Idaho, Maryland, New York, Ohio, Pennsylvania, and Utah All OTHER states criminalize as lesser degree
Object (Includes body part in definition)	All EXCEPT Louisiana, American Samoa, and Northern Mariana Islands	Highest level sex offense: Alabama, Connecticut, Indiana, North Carolina, Oregon, Virginia All OTHER states criminalize as lesser degree
Other Body Part (e.g. digit, fist)	All EXCEPT Louisiana, Idaho, Maine, Kentucky, Wisconsin, American Samoa, Northern Mariana Islands	Highest level EXCEPT Alabama, Georgia, Maryland, New York, Pennsylvania (unless victim is a child).

Figure 7. All jurisdictions criminalize forced penetration of the vagina, anus, or mouth and the majority criminalize penetration by an object or body part, as a specific offense. This figure represents the degree of gradation for these crimes. Generally, these crimes are graded as the highest level sex offense; however, certain jurisdictions charge penetration of the anus or mouth or penetration by an object or other body part to a lesser degree.

Penetration without consent and without force

Some jurisdictions also criminalize penetration that is achieved without the victim’s consent when there is no force (other than the force of the actual penetration) by the perpetrator.

Of these, Kansas and Minnesota recognize the crime of penetration without consent and force only for anal or oral penetration and not for vaginal penetration. Similarly to affirmative consent jurisdictions, these jurisdictions typically define either “consent” or “without consent” to require words or conduct indicating freely given consent¹⁵⁴ or lack of consent¹⁵⁵.

¹⁵³ OKLA. STAT. ANN. tit. 21, §886 (2012) (conviction of a crime against nature, such as oral sodomy, is punishable by imprisonment not exceeding 10 years compared to conviction of rape punishable for 15 or more years).

¹⁵⁴ District of Columbia, Florida, Minnesota, and Washington.

¹⁵⁵ Nebraska, New Hampshire, New York, and Utah.

Penetration crimes without consent and without force may be graded or classified lower than forced penetration, either as a misdemeanor or second or third degree felony. The punishment may also be less severe.

Penetration Without Force and Without Consent	
Vaginal, Anal, and Oral Penetration	Alabama, District of Columbia, Florida, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Washington, American Samoa
Anal and Oral Penetration	Kansas

Figure 8. Seventeen jurisdictions above prohibit vaginal, anal, and oral penetration where the actor has not used force and the victim has not consented to the sexual activity. One jurisdiction prohibits anal and oral penetration without force and without consent but not vaginal penetration.

Non-Penetration Crimes

Contact

Sexual contact crimes involve touching or fondling, direct and indirect, of sexual or other intimate parts of a person. In some jurisdictions, they also include contact with third parties.¹⁵⁶ One jurisdiction, New Mexico, requires the contact to be skin-to-skin¹⁵⁷ but most include touching that occurs over clothing. Significantly, contact crimes are graded as misdemeanors in every jurisdiction. In some jurisdictions, these crimes can also include conduct such as urinating or defecating on a person for sexual arousal, gratification, or degradation.¹⁵⁸

Exposure

Sexual exposure crimes may include forced viewing of a body part or of sexual activity. Typically dismissed as “morals crimes,” exposure crimes involve conduct commonly used by perpetrators to groom their victims.¹⁵⁹ These crimes involve sexual acts in public or exposure of genitals in a public place or where other persons are present for the purpose of offending, alarming, or arousing others. These statutes may also include conduct in which the offender causes someone else to expose him/herself.

¹⁵⁶ Delaware, Nevada, Oregon, Texas, Vermont, Virginia, Wisconsin, and UCMJ.

¹⁵⁷ N.M. STAT. ANN. § 30-9-12 (2012).

¹⁵⁸ See, e.g., WIS. STAT. ANN. § 939.25(5)(b) (2011)(defining “Sexual Contact” to include “2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant’s instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.3. For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant’s body, whether clothed or unclothed.”)

¹⁵⁹ Samantha Craven et al., *Sexual Grooming of Children: Review of Literature and Theoretical Considerations*, 12 J. SEXUAL AGGRESSION 287, 297 (2006).

Contact and Exposure Crimes that Require Sexual Arousal, Gratification, Degradation or Humiliation		
	Sexual Arousal Requirement	Degradation/ Humiliation
Indecent contact ¹⁶⁰	Alabama, California, Colorado, Connecticut, District of Columbia, Georgia, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming, American Samoa, Guam, Virgin Islands, Federal Law, UCMJ	Connecticut, District of Columbia, Montana, New Hampshire, New Jersey, New York, Ohio, South Dakota, Wisconsin, Federal Law, UCMJ
Indecent exposure	Alabama, Alaska, Colorado, Connecticut, Illinois, Indiana, Louisiana, Massachusetts, Montana, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, West Virginia, Wisconsin, Wyoming	Montana

Figure 9. The above jurisdictions include, within their sexual contact and exposure crimes, the requirement that the prohibited activity was done for the purpose of sexual arousal, gratification, degradation or humiliation of the victim or offender. The jurisdictions that are **bolded** under the crime of indecent exposure require that the exposure be done in a public place to be punishable.

Contact without consent and without force

Sexual contact without consent and without force is recognized as a crime more frequently than sexual penetration without consent and without force. Sexual contact, in these circumstances, is criminal in twenty jurisdictions. These states include California, Colorado, Georgia, Kansas, Kentucky, Maine, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Tennessee, West Virginia, Wisconsin, American Samoa, and the Military.

Other requirements in sexual contact crimes

Sexual contact crimes may include elements requiring the purpose of the conduct to be for sexual arousal and may also include requirements relating to force, consent, age, and relationship.

Miscellaneous

Marital relationship

The concept of spousal or marital rape¹⁶¹ was not legally or otherwise recognized until well into the 1970s, when studies finding as many as 10 to 14 percent of married

¹⁶⁰ All jurisdictions except Mississippi include indecent contact laws in their criminal code. Under Mississippi court decisions, however, contact between a person’s mouth, lips or tongue and the genitals of another constitutes penetration and is punishable under the sexual battery statutes. *Pierce v. State*, 2 So. 3d 641 (Miss. Ct. App. 2008).

women were raped by their husbands brought the issue of spousal rape into the national consciousness. Rape used to be legally defined as the forcing of sexual intercourse on a person *other than the wife* of the accused. Over time, state legislatures expanded the definition of rape, providing for varying degrees of the crime and its penalties. By July 1993, the rape or sexual assault of one's spouse had become a crime, *to some degree*, in all jurisdictions. This means that each of the 58 jurisdictions examined currently has some provision within its law allowing for the prosecution of a husband for the rape or sexual assault of or lewd conduct against his wife.¹⁶² The marital relationship may, however, impact the penalty or grade of the offense because some jurisdictions have statutes that grade spousal rape less seriously than rape of a non-spouse.¹⁶³

Sex of perpetrator-victim

All jurisdictions criminalize forced penile/vagina, penile/anal, and penile/oral penetration, regardless of the victim's gender. However, 6 jurisdictions have statutes that require the perpetrator and victim to be of a different gender: Alabama, Georgia, Idaho, Indiana, North Carolina and Puerto Rico.¹⁶⁴

Multiple perpetrators/gang rape

Some jurisdictions have enacted specific statutes to address rape and sexual assault committed by multiple perpetrators.¹⁶⁵ Even in jurisdictions without specific statutes to address these crimes, however, multiple perpetrators can be prosecuted under criminal conspiracy¹⁶⁶ or accomplice liability statutes, which may be additional criminal offenses, theories of criminal liability, or both.¹⁶⁷

¹⁶¹ See generally DAVID CHEAL, FAMILY: CRITICAL CONCEPTS OF SOCIOLOGY (Routledge 2003); DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (Holt, Rinehart and Winston eds., Library of Congress 1985).

¹⁶² Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 367-69 (1995).

¹⁶³ The rape and sexual assault analysis and compilation, accompanying this paper, includes a chart analyzing the impact of a marital relationship on the application of the statutes to the particular incident.

¹⁶⁴ ALA. CODE § 13a-6-61 (2012); Rape in the First Degree, ALA. CODE § 13a-6-62 (2012); Rape in the Second Degree; GA. CODE ANN. § 16-6-1 (2011); Rape, IDAHO CODE ANN. § 18-6101 (2012); Rape, IND. CODE ANN. § 35-42-4-1 (2012); Rape, N.C. GEN. STAT. ANN. § 14-27.2 (2011); First Degree Rape, N.C. GEN. STAT. ANN. § 14-47-27.3 (2011); Second Degree Rape, 33 LAWS OF PUERTO RICO ANN. § 4061 (2012).

¹⁶⁵ See, e.g., FLA. STAT. ANN. § 794.023 (2012); LA. REV. STAT. ANN. § 14:42(A)(5); MD. CODE ANN., CRIM. LAW § 3-303(a)(2)(iv); § 3-305(a)(2)(iv); § 3-307(a)(2)(iv); MICH. COMP. LAWS ANN. § 750.520b(d); MINN. STAT. ANN. § 609.342; MONT. CODE ANN. § 45-5-503(3)(b); N.J. STAT. ANN. § 2C:14-2(5); N.M. STAT. ANN. § 30-9-11(E)(4); N.C. GEN. STAT. ANN. § 14-27.2(a)(2)(c); § 14-27.4(a)(2)(c); TENN. CODE ANN. § 39-13-502(3); TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(v); UTAH CODE ANN. § 76-5-405(1)(a)(iii); VT. STAT. ANN. TIT. 13, § 3253; § 3253a; WASH. REV. CODE ANN. § 9A.44.040(1); WIS. STAT. ANN. § 940.225(1)(c); § 940.225(2)(f); 9 GUAM CODE ANN. § 25.15(a)(4); § 25.20(a)(4).

¹⁶⁶ Criminal conspiracy is "[a]n agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose ... Conspiracy is a separate offense from the crime that is the object of the conspiracy." BLACK'S LAW DICTIONARY (9th ed.2009). See, e.g., *State v. Mahon*, 97 Conn. App. 503 (2006).

¹⁶⁷ Accomplice liability is "[c]riminal responsibility of one who acts with another before, during, or (in some jurisdictions) after a crime." BLACK'S LAW DICTIONARY (9th ed.2009). See, e.g., *State v. Cormier*, 838 A.2d 356 (Me. 2003).

Conclusion

Sex crimes involve complex dynamics that call for detail-oriented investigations and statutory analyses. Sex offenders often employ unique, manipulative, and murky methods in order to victimize. Victim behaviors and responses to rape and sexual assault crimes are often counterintuitive to what laypersons and others without field expertise expect. Unfortunately, experts in sex crimes and offender and victim behavior are rarely sought out for collaboration with legal professionals or legislators regarding the development of legislation and protocols. Although some jurisdictions' laws have evolved to incorporate our ever-expanding knowledge of rape and sexual assault and offender behaviors, in other jurisdictions, the laws remain sadly outdated in either language or content. The disconnect between the law and reality can play a crucial role in individual victims' perception of whether or not they were victims of a crime¹⁶⁸ and whether they believe they will receive some measure of justice in the legal system. As a result, the ability to develop questions that will most accurately and successfully reveal a victim's experience will be invaluable to understanding the incidence and prevalence of rape and sexual assault. It will also play an important role in helping allied criminal justice professionals improve their understanding of rape and sexual assault, their responses to reports of such crimes and their ability to stop serial predators.

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¹⁶⁸ RAND & RENNISON, *supra* note 2.