Rape and Sexual Assault
Analyses and Laws

Part II
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td>Penetration Crimes</td>
<td>5</td>
</tr>
<tr>
<td> Conduct</td>
<td>5</td>
</tr>
<tr>
<td> Unlawfulness</td>
<td>6</td>
</tr>
<tr>
<td>Force</td>
<td>7</td>
</tr>
<tr>
<td>Consent</td>
<td>9</td>
</tr>
<tr>
<td> Freely given</td>
<td>9</td>
</tr>
<tr>
<td> Affirmative consent</td>
<td>10</td>
</tr>
<tr>
<td> Capacity to consent</td>
<td>10</td>
</tr>
<tr>
<td> Age</td>
<td>10</td>
</tr>
<tr>
<td> Developmental Disability or Mental Incapacity</td>
<td>12</td>
</tr>
<tr>
<td> Physical Disability, Incapacity, or Helplessness</td>
<td>12</td>
</tr>
<tr>
<td> Unconsciousness</td>
<td>13</td>
</tr>
<tr>
<td> Intoxication</td>
<td>13</td>
</tr>
<tr>
<td> Relationship</td>
<td>15</td>
</tr>
<tr>
<td>Sexual Arousal, Gratification, Degradation, Humiliation, or Abuse Requirement</td>
<td>15</td>
</tr>
<tr>
<td>Non-Penetration Crimes</td>
<td>17</td>
</tr>
<tr>
<td> Contact</td>
<td>17</td>
</tr>
<tr>
<td> Exposure</td>
<td>17</td>
</tr>
<tr>
<td>Grading Forcible and Nonconsensual Penetration</td>
<td>19</td>
</tr>
<tr>
<td> Penetration without consent and with force</td>
<td>19</td>
</tr>
<tr>
<td>Other Notable Considerations</td>
<td>21</td>
</tr>
<tr>
<td> Marital relationship</td>
<td>21</td>
</tr>
<tr>
<td> Sex of perpetrator-victim</td>
<td>21</td>
</tr>
<tr>
<td> Multiple perpetrators/gang rape</td>
<td>21</td>
</tr>
<tr>
<td>Conclusion</td>
<td>21</td>
</tr>
<tr>
<td>ENDNOTES</td>
<td>22</td>
</tr>
</tbody>
</table>
INTRODUCTION

Over the years there has been an evolution in the understanding of rape and sexual assault dynamics. This evolution is reflected in the modified Unified Crime Report (UCR) definition of rape, which removes the requirement of force for reportable sexual offenses and also expands the definition of rape to encompass penetration of the mouth and anus. This evolution is also evident in some jurisdictions’ laws, which now reflect the ever-expanding research about sex crimes and offender behaviors. For example, 27 jurisdictions do not require the use – or threat – of force or coercion in at least one of their rape or sexual assault statutes that cover penetration crimes. Still more jurisdictions do not require force in sex crime statutes that cover contact and exposure crimes. In other jurisdictions, however, the laws remain outdated in language, content, or both (e.g., using language such as deviate sexual intercourse to criminalize forcible sodomy or containing, marital exemptions in circumstances of alcohol-facilitated sexual assault).

The disconnect between the law and the 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 crime,¹ and whether they believe they will receive some measure of justice in the legal system.² Part II reviews sex crime statutes³ 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. Our review revealed that jurisdictions differ in their terminology, gradation,⁴ and interpretation of the proscribed conduct. In order to adequately compare the different laws, the analysis below 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 as to the conduct they cover. For example, conduct defined as “rape” in one jurisdiction may be termed “sexual assault,” “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 definition of consent;
- The victim’s ability to consent (e.g., intoxication, age, relationship to perpetrator); and
- Requirements that 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, each crime and their elements are unique. 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.
**Figure 1**, below, is intended to provide a big picture understanding of the types of rape and sexual assault crimes, their general 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 18 jurisdictions, some penetration crimes also require the act be done for the purpose of sexual arousal and/or gratification, with nine 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 the use of force, the use of force without consent, and those that simply require the absence of consent (no force required).

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<thead>
<tr>
<th>PENETRATION</th>
<th>CONTACT</th>
<th>EXPOSURE</th>
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<tr>
<td><strong>FELONY</strong></td>
<td><strong>MISDEMEANOR</strong></td>
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</tr>
<tr>
<td><strong>FOR THE PURPOSE OF</strong></td>
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<tr>
<td><strong>SEXUAL AROUSAL, GRATIFICATION, DEGRADATION OR HUMILIATION</strong></td>
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For some penetration crimes, 18 jurisdictions require sexual arousal and/or gratification with 9 of those also criminalizing conduct committed for the purpose of degradation or humiliation. For some contact crimes, 42 jurisdictions require sexual arousal and/or gratification with 10 of those also criminalizing conduct committed for the purpose of degradation or humiliation. For some exposure crimes, 21 require sexual arousal and/or gratification with 1 of those also criminalizing conduct committed for the purpose of degradation or humiliation.
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 mouth by the penis or other body part, or penetration of the vagina or anus by an object. 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 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, depending on the jurisdiction. Other factors impacting the grade level of the offense include whether a weapon or force was used in commission of the crime and whether there were multiple perpetrators, and the degree of injury sustained.
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.”

Statutory elements are not defined identically across jurisdictions, and even slight variations among these definitions impact whether the penetration is criminal. 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. The same term may have various definitions among jurisdictions which are likely to vary among society’s colloquial understanding.

Most jurisdictions’ statutes employ language to the effect that any intrusion, “however slight,” is sufficient to meet the penetration requirement. While some jurisdictions do not employ the “however slight” terminology explicitly in their statutes, a review of case law reveals that no jurisdiction requires more than slight penetration. 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, the lips of a victim’s mouth, or the anal opening. Penetration has also been established by the act of licking a penis. Significantly, penetration through clothing has also been held sufficient under at least five jurisdiction’s laws, including federal law. At least one court, however, has determined that penetration of the buttocks (as opposed to the anus) is insufficient to establish sexual intercourse. In states that have statutes that do not specifically enumerate the requirement that penetration need only be “slight,” one must consult the relevant case law for this element; treatises also provide examples and further guidance.

There is persistent confusion among victims over what depth of penetration constitutes legal penetration of the vagina, anus, or mouth, which may impact their description of the assault; many victims may not think to report slight penetration because they mistakenly believe that it is not legally relevant.

No jurisdictions require emission to satisfy the penetration element.

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, or 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.

The elements—particularly those around force and consent—are further refined, qualified, and defined inconsistently among the jurisdictions, and do not always follow their respective colloquial meanings. For example, statutes in differing jurisdictions may vary widely in how they determine: a) whether the victim had the capacity to consent and, if so, b) whether the consent was freely given.
Factors which may impact an individual’s capacity to consent include: age, relationship with the perpetrator, intoxication, disability (mental/physical), physical capacity, and consciousness.

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 under rape and sexual assault laws. For the purpose of this paper, we don’t draw a distinction between coercion and force since both requires something more than mere nonconsent of the victim. Jurisdictions vary widely in how they define and interpret force. A nuanced understanding of how jurisdictions treat force requires an in-depth look at case law. Some jurisdictions even incorporate descriptions of force in their statutory definitions of consent. The overlap between concepts of force and concept 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. The overlap between force and consent can also complicate the analysis where a factor, such as the relationship between the victim and the defendant, may be analyzed under the consent definition in one jurisdiction, and the force definition in another. It is, therefore, important to understand the relationship between force and consent and how it affects application of the laws both separately and together. Significantly, in many jurisdictions, the absence of force may preclude a sex crime charge if the circumstances of the assault do not satisfy other requirements under existing statutes. 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.\(^{21}\)

All jurisdictions criminalize attempted and completed forcible sexual penetration,\(^{22}\) but there are significant variations in how force is defined among the rape and sexual assault laws of different jurisdictions. Statutory definitions of force include:

- Physical force;
- Violence;
- Force sufficient to overcome victim resistance;
- 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;
- Threats of retaliation;
- 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 intimidation\(^{23}\) and coercion;\(^{24}\) and
• Overcoming the victim by concealment or surprise (e.g., where a perpetrator pretends to be the victim’s husband)\(^{25}\)

Most jurisdictions include a combination of these in their definitions of force. The three most common – actual physical force, threatened physical force, and threatened force against third parties – are specified in Figure 2 below. While most jurisdictions treat forcible sex offenses as their highest-level sex crimes, many jurisdictions do not require force to complete a sexual assault.

When physical force is at issue, jurisdictions vary in the level of physical force required. Two seminal cases from the early 1990s illustrate jurisdictional differences. 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.”\(^{26}\) The M.T.S. court concluded that “to 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 nonconsent.”\(^{27}\) 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.

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.”\(^{28}\) Following this decision, the legislature enacted a statute criminalizing sexual intercourse to which the victim did not consent. They created a lower graded crime to cover cases where force was not used.\(^{29}\) In all cases, courts interpreting rape and sexual offenses look to the context of the assault in order to determine if the evidence establishes the force requirement. There have been several decisions recognizing that the size differential or relationship between the offender and the victim is relevant to determining the presence of force.\(^{30}\)

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<th>Jurisdictions with Use of Force Statutes</th>
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<tr>
<td>Force</td>
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<tr>
<td>Actual Force</td>
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<td>Threatened force</td>
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<tr>
<td>Force Against a Third Party</td>
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<td>(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)</td>
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\textit{Figure 2}. The above chart illustrates those jurisdictions that have a statute or a statutory subsection that specifically requires the defendant to have used force, threatened force, or force against a third party. For purposes of this publication, a jurisdiction’s forcible sex offense statute encompasses force against a third party in any of the following circumstances: a) the definition of force explicitly includes actual and/or threatened force against a third party; b) the highest-level forcible sex offense includes force against a third party, even if force against a third party is not included in the definition of force; c) the statutory definition of force does not explicitly include force against a third party, but the statutory
definition or case law definition is broad enough to include force against a third party; or d) force against a third party is included in the definition of “coercion” and force and coercion are used interchangeably in the jurisdiction’s statutes.

The fact that a jurisdiction includes such a statute or subsection does not mean that forcible rape is the only type of sexual assault that can be prosecuted in that jurisdiction. On the contrary more than 24 jurisdictions have statutes or subsections of statutes that merely require nonconsensual contact (i.e., there is no requirement that the defendant had to have used additional force or coercion). Two additional states, Georgia and Oklahoma, criminalize nonconsensual penetration with a foreign object but require something more than lack of consent for penile penetration offenses.

In some jurisdictions, the most highly graded offenses involve force with additional aggravating factors. The existence of one or more of these factors typically increase the penalty for a crime. Some of these elements may include 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.

Only a minority of jurisdictions — Idaho, Nebraska, West Virginia, and the Virgin Islands— require resistance to some degree to prove the element of force. Alabama recently eliminated the resistance requirement. These jurisdictions vary in how much resistance they require, and resistance does not always need to be physical. Some jurisdictions expressly state that no resistance is required (e.g., Alabama, 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 (e.g., District of Columbia, Florida, Illinois, Minnesota, New Mexico, Oregon, and UCMJ). However, some specify that, while resistance is not required, a lack of resistance may be considered along with all other relevant evidence to determine whether force was present or consent was given.

**CONSENT**

The element of consent is critical in determining whether conduct addressed by rape and sexual assault statutes is criminal. Whether a victim consented to the conduct is determined by the circumstances of the assault, e.g., a victim’s communication of his/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. Freely given consent has been defined as conveying permission, positive cooperation in an act or an attitude pursuant to an exercise of free will and with knowledge of the nature of the act. “Permissions may be inferred from acts or statements reasonable viewed in light of the surrounding circumstances.” Lack of freely given consent has been defined as
“compulsion,” or “compulsion to submit due to use of force or threat of force or coercion” or “consent induced by fraud.”

Some statutes explicitly state that the victim’s lack of resistance or the victim’s current or prior “social” relationship, or “manner of dress” with the perpetrator shall not constitute consent. As set forth in the reasoning behind rape shield laws, consent is determined by time and circumstance.

Some jurisdictions require that the perpetrator knowingly, knew, or had reason to know that the victim did not consent. This mens rea requirement can be determined by specific circumstances surrounding the assault.

Some jurisdictions specify that if the offender obtains the victim’s consent by fraud, then the consent is not valid. Fraud comes up in two ways, either the victim consents to the penetration under the belief it is necessary for a non-sexual purposes, some other purpose (e.g., fertility doctor needing to penetrate a victim to become pregnant) or a victim is having sexual intercourse with an individual s/he believes to be a partner but is actually another person. Louisiana, for example, defines nonconsent as including penetration that was induced by conduct that leads the victim to believe she is having sexual intercourse with her husband.

**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.

**Capacity to consent**
Laws that govern whether individuals have the capacity to consent to sexual penetration and contact involve a number of variables, including: age, mental incapacity, physical incapacity, unconsciousness, and/or drug/alcohol impairment. Different jurisdictions take varying approaches to how they incorporate these issues into their laws. While some jurisdictions may include these variables in a single statutory provision describing the elements of penetration and contact crimes, others have separate provisions that describe crimes involving capacity to consent; many have both.

**Age**
Age-related sex crime statutes generally 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. In other words, sex with any child under the “per se” age under the circumstances enumerated in the offense is a crime, regardless of the age of the offender or whether the child “consented.” In statutory sexual assault laws, the prohibition is defined by both the age of the victim and a specified age difference between the victim and offender, and in some circumstances, criminality depends on the age of the offender. 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 these 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; this rationale is also the foundation of the age at which one has the capacity to consent.⁶¹ The MPC provisions set this age at 10; the MPC, however, is under revision.⁶² Most statutes currently set the age of consent at 12 or older. In some jurisdictions, it is a defense if the individuals are married.⁶³

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<th>Age</th>
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<td>9</td>
<td>Illinois</td>
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<tr>
<td>10</td>
<td>Georgia⁶⁴</td>
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<td>11</td>
<td>New York,⁶⁵ South Carolina⁶⁶</td>
</tr>
<tr>
<td>12</td>
<td>Alabama, Delaware⁶⁷ Florida, Iowa⁶⁸ Kentucky⁶⁹ Maine, Missouri,⁷⁰ Nebraska, Ohio,⁷¹ Oregon⁷² Washington, Wisconsin, West Virginia, Wisconsin⁷³ American Samoa⁷⁴ Federal,⁷⁵ UCMJ</td>
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<td>14</td>
<td>California,⁸⁸ Delaware,⁸⁹ Hawaii,⁹⁰ Indiana,⁹¹ Iowa,⁹² Kansas,⁹³ Kentucky, Maine, Maryland, Mississippi, Missouri,⁹⁴ Nebraska, New York,⁹⁵ Nevada, Oklahoma, Oregon⁹⁶ Rhode Island⁹⁷ South Carolina⁹⁸ Texas⁹⁹ Utah, Washington, American Samoa, Guam,¹⁰⁰ Northern Mariana Islands, Puerto Rico</td>
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<tr>
<td>15</td>
<td>Arizona,¹⁰¹ Colorado, Louisiana, Maryland, New York, North Dakota, Tennessee, Vermont, Virginia,¹⁰² Wyoming, Northern Mariana Islands</td>
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<tr>
<td>17</td>
<td>Colorado, Florida, Illinois, Louisiana, Missouri, New York, Texas</td>
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<tr>
<td>18</td>
<td>Arizona,¹¹⁷ California,¹¹⁸ Colorado,¹¹⁹ Kentucky, New Mexico, Oregon,¹²⁰ Tennessee, Utah</td>
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**Figure 3.** Most states have multiple ages of consent; the age of consent depends on the particular offense. Per se ages for particular offenses are indicated in **bold.** It is important to note that most states with per se laws also have enacted statutory sexual offenses; for instance, California’s sodomy law contains a per se restriction on sodomy with any individual under 18, but the state’s unlawful sexual
intercourse law only prohibits sexual intercourse with an individual under 18 who is not more than three years younger or three years older than the perpetrator.121

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 intended to criminalize adult exploitation of children, the actions of these offenders are often graded less severely than other types of sexual assault. 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 research, about one in four sexually active youth report doing something sexual they didn’t want to do, and one in three report being in a situation where things were “happening too fast” sexually.122

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<th>Statutory Sexual Assault: Specified Perpetrator – Victim Age Differences</th>
</tr>
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<tr>
<td><strong>Penetration Crimes</strong></td>
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<td><strong>Contact Crimes</strong></td>
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**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 a particular age difference.

Additionally, several jurisdictions address assaults targeting adults in later life by including the victim’s advanced age as an aggravating factor for sentencing.123 Unlike statutes addressing the age of child victims, no state has a specified age at which an adult cannot consent.

**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.124 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.

**Physical Disability, Incapacity, or Helplessness**

In some jurisdictions, committing an assault against a person with a physical disability is an aggravating factor.125 In many states, a victim’s physical disability can be considered in determining whether s/he had the capacity to consent. No jurisdiction provides that physical disability alone renders a person incapable of consent; rather, it is a factor to be considered in
assessing capacity to consent in some jurisdictions. Because of the particular vulnerabilities of individuals with disabilities, however, many jurisdictions’ rape and sexual assault statutes include provisions criminalizing sexual activity between caretakers and those under their care. 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.

### Unconsciousness

All jurisdictions recognize—either by statute or court decision—that unconsciousness renders a person incapable of giving consent. Unconsciousness can encompass a sleeping victim as well as one who is unconscious due to intoxication, sedation, strangulation, or physical trauma. 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. The crime can, however, be established through physical or forensic evidence, other witnesses, and, sometimes, the perpetrator’s confession.

### 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.

Rape and sexual assault statutes in all but two jurisdictions’ criminalize nonforcible rape and sexual assault of victims who are intoxicated. These intoxication statutes address drug and alcohol-facilitated rape and sexual assault in two ways: either by focusing on the cause 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. 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).

Several 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 voluntarily intoxicated as well as those who are involuntarily intoxicated, to the extent that they are incapable of consenting to sexual activity. Forty additional jurisdictions that use the term “intoxication” require a victim to be involuntarily intoxicated in order to be covered by any of its provisions. Of those 40 jurisdictions, 38 protect victims who are too intoxicated to consent because of
voluntary intoxication under statutes that do not include intoxication language. Instead, these statutes use language that describes typical characteristics of intoxicated victims. For example, a statute may describe incapacitation or inability to appraise or control conduct. A statute may also make it a crime when a victim is unable to communicate their unwillingness to participate in conduct.\textsuperscript{134}

With respect to states that do not have a specific sex crime intoxication provision, traditional rape and sexual assault statutes—such as 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 has reached a particular level of impairment.\textsuperscript{135} To determine whether a victim was too impaired to consent, courts evaluate the totality of the circumstances of each case. Objective factors used to establish that the victim’s impairment was sufficiently great, that s/he could not exercise reasonable judgment,\textsuperscript{136} include: the degree of the victim’s motor control, whether the victim vomited before or during the incident, whether the victim lost consciousness, and whether s/he 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 s/he 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, such as 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.\textsuperscript{137}

A defendant’s voluntary intoxication is not a defense (\textit{i.e.}, it does not impact his/her culpability) to rape or sexual assault crimes when they are general intent\textsuperscript{138} crimes. Voluntary intoxication may impact a defendant’s culpability for specific intent\textsuperscript{139} crimes, such as in sex offenses which require the act be committed for the purpose of sexual arousal, gratification, etc.\textsuperscript{140} Most attempt offenses are also considered specific intent crimes, and as such, voluntary intoxication might be a defense.
**Relationship**

An individual’s familial blood or other duty-related relationship to the victim, such as in the case of corrections officers or teachers, can also impact a victim’s capacity to consent by either rendering them incapable of consent\textsuperscript{141} or acting as an aggravating factor.\textsuperscript{142} The term most commonly used for these duty relationships is that the perpetrator was in a “position of authority” to the victim.

<table>
<thead>
<tr>
<th>Victim Perpetrator Relationships</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incest-blood</td>
</tr>
<tr>
<td>All jurisdictions except Washington, UCMJ</td>
</tr>
<tr>
<td>Correctional</td>
</tr>
<tr>
<td>All jurisdictions except Alabama, Indiana, Louisiana, Nevada, North Carolina, Oregon, South Carolina, Tennessee, Washington, American Samoa, Guam, UCMJ</td>
</tr>
<tr>
<td>Other special relationships</td>
</tr>
<tr>
<td>Additional special relationships protected under rape and sexual assault laws include educator-student, medical professional-patient, and employer-employee.\textsuperscript{143}</td>
</tr>
</tbody>
</table>

*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 healthcare professionals.\textsuperscript{144}

**Sexual Arousal, Gratification, Degradation, Humiliation, or Abuse Requirement**

Sexual penetration crimes in certain jurisdictions 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.\textsuperscript{145} 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.”\textsuperscript{146} A review of court decisions across the country supports this interpretation.\textsuperscript{147}

<p>| Penetration Crimes that Require Sexual Arousal, Gratification, Degradation or Humiliation |
|---------------------------------|---------------------------------|-------------------|-------------------|
| State                           | Statute                                         | Sexual Arousal/Gratification | Degradation/Humiliation |
| Alabama                         | Sodomy 1\textsuperscript{st} Degree; Sodomy 2\textsuperscript{nd} Degree; Sexual Misconduct\textsuperscript{148}; School Employee Engaging in a Sex Act with a Student Under the Age of 19 years\textsuperscript{149}; Sexual Extortion\textsuperscript{150} | X | |
| Arkansas                        | Rape; Sexual Assault 1\textsuperscript{st} Degree; Sexual Assault 3\textsuperscript{rd} Degree; Sexual Assault 4\textsuperscript{th} Degree; Public Sexual Indecency\textsuperscript{151} | X | |
| California                      | Forcible Acts of Sexual Penetration, by a Foreign or Unknown Object | X | |</p>
<table>
<thead>
<tr>
<th>State</th>
<th>Penetration Crimes</th>
<th>X</th>
<th>X</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>Sexual Assault; Sexual Assault on a Client by a Therapist</td>
<td></td>
<td></td>
</tr>
<tr>
<td>District of Columbia</td>
<td>First Degree Sexual Abuse; Second Degree Sexual Abuse; Misdemeanor Sexual Abuse; First Degree Sexual Abuse of a Secondary Education Student; First Degree Sexual Abuse of a Ward, Patient, Client or Prisoner; First Degree Sexual Abuse of a Patient or Client</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hawaii</td>
<td>Sexual Assault in the First Degree; Sexual Assault in the Second Degree; Sexual Assault in the Third Degree; Incest</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>Male Rape; Forcible Sexual Penetration by Use of a Foreign Object</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Iowa</td>
<td>Sexual Exploitation by a Counsel, Therapist, or School Employee</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kentucky</td>
<td>Sodomy in the First Degree; Sodomy in the Second Degree; Sodomy in the Third Degree; Sexual Misconduct</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>Gross Sexual Assault</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>Penetration by an Object: Sexual Offense 1st Degree; Sexual Offense 2nd Degree; Sexual Offense 3rd Degree; Sexual Offense 4th Degree;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>Sodomy in the First Degree; Sodomy in the Second Degree; Sexual Misconduct; Sexual Conduct with a Nursing Facility Resident or Vulnerable Person in the First Degree; Incest</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>Sexual Intercourse without Consent; Incest; Aggravated Sexual Intercourse Without Consent;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>Object Rape; Aggravated Sexual Assault; Sexual Offenses Against Victim Without Consent of Victim</td>
<td></td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>Sexual Assault 1st Degree; Sexual Assault 2nd Degree; Sexual Assault 3rd Degree; Incest</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td>Sexual Assault 1st Degree; Sexual Assault 2nd Degree; Sexual Assault 3rd Degree; Incest</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal</td>
<td>Aggravated Sexual Abuse; Sexual Abuse of a Minor or Ward</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Military</td>
<td>Rape and Sexual Assault Generally</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Figure 6.** The 18 jurisdictions above 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.
NON-PENETRATION CRIMES

Contact
Sexual contact crimes involve direct or indirect touching or fondling of sexual or other intimate parts of a person. All sexual contact crimes criminalize unlawful touching of another person’s genitals (or the touching of another person’s body with the perpetrator’s genitals), and many also criminalize touching of the anus, buttocks, and/or female breasts. In some jurisdictions, these crimes can also include conduct such as urinating, defecating, or ejaculating on a person. Several jurisdictions interpret “sexual contact” broadly: in Ohio, it is defined as “any touching of an erogenous zone of another,” and Kansas criminalizes nonconsensual touching of any part of a victim’s body, if committed with the intent to arouse or satisfy the sexual desire of any individual. Most jurisdictions criminalize non-consensual sexual contact that occurs under and over clothing, although New Mexico requires skin-to-skin contact.

Sexual contact crimes may require that the contact occur for purposes of sexual arousal, gratification, humiliation, or degradation. The jurisdictions that require these elements are listed in Figure 9 below. Sexual contact crimes may also include other elements; notably, some states only criminalize nonconsensual sexual contact between unmarried persons.

Sexual contact without consent and without force is recognized as a crime more frequently than sexual penetration without consent and without force or coercion. Sexual contact, in these circumstances, is criminal in 20 jurisdictions: Alabama, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, Wyoming, American Samoa, and UCMJ.

Sexual contact crimes are often graded as misdemeanors, but typically rise to the level of a felony under certain circumstances, such as when the crime is committed with actual or threatened force or when the victim is incapable of consent due to physical helplessness or mental incapacitation. Some sexual contact crimes that are otherwise misdemeanors become felonies if they are committed by an employee of a state correctional facility against a person in custody.

Exposure
Indecent exposure crimes, sometimes referred to as “lewd and lascivious conduct,” typically involve exposure of a body part or the public display of sexual activity. These crimes are often statutorily categorized as “moral crimes” rather than as sex offenses. However, indecent exposure is a common method used by perpetrators of child sexual assault to “groom” their victims, i.e. to prime them for further abuse.

Similar to sexual conduct crimes, these offenses always criminalize exposure of genitals, and often prohibit exposure of buttocks, anus, and/or female breasts, although many jurisdictions make an
explicit exception for public breastfeeding. Many indecent exposure statutes also prohibit public displays of sexual acts and/or masturbation in public.

For indecent exposure to rise to the level of a crime, some jurisdictions require the act to occur in a public place, while many others criminalize exposure under circumstances “likely to cause affront or alarm.” Other jurisdictions criminalize exposure in any place where other persons are present. Oregon even has a separate private indecency statute; criminalizing the exposure of genitals in front of another who does not consent to the exposure in a place where he/she would have a reasonable expectation of privacy. Two states, Montana and North Dakota, explicitly criminalize nonconsensual indecent exposure committed via electronic communication.

Many jurisdictions - although noticeably fewer than for sexual contact crimes - require the element of sexual arousal, humiliation, degradation, or humiliation. The jurisdictions that require these elements are listed in Figure 9 below. Another common element of indecent exposure is that the victim and perpetrator are unmarried.

Most exposure crimes are graded as misdemeanors, but some jurisdictions designate subsequent offenses as felonies. In Georgia and Minnesota, for instance, indecent exposure rises to the felony level upon the perpetrator’s third offense. Meanwhile, indecent exposure in Florida rises to the felony level when an employer exposes his/her sexual organs in front of an employee.

| Contact and Exposure Crimes that Require Sexual Arousal, Gratification, Degradation or Humiliation |
|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|
| **Connecticut,** **District of Columbia,** **Georgia,** **Illinois,** **Indiana,** **Kansas,** **Kentucky,** **Maine,** **Maryland,** **Michigan,** **Minnesota,** **Missouri,** **Montana,** **Nebraska,** **Nevada,** **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** | **Montana** | **Alabama, Arkansas, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Louisiana, Montana, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, West Virginia, Wisconsin, Wyoming** |

*Figure 7. 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.*
Penetration without consent and with force

All jurisdictions criminalize forced penile/vagina, penile/anal, and penile/oral penetration where the victim has not consented and the perpetrator has used force. In some jurisdictions, there is also a requirement that certain forms of penetration be for sexual arousal, gratification, abuse, degradation or humiliation, as described below. This element must be established to prove these crimes. There may, however, be additional charges that fit the circumstances of the assault. Familiarity with the specific state law and the full range of criminalized conduct will ensure that perpetrators are held accountable for their actions. Some jurisdictions also have offenses that include force directed at third parties. 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. Specifically, five jurisdictions criminalize object penetration to a lesser degree than they penalize penile penetration: California, Delaware, Georgia, Louisiana, and Missouri. Eight jurisdictions criminalize object penetration as a separate crime but still graded at the same felony level as penile/vagina penetration crimes: Alabama, Idaho, New York, North Carolina, Oregon, Pennsylvania, Utah, and Virginia. Only American Samoa does not explicitly 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, in which case it is a first-degree misdemeanor or first-degree felony. Four jurisdictions do not criminalize other body part penetration as a specific offense but might criminalize the behavior as indecent contact: Alabama, Kentucky, Louisiana, and Maine. In ten jurisdictions, body part penetration is categorized under the object penetration statute: California, Delaware, Georgia, Idaho, Louisiana, Missouri, North Carolina, Oregon, Utah, Virginia.

<table>
<thead>
<tr>
<th>Forced Penetration</th>
<th>Jurisdiction</th>
<th>Offense Grade</th>
</tr>
</thead>
<tbody>
<tr>
<td>Penile/Vaginal</td>
<td>All</td>
<td>Highest level sex offense</td>
</tr>
<tr>
<td>Penile/Anal</td>
<td>All</td>
<td>Highest level sex offense except Georgia and Missouri</td>
</tr>
<tr>
<td>Penile/Oral</td>
<td>All</td>
<td>Highest level sex offense except Oklahoma</td>
</tr>
<tr>
<td>Object (Body part penetration not included)</td>
<td>All EXCEPT American Samoa</td>
<td>Highest level sex offense except for Georgia, Louisiana, Missouri</td>
</tr>
<tr>
<td>Object (Includes body part in definition)</td>
<td>All EXCEPT American Samoa</td>
<td>Highest level sex offense: Connecticut, Florida, Indiana, New Mexico, North Carolina,</td>
</tr>
</tbody>
</table>
All OTHER states criminalize as lesser degree

Other Body Part (e.g., digit, fist) as Separate from “Object”  All EXCEPT Maine,\(^{219}\) and Kentucky\(^{220}\) Highest level except Alabama, Kentucky, Louisiana,\(^{221}\) Maine, Mississippi,\(^{222}\) Missouri\(^{223}\) New York, Pennsylvania (unless victim is a child).

**Figure 8.** 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, anal penetration crimes, as well as object and other body part penetration crimes are graded as equivalent to penile/vaginal crimes; 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 consent\(^{224}\) or lack of consent\(^{225}\).

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

<table>
<thead>
<tr>
<th>Penetration Without Force/Coercion and Without Consent</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Anal and Oral Penetration</strong></td>
</tr>
</tbody>
</table>

**Figure 9.** Twenty-seven (27) jurisdictions above prohibit vaginal, anal, and oral penetration where the actor has not used force/coercion and the victim has not consented to the sexual activity. Two jurisdictions prohibit foreign object penetration without force and without consent but not penile penetration.
**OTHER NOTABLE CONSIDERATIONS**

**Marital relationship**
The concept of spousal or marital rape was not legally recognized until well into the 1970s, when studies brought the issue of spousal rape into the national consciousness, and found that as many as 10 to 14 percent of married women were raped by their husbands. 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. However, many jurisdictions’ sexual contact and indecent exposure crimes explicitly exclude perpetrators who are married to victims. Some penetration crimes are also affected by the marital relationship, excluding spouses from the definitions of sexual offenses or designating marriage as a defense to the crime. In these jurisdictions, it is not a crime for a person to have sexual intercourse with a spouse who is mentally incapable, incapacitated, or physically helpless. The marital relationship may also 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.

**Sex of perpetrator-victim**
All jurisdictions criminalize forced penile/vagina, penile/anal, and penile/oral penetration, regardless of the victim’s gender. Alabama, Georgia, and North Carolina, however, have specific criminal provisions for crimes committed against someone of the opposite sex or a female victim. These jurisdictions do have other statutes criminalizing sexual offenses when the perpetrator is the same sex as the victim; these offenses are classified as “sexual abuse”, “sodomy”, and “sexual assault” rather than rape.

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

**CONCLUSION**
Sex crimes involve complex dynamics that call for detail-oriented investigations and statutory analyses. Sex offenders often employ unique, manipulative, and deceptive 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 they were victims of a crime, 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.

Although the law is inconsistent nationwide, there are rare circumstances where the law is the barrier to justice for sexual assault victims; the laws, albeit imperfect are on the books, but they may not be implemented for a variety of reasons, including prematurely truncated investigations or gaps in capacity to accurately identify and analyze available evidence and present a compelling case.

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ENDNOTES


2 This paper focuses primarily on an analysis of statutory construction. In some cases, even if conduct is not prohibited by one particular section of a statute, another section or another statute may apply. Prosecutors are encouraged,
therefore, to carefully consider multiple alternative charging theories and to carefully review their laws and relevant case law. For information on prosecutorial efforts to improve the justice system response to sexual assault, see Sexual Assault Justice Initiative: Promoting and Measuring Success in Sexual Assault Prosecutions, AEOQUITAS, http://www.aequitasresource.org/Sexual-Assault-Justice-Initiative.cfm (last visited Nov. 14, 2017). This paper is a companion to Rape and Sexual Assault in the Legal System: Part I. This paper is a living document which will be used to clarify the analyses of each jurisdiction’s statutes, corresponding case decisions, and other relevant documents. The original paper, by Carol E. Tracy, Terry L. Fromson, Jennifer Gentile Long, and Charlene Whitman-Barr has been updated by Holly Fuhrman and will be re-released at a later date.

3 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.

4 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.

5 Contact AEOQUITAS for information on gradation of sexual offenses at ta@aequitasresource.org or at (202) 558-0040.

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

7 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. See 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).

8 See, e.g., IDAHO CODE ANN. §18-6108 (2012).

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

10 See, e.g., Ala. CODE § 13A-6-60; D.C. CODE ANN. § 22-3001(8); IDAHO CODE ANN. § 18-6608; KY. REV. STAT. ANN. § 510.010 (8); Mich. COMP. LAWS ANN. § 750.520a(a); N.H. REV. STAT. ANN. § 632-A:1(V)(a)(6); OKLA. STAT. ANN. tit. 21 § 1113; PA. CONS. STAT. ANN. 18 § 3101; S.D. CODIFIED LAWS § 22-22-2; UTAH CODE ANN. § 76-5-407(2)(a); WASH. CODE ANN. § 9a.44.010(1). This is not an inclusive list of all jurisdictions that employ the “however slight” language.

11 Arizona, Florida, Georgia, Indiana, Maine, Massachusetts, Mississippi, Texas, and Virginia.


14 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).

15 See RIEGLEHaupt, supra note 13.

16 See, e.g., id. (citing Commonwealth v. King, 445 Mass. 217, 223 (2005)); see also Hennington v. State, 702 So.2d 403, 408 (Miss. 1997); People v. R.F., 825 N.E.2d 287, 295 (Ill. Ct. App. 2005); but see State v. Elmer G., 170 A.3d 749 (Conn. Ct. App. 2017) (Finding that the act of licking a penis is insufficient to prove penetration because licking involves extending the tongue from the mouth, not inserting the penis into the mouth).


18 See 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 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).

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).

See RIEGLEHaupt, supra note 13.

See, e.g., Mont. Code Ann. § 45-5-501 (Defining lack of consent as when “the victim is compelled to submit by force against the victim or another.”).


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


Id.


Does not explicitly mention force or threatened force against third parties but wording is broad enough to conceivably include it. See Mack v. State, 792 S.E.2d 120 (Ga. Ct. App. 2016) (Holding that the term “forcibly,” as used in statute governing crime of rape, means the use of acts of physical force, threats of death or physical bodily harm, or mental coercion).

No mention of force against third parties, but force may be “inferred from the circumstances” according to case law so it is reasonable to conclude that force against third parties could constitute force under Indiana law. Maslin v. State, 718 N.E.2d 1230, 1235 (Ind. Ct. App. 1999). The court upheld the defendant’s conviction for rape, finding the evidence sufficient, holding “[i]t is the victim’s perspective, not the assailant’s, from which the presence or absence of forceful compulsion is to be determined.” Id. (overruled on other grounds).

Force not defined by statute. Constructive force definition from Newcomb case may be broad enough to encompass actual/threatened force. The court then held that constructive force, for purposes of the force element of rape, may be threatening words or gestures and operates on the mind to instill fear in the victim for the defendant to achieve his goal. Stated differently, there must be proof that the victim was afraid or that she submitted to the defendant because his conduct intimidated her. See Com. v. Newcomb, 954 N.E.2d 67 (Mass. Ct. App. 2011).

Force not statutorily defined, but reading of statute may encompass force against third parties: “[h]as sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.” Wis. Stat. Ann. § 940.225(a).

Puerto Rico’s sexual assault statute criminalizes sexual penetration “if the victim has been compelled into the act by means of physical force, violence, intimidation, or the threat of serious and immediate bodily harm.” P.R. Laws Ann. TIT. 33 § 4770(d). This could encompass third parties.

See, e.g., N.J. Stat. Ann. § 2C: 14-2 (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 where the actor is armed with a weapon).

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

Unless victim presented from resistance by the infliction, attempted infliction, or threatened infliction of bodily harm; or unless victim is presented from resistance due to an objectively reasonably believe that resistance would be futile or that resistance would result in force or violence beyond that necessary to accomplish the prohibited contact. See Idaho Code Ann. § 18-6101(5)&(6). However, the amount of resistance need only be such that would show the victim’s lack of consent to the act. See Idaho Crim. J.I. 904.

“The victim need only resist, either verbally or physically, so as to make the victim’s refusal to consent genuine and real and so as to reasonably make known to the actor the victim’s refusal to consent. A victim need not resist verbally or physically where it would be useless or futile to do so . . . .” Neb. Rev. Stat. Ann. § 28-318(8)(b)&(c).

West Virginia requires physical force to overcome “earnest resistance as might reasonably be expected under the circumstances,” and includes physical resistance or any clear communication of the lack of the victim’s consent. W. Va. Code Ann. § 61-8B-1.
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.

See, e.g., D.C. Code § 22-3006.


See, e.g., UCMJ § 920 Art. 120(t)(15).


See, e.g., D.C. Code § 22-3001(4); 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).


See La. Rev. Stat. Ann. § 14:43 (A)(3). However, in other jurisdictions, obtaining consent by fraud may not vitiate the consent to the act. This may occur because fraud is addressed under the element of force or it may result in the act not being criminal.

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).

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.


See, e.g., id.

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


63 See, e.g., ALASKA STAT. § 11.41.432.

64 Strict liability law for rape and sodomy. See GA. CODE ANN. §§ 16-6-1, 16-6-2.

65 Per se law for rape in the first degree, oral sexual act in the first degree, sexual abuse in the first degree, and aggravated sexual abuse in the first, second, and third degrees. See N.Y. PENAL LAW §§ 130.05(3)(a), 130.50, 130.65, 130.70(1)(c), 130.67(1)(c), and 130.66(1)(c).

66 Per se law for criminal sexual conduct with minors in the first degree. See S.C. CODE ANN. § 16-3-655(a).

67 Persons under the age of 12 are unable to consent in any circumstances. See DEL. CODE ANN. § 761.

68 Per se law for sexual abuse in the second degree. See IOWA CODE ANN. § 709.3.

69 Per se law for rape in the first degree, sodomy in the first degree, and sexual abuse in the first degree. See KY. REV. STAT. ANN. §§ 510.040(1)(b), 510.070, 510.110.

70 Per se law for aggravated statutory rape. See MO. REV. STAT. ANN. § 566.032(2)(1).

71 Per se law for gross sexual imposition if knowingly touching the unclothed genitalia of the child for purposes of sexual arousal, humiliation, or degradation. See OHIO. REV. STAT. ANN. § 2907(B).

72 Per se law for unlawful sexual penetration in the first degree, sodomy in the first degree, and rape in the first degree. See OR. REV. STAT. ANN. §§ 163.411, 163.405.

73 Per se law for class B felony first degree sexual assault of a child. See WIS. STAT. ANN. § 948.02(1).

74 Per se law for child molesting. See AM. SAMOA CODE ANN. § 46.3618(a).

75 Per se law for abusive sexual conduct. See 18 U.S.C.A. § 2244(c).

76 Per se law for unlawful sexual contact in the first degree. See DEL. CODE ANN. § 769.

77 Per se law for aggravated rape. See LA. REV. STAT. ANN. § 14:42.

78 Per se law for criminal sexual conduct in the first and second degrees. See MICH. COMP. LAWS ANN. §§ 750.520b(1)(a), 750.520c(1)(a).

79 Per se law for aggravated felonious sexual assault and for sexual contact. See N.H. REV. STAT. ANN. §§ 632-A:2, 632-A:3.

80 Per se law for aggravated sexual assault. See N.J. STAT. ANN. § 2C:14-2(1).


82 Per se law for rape and gross sexual imposition. See OHIO. REV. CODE ANN. §§ 2907.02(A)(1)(b), 2907.05.

83 Per se law for rape. See PA. CONS. STAT. ANN. 18 § 3121.

84 Per se law for rape. See S.D. CODIFIED LAWS § 22-22-1(1).

85 Per se law for aggravated sexual battery. See TENN. CODE ANN. § 39-13-504.

86 Per se law for forcible sodomy, object sexual penetration, and aggravated sexual battery. See VA. CODE ANN. §§ 18.2-67.1(1), 18.2-67.2(1), 18.2-67.3.

87 Per se law for aggravated rape in the first degree and unlawful contact in the first degree. See 14 V.I. CODE ANN. §§ 1700(a)(1), 1708.

88 Per se law for unlawful sexual contact in the second degree. See DEL. CODE ANN. § 768.

89 Per se law for unlawful sexual contact in the second degree. See 11 DEL. CODE § 777.

90 Per se law for sexual assault in the first degree. See HAW. REV. STAT. ANN. 707-730.

91 Per se law for child molestation. See IND. CODE ANN. § 35-42-4-3.

92 Per se law for sexual abuse in the third degree. See IOWA CODE ANN. § 709.4.

93 Per se law for rape. See KAN. CRIM. CODE ANN. § 21-5503(a)(3).

94 Per se law for statutory rape in the first degree, and statutory sodomy in the first degree. See MO. REV. STAT. ANN. §§ 566.032, 566.060(2)(2).

95 Per se law for sexual abuse in the second degree. See N.Y. PENAL LAW § 130.60.

96 Per se law for unlawful sexual penetration in the second degree, sodomy in the second degree, rape in the second degree, and sexual abuse in the first degree. See OR. REV. STAT. ANN. §§ 163.408, 163.395, 163.365, and 163.427.

Per se law for criminal sexual conduct with minors in the second degree. See S.C. CODE ANN. § 16-3-655(a).

Per se law for aggravated sexual assault. See TEX. PENAL CODE ANN. § 22.021(2)(B).


Per se law for molestation of a child. See ARIZ. REV. STAT. ANN. § 13-1410.


Per se age of consent law for rape in the fourth degree. See 11 DEL. CODE § 770.

Per se age of consent law for lewd acts. See P.R. LAWS ANN. TIT. 33 § 4772.

Per se law for sexual contact with minors in the second degree. While the offender’s age is not a bar to prosecution, if the offender is less than 4 years older than the victim, the offense is mitigated. See UTAH CODE ANN. § 76-5-401.

Per se law for second degree sexual assault. See WYO. STAT. ANN. § 6-2-303.

Per se law for rape, sexual assault, sodomy, deviate sexual assault, and sexual abuse in the first degree. See AM. SAMOA CODE ANN. §§ 46.3604(a)(2), 46.3610(a), 46.3611(a)(2), 46.3612(a), 46.3615(a)(2).

Per se law for criminal sexual conduct in the third degree. See 9 GUAM CODE ANN. § 25.25(a)(1).

Per se law for sexual activity with a minor. While the offender’s age is not a bar to prosecution, if the offender is less than 4 years older than the victim, the offense is mitigated. See UTAH CODE ANN. § 76-5-401.

Per se law for second degree sexual assault. See WYO. STAT. ANN. § 6-2-303.


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

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

See, e.g., WASH. REV. CODE ANN. §§ 9A.44.050(1)(c-e), 9A.44.100(1)(c-e).


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


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).

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


See White, supra note 130, for a detailed discussion in establishing victims’ levels of intoxication.

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

See, e.g., 18 PA. CONST. STAT. ANN. § 3121. 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).

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).


See, e.g., IDAHO CODE ANN. § 18-6602.

See, e.g., ME. REV. STAT. ANN. Tit. 17-A, § 253 (2)(H) (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).

Contact AEQuitas for more information.

See e.g., William G. 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).

See, e.g., State v. Jensen, 184 S.W.3d 586 (Mo. Ct. App. 2006) (Stating that permissible inferences are allowed).


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).

If the act constitutes deviant sexual intercourse within the meaning of ALA. CODE ANN. § 13A-6-65(c).

If the act constitutes deviant sexual intercourse within the meaning of ALA. CODE ANN. § 13A-6-81.

If the act constitutes deviant sexual intercourse within the meaning of ALA. CODE ANN. § 13A-6-241.

If the act constitutes deviate sexual activity within the meaning of ARK. CODE ANN. § 5-14-111(a)(2).

If the act constitutes sexual intrusion within the meaning of COL. REV. STAT. ANN. § 18-3-405.5.

If a sexual act within the meaning of D.C. CODE ANN. § 22-3001(8)(c).

Id.
satisfy the sexual desire of the person.

For the purpose of terrorizing the victim. See Mo. Ann. Stat. § 566.010(3).

If the act constitutes object rape. See Utah Code Ann. § 76-5-402.2.

With the intent to cause substantial emotional or bodily pain to the victim. See Utah Code Ann. § 76-5-402.2.


Id.


Id.

Id.

Id.

Id.


If a sexual act within the meaning of 18 U.S.C.A. § 2246(2)(C).

Id.

If a sexual act within the meaning of UCMJ § 920 art. 120(g)(1)(C).


Ohio Rev. Code Ann. § 2907.01.


purpose of causing bodily sexual contact offense. The definition of "sexual contact" is "219 which includes an element of object penetration, carries a minimum penalty of 10 years imprisonment.

minimum penalty of 15 years imprisonment. See § 43.1. The highest level vaginal-penisl offense is rape, which is punishable by life imprisonment; if the victim is under 13, the punishment could be death. See § 42. Both sexual battery and rape are considered felonies, which doesn’t have grades/classifications.

In Missouri, aggravated rape in the first degree, which is characterized by vaginal-penisl penetration, carries a minimum penalty of 15 years imprisonment. See § 556.030(2)(1). Aggravated sodomy in the first degree, which includes an element of object penetration, carries a minimum penalty of 10 years imprisonment. See Mo. Rev. Stat. § 556.060(2)(1). However, both aggravated rape and aggravated sodomy are considered Class A felonies.

While digital penetration is not explicitly criminalized as a penetration offense in Maine, it is likely criminalized as a sexual contact offense. The definition of “sexual contact” is “any touching of genitals or anus, directly or through clothing, other than as would constitute a sexual act, for the purpose of arouslng or gratifying sexual desire or for purpose of causing bodily injury or offensive physical contact.” Me. Rev. Stat. Ann. Tit. 17-A § 251(D).
While digital penetration is not explicitly criminalized as a penetration offense in Kentucky, it is likely criminalized as a sexual contact offense. The definition of “sexual contact” is “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party”. Ky. Rev. Stat. Ann. § 510.010(7).

223 The highest-level sexual offense including digital penetration in Louisiana is sexual battery, which carries a maximum prison sentence of 15 years in most circumstances, and between 25-99 years when other aggravating factors are present. See LA. STAT. ANN. § 43.1 The highest level vaginal-penile offense is rape, which is punishable by life imprisonment; if the victim is under 13, the punishment could be death. See LA. STAT. ANN. § 42. Both sexual battery and rape are considered felonies, which don’t have grades/classifications.

224 The highest-level sexual offense in Mississippi that includes an element of digital penetration is sexual battery, which carries a maximum prison sentence of 40 years. See Miss. Code. Ann. § 97-3-65. Both crimes are felonies, but felonies do not have grades/classifications in Mississippi.

225 In Missouri, aggravated rape in the first degree, which is characterized by vaginal-penile penetration, carries a minimum penalty of 15 years imprisonment. See Mo. Rev. Stat. § 556.030(2)(1). Aggravated sodomy in the first degree, which includes an element of digital penetration, carries a minimum penalty of 10 years imprisonment. See Mo. Rev. Stat. § 556.060(2)(1). However, both aggravated rape and aggravated sodomy are considered Class A felonies.


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


230 See, e.g., ALA. CODE § 13A-6-60(3); CONN. GEN. STAT. ANN. § 53a-65(3); GA. CODE ANN., § 16-6-5.1(a)(4); W. VA. CODE, § 61-8B-1(6).

231 See, e.g., ALASKA STAT. ANN. § 11.41.432; MD. CODE, CRIM. LAW, § 3-318; MINN. STAT. ANN. § 609.349; Miss. Code Ann. § 97.3-99; S.C. CODE § 16-3-658.

232 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.


235 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 State v. Mahon, 97 Conn. App. 503 (2006).


Rand & Rennison, supra note 1.