STRATEGIES *In Brief*

AEQUITAS

Issue #35 • September 2019

"Stop it—NOW": Charging Considerations in the Prosecution of Rape Following a Revocation of Consent

AEquitas and Jennifer Newman[1]

"A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct."[2]

720 Ill. Comp. Stat. Ann. 5/11-1.70(c)

Introduction

Rape and sexual assault crimes are deeply traumatic events for victims. When a rape is preceded by consensual contact between the victim and perpetrator – even where that contact occurred days, weeks, months, or even years ago — there is a risk that the crime will be minimized or the victim will be blamed for their own assault. When the assault involves activity to which a victim initially consented before revoking their consent, the potential for minimization and victim-blaming are amplified as the focus shifts away from the offender and onto the victim. Some of this focus is justified; some is not. For example, whether and how the victim communicated their revocation of consent is an important factor in determining whether an actor should be charged with a rape or sexual assault crime. However, determinations of victim credibility or consent made *solely* on the existence of previous consent represents a misunderstanding of both law and sexual violence dynamics, leading to unjust and dangerous outcomes.[3]

An individual may revoke their consent to sexual activity in a variety of contexts, ranging from Bondage/Discipline, Dominance/Submission, and Sadism/Masochism (BDSM) scenarios[4] to encounters in which an actor engages in unexpected or additional behavior than the activity originally consented to.[5] Although the dynamics surrounding sexual violence in each of these contexts is unique, the standard for analyzing the conduct remains the same: (1) whether a revocation of consent was communicated; (2) how the revocation was communicated; (3) if the conduct that followed satisfies the elements of a criminal offense under the relevant jurisdiction's law;[6] and (4) if charging that offense is consistent with justice.

There is nothing in the criminal codes opposed to the concept that a victim who has once consented to sexual activity with a specific person may refuse sexual activity with that individual on a future occasion. In fact, evidence rules such as rape shield laws recognize that prior consent to sexual activity with the defendant, while potentially relevant to a defense of consent to a charge of rape, does not in itself establish such consent to sexual activity in the future. Likewise, an agreement to engage in sexual activity is universally recognized as revocable at any time prior to the initial act of penetration on a specific occasion. The evaluation of the case undoubtedly becomes more complicated when consent is revoked after that initial act of penetration. Nevertheless, the laws concerning sexual assault and rape are premised on the notion that consent to a sexual act is conditional and revocable at any point in time, however inconvenient, unpleasant, or uncomfortable it may be for the actor(s) to stop.[7]

This *Strategies In Brief* examines the law relevant to prosecuting sexual violence cases in which an individual revokes consent to an act of penetration to which they originally consented, but the actor(s) continues the penetration regardless of the revocation.[8] It identifies: (1) jurisdictions with laws that explicitly criminalize rape following a revocation of consent; (2) the majority of jurisdictions, in which the law remains unspecified, and (3) an "anomaly" jurisdiction, which *prohibits* the prosecution of a rape complaint in circumstances where the victim previously gave their consent. Further, it offers guidance on how to proceed in jurisdictions with no explicit statutes or case decisions governing this conduct, including determining the impact of statutes requiring force on whether revocation of consent cases can be charged, and considering how to overcome mistake of fact, which exists as an affirmative defense in some jurisdictions.[9] Further, where applicable, this article refers to existing AEquitas resources relevant to the prosecution of these cases.

II. The Law

The right to revoke permission is hardly ever questioned in the context of property offenses, such as theft and trespass. An individual who offers to lend money to a friend, and then, rethinking that offer, decides not to, can be called many things, but their original offer does not entitle their friend to take their money and depart without consequence. When a visitor is no longer welcome on one's property yet refuses a demand to leave, that visitor would be violating trespass law to varying degrees — and, if they removed property without permission, they would be committing theft. There is a much greater interest at stake when bodily autonomy is violated.

There is no clear uniform language across jurisdictions explicitly guiding the analysis of revocation of consent cases. No state's criminal code–and only one identified state case—explicitly *permits* penetration after consent is revoked. Most jurisdictions have not considered the issue in any reported case, so there is not clear authority permitting or prohibiting the charging of rape in such cases. Nevertheless, there is early and well-established law prohibiting penetration following an individual's revocation of consent, and an analysis of the available laws reveals few true gaps to holding offenders accountable.

One of the oldest cases to examine this issue is the Tennessee case of *Wright v. State,*[10] decided in 1843. Notwithstanding the extremely troubling and objectionable language allowing for the premise that a young child have the capacity to consent to sex and describing sexually exploited women as "common prostitutes," the case clearly recognized the right to revoke consent:

> [i]t is no difference if the person abused consented through fear, or that she was a common prostitute, or that she assented after the fact, or that she was taken first with her own consent, if she were afterwards forced against her will.[11]

Similarly, *State v. Niles*,[12] decided in 1874, and *State v. Shields,*[13] an 1877 case, both upheld instructions supporting an individual's right to revoke consent at any time during sexual activity.

The Impact of Force and Consent[14]

Definitions of force and consent vary across jurisdictions. Depending on how it is defined, force can encompass physical force, express or implied threats to physically harm an individual or a third party, coercion, and/or other threats to retaliate against the victim in some way.[15] Determining whether a victim consented to sexual activity requires two separate anal-

yses: first, whether the victim freely and knowingly consented to the conduct, and/or second, whether the individual had the capacity to consent. Whether the victim freely and knowingly consented to sexual activity is a factual determination that can be made from reviewing the totality of the circumstances around the assault, including verbal or nonverbal cues.[16] Whether the victim had the capacity to consent can be determined by many factors, including, for example, looking at the victim's age or relationship with the perpetrator; particular vulnerabilities such as physical or developmental disabilities, or physical or mental incapacity; whether the victim was intoxicated; or whether the victim was unconscious.

In evaluating cases involving rape following a revocation of consent, it is necessary to determine the elements of the applicable rape and sexual assault statutes, *e.g.,* whether they include a force element, and whether it is sufficient that the activity following the revocation of consent was forcible, which generally defeats the offense.[17] This additional complexity underscores the importance of conducting comprehensive investigations that identify all admissible evidence and consulting all available laws. These practices increase the likelihood of accurately assessing these scenarios.[18]

Below is a discussion of the state of the law in: a) jurisdictions in which charging penetration following revocation of consent as rape or sexual assault is explicitly permitted; b) jurisdictions that have not considered the issue; and c) an anomaly jurisdiction, North Carolina, which has ruled that continued penetration following a revocation of consent does not constitute rape. For all jurisdictions in which charging revocation of consent as rape is *not* explicitly permitted, the discussion offers strategies for holding offenders accountable.

A. Charging Revocation of Consent Explicitly Permitted

Some jurisdictions recognize through explicit statutory language that rape can be committed if penetration continues despite the revocation of consent to that penetration. For example, the Illinois penal code incorporates revocation of consent into its rape law as follows:

> "A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct."[19]

In other jurisdictions, this guidance is made clear through case decisions. In *State v. Crims*,[20] the Minnesota appellate court found that "sexual penetration" under Minnesota law includes both the initial intrusion as well as ongoing intercourse; thus, rape may be charged whenever that sexual penetration is accomplished without consent and by means of force.[21]

Court decisions in other jurisdictions have similarly held that rape occurs when penetration persists after an individual revokes his or her initial consent to penetration. A brief survey of such cases follows:

- The Maine case of *State v. Robinson*[22] took a common-sense approach to analyzing rape and sexual assault statutes and is highly-cited in other states' case decisions considering revocation of consent as an issue of first impression. The defendant in *Robinson* argued that rape only occurs when the *entry* of the female sex organ is made as a result of force or compulsion, but not when the defendant forcibly continues penetration when the victim withdraws consent during the course of the act. The *Robinson* court reasoned that, if the law were to be interpreted consistently with the defendant's argument, **"**...[t]he question of rape or no rape in fact situations like the present one would turn on whether the prosecutrix, on revoking her consent and struggling against the defendant's forcible attempt to continue intercourse, succeeds at least momentarily in displacing the male sex organ."[23]

- In Maryland, *State v. Baby*[24] definitively held that "the crime of first-degree rape includes post-penetration vaginal intercourse accomplished through force or threat of force and without the consent of the victim, even if the victim consented to the initial penetration." In doing so, it explicitly reversed the lower court's holding and overturned *Battle v. State*,[25] which held that post-penetration withdrawal of consent, followed by the continuation of intercourse through force or threat of force, did not constitute rape.

- In *Maddox v. State,*[26] a Georgia case, the jury returned with a question, asking "if a person could initially consent to having sexual intercourse and then withdraw that consent," and the trial court answered "that at the time of carnal knowledge as referred to in the statute, for there to be rape it must *at that time* be done forcibly and against the will of the victim"[27] (emphasis added).

- In *State v. Siering*[28] the Connecticut Appeals Court quoted *State v. Robinson*:[29] "'[i]n anybody's everyday lexicon, continued penetration of the female sex organ by the male sex organ … is factually 'sexual intercourse.'" It went on to hold that "if intercourse is without consent and accomplished through force, it constitutes sexual assault."[30] It dismissed the holding of *State v. Way*,[31] a North Carolina case discussed below, as being unpersuasive for a lack of explicit reasoning. The *Siering* Court went on to note that California and Maine, two states with rape statutes nearly identical to that in Connecticut, had case law with opposite results as that of *Way*.[32]

- In *People v. Denbo,*[33] an Illinois case from 2007 involving interpretation of a forcible rape statute, the court held that the element of force was satisfied by the victim continually pushing the defendant's hand away from her genitals, which should have signaled to him after the first time she did it that she no longer consented to what he was doing.

- In *In re John Z.,*[34] decided in 2003, the California Supreme Court overturned prior case law[35] which had described the "essence of rape" to be the essential outrage a victim feels in response to the "violation of her womanhood." Significantly, the *John Z* Court held that it is immaterial at which point the victim withdraws her consent, so long as the withdrawal is communicated and the perpetrator thereafter ignores it.

- In considering the issue of consent under Alaska's first-degree sexual assault statute[36] in *McGill v. State,*[37] the Alaska Court of Appeal stated that "[n]othing in the legislative history of our statute [governing sexual assault without consent] supports [the] argument that once a person is sexually penetrated with consent, that consent cannot be withdrawn."

Even where revocation of consent can be charged as rape, myths about sexual violence persist; jurors may engage in jury nullification[38] or may cast doubts on the victim's credibility because of their prior consent to sexual conduct with the offender. Prosecutors should emphasize to juries that, far from demonstrating dishonesty, the candor reflected in a victim's disclosure of their consensual activity with their perpetrator prior to the assault should logically serve to bolster the victim's credibility.

B. Open Question

Most jurisdictions have no explicit authority on whether withdrawal of consent after penetration falls under the crime of rape. A handful or more of these jurisdictions have case law or dicta that is helpful and could serve as a foundation for future precedent, but do not qualify as precedent itself.[39] Given the history of established case law outlined above and a common-sense approach to statutory interpretation, the lack of explicit precedent should not be an obstacle to prosecution.

One approach to arguing for the applicability of criminal offenses to rape following the revocation of consent is to emphasize the rulings from jurisdictions that have freshly considered the issue. Although these states' laws are not authoritative for courts outside of those jurisdictions, they can be persuasive.

Courts may also look to legislative intent, as in *McGill*; [40] the similar nature of the harm suffered by victims who have revoked their consent and by victims who had not consented to begin with, as with *In re John Z.*;[41] and the common sense notion that sexual intercourse includes continuing penetration, as applied by courts in *Siering*,[42] *Maddox,*[43] and *Robinson*.[44] This last point is the most critical: within the meaning of most rape statutes, the court must strain in order to find any justification for the assertion that consent is set at the moment of initial penetration. Recognizing revocation of consent rape requires only that a court accept that their state's rape statute governs the *entirety* of the act, and not simply the moment of initial penetration. And as was emphasized by the court in *In re John Z,* a victim's suffering as a result of rape does not peak and end at the moment of penetration; a victim can be traumatized by having their consent violated, regardless of whether that violation occurs at the moment of penetration or sometime during.

C. The Anomaly and Overcoming it

In the 1979 case of *State v. Way*,[45] North Carolina became the only state in the last fifty years to hold that continued penetration after revocation of initial consent does not constitute rape. In *Way*, the defendant and victim were friends who were having consensual sexual intercourse. The victim testified that in the middle of their intercourse, she told the defendant she was in pain and wanted to stop, but the defendant did not stop. The appellate court held that the trial court erred in issuing a jury instruction on revocation of consent: "[u]nder the [trial court's] instruction, the jury could have found the defendant guilty of rape if they believed [the victim] had consented to have intercourse with the defendant and in the middle of that act, she changed her mind. This is not the law."[46]

The court stated that consent can be withdrawn, but only in those situations where there is evidence of more than one act of intercourse between the victim and the accused. "If the particular act of intercourse was without her consent, the offense is rape without regard to the consent given for prior acts to third persons or the defendant."[47] The character of each of these acts is defined, according to the court in *Way*, by the moment of initial penetration. However, a single act, once commenced, could not become a rape if the victim withdraws their consent during the course of the act. Only if the defendant proceeded with a different or second act would the victim's lack of consent be transformed into a rape. *Way* cites to no legal authority or justification for drawing this line.[48]

There may be opportunities for distinguishing *Way* from a case arising today. Simply stated, *Way's* holding reflects a belief far beyond the current consent debate regarding how and when consent or non-consent must be communicated.[49] *Way*'s expansion of consent, taken to its logical conclusion, says that once an individual has consented to penetration, no matter how uncomfortable or unpleasant it is, or regardless of a change in the individual's circumstance, the other partner must agree to get the penetration to stop.

There are ways for prosecutors in North Carolina to argue that penetration following the revocation of consent constitutes rape in a way that does not challenge existing precedent. One way is to differentiate the acts taking place *before* and *after* the victim's withdrawal of consent. *Way* involved only a single continuous sex act, which can be distinguished from the above cases on the right facts, using *Way*'s own language[50]: "[i]f the *particular act* of intercourse was without her consent, the offense is rape without regard to the consent given for prior acts to third persons or the defendant."[51] (emphasis added). Distinguishing the acts that the victim consented to from those acts that the victim did *not* consent to is necessarily a case-specific and fact-dependent analysis.

Cases involving BDSM and sexual exploitation are perceived to be the most difficult to investigate and prosecute because of the existence of the victim's prior consent. These cases, however, often offer the most straightforward evidence around the communication of consent and its subsequent revocation. BDSM activity involves early agreement around the type and range of conduct to which both actors consent to engage. Individuals participating in BDSM relationships typically anticipate situations in which one of the actors may change their minds by designating "safe" words or actions which, when communicated, must put an immediate stop to the conduct.[52] This clear communication of consent is fundamental to the BDSM community and the safety and pleasure of its members; violation of this standard practice creates a dangerous environment for all involved. Prosecutors who receive reports involving a rape following revocation of consent in BDSM relationships should work with experts in that culture to ensure they understand the significance of safe words, consent agreements, and other practices in the BDSM community.[53]

Rape and sexual assault within the context of commercial sexual exploitation (CSE) is also often treated with suspicion and doubt. This stems from the public's acceptance of rape myths about the victim's prior consent and sexual conduct, as well as an unfair assessment of the victim's credibility based upon their involvement in the commercial sex industry, whether voluntary or coerced. While sexually exploited persons typically agree to particular sexual acts with clearly laid out parameters for money or something else of value, sex buyers often cross those boundaries – because they think the victim has no bodily autonomy, or because they think no one will believe them if they report being assaulted. Sexually exploited persons are among the most vulnerable to rape and sexual assault, and criminal justice professionals handling these cases must ensure that their own biases, acceptance of rape myths, or misplaced sympathy for the perpetrators does not interfere with their ability to objectively assess the case.

Mistake of Fact Defense in Revocation of Consent Cases

Some jurisdictions allow defendants to assert the affirmative defense of "mistake of fact" – *i.e.,* the defendant mistakenly believed that the victim consented to the sexual conduct.[54] Prosecutors in all jurisdictions, even those that do not formally allow for such a defense, should undertake a mistake of fact analysis, since the evidence pertinent to this inquiry is the same evidence that will be needed to prove the statutory element of absence of consent.

Mistake of Fact

The mistake of fact defense is based on the rationale that if a defendant believed a victim consented to intercourse or other conduct, and did not reasonably know that the victim was not consenting to the activity, then the defendant should not be convicted of rape or sexual assault. This defense negates the *mens rea* required for the offense by eliminating the defendant's belief in a necessary element for the offense — the absence of consent. The mistake of fact defense has both a subjective and objective components. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented/was still consenting/did not revoke consent. The objective component asks whether the defendant's mistaken belief about consent was reasonable under the circumstances. The initial burden of raising a reasonable doubt about consent is on the defendant and, once raised, must by disproven by the prosecutor beyond a reasonable doubt.

The court must approve a jury instruction on the mistake of fact defense before the jury may consider the defense. Whether or not the court approves that instruction depends on the applicable evidentiary standard — make sure to check your local jurisdiction's rules and laws.

Jurisdictions have recognized the defense differently. Some jurisdictions focus on the actions of the victim, others focus on the defendant's state of mind, and other jurisdictions focus on whether the construction of their rape statutes allows for the defense. All jurisdictions find the defense is not warranted when there is evidence of force and/or evidence raising a factual issue as to actual consent. Proof of force negates any possible mistake as to consent, except in some rare circumstances like BDSM.

The crux of the mistake of fact defense in all rape cases is the objective reasonableness of a perpetrator's belief in consent: if it was reasonable for a perpetrator to believe there was consent, then the defense can succeed. If it was unreasonable for a perpetrator to believe there was consent, then the perpetrator should be convicted. The two key questions that are unique to the mistake of fact defense in withdrawal of consent cases are:[55] 1) how does initial consent mixed with the victim's actions in revoking consent affect *an objective determination of consent* to an alleged act of rape? (*i.e.,* how does the evidence affect the statutory element of absence of consent?); and 2) how does initial consent mixed with victim's actions in revoking the consent affect the *objective reasonableness of a perpetrator's belief in consent*? (*i.e.,* how does the evidence affect the defendant's possible mistake of fact defense?) The evidence that is relevant to a determination of objective consent may be different from the evidence relevant to a determination of reasonable belief in consent.

At what point during the encounter did the victim indicate an intent to have intercourse, and what conduct on the part of the victim—after the intent manifested—supported the defendant's reasonable belief in consent?[56] In *Battle v. Maryland*, the judge instructed the jury that "it [was] possible for a situation to start out as consensual and then become a non-consensual one in the course of the event."[57] The court elaborated with an example:

> ...[I]n evaluating petting and oral sex—the conduct at issue in the aforementioned cases—questions as to the nature of these acts are central to a determination of relevancy to consent to intercourse. Presumably, people engage in petting with greater frequency than they engage in sexual intercourse; therefore, petting alone does not tend to show consent to sex. However, petting can operate as foreplay to intercourse and in those instances may indicate consent to sex. To distinguish between these two circumstances, the court could require the jury to consider whether the consensual sexual intimacy of the two parties escalated consensually from petting to intercourse. An affirmative determination would establish that consent had been objectively granted. This inquiry focuses the jury on the shift in the victim's status from voluntary to involuntary participant, emphasizing that the victim's consent to petting is specific rather than generalized consent and, without more, should not imply consent to sex. Certain acts subsequent to this consensual activity, such as further disrobing or the willing move to a more intimate location (beginning in the living room and going to the bedroom, or beginning in the car and going to a hotel), may indicate an escalation of consent. This is obviously a complex determination, but it focuses the jury on a crucial issue—not whether consensual petting or necking occurred, but what it meant.[58]

Stated another way, consent to one type of contact should not automatically raise a presumption that there is consent to all types of contact.[59]

IV. Conclusion

A rape following a revocation of consent requires unique factual and legal analyses, but the level of harm and trauma they cause does not differ from the harm and trauma caused by any other type of sexual violence. There are extremely few legal barriers to charging revocation of consent rape. Almost every jurisdiction to consider the issue in the past century has found that penetration following a revocation of consent will meet a *prima facie* rape case. Where there is no explicit authority, a good legal argument grounded in common-sense statutory interpretation, policy justifications, and persuasive law should overcome any statutory ambiguity in a particular jurisdiction. And, where, as in North Carolina, prosecutors encounter more significant barriers to charging cases in these scenarios, prosecutors may still seek to hold offenders accountable by differentiating acts previously consented to from acts for which there had never been consent; if challenging precedent in an appeal, thy may utilize favorable case law from other jurisdictions.

Penetration following revocation of consent is a serious crime. In *People v. Roundtree,* the California Court of Appeals stated:

> [T]he crime of rape therefore is necessarily committed when a victim withdraws her consent during an act of sexual intercourse but is forced to complete the act. The statutory requirements of the offense are met as the act of sexual intercourse is forcibly accomplished against the victim's will. The outrage to the victim is complete.[60]

The "outrage" experienced by victims is often cited as part of the policy justification for criminalizing sexual violence and for invoking serious penalties for offenders. It occurs whenever an individual's physical autonomy is violated, regardless of whether the individual had previously given consent. With strategic evaluation and framing of revocation of consent cases, prosecutors can ensure accountability for perpetrators and justice for the victims they harm.

Endnotes

1. Jennifer Newman is an Assistant District Attorney at the Office of the District Attorney for the City of Philadelphia. This Strategies in Brief was co-written by AEquitas staff members Jennifer Long, Chief Executive Officer; Holly Fuhrman, Associate Attorney Advisor; Jonathan Kurland, Attorney Advisor; and Teresa Garvey, Attorney Advisor. AEquitas would like to thank Cary Zhang, Temple University Beasley School of Law 2021, for her contributions to this article.
2. 720 Ill. Comp. Stat. Ann. 5/11-1.70(c).
3. *See, e.g.*, Heather D. Flowe, Ebbe B. Ebbesen and Anila Putcha-Bhagavatula, *Rape Shield Laws and Sexual Behavior Evidence: Effects of Consent Level and Women's Sexual History on Rape Allegations*, 31 Law and Human Behavior 159 (Apr., 2007), *available at* http://link.springer.com/article/10.1007%2Fs10979-006-9050-z.
4. *See BDSM*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/BDSM (last visited Sep. 24, 2019).
5. *See People v. Ireland*, 188 Cal. App. 4th 328 (Cal. App. 2010) (where the victim withdrew her consent when her partner produced a knife during sex); *In re Daniel*, 2017 WL 4015764 (September 12, 2017) (unreported) (where the victim consented to oral sex with the defendant, but had not consented to the defendant groping her and forcing her head down in order for him to ejaculate in her mouth). It also applies in situations where the defendant, while participating in an otherwise consensual encounter, proceeds to do something the victim explicitly stated prior to the encounter that they did not consent to. *See Commonwealth v. Stauffer*, 2014 WL 10518709 (Pa. Com. Pl.) (Trial Order) (where the defendant and the victim agreed that during their sexual encounter the defendant would withdraw from penetration before ejaculating, and when he refused to do as asked, his victim attempted to flee and he held her down to continue the intercourse).
6. *See In re John Z.,* 60 P.3d 183 (Cal. 2003) (where the victim withdrew her consent during a threesome she initially, though not particularly enthusiastically, consented to).
7. *See, e.g.,* Model Penal Code § 213.6 (Am. Law Inst., Tentative Draft No. 8, 2018). "An actor whose sexual acts are met with a clear verbal statement of refusal –such as "No," "Stop", or "Don't"—must take that rejection at face value, even if the actor hopes that it does not reflect the other party's actual sexual desires. The actor must also heed the other party's revocation of a prior expression of willingness by ceasing further sexual acts, notwithstanding disappointment, frustration, anger, or confusion."
8. *See In re John Z., supra* note 6.
9. Prosecutors considering these cases should consult the applicable statutes and case decisions in their respective decisions. AEquitas is available to discuss laws related to revocation of consent as well as strategies for proceeding in these types of cases. Please call (202)-558-0040.
10. 23 Tenn. 194 (Tenn. 1843).
11. *Id.* at 198.
12. 47 Vt. 82 (Vt. 1874) (Trial court instructed the jury that if the victim withdrew her consent after the act of intercourse had commenced, even if she had previously consented to the act, then a rape had occurred).
13. 45 Conn. 256, 259 (Conn. 1877) (Holding there was no error in jury instruction that the jury "must be satisfied that there was no consent during any part of the act.").
14. AEquitas, *Legal Issues in Sexual Assault From a Prosecutor's Perspective, adapted from original chapter written by Mimi Rose, JD, in* Sexual Assault Victimization Across the Life Span: Investigation, Diagnosis, and the Multidisciplinary Team, vol. 1. (STM Learning, 2017).
15. Threats of retaliation have varying statutory definitions, but commonly includes some sort of express or implied threat beyond the threat of bodily harm. In Hawaii it is referred to as "compulsion" and is defined in part as a "threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss." *See* Haw. Rev. Stat. § 707-700.
16. *See* Teresa Scalzo, *Overcoming the Consent Defense*, 1(7) The Voice (2006), *available at* http://www.markwynn.com/sex-assault/overcoming-the-consent-defense.pdf.
17. *But see* discussion on BDSM, discussed *infra.*
18. Call AEquitas, as we would be happy to assist with this.
19. *Supra* note 2.
20. 540 N.W.2d 860 (Minn. Ct. App. 1995).
21. *See* M.S.A. § 609.341(9) (2013) (defining someone who is physically helpless as being unable to "withhold consent or *withdraw* consent."); M.S.A. § 609.341(12)(2)(i) (defining sexual penetration, in part, as: "any intrusion, however slight in the genital or anal openings . . . of the complainant's body by any part of the actor's body. . .").
22. 496 A.2d 1067 (Me. 1985).
23. *Id.* at 1071.
24. 946 A.2d 463 (Md. 2008).

25. 287 Md. 675 (Ct. App. 1980).
26. 317 S.E.2d 658, 659 (Ga. Ct. App. 1984).
27. O.C.G.A. § 16–6–1.
28. 644 A.2d 958 (Conn. App. Ct. 1994).
29. 496 A.2d at 1068.
30. *Siering*, 644 A.2d at 962.
31. 254 S.E.2d 760 (N.C. 1979).
32. *See Siering,* 644 A.2d at 963.
33. 868 N.E.2d 347 (Ill. App. Ct. 2007).
34. 60 P.3d 183 (Cal. 2003).
35. *People v. Vela*, 172 Cal. App. 3d 237 (Cal. App. 1985).
36. *See* Alaska Stat. § 11.41.410(a).
37. 18 P.3d 77, 84 (Alaska Ct. App. 2001).
38. Jury nullification typically occurs when members of a criminal jury believe that the defendant is guilty but nonetheless acquit because they believe the law to be unjust. For help formulating *voir dire* questions to assess prospective jury members at risk for juror nullification, please contact AEquitas at (202) 558-0040.
39. For example, the Court of Appeals of Michigan in the unreported decision, *In re Daniel*, sustained a finding of criminality where the defendant performed a sex act different than the one the victim had consented to do. No. 334057, 2017 WL 4015764 (Mich. Ct. App. Sept. 12, 2017). In *Commonwealth v. Stauffer*, legal sufficiency for rape charges existed where the victim reportedly consented to the penetration upon the condition that the defendant withdraw his penis when he was ready to ejaculate, but when defendant was ready to ejaculate, refused to cease penetration. No. 176 OF 2014, 2014 WL 10518709 (Pa. Com. Pl. Oct. 21, 2014).
40. *See McGill,* 18 P.3D at 84-85.
41. *See In re John Z.,* 60 P.3d at 762.
42. *See Siering*, 644 A.2d at 182.
43. *See Maddox*, 317 S.E.2d at 659.
44. *ee Robinson*, 496 A.2d at 1069.
45. *See* 254 S.E.2d at 762.
46. *Id.*
47. R. Anderson, 1 Wharton's Criminal Law and Procedure § 302 (1957).
48. *See* 254 S.E.2d at 762.
49. *Reasonably Speaking: Why is Defining Consent So Difficult?* American Law Institute (June 4, 2019), *available at* https://www.ali.org/news/podcast/episode/why-defining-consent-so-difficult/?fbclid=IwAR1zriBWSYoS8qrgYL9c7mASvjnADJ97kw7QwR5HMDnj-Go_GVfyO9d6bg0.
50. *See* Anderson, *supra* note 47.
51. 254 S.E.2d at 761.
52. *See generally* Katie Van Sickle, *A Crash Course in Kink*, N.Y. Times, May 25, 2018, *available at* https://www.nytimes.com/2018/05/25/insider/a-crash-course-in-kink.html. *See also* Benjamin Graham et. al, *Member Perspectives on the Role of BDSM Communities,* 53(8) J. Sex Research 895 (2015).
53. AEquitas is available to help you find an expert in BDSM culture. Please call us at 202-558-0040.
54. *See, e.g., U.S. v. Lewis*, 6 M.J. 581 (A.C.M.R. 1978) (Considering whether the victim's lack of consent was made reasonably evident to defendant); *People v. Sojka*, 2011 WL 2319945 (Cal. App. 1st Dist. 2011) (Holding that defendant presented sufficient evidence of reasonable and honest belief in the victim's consent); *Reynolds v. State*, 664 P.2d 621 (Alaska Ct. App. 1983) (Determining whether victim make her nonconsent known to defendant).
55. *See* Acquaintance Rape and Degrees of Consent: "No" Means "No," but What Does "Yes" Mean?, 117(7) Harv. L. Rev. 2341 (2004).
56. *See id.*
57. 414 A.2d 1266, 1267 (Md. 1980).

58. *Id.*
59. This issue is also illustrated in the case of *People v. Ray*, wherein the defendant asserted that he and the victim had engaged in consensual oral sex a few hours before the rape. Without explicitly saying so, the Court seemed to rely on some distinction between the nature of intercourse and the nature of other sexual acts. 2002 WL 64543 (Cal. Ct. App. Jan. 17, 2002).
60. 77 Cal. App 4th 846, 851 (Cal. App. 2000).

This article was supported by Grant No. 2016-TA-AX-K020 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the authors and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

1100 H Street NW, Suite 310 • Washington, DC 20005
P: 202-558-0040 • F: 202-393-1918