

Rape and Sexual Assault Analyses and Laws

Part II

TABLE OF CONTENTS

Introduction	3
Penetration Crimes	5
Conduct	5
Unlawfulness	6
Force	7
Consent	9
Freely given	9
Affirmative consent	10
Capacity to consent	10
Age	10
Developmental Disability or Mental Incapacity.....	12
Physical Disability, Incapacity, or Helplessness	12
Unconsciousness	13
Intoxication.....	13
Relationship	15
Sexual Arousal, Gratification, Degradation, Humiliation, or Abuse Requirement	15
Non-Penetration Crimes	17
Contact	17
Exposure.....	17
Grading Forcible and Nonconsensual Penetration	19
Penetration without consent and with force.....	19
Other Notable Considerations	20
Marital relationship.....	20
Sex of perpetrator-victim.....	21
Multiple perpetrators/gang rape.....	21
Conclusion	21
ENDNOTES	22

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 In other jurisdictions, however, the laws remain outdated in language, content, or both (e.g., using language such as *deviate* sexual intercourse to criminalize forcible sodomy or containing marital exemptions in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).

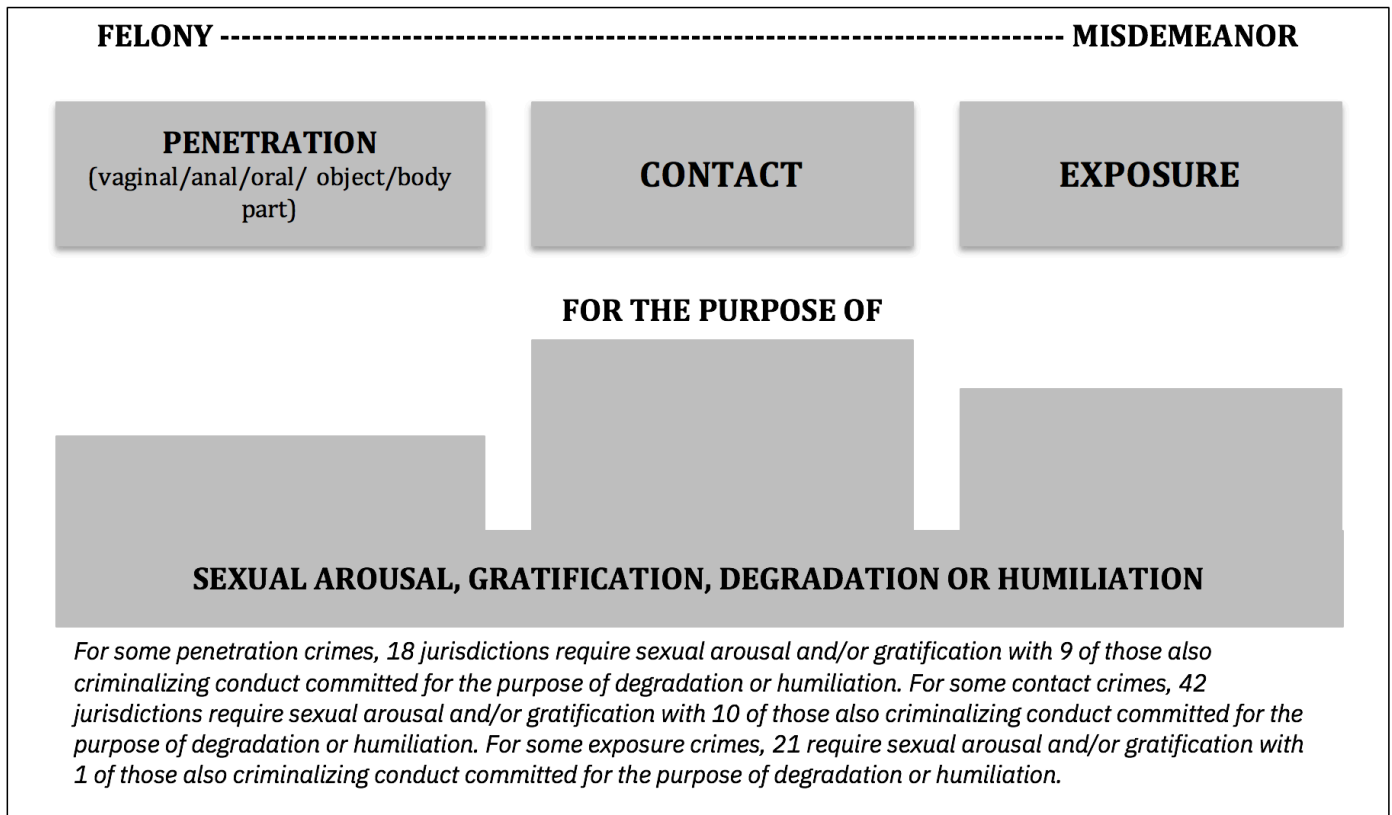
The disconnect between the law and the dynamics of rape and sexual assault can play a crucial role in individual victims' perception of whether or not they were the victims of a crime,¹ and whether they believe they will receive some measure of justice in the legal system.² Part II reviews sex crime 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).⁵ 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).



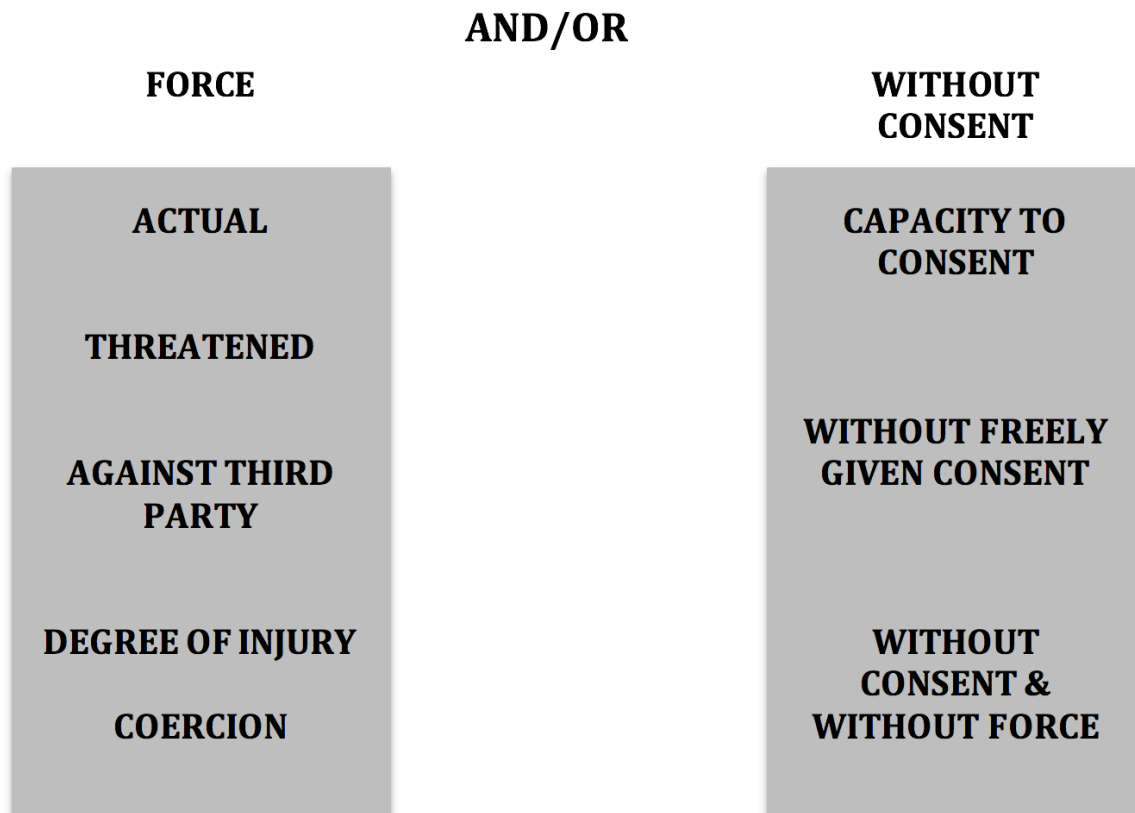


Figure 1. This visual is intended to provide a big picture understanding of the types of rape and sexual assault crimes, their gradation, and the conduct prohibited.

PENETRATION CRIMES

Conduct

Sexual penetration crimes may include penetration of the vagina, anus, or mouth⁶ by the penis or other body part, or penetration of the vagina or anus by an object.⁷ 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.”⁸

Statutory elements are not defined identically across jurisdictions, and even slight variations among these definitions impact whether the penetration is *criminal*.⁹ 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.¹⁰ While some jurisdictions do not employ the “however slight” terminology explicitly in their statutes,¹¹ a review of case law reveals that no jurisdiction requires more than slight penetration.¹² 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,¹³ the lips of a victim’s mouth,¹⁴ or the anal opening.¹⁵ Penetration has also been established by the act of licking a penis.¹⁶ Significantly, penetration through clothing has also been held sufficient under at least five jurisdiction’s laws, including federal law.¹⁷ At least one court, however, has determined that penetration of the buttocks (as opposed to the anus) is insufficient to establish sexual intercourse.¹⁸ 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.¹⁹

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.²⁰ 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 intimidation²³ 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

Jurisdictions with Use of Force Statutes	
Force	Jurisdiction
Actual Force	All
Threatened force	All
Force Against a Third Party (Where the force or threat of force used by the perpetrator is directed at a third party to commit a rape or other sexual assault against the victim)	ALL jurisdictions <i>except</i> Georgia, ³¹ Indiana, ³² Louisiana, Massachusetts, ³³ Mississippi, Wisconsin, ³⁴ Puerto Rico, ³⁵ Virgin Islands

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.³⁶ 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.³⁷

Only a minority of jurisdictions — Idaho³⁸, Nebraska,³⁹ West Virginia,⁴⁰ and the Virgin Islands⁴¹— require resistance to some degree to prove the element of force. Alabama recently eliminated the resistance requirement.⁴² These jurisdictions vary in how much resistance they require, and resistance does not always need to be physical.⁴³ 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.⁴⁴ 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,⁴⁵ positive cooperation in an act or an attitude pursuant to an exercise of free will and with knowledge of the nature of the act.⁴⁶ “Permissions may be inferred from acts or statements reasonable viewed in light of the surrounding circumstances.”⁴⁷ Lack of freely given consent has been defined as

“compulsion,”⁴⁸ or “compulsion to submit due to use of force or threat of force or coercion”⁴⁹ or “consent induced by fraud.”⁵⁰

Some statutes explicitly state that the victim’s lack of resistance or the victim’s current or prior “social” relationship, or “manner of dress”⁵¹ with the perpetrator shall not constitute consent.⁵² 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.⁵³ 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.⁵⁴ 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.⁵⁵

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.⁵⁶

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.⁵⁷ Different jurisdictions take varying approaches to how they incorporate these issues into their laws.⁵⁸ 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.⁵⁹

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.⁶⁰ 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

Ages of Consent	
AGE	STATE
9	Illinois
10	Georgia ⁶⁴
11	New York, ⁶⁵ South Carolina ⁶⁶
12	Alabama, Delaware, ⁶⁷ Florida, ⁶⁸ Iowa, ⁶⁸ Kentucky, ⁶⁹ Maine, Missouri, ⁷⁰ Nebraska, Ohio, ⁷¹ Oregon, ⁷² Washington, Wisconsin, West Virginia, Wisconsin, ⁷³ American Samoa, ⁷⁴ Federal, ⁷⁵ UCMJ
13	Alaska, Connecticut, Delaware, ⁷⁶ Georgia, Illinois, Louisiana, ⁷⁷ Maryland, Michigan, ⁷⁸ Minnesota, New Hampshire, ⁷⁹ New Jersey, ⁸⁰ New Mexico, ⁸¹ New York, North Carolina, Ohio, ⁸² Pennsylvania, ⁸³ South Dakota, ⁸⁴ Tennessee, ⁸⁵ Vermont, Virginia, ⁸⁶ Virgin Islands, ⁸⁷ Wisconsin, Wyoming, Northern Mariana Islands
14	California, ⁸⁸ Delaware, ⁸⁹ Hawaii, ⁹⁰ Indiana, ⁹¹ Iowa, ⁹² Kansas, ⁹³ Kentucky, Maine, Maryland, Mississippi, Missouri, ⁹⁴ Nebraska, New York, ⁹⁵ Nevada, Oklahoma, Oregon, ⁹⁶ Rhode Island, ⁹⁷ South Carolina, ⁹⁸ Texas, ⁹⁹ Utah, Washington, American Samoa, Guam, ¹⁰⁰ Northern Mariana Islands, Puerto Rico
15	Arizona, ¹⁰¹ Colorado, Louisiana, Maryland, New York, North Dakota, Tennessee, Vermont, Virginia, ¹⁰² Wyoming, Northern Mariana Islands
16	Alabama, Alaska, Arkansas, California, Connecticut, Delaware, ¹⁰³ District of Columbia, Florida, ¹⁰⁴ Georgia, Hawaii, Kentucky, ¹⁰⁵ Kansas, Kentucky, Idaho, ¹⁰⁶ Indiana, Massachusetts, ¹⁰⁷ Michigan, ¹⁰⁸ Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, ¹⁰⁹ Oregon, ¹¹⁰ Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, ¹¹¹ Vermont, West Virginia, Washington, Wisconsin, ¹¹² American Samoa, ¹¹³ Guam, ¹¹⁴ Puerto Rico, ¹¹⁵ Federal, ¹¹⁶ UCMJ
17	Colorado, Florida, Illinois, Louisiana, Missouri, New York, Texas
18	Arizona, ¹¹⁷ California, ¹¹⁸ Colorado, ¹¹⁹ Kentucky, New Mexico, Oregon, ¹²⁰ Tennessee, Utah

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

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

Figure 4. *The jurisdictions included in this table criminalize sexual penetration and/or sexual contact between persons of a certain age or range with an actor who is a specified number of years older or where there is 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.¹²⁶ This is a broad category that includes a victim's inability or unwillingness to express consent. Physical incapacity can also be termed physical helplessness, and can cover cases in which a victim is impaired or unconscious as a result of her intoxication.

Unconsciousness

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

Intoxication¹³⁰

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.¹³¹

Rape and sexual assault statutes in all but two jurisdictions criminalize nonforcible rape and sexual assault of victims who are intoxicated.¹³² 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.¹³³ Other jurisdictions that use the term "intoxication" require a victim to be involuntarily intoxicated in order to be covered by any of its provisions.¹³⁴ Of those jurisdictions, most 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.¹³⁵

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.¹³⁶ 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,¹³⁷ 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.¹³⁸

A defendant's voluntary intoxication is not a defense (*i.e.*, it does not impact his/her culpability) to rape or sexual assault crimes when they are general intent¹³⁹ crimes. Voluntary intoxication may impact a defendant's culpability for specific intent¹⁴⁰ crimes, such as in sex offenses which require the act be committed for the purpose of sexual arousal, gratification, etc.¹⁴¹ 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 consent¹⁴² or acting as an aggravating factor.¹⁴³ The term most commonly used for these duty relationships is that the perpetrator was in a “position of authority” to the victim.

Victim Perpetrator Relationships	
Incest-blood	ALL jurisdictions <i>except</i> Washington, UCMJ
Correctional	ALL jurisdictions <i>except</i> Alabama, Indiana, Louisiana, Nevada, North Carolina, Oregon, South Carolina, Tennessee, Washington, American Samoa, Guam, UCMJ
Other special relationships	Additional special relationships protected under rape and sexual assault laws include educator-student, medical professional-patient, and employer-employee. ¹⁴⁴

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.¹⁴⁵

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.¹⁴⁶ 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.”¹⁴⁷ A review of court decisions across the country supports this interpretation.¹⁴⁸

Penetration Crimes that Require Sexual Arousal, Gratification, Degradation or Humiliation			
State	Statute	Sexual Arousal/ Gratification	Degradation/ Humiliation
Alabama	Sodomy 1 st Degree; Sodomy 2 nd Degree; Sexual Misconduct ¹⁴⁹ ; School Employee Engaging in a Sex Act with a Student Under the Age of 19 years ¹⁵⁰ ; Sexual Extortion ¹⁵¹	X	
Arkansas	Rape; Sexual Assault 1 st Degree; Sexual Assault 3 rd Degree; Sexual Assault 4 th Degree; Public Sexual Indecency ¹⁵²	X	
California	Forcible Acts of Sexual Penetration, by a Foreign or Unknown Object	X	

Colorado	Sexual Assault; Sexual Assault on a Client by a Therapist ¹⁵³	X	
District of Columbia	First Degree Sexual Abuse ¹⁵⁴ ; Second Degree Sexual Abuse ¹⁵⁵ ; Misdemeanor Sexual Abuse ¹⁵⁶ ; First Degree Sexual Abuse of a Secondary Education Student ¹⁵⁷ ; First Degree Sexual Abuse of a Ward, Patient, Client or Prisoner ¹⁵⁸ ; First Degree Sexual Abuse of a Patient or Client ¹⁵⁹	X	X
Hawaii	Sexual Assault in the First Degree ¹⁶⁰ ; Sexual Assault in the Second Degree ¹⁶¹ ; Sexual Assault in the Third Degree ¹⁶² ; Incest ¹⁶³	X	X
Idaho	Male Rape; Forcible Sexual Penetration by Use of a Foreign Object	X	
Iowa	Sexual Exploitation by a Counsel, Therapist, or School Employee	X	
Kentucky	Sodomy in the First Degree; Sodomy in the Second Degree; Sodomy in the Third Degree; Sexual Misconduct ¹⁶⁴	X	
Maine	Gross Sexual Assault ¹⁶⁵	X	
Maryland	Penetration by an Object: Sexual Offense 1 st Degree; Sexual Offense 2 nd Degree; Sexual Offense 3 rd Degree; Sexual Offense 4 th Degree;	X	
Missouri	Sodomy in the First Degree; Sodomy in the Second Degree; Sexual Misconduct ¹⁶⁶ ; Sexual Conduct with a Nursing Facility Resident or Vulnerable Person in the First Degree ¹⁶⁷ ; Incest ¹⁶⁸	X	X ¹⁶⁹
Montana	Sexual Intercourse without Consent; Incest; Aggravated Sexual Intercourse Without Consent;	X	X
Utah	Object Rape; ¹⁷⁰ Aggravated Sexual Assault; Sexual Offenses Against Victim Without Consent of Victim ¹⁷¹	X	X ¹⁷²
West Virginia	Sexual Assault 1 st Degree ¹⁷³ ; Sexual Assault 2 nd Degree ¹⁷⁴ ; Sexual Assault 3 rd Degree ¹⁷⁵ ; Incest ¹⁷⁶	X	X
Wyoming	Sexual Assault 1 st Degree ¹⁷⁷ ; Sexual Assault 2 nd Degree ¹⁷⁸ ; Sexual Assault 3 rd Degree ¹⁷⁹ ; Incest ¹⁸⁰	X	X ¹⁸¹
Federal	Aggravated Sexual Abuse ¹⁸² ; Sexual Abuse ¹⁸³ ; Sexual Abuse of a Minor or Ward ¹⁸⁴	X	X
Military	Rape and Sexual Assault Generally ¹⁸⁵	X	X

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.¹⁸⁶ Several jurisdictions interpret "sexual contact" broadly: in Ohio, it is defined as "any touching of an erogenous zone of another,"¹⁸⁷ 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.¹⁸⁸ Most jurisdictions criminalize non-consensual sexual contact that occurs under and over clothing, although New Mexico requires skin-to-skin contact.¹⁸⁹

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.¹⁹⁰

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 force¹⁹¹ or when the victim is incapable of consent due to physical helplessness or mental incapacitation.¹⁹² 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.¹⁹³

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.¹⁹⁴

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.¹⁹⁵ Many indecent exposure statutes also prohibit public displays of sexual acts and/or masturbation in public.¹⁹⁶

For indecent exposure to rise to the level of a crime, some jurisdictions require the act to occur in a public place,¹⁹⁷ while many others criminalize exposure under circumstances “likely to cause affront or alarm.”¹⁹⁸ Other jurisdictions criminalize exposure in *any* place where other persons are present.¹⁹⁹ 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.²⁰⁰ Two states, Montana and North Dakota, explicitly criminalize nonconsensual indecent exposure committed via electronic communication.²⁰¹

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.²⁰²

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.²⁰³ Meanwhile, indecent exposure in Florida rises to the felony level when an employer exposes his/her sexual organs in front of an employee.²⁰⁴

Contact and Exposure Crimes that Require Sexual Arousal, Gratification, Degradation or Humiliation²⁰⁵		
	Sexual Arousal/ Gratification	Degradation/ Humiliation
Sexual contact²⁰⁶	Alabama, Arkansas, California, Colorado, Connecticut, District of Columbia, Georgia, ²⁰⁷ 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	Connecticut, District of Columbia, Michigan, Montana, New Jersey, New York, South Dakota, Wisconsin, Federal Law, UCMJ
Indecent exposure	Alabama, Arkansas, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, ²⁰⁸ Louisiana, Montana, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, West Virginia, Wisconsin, Wyoming	Montana

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.

GRADING FORCIBLE AND NONCONSENSUAL PENETRATION

Penetration without consent and with force

All jurisdictions criminalize forced penile/vagina, penile/anal, and penile/oral²⁰⁹ penetration where the victim has not consented and the perpetrator has used force.²¹⁰ 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.²¹¹

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.²¹² 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.²¹³ 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.

Gradation Among Penetration Crimes Requiring Force²¹⁴		
Forced Penetration	Jurisdiction	Offense Grade
Penile/Vaginal	All	Highest level sex offense
Penile/Anal	All	Highest level sex offense <i>except</i> Georgia and Missouri ²¹⁵
Penile/Oral	All	Highest level sex offense <i>except</i> Oklahoma ²¹⁶
Object (Body part penetration not included)	All EXCEPT American Samoa	Highest level sex offense <i>except for</i> Georgia, ²¹⁷ Louisiana, ²¹⁸ Missouri ²¹⁹
Object (Includes body part in definition)	All EXCEPT American Samoa	Highest level sex offense: Connecticut, Florida, Indiana, New Mexico, North Carolina,

		Oregon, Texas, Utah, Virginia, Washington, West Virginia, Virgin Islands All OTHER states criminalize as lesser degree
Other Body Part (e.g., digit, fist) as Separate from “Object”	All EXCEPT Maine, ²²⁰ and Kentucky ²²¹	Highest level <i>except</i> Alabama, Kentucky, Louisiana, ²²² Maine, Mississippi, ²²³ Missouri ²²⁴ 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. 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.

Penetration Without Force/Coercion and Without Consent	
Vaginal, Anal, and Oral Penetration	Alabama, Alaska, Arizona, Colorado, Delaware, Florida, Hawaii, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, American Samoa, UCMJ
Anal and Oral Penetration	Georgia, Oklahoma

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 rape²²⁵ 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.²²⁶ However, many jurisdictions' sexual contact and indecent exposure crimes explicitly exclude perpetrators who are married to victims.²²⁷ 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.²²⁸ 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.²²⁹

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.²³⁰ 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.²³¹ Even in jurisdictions without specific statutes to address these crimes, multiple perpetrators can be prosecuted under criminal conspiracy²³² or accomplice liability statutes, which may be additional criminal offenses, theories of criminal liability, or both.²³³

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,²³⁴ 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

¹ See Michael R. Rand and Callie Marie Rennison, *Bigger is Not Necessarily Better: An Analysis of Violence Against Women Estimates from the National Crime Victimization Survey and the National Violence Against Women Survey*, 21(3) J. QUANTITATIVE CRIMINOLOGY 267-291 (2005).

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*, AEQUITAS, <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 AEQUITAS 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(r); 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 REV. 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.

¹² *See, e.g.*, *State v. Torres*, 105 Ariz. 361 (1970); *Richards v. State*, 738 So.2d 415 (Fla. Dist. Ct. App. 2011); *State v. Pratt*, 309 A.2d 864 (Me. 1973).

¹³ *See, e.g.*, James L. Rigelhaupt, Jr., Annotation, *What Constitutes Penetration in Prosecution for Rape or Statutory Rape*, 76 A.L.R. 3d 163, § 3 (1977).

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* RIGELHAUPT, *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).

¹⁷ *See, e.g.*, *id.* at § 6.5 (citing *United States v. Norman T.*, 129 F.3d 1099, 1103 (10th Cir. 1997)); *see also* *Lopez v. State*, 567 S.W.3d 408, 416 (Tex. Ct. App. 2018); *State v. Florez*, 385 P.3d 335, 339-41 (Ariz. Ct. App. 2016); *Auringer v. State*, 695 N.W.2d 640, 643 (Minn. Ct. App. 2005); *Holland v. State*, 434 S.E.2d 808, 809 (Ga. Ct. App. 1993).

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 part of statute which is applicable to adult victims as well).

¹⁹ *See, e.g.*, *Clayton v. State*, 695 P.2d 3 (Okla. Crim. App. 1984).

²⁰ *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.”).

²¹ *See, e.g.*, Teresa Scalzo, *Overcoming the Consent Defense*, 1(7) THE VOICE (2006). *See* below for discussion of consent as an element of rape and sexual assault crimes.

²² Jurisdictions with laws that also criminalize penetration without force and without consent will be discussed below.

²³ *See, e.g.*, W. VA. CODE ANN. § 61-8B-1.

²⁴ *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520C.

²⁵ See, e.g., MICH. COMP. LAWS ANN. § 750.520B(1)(f)(v); LA. REV. STAT. ANN. § 14:43(3).

²⁶ 129 N.J. 422, 443 (1992).

²⁷ *Id.*

²⁸ 537 Pa. 143, 148 (1994).

²⁹ See 18 PA. CONS. STAT. ANN. § 3124.1.

³⁰ See, e.g., *People v. Lee*, 51 Cal. 4th 620 (2011); *People v. Keene*, 226 P.3d 1140 (Colo. Ct. App. 2009).

³¹ 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*).

³² 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).

³³ 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).

³⁴ 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).

³⁵ 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.

³⁶ 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).

³⁷ The impact of intoxication on the evaluation of rape and sexual assault crimes is discussed later in this paper.

³⁸ 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.

³⁹ “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).

⁴⁰ 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.

⁴¹ Unless resistance is prevented by fear of immediate and great bodily harm. See V. I. CODE ANN. tit. 14 §. 1701(a)(2)&(3).

⁴² See ALA. CODE ANN. 13A-6-60(1).

⁴³ For instance, Idaho’s Supreme Court has held that verbal resistance is sufficient to substantiate a charge of forcible rape. See *State v. Jones*, 299 P.3d 219 (Idaho 2013).

⁴⁴ 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.

⁴⁵ See, e.g., D.C. CODE § 22-3006.

⁴⁶ See, e.g., CAL PENAL CODE § 261.6; COL. REV. STAT. ANN. § 18-3-401.

⁴⁷ *State in Interest of M.T.S.*, 129 N.J. at 445.

⁴⁸ See, e.g., HAW. REV. STAT. § 707-700.

⁴⁹ See, e.g., NEB. REV. STAT. ANN. § 28-318.

⁵⁰ See, e.g., ALA. CODE § 13A-6-65.

⁵¹ See, e.g., UCMJ § 920 ART. 120(t)(15) .

⁵² See, e.g., D.C. CODE §§ 22-3001(4), 22-3019; FLA. STAT. ANN. § 794.011(1)(a); MINN. STAT. ANN. § 609.341.

⁵³ 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).

⁵⁴ See, e.g., ALA. CODE § 13A-6-65; CAL. PENAL CODE § 261; HAW. REV. STAT. § 707-700; TENN. CODE ANN. § 39-13-503; LA. REV. STAT. ANN. § 14:43; NEB. REV. STAT. § 28-318; OKLA. STAT. ANN. TIT 21, § 1111; P.R. LAWS ANN. TIT. 33 § 4061. Other terms used are “deception” or language related to the victim’s belief.

⁵⁵ 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.

⁵⁶ 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).

⁵⁷ 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.

⁵⁸ See, e.g., PA. CONS. STAT. ANN. 18 § 3122.1; N.C. GEN. STAT. ANN. § 14-27.7A.

⁵⁹ See, e.g., U.S. DEP’T OF HEALTH AND HUMAN SERVICES, STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS, <http://aspe.hhs.gov/hsp/08/SR/StateLaws/summary.shtml> (last visited July 20, 2012) [hereinafter A Guide to State Law].

⁶⁰ See, e.g., *id.*

⁶¹ See, e.g., *In the Matter of B.W.*, 313 S.W.3d 818 (Tex. 2010). However, in several jurisdictions, adolescents under the age of consent are routinely arrested for prostitution related offenses covering activity to which they cannot legally consent. See, e.g., U.S. DEP’T OF JUST., FBI, Uniform Crime Reports, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl38.xls> (last visited July 20, 2012).

⁶² MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (American Law Institute), available at https://www.ali.org/projects/show/sexual-assault-and-related-offenses/#_status

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.

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- 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)9c), 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).
- ⁸¹ Per se law for criminal sexual penetration in the first degree and criminal sexual contact of a minor. See N.M. STAT. ANN. §§ 30-9-11(D)(1), 30-9-13.
- 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 dangerous crime against a child. 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.
- ⁹⁷ Per se law for first- and second-degree child molestation sexual assault. See R.I. GEN. LAWS §§ 11-37-8.1, 11-37-8.3.
- ⁹⁸ Per se law for criminal sexual conduct with minors in the second degree. See S.C. CODE ANN. § 16-3-655(a).
- ⁹⁹ Per se law for aggravated sexual assault. See TEX. PENAL CODE ANN. § 22.021(2)(B).
- ¹⁰⁰ Per se law for criminal sexual conduct in the first and second degrees. See 9 GUAM CODE ANN. §§ 25.15(a)(1), 25.20(a)(1).
- ¹⁰¹ Per se law for molestation of a child. See ARIZ. REV. STAT. ANN. § 13-1410.

- ¹⁰² Per se law for sexual abuse of a child under 15. See VA. CODE ANN. § 18.2-67.4:2. Per se felony for carnal knowledge of a child under 15. See VA. CODE ANN. § 18.2-63.
- ¹⁰³ Per se age of consent law for rape in the fourth degree. See 11 DEL. CODE § 770.
- ¹⁰⁴ Per se age of consent law for lewd and lascivious battery and lewd or lascivious molestation. See FLA. STAT. ANN. § 800.004
- ¹⁰⁵ “A person is deemed incapable of consent if he or she is less than 16 years old.” KY. REV. STAT. ANN. 510.020(3)(a).
- ¹⁰⁶ Per se law offense of lewd conduct of a minor under 16. See IDAHO CODE ANN. § 18-1508.
- ¹⁰⁷ Per se law for rape and abuse of a child. See MASS. GEN. LAWS ANN. CH. 265, § 23.
- ¹⁰⁸ Per se law for criminal sexual conduct in the third degree. See MICH. COMP. LAWS ANN. § 750.520d.
- ¹⁰⁹ Per se law for rape. See OKLA. STAT. ANN. TIT. 21, § 111(A)(1).
- ¹¹⁰ Per se law for rape in the third degree and sodomy in the third degree. See OR. REV. STAT. ANN. §§ 163.355, 163.385.
- ¹¹¹ 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.
- ¹¹² Per se law for second degree sexual assault. See WYO. STAT. ANN. § 6-2-303.
- ¹¹³ 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).
- ¹¹⁴ Per se law for criminal sexual conduct in the third degree. See 9 GUAM CODE ANN. § 25.25(a)(1).
- ¹¹⁵ Per se law for lewd acts. See P.R. LAWS ANN. TIT. 33 § 4772.
- ¹¹⁶ Per se law for sexual act. See 18 U.S.C.A. § 2246(2)(D).
- ¹¹⁷ Per se age of consent for offense of sexual conduct with a minor. See ARIZ. REV. STAT. ANN. § 13-1405(A).
- ¹¹⁸ Per se age of consent for offense of sodomy. See CAL. PENAL CODE § 286.
- ¹¹⁹ Per se age of consent for offense of unlawful sexual contact. See COLO. REV. STAT. ANN. § 18-3-404.
- ¹²⁰ A person is deemed incapable of consent if they are under 18 years old. See OR. REV. STAT. ANN. § 163.315(1)(a). Per se law for sexual abuse in the first degree if offender intentionally causes victim under touch or contact the mouth, anus or sex organs of an animal for the purpose of arousing or gratifying the sexual desire of a person. See OR. REV. STAT. ANN. § 163.427(1).
- ¹²¹ See CAL. PENAL CODE § 261.5, 286. Contact AEQUITAS for a detailed state-by-state analysis of age of consent laws, including per se laws and statutory sexual assault laws.
- ¹²² T. HOFF ET. AL, NATIONAL SURVEY OF ADOLESCENTS AND YOUNG ADULTS: SEXUAL HEALTH KNOWLEDGE, ATTITUDES, AND EXPERIENCES (2003), available at <https://www.kff.org/wp-content/uploads/2013/01/national-survey-of-adolescents-and-young-adults.pdf>.
- ¹²³ 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).
- ¹²⁴ There are, however, some exceptions that include intoxication or other causes. See, e.g., LA. REV. STAT. ANN. § 14:43 (Determining capacity to consent based on the victim’s inability to resist or understand the nature of the act “by reason of stupor or abnormal condition of mind produced by ... any cause”); ALA. CODE § 13A-6-60 (Incapacity based on victim being “temporarily incapable . . . owing to the influence of a narcotic”).
- ¹²⁵ See, e.g., ILL. COMP. STAT. ANN. 5/11-1.30 (Stating it is an aggravating factor if the victim is “physically handicapped”).
- ¹²⁶ See, e.g., WASH. REV. CODE ANN. §§ 9a.44.050(1)(c-e), 9a.44.100(1)(c-e).
- ¹²⁷ See, e.g., *Commonwealth v. Wall*, 953 A.2d 581 (Pa. Super. 2008); *King v. State*, 978 P.2d 1278 (Alaska Ct. App. 1999).
- ¹²⁸ Georgia, Utah, and Virginia do not include specific provisions covering physical capacity to consent but criminalize sexual activity where the victim is unconscious at the time. See *Baker v. State*, 270 Ga. App. 762 (2004); *State v. Cude*, 784 P.2d 1197 (Utah 1989); *Molina v. Commonwealth*, 47 Va. App. 338, 358 (2006).
- ¹²⁹ Having been unconscious may also impact the victim’s ability to answer Bureau of Justice Statistics household survey questions.
- ¹³⁰ Research in this section is current as of 2016.
- ¹³¹ Aaron M. White, *What Happened? Alcohol, Memory Blackouts, and the Brain*, 27(2) *Alcohol Res. & Health* 186, 186 (2003), available at <https://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm>.

¹³² 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).

¹³³ *E.g.*, Alabama, Arizona, Arkansas, California, Idaho, Iowa, Kansas, Louisiana, Montana, South Carolina, Washington, Wisconsin, and the Virgin Islands.

¹³⁴ *E.g.*, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Kentucky, Maine, and Maryland.

¹³⁵ *E.g.*, Alabama, Arkansas, Connecticut, Michigan, New Jersey, and Rhode Island.

¹³⁶ See White, *supra* note 130, for a detailed discussion in establishing victims’ levels of intoxication.

¹³⁷ See, *e.g.*, *People v. Giardino*, 98 Cal.Rptr.2d 315 (Cal. Ct. App. 2000).

¹³⁸ Note that there are limitations to the application of the physically helpless or incapacitated statutes. Contact AEQUITAS for additional resources and consultation.

¹³⁹ See, *e.g.*, WYO. STAT. ANN. § 6-2-302; CRIM 720 ILL. COMP. STAT. ANN. 5/11-1.20. 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).

¹⁴⁰ 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).

¹⁴¹ See, *e.g.*, MONT. CODE ANN. §, 45-2-101.

¹⁴² See, *e.g.*, IDAHO CODE ANN. § 18-6602.

¹⁴³ 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).

¹⁴⁴ Contact AEQUITAS for more information.

¹⁴⁵ 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).

¹⁴⁶ See *e.g.*, *State v. Jensen*, 184 S.W.3d 586 (Mo. Ct. App. 2006) (Stating that permissible inferences are allowed).

¹⁴⁷ *A.B.T. v. State*, 620 So.2d 120, 122 (Ala. Crim. App. 1992); see also *Marshall v. State*, 992 So.2d 762 (Ala. Crim. App. 2007).

¹⁴⁸ 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).

¹⁴⁹ If the act constitutes deviant sexual intercourse within the meaning of ALA. CODE ANN. § 13A-6-65(c).

¹⁵⁰ If the act constitutes deviant sexual intercourse within the meaning of ALA. CODE ANN. § 13A-6-81.

¹⁵¹ If the act constitutes deviant sexual intercourse within the meaning of ALA. CODE ANN. § 13A-6-241.

¹⁵² If the act constitutes deviate sexual activity within the meaning of ARK. CODE ANN. § 5-14-111(a)(2).

¹⁵³ If the act constitutes sexual intrusion within the meaning of COL. REV. STAT. ANN. § 18-3-405.5.

¹⁵⁴ If a sexual act within the meaning of D.C. CODE ANN. § 22-3001(8)(c).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ If act constitutes deviate sexual intercourse within the meaning of HAW. REV. STAT. ANN. § 707-700.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

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- ¹⁶⁴ If the act constitutes deviate sexual intercourse within the meaning of KY. REV. STAT. ANN. § 510.010(1).
- ¹⁶⁵ If the act constitutes a sexual act within the meaning of ME. REV. STAT. ANN. TIT. 17-A § 251(C)(3).
- ¹⁶⁶ If act constitutes deviate sexual intercourse within the meaning of Mo. ANN. STAT. § 566.010(3).
- ¹⁶⁷ *Id.*
- ¹⁶⁸ *Id.*
- ¹⁶⁹ For the purpose of terrorizing the victim. *See* Mo. ANN. STAT. § 566.010(3).
- ¹⁷⁰ If the act constitutes object rape. *See* UTAH CODE ANN. § 76-5-402.2.
- ¹⁷¹ *Id.*
- ¹⁷² With the intent to cause substantial emotional or bodily pain to the victim. *See* UTAH CODE ANN. § 76-5-402.2.
- ¹⁷³ If act constitutes sexual intrusion within the meaning of W. VA. CODE ANN. § 61-8B-1(8).
- ¹⁷⁴ *Id.*
- ¹⁷⁵ *Id.*
- ¹⁷⁶ *Id.*
- ¹⁷⁷ If sexual intrusion within the meaning of WYO. STAT. ANN. § 6-2-301(vii)(A).
- ¹⁷⁸ *Id.*
- ¹⁷⁹ *Id.*
- ¹⁸⁰ *Id.*
- ¹⁸¹ For purposes of abuse. *See* WYO. STAT. ANN. § 6-2-301(vii)(A).
- ¹⁸² If a sexual act within the meaning of 18 U.S.C.A. § 2246(2)(C).
- ¹⁸³ *Id.*
- ¹⁸⁴ *Id.*
- ¹⁸⁵ If a sexual act within the meaning of UCMJ § 920 art. 120(g)(1)(C).
- ¹⁸⁶ *See, e.g.*, N.D CENT. CODE ANN. § 12.1-20-02; WIS. STAT. ANN. § 940.225(5)(b).
- ¹⁸⁷ OHIO REV. CODE ANN. § 2907.01.
- ¹⁸⁸ *See* KAN. STAT. ANN. § 21 – 5505.
- ¹⁸⁹ *See* N.M. STAT. ANN. § 30-9-12.
- ¹⁹⁰ *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).
- ¹⁹¹ *See, e.g.*, ALA. CODE § 13A-6-66; 720 ILL. COMP. STAT. ANN. 5/12-15; COLO. REV. STAT. ANN. § 18-3-404.
- ¹⁹² *See, e.g.*, ALA. CODE § 13A-6-66; ALASKA STAT ANN. §11.41.425; HAW. REV. STAT. ANN. § 707-732.
- ¹⁹³ *See, e.g.*, IDAHO CODE ANN. § 18-6110; HAW. REV. STAT ANN. § 707-732.
- ¹⁹⁴ *See* Samantha Craven et al., *Sexual Grooming of Children: Review of Literature and Theoretical Considerations*, 12 J. SEXUAL AGGRESSION 287, 297 (2006).
- ¹⁹⁵ *See, e.g.*, FL. STAT. ANN. § 800.09; MINN. STAT. ANN. § 617.23.
- ¹⁹⁶ *See, e.g.*, COLO. REV. STAT. ANN. § 18-7-302, D.C. CODE § 22-1312.
- ¹⁹⁷ *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-186 (“lewd exposure of the body in public place with intent to arouse or to satisfy the sexual desire of the person”); GA. CODE ANN. § 16-6-8; IND. CODE ANN. § 35-45-4-1.
- ¹⁹⁸ *See e.g.*, COLO. REV. STAT. ANN. § 18-7-302; DEL. CODE ANN. TIT. 11, § 765; KY. REV. STAT. ANN. § 510.150.
- ¹⁹⁹ *See e.g.*, ALA. STAT. ANN. § 11.41.460; VA. CODE ANN. § 18.2-387.
- ²⁰⁰ *See* OR. REV. STAT. ANN. § 163.467.
- ²⁰¹ *See* MONT. CODE ANN. § 45-5-504; N.D. CENT. CODE § 12.1-30.12.1.
- ²⁰² *See e.g.*, HAW. REV. STAT. ANN. § 707-734; IOWA CODE ANN. § 709.9; KAN. STAT. ANN. § 21-3508.
- ²⁰³ *See* GA. CODE ANN. § 16-6-8; MINN. STAT. ANN. § 617.23.
- ²⁰⁴ *See* FL. STAT. ANN. § 800.09.
- ²⁰⁵ Research current as of January 2018.
- ²⁰⁶ All jurisdictions except Mississippi include indecent contact laws in their criminal code. Under Mississippi court decisions, however, contact between a person’s mouth, lips or tongue and the genitals of another constitutes penetration and is punishable under the sexual battery statutes. *See Pierce v. State*, 2 So. 3d 641 (Miss. Ct. App. 2008).

²⁰⁷ In Georgia, the crime of sexual assault requires the element of sexual arousal or gratification. See GA. CODE ANN., § 16-6-5.1. However, the crime of sexual battery does not require sexual arousal or gratification. See GA. CODE ANN. § 16-6-22.1.

²⁰⁸ In Kansas, the indecent exposure statute requires the element of sexual arousal or gratification if the perpetrator exposes his genitals, but it does not require this element if the perpetrator forces others to watch otherwise lawful sexual intercourse or sodomy. See KAN. STAT. ANN. § 21-5513.

²⁰⁹ See *e.g.*, *Clayton v. State*, 695 P.2d 3 (Okla. Crim. App. 1984) (Oklahoma criminalizes forced penile/oral penetration as “oral sodomy” under the provision for Crimes Against Nature); OKLA. STAT. ANN. tit. 21, § 888).

²¹⁰ All jurisdictions criminalize forced penile/vagina, penile/anal, and penile/oral penetration, regardless of the victim’s gender. However, some jurisdictions have statutes that require the perpetrator and victim to be of a different gender. See *e.g.*, ALA. CODE §§ 13a-6-61, 13a-6-62; GA. CODE ANN. § 16-6-1; IDAHO CODE ANN. § 18-6101; IND. CODE ANN. § 35-42-4-1; N.C. GEN. STAT. ANN. § 14-27.2; P.R. LAWS ANN. TIT. 33 § 4061.

²¹¹ See *e.g.*, NEB. REV. STAT. § 28-318(9).

²¹² See, *e.g.*, ALA. CODE § 13A-6-65.1 (For object penetration); GA. CODE ANN. § 16-6-22.2 (For other body part penetration).

²¹³ See 18 PA. STAT. & CONS. STAT. ANN. § 3125.

²¹⁴ Research is current as of June 2018.

²¹⁵ In Georgia, rape, which is characterized by penile-vaginal penetration, has a maximum punishment of death. Aggravated sodomy, which is the highest-level sexual offense with an element of anal penetration, has a maximum penalty of life imprisonment. See GA. CODE ANN. §§ 16-6-1, 16-6-2. Georgia does not have separate grades of felonies. In Missouri, aggravated rape in the first degree carries a minimum penalty of 15 years imprisonment. See MO. REV. STAT. § 556.030(2)(1). Aggravated sodomy in the first degree 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.

²¹⁶ A conviction for rape in the first or second degree in Oklahoma is punishable by death, life, life without parole, or not less than 5 years and post-imprisonment supervision. See OKLA. STAT. ANN. TIT. 21, § 1114. A conviction for forcible sodomy is punishable by a maximum of 20 years imprisonment. Both crimes are considered felonies, but there are no felony grades or classifications.

²¹⁷ The highest-level sexual offense that includes object penetration, aggravated sexual battery, is punishable by a maximum sentence of life imprisonment or 25 years + life parole. See GA. CODE ANN. § 16-6-22.2. The highest-level sex offense that includes penile-vaginal penetration is rape, punishable by death, life imprisonment, or 25 years life parole. See GA. CODE ANN. § 16-6-1. Both crimes are considered felonies, which aren’t graded in Georgia.

²¹⁸ The highest-level sexual offense including object 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 doesn’t have grades/classifications.

²¹⁹ 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 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.

²²⁰ 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 arousing or gratifying sexual desire or for purpose of causing bodily injury or offensive physical contact.” ME. REV. STAT. ANN. TIT. 17-A § 251(D).

²²¹ 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).

²²² 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 doesn't have grades/classifications.

²²³ The highest-level sexual offense in Mississippi that includes an element of digital penetration is sexual battery, which carries a maximum prison sentence of 30 years. See MISS. CODE. ANN. § 97-3-101. The highest-level sexual offense in Mississippi that includes vaginal-penile penetration is forcible sexual intercourse, 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.

²²⁴ 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.

²²⁵ See generally DAVID CHEAL, FAMILY: CRITICAL CONCEPTS OF SOCIOLOGY (Routledge 2003); DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (Holt, Rinehart and Winston eds., Library of Congress 1985).

²²⁶ See Lalena Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 367-69 (1995).

²²⁷ 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).

²²⁸ See, e.g., ALASKA STAT. ANN. § 11.41.432; MD. CODE, CRIM. LAW, § 3-318; MISS. CODE ANN. § 97.3-99; S.C. CODE § 16-3-658.

²²⁹ 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.

²³⁰ See ALA. CODE §§ 13a-6-61, 13a-6-62; GA. CODE ANN. § 16-6-1; N.C. GEN. STAT. ANN. § 14-27.1.

²³¹ See, e.g., FLA. STAT. ANN. § 794.023; LA. REV. STAT. ANN. § 14:42(A)(5); MD. CODE ANN., CRIM. LAW §§ 3-303(a)(2)(iv), 3-305(a)(2)(iv), 3-307(a)(2)(iv); MICH. COMP. LAWS ANN. § 750.520b(d); MINN. STAT. ANN. § 609.342; MONT. CODE ANN. § 45-5-503(3)(b); N.J. STAT. ANN. § 2C:14-2(5); N.M. STAT. ANN. § 30-9-11(E)(4); N.C. GEN. STAT. ANN. § 14-27.2(a)(2)(c); § 14-27.4(a)(2)(c); TENN. CODE ANN. § 39-13-502(3); TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(v); UTAH CODE ANN. § 76-5-405(1)(a)(iii); VT. STAT. ANN. TIT. 13, § 3253; § 3253a; WASH. REV. CODE ANN. § 9A.44.040(1); WIS. STAT. ANN. §§ 940.225(1)(c), 940.225(2)(f); 9 GUAM CODE ANN. §§ 25.15(a)(4), 25.20(a)(4).

²³² 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).

²³³ Accomplice liability is “[c]riminal responsibility of one who acts with another before, during, or (in some jurisdictions) after a crime.” BLACK'S LAW DICTIONARY (9th ed. 2009). See *State v. Cormier*, 838 A.2d 356 (Me. 2003).

²³⁴ Rand & Rennison, *supra* note 1.