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CRIMINAL LAW

"NO" STILL MEANS "YES": THE FAILURE OF THE "NON-CONSENT" REFORM MOVEMENT IN AMERICAN RAPE AND SEXUAL ASSAULT LAW

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I. INTRODUCTION

New Haven, Conn.

Yale fraternity's sexist chants

A Yale University fraternity that counts both Bush presidents among its alumni has apologized after a video surfaced on YouTube showing prospective fraternity members marching through campus chanting obscenities in what a woman's group called "an active call for sexual violence." Pledges to Delta Kappa Epsilon (DKE), which boasts "the maintenance of gentlemanly dignity" as one of its founding objectives, chanted phrases including "No means yes, yes means anal" during the campus march. DKE later publicly apologized in a forum arranged by university officials. "It was a serious lapse in judgment by the fraternity and in very poor taste,"

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This two-year project could not have been completed without the assistance of a number of DePaul University College of Law students. The authors wish to acknowledge the outstanding support of the Senior Research Assistants, Bryant Greening, Carin McDonald, Kelly O'Bryan, and Katherine Strle, Class of 2011, who assumed leadership roles throughout this project, as well as Research Assistants Randy Borek and Ian Burkow, Class of 2010; Elizabeth Keleher and Ella Moriarty, Class of 2011; and Jennifer Hanley, Raymond Jacobi, and Mark Vazquez, Class of 2012.

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said fraternity president Jordon Forney.[1]

This was the scene at an educational institution that grooms future presidents, governors, law professors, and Fortune 500 CEOs. "No means yes" was the clarion call that these bright Elis thought totally acceptable until confronted by outraged individuals within the university. Sadly, this event represented only too well the attitude of many American males when it comes to what standards of conduct should govern sexual relations with another.[2] This view of sex was not isolated for the moment to a prestigious university fraternity. Today, many believe it is totally proper to grab, fondle, and paw another person in a sexual manner unless a scream or slap becomes the response.[3]

This is the sorry state of affairs in America that prompts the development of this Article. Earlier legal literature has described some of the problems documented in this study.[4] However, sexual assault laws have experienced rapid change in recent years and, as such, the authors concluded that an updated comprehensive examination of the subject of consent and sexual assault would provide a useful contribution to understanding the depth of the problems that still exist with respect to unwanted sex in America.

This Article explores criminal sexual assault and rape laws on the topics discussed above, as well as case law interpreting and enforcing these laws. The findings and conclusions that follow are products of an exhaustive review of rape and sexual assault laws in all fifty states. The Article focuses on statutes and case law dealing with adult claims of unwanted sex. This study does not undertake an examination of the sexual prohibitions designed to protect minor victims in the various states on the assumption, perhaps faulty, that offenses involving children are taken much more seriously in state legislation and by law enforcement than those directed at adults.

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[1] *The Week at a Glance . . . United States: Yale Fraternity's Sexist Chants*, WEEK, Oct. 29, 2010, at 9.

[2] For a perspective on the effects on young women of these young men's attitudes toward sex, see Caitlin Flanagan, *The Hazards of Duke*, ATLANTIC, Jan./Feb. 2011, at 87.

[3] *See generally* David P. Bryden & Maren M. Grier, *The Search for Rapists' "Real" Motives*, 101 J. CRIM. L. & CRIMINOLOGY 171 (2011) (examining theories about why rapes occur).

[4] Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625 (2005); *see* Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401 (2005); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998); Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287 (1997); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993); Ann T. Spence, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57 (2003).

Part II examines the "non-consent" strictures that outlaw any sexual penetration or sexual contact without consent of another but do not require proof of force, threat of force, or some other circumstance such as physical or mental incapacity of the victim. Part III addresses whether a requirement of victim resistance, physical or verbal, still exists and to what extent it presents a barrier to the successful prosecution of unwanted sex.

Part IV deals with measures that prohibit non-physical threats or some form of "coercion" resulting in non-consensual sex without force or a threat of force. Part V examines those in positions of authority and whether exploiting that position of trust to gain sexual favor can or should be punished. Part VI focuses on deception of a victim and the degree to which misrepresentations designed to take sexual advantage of another are criminal or not. Part VII explores whether corroboration of a victim's claim of rape is a precondition for conviction. Part VIII looks at the survival of the common law marital exemption to prohibitions on unwanted sexual penetration and sexual contact.

II. NON-CONSENT

At English common law, a conviction of rape required evidence that the perpetrator used force or threats of force against the victim. Rape was defined as "carnal knowledge of a woman forcibly and against her will."[5] Most jurisdictions in the United States originally adopted this definition of rape to include the force requirement.[6] This Part of the Article analyzes the text of all fifty states' current statutes to determine which states still require evidence of force to convict a perpetrator of a sex offense. A facial examination of the current sex offense statutes across the country shows that many states still require a showing of forcible compulsion or a victim's incapacity to consent for a conviction.[7] Generally, "forcible compulsion" is the statutory language used to denote a force requirement.[8] "Incapacity to consent" generally means an inability to appraise or understand a situation involving a sexual act.[9] Alternatively, some states include non-consent

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[5] Matthew R. Lyon, Comment, *No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. CRIM. L. & CRIMINOLOGY 277, 281 (2004) (citing CATHARINE A. MACKINNON, SEX EQUALITY: RAPE LAW 801 (2001) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *210)).

[6] *Id.* (citing SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 318 (7th ed. 2001)).

[7] *See infra* notes 21–23.

[8] *See, e.g.*, MO. ANN. STAT. § 556.061(12)(a)–(b) (West 1999 & Supp. 2011) (defining forcible compulsion as either a "[p]hysical force that overcomes reasonable resistance" or "[a] threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of such person or another person").

[9] *See, e.g.*, § 556.061(13) (defining "incapacitated" as a "physical or mental condition,

provisions within their sex offense statutes that permit convictions without a showing of force or incapacity, so long as the victims did not consent to the sexual acts.[10]

This Part splits states into "true non-consent states," "contradictory non-consent states," and "force states." In true non-consent states, the state can convict a defendant of at least one sex offense by showing that the victim did not consent to the sexual act. The prosecution is not required to show that the perpetrator used force or threats of force against the victim to meet the statutory requirements. Twenty-eight states fall into this category.[11] However, only seventeen of the true non-consent states have non-consent provisions for sexual penetration offenses.[12] The other eleven only have non-consent provisions for sexual contact offenses consisting of the touching of the intimate parts of a person.[13] These eleven states still require a showing of "forcible compulsion" or "incapacity to consent" for

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temporary or permanent, in which a person is unconscious, unable to appraise the nature of such person's conduct, or unable to communicate unwillingness to an act").

[10] *See infra* notes 11–17.

[11] COLO. REV. STAT. §§ 18-3-402, -404 (2011); CONN. GEN. STAT. ANN. § 53a-73a (West 2007); FLA. STAT. ANN. § 794.011 (West 2007); GA. CODE ANN. §§ 16-6-22.1 to .2 (West 2009); HAW. REV. STAT. ANN. §§ 707-731 to -733 (LexisNexis 2007 & Supp. 2010); KAN. STAT. ANN. § 21-5501(a) (West, Westlaw through 2010 Legis. Sess.); KY. REV. STAT. ANN. § 510.130 (LexisNexis 2008); LA. REV. STAT. ANN. § 14:41 (2007); ME. REV. STAT. ANN. tit. 17-A, § 255-A (2006 & Supp. 2010); MD. CODE ANN., CRIM. LAW § 3-308 (LexisNexis 2002 & Supp. 2010); MINN. STAT. ANN. § 609.3451 (West 2009); MO. ANN. STAT. §§ 566.040, .070 (West 1999); MONT. CODE ANN. § 45-5-502 (2010); NEB. REV. STAT. §§ 28-319 to -320 (2008); NEV. REV. STAT. ANN. § 200.366 (LexisNexis 2006 & Supp. 2009); N.H. REV. STAT. ANN. § 632-A:2(m) (LexisNexis 2007 & Supp. 2010); N.M. STAT. ANN. § 30-9-12 (2004); N.Y. PENAL LAW §§ 130.52, .55 (McKinney 2009); OKLA. STAT. ANN. tit. 21, § 1111.1 (West 2002 & Supp. 2011); OR. REV. STAT. §§ 163.415, .425 (2009); 18 PA. CONS. STAT. ANN. §§ 3124.1, 3125–26 (West 2000 & Supp. 2011); S.D. CODIFIED LAWS § 22-22-7.4 (2006); TENN. CODE ANN. §§ 39-13-503, -505 (2010); UTAH CODE ANN. § 76-5-406 (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 3252 (2009); WASH. REV. CODE ANN. § 9A.44.060 (West 2009); W. VA. CODE ANN. § 61-8B-2 (LexisNexis 2010); WIS. STAT. ANN. §§ 940.225(3), (3m) (West 2005 & Supp. 2010).

[12] COLO. REV. STAT. §§ 18-3-402, -404; FLA. STAT. ANN. § 794.011; GA. CODE ANN. §§ 16-6-22.1 to .2; HAW. REV. STAT. ANN. §§ 707-731 to -733; MO. ANN. STAT. §§ 566.040, .070; NEB. REV. STAT. §§ 28-319, -320; NEV. REV. STAT. ANN. § 200.366; N.H. REV. STAT. ANN. § 632-A:2(m); N.Y. PENAL LAW §§ 130.52, .55; OKLA. STAT. ANN. tit. 21, § 1111.1; OR. REV. STAT. §§ 163.415, .425; 18 PA. CONS. STAT. ANN. §§ 3124.1, 3125–26; TENN. CODE ANN. §§ 39-13-503, -505; UTAH CODE ANN. § 76-5-406; VT. STAT. ANN. tit. 13, § 3252; WASH. REV. CODE ANN. § 9A.44.060; WIS. STAT. ANN. §§ 940.225(3), (3m).

[13] CONN. GEN. STAT. ANN. § 53a-73a; KAN. STAT. ANN. § 21-5501(a); KY. REV. STAT. ANN. § 510.130; LA. REV. STAT. ANN. § 14:41; ME. REV. STAT. ANN. tit. 17-A, § 255-A; MD. CODE ANN., CRIM. LAW § 3-308; MINN. STAT. ANN. § 609.3451; MONT. CODE ANN. § 45-5-502; N.M. STAT. ANN. § 30-9-12; S.D. CODIFIED LAWS § 22-22-7.4; W. VA. CODE ANN. § 61-8B-2.

sexual penetration offenses.[14]

In contradictory states, it may appear as though the elements of a sex offense statute are met when a victim did not affirmatively consent to the act. However, statutory definitions of "consent" reveal the contradictory nature of these laws. To establish a "lack of consent" in contradictory states, the prosecution must show either the use of forcible compulsion or a victim's incapacity to consent.[15] Requiring force or a lack of capacity to consent completely negates the purpose of including a non-consent provision. This Article categorizes such states as "contradictory non-consent" states. Nine states fall into this category.[16] Three of these contradictory non-consent states also have at least one true non-consent offense in their criminal codes.[17]

Furthermore, while a number of jurisdictions have implemented some form of a non-consent provision, only two states put the onus on the defendant to prove that he received the affirmative consent of the victim.[18] By not requiring the defendant to obtain affirmative consent from the victim before sexual contact, the other states continue to place some onus on the victim to object to the act. Even Illinois, which defines consent as a "freely given agreement,"[19] continues to require a showing of force to prove the absence of consent, thus negating any effect that this statutory definition might have on the underlying charge of sex assault or abuse.[20]

Sixteen states do not have any non-consent sex offenses.[21] This

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[14] CONN. GEN. STAT. ANN. § 53a-73a; KAN. STAT. ANN. § 21-5501(a); KY. REV. STAT. ANN. § 510.130; LA. REV. STAT. ANN. § 14:41; ME. REV. STAT. ANN. tit. 17-A, § 255-A; MD. CODE ANN., CRIM. LAW § 3-308; MINN. STAT. ANN. § 609.3451; MONT. CODE ANN. § 45-5-502; N.M. STAT. ANN. § 30-9-12; S.D. CODIFIED LAWS § 22-22-7.4; W. VA. CODE ANN. § 61-8B-2.

[15] *See infra* notes 52–88.

[16] ALA. CODE § 13A-6-65 (LexisNexis 2005); ALASKA STAT. § 11.41.410 (2010); ARIZ. REV. STAT. ANN. §§ 13-1404(a), -1406 (2010); DEL. CODE ANN. tit. 11, § 772 (2007 & Supp. 2010); IOWA CODE ANN. § 709.4 (West 2003); KY. REV. STAT. ANN. §§ 510.130, .140; MONT. CODE ANN. §§ 45-5-502 to -503; N.Y. PENAL LAW § 130.20; TEX. PENAL CODE ANN. § 22.011 (West 2011).

[17] KY. REV. STAT. ANN. § 510.020; MONT. CODE ANN. § 45-5-502; N.Y. PENAL LAW §§ 130.52, .55.

[18] 720 ILL. COMP. STAT. ANN. 5/11-1.70 (West Supp. 2011) ("'Consent' means a freely given agreement to the act . . . ."); WIS. STAT. ANN. § 940.225(4) (West 2005 & Supp. 2010) (defining consent as "words or overt actions . . . indicating a freely given agreement").

[19] 720 ILL. COMP. STAT. ANN. 5/11-1.70.

[20] *Id.* at 5/11-1.20(a) ("A person commits criminal sexual assault if that person commits an act of sexual penetration and uses force or threat of force . . . .").

[21] ARK. CODE ANN. §§ 5-14-103, -125 (2006 & Supp. 2011); CAL. PENAL CODE §§ 261, 266(c) (West 2008); IDAHO CODE ANN. § 18-6101 (2004 & Supp. 2011); 720 ILL. COMP. STAT. ANN. 5/11-1.20, .30, .50, .60; IND. CODE ANN. § 35-42-4-1 (West 2004); MASS. ANN.

Article calls these states "force states." Fifteen of the force states require a showing of either "forcible compulsion" or "incapacity to consent" for at least one of their respective sex offenses.[22] Massachusetts is the only state that requires a showing of forcible compulsion without consideration of the victim's incapacity to consent.[23]

Section A of this Part examines true non-consent states' statutes, and Section B examines contradictory states' statutes. Section C provides illustrations of case law that either frustrates or confirms states' statutory adoption of a non-consent standard in sex offense prosecutions. Section D examines which party has the burden of showing consent or non-consent.

A. TRUE NON-CONSENT STATES

1. Sexual Contact or Penetration

With twenty-eight true non-consent states, a trend toward rejecting force as a required element in sex offense prosecutions appears to be forming. However, only sixteen of the twenty-eight true non-consent states have non-consent provisions for offenses involving sexual penetration.[24] For example, in Missouri, a person commits the offense of sexual assault if he "has sexual intercourse with another person knowing that he does so

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LAWS ch. 265, § 22 (LexisNexis 2010); MICH. COMP. LAWS ANN. §§ 750.520(d)–(e) (West 2004 & Supp. 2011); MISS. CODE ANN. § 97-3-65(4)(a) (2006 & Supp. 2011); N.J. STAT. ANN. §§ 2C:14-2 to -3 (West 2005); N.C. GEN. STAT. §§ 14-27.2 to .5 (2009); N.D. CENT. CODE §§ 12.1-20-03 to -04, -07 (1997 & Supp. 2011); OHIO REV. CODE ANN. §§ 2907.02–.03, .05–.06 (West 2006 & Supp. 2011); R.I. GEN. LAWS §§ 11-37-2, -4 (2002); S.C. CODE ANN. §§ 16-3-652 to -654 (2003 & Supp. 2010); VA. CODE ANN. §§ 18.2-61, -67.4 (2009); WYO. STAT. ANN. §§ 6-2-302 to -304 (2011).

[22] *See* ARK. CODE ANN. §§ 5-14-103, -125; CAL. PENAL CODE §§ 261, 266(c); IDAHO CODE ANN. § 18-6101; 720 ILL. COMP. STAT. ANN. 5/11-1.20, .30, .50, .60; IND. CODE ANN. § 35-42-4-1; MICH. COMP. LAWS ANN. §§ 750.520(d)–(e); MISS. CODE ANN. § 97-3-65(4), (6); N.J. STAT. ANN. §§ 2C:14-2 to -3; N.C. GEN. STAT. §§ 14-27.3, .5; N.D. CENT. CODE §§ 12.1-20-03, -07; OHIO REV. CODE ANN. §§ 2907.02–.03, .05–.06; R.I. GEN. LAWS §§ 11-37-2, -4; S.C. CODE ANN. §§ 16-3-652 to -654; VA. CODE ANN. §§ 18.2-61, -67.4; WYO. STAT. ANN. §§ 6-2-302 to -304.

[23] MASS. ANN. LAWS ch. 265, § 22.

[24] COLO. REV. STAT. §§ 18-3-402(1), -404 (2011); FLA. STAT. ANN. § 794.011 (West 2007); GA. CODE ANN. §§ 16-6-22.1 to .2 (West 2009); HAW. REV. STAT. ANN. §§ 707-731 to -733 (LexisNexis 2007 & Supp. 2010); MO. ANN. STAT. §§ 566.040, .070 (West 1999); NEB. REV. STAT. §§ 28-319 to -320 (2008); NEV. REV. STAT. ANN. § 200.366 (LexisNexis 2006 & Supp. 2009); N.H. REV. STAT. ANN. § 632-A:2(I)(m) (LexisNexis 2007 & Supp. 2010); OKLA. STAT. ANN. tit. 21, § 1111.1 (West 2002 & Supp. 2011); OR. REV. STAT. §§ 163.415, .425 (2009); 18 PA. CONS. STAT. ANN. §§ 3124.1, 3125–3126 (West 2000 & Supp. 2011); TENN. CODE ANN. §§ 39-13-503, -505 (2010); UTAH CODE ANN. § 76-5-406 (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 3252 (2009); WASH. REV. CODE ANN. § 9A.44.060 (West 2009); WIS. STAT. ANN. §§ 940.225(3), (3m) (West 2005 & Supp. 2010).

without that person's consent."[25] In Nevada, a "person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim . . . is guilty of sexual assault."[26] In both of these states, the state need only show the victim's lack of consent to successfully prosecute a sex offense under the statute.

Yet while states like Missouri and Nevada criminalize non-consensual penetration without a showing of force or incapacity, eleven true non-consent states impose the non-consent standard only on sexual *contact* offenses.[27] Ten of those eleven states still require a showing of forcible compulsion or incapacity to consent for sexual *penetration* offenses.[28] For example, Minnesota's fifth-degree sexual conduct statute states: "A person is guilty of criminal sexual conduct in the fifth degree if the person engages in non-consensual sexual contact."[29] Conversely, all of Minnesota's other sex offenses, including penetration offenses, require a showing of force, threat of force, coercion, or deception.[30] Likewise in Kansas, the sexual battery statute states: "Sexual battery is the touching of a victim who is not the spouse of the offender, who is 16 or more years of age and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another."[31] Yet Kansas's other sex offenses, including sexual penetration offenses, require a showing of force or incapacity to consent.[32]

While it is commendable that eleven states have created non-consent provisions for sexual contact offenses, it is troublesome that these eleven states do not impose the non-consent standard on sexual *penetration*

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[25] MO. ANN. STAT. § 566.040; *see also* § 566.070.

[26] NEV. REV. STAT. ANN. § 200.366.

[27] CONN. GEN. STAT. ANN. § 53a-73a (West 2007); KAN. STAT. ANN. § 21-5501(a) (West, Westlaw through 2010 Legis. Sess.); KY. REV. STAT. ANN. § 510.130(1) (LexisNexis 2008); LA. REV. STAT. ANN. § 14:43.1 (2007 & Supp. 2011); ME. REV. STAT. ANN. tit. 17-A, § 255-A (2006 & Supp. 2010); MD. CODE ANN., CRIM. LAW § 3-308(b)(1) (LexisNexis 2002 & Supp. 2010); MINN. STAT. ANN. § 609.3451 (West 2009); MONT. CODE ANN. § 45-5-502(1) (2010); N.M. STAT. ANN. § 30-9-12 (2004); S.D. CODIFIED LAWS § 22-22-7.4 (2006); W. VA. CODE ANN. § 61-8B-2 (LexisNexis 2010).

[28] CONN. GEN. STAT. ANN. § 53a-70; KAN. STAT. ANN. §§ 21-5503, -5505(b); KY. REV. STAT. ANN. § 510.040; LA. REV. STAT. ANN. § 14:41 (2007); ME. REV. STAT. ANN. tit. 17-A, §§ 255-A(1)(H), (P); MD. CODE ANN., CRIM. LAW §§ 3-303 to -304; MINN. STAT. ANN. §§ 609.342–.344 (West 2009 & Supp. 2011); N.M. STAT. ANN. § 30-9-11; S.D. CODIFIED LAWS § 22-22-1; W. VA. CODE ANN. § 61-8B-4.

[29] MINN. STAT. ANN. § 609.3451. Sexual contact is defined as the "intentional touching by the actor of the complainant's intimate parts." § 609.341, subdiv. 11(i).

[30] §§ 609.342, .343–.345.

[31] KAN. STAT. ANN. § 21-5501(a).

[32] §§ 21-5503, -5505(b).

offenses. Without non-consent provisions for sex offenses involving penetration, these eleven states cannot successfully prosecute perpetrators of sex crimes who have non-consensual intercourse with victims, unless there is also evidence of force or incapacity. Therefore, although twenty-eight states appear at first glance to be true non-consent states, only seventeen of them are true non-consent states for sex offenses involving penetration *and* contact, whereas eleven are true non-consent states only for sex offenses involving sexual contact.

2. Definitions of Consent

Twelve of the twenty-eight true non-consent states provide statutory definitions of "consent" or "without consent."[33] For example, in Washington, rape in the third degree is a non-consent offense.[34] The legislature defines consent as "actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."[35] In Wisconsin, third- and fourth-degree sexual assault are also true non-consent offenses.[36] The statute defines consent as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact."[37]

Some states provide more detailed explanations of what constitutes consent. In Colorado, for example, the offense of sexual assault criminalizes non-consensual sexual penetration.[38] The statute states that "any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if the actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will."[39] Another provision of Colorado law defines consent as "cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent . . . . Submission

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[33] COLO. REV. STAT. § 18-3-401(1.5) (2011); FLA. STAT. ANN. § 794.011(1)(a) (West 2007); KY. REV. STAT. ANN. § 510.020; ME. REV. STAT. ANN. tit. 17-A, § 255-A; MINN. STAT. ANN. § 609.341, subdiv. 4; MO. ANN. STAT. § 556.061(5) (West 1999 & Supp. 2011); NEB. REV. STAT. § 28.318(8) (2008 & Supp. 2010); N.Y. PENAL LAW § 130.05 (McKinney 2009 & Supp. 2011); VT. STAT. ANN. tit. 13, § 3251(3) (2009); WASH. REV. CODE ANN. § 9A.44.010(7) (West 2009); W. VA. CODE ANN. § 61-8B-2; WIS. STAT. ANN. § 940.225(4) (West 2005 & Supp. 2010).

[34] WASH. REV. CODE ANN. § 9A.44.060.

[35] § 9A.44.010(7).

[36] WIS. STAT. ANN. §§ 940.225(3), (3m).

[37] § 940.225(4).

[38] COLO. REV. STAT. § 18-3-402 (2011).

[39] § 18-3-402(1)(a).

under the influence of fear shall not constitute consent."[40]

Three of the true non-consent states—Kentucky, Montana, and New York—have contradictory definitions of "without consent" for some sex offenses, but not others.[41] Unlike the rest of the contradictory non-consent states discussed in Section B, these three states still maintain at least one true non-consent sex offense that is not negated by a contradictory definition of consent that requires force.[42] However, in these three states a contradictory definition of consent is usually provided for sex offenses involving sexual penetration, not sex offenses involving sexual contact. Thus, in effect, the true non-consent provisions criminalize only non-consensual sexual contact, not non-consensual sexual penetration.[43]

For example, every sexual offense in Montana requires that the act was committed without the victim's consent.[44] Yet the Montana statutes and courts have defined non-consent differently for sexual assault (which criminalizes non-consensual sexual contact) and unlawful sexual intercourse. The legislature did not define the term "without consent" for sexual assault.[45] As discussed in Section C, the Montana Supreme Court has held that the "ordinary meaning of 'without consent'" applies in cases of sexual assault.[46] In contrast, the Montana legislature explicitly defined "consent" in the code as it relates to unlawful sexual intercourse.[47] To meet the requirements of sexual intercourse without consent, the perpetrator must have compelled the victim to submit to intercourse by force against the victim or another person.[48] "Force" is also explicitly defined by the Montana Code and includes "the infliction, attempted infliction, or threatened infliction of bodily injury or the commission of forcible felony by the offender" and "the threat of substantial retaliatory action that causes the victim to reasonably believe that the offender has the ability to execute the threat."[49] Therefore, although sexual intercourse in Montana is illegal if it is "non-consensual," the definition of consent as it relates to intercourse

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[40] § 18-3-401(1.5).

[41] KY. REV. STAT. ANN. § 510.020 (LexisNexis 2008); MONT. CODE ANN. § 45-5-501 (2010); N.Y. PENAL LAW §§ 130.52, .55 (McKinney 2009).

[42] KY. REV. STAT. ANN. §§ 510.020, .130; MONT. CODE ANN. § 45-5-502; N.Y. PENAL LAW §§ 130.52, .55.

[43] KY. REV. STAT. ANN. §§ 510.020, .130, .140; MONT. CODE ANN. § 45-5-502; N.Y. PENAL LAW §§ 130.52, .55.

[44] MONT. CODE ANN. §§ 45-5-502 to -503, -505.

[45] § 45-5-502.

[46] State v. Detonancour, 34 P.3d 487, 495 (Mont. 2001). See *infra* text accompanying notes 92–97 for a discussion of Montana case law on the definition of "without consent."

[47] MONT. CODE ANN. § 45-5-501(1)(a).

[48] *Id.*

[49] § 45-5-501(2).

requires a showing of force or threat of force.

The Kentucky criminal code states that "lack of consent" results from "(a) Forcible compulsion; (b) Incapacity to consent; or (c) If the offense charged is sexual abuse, any circumstances in addition to forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct."[50] Kentucky therefore provides another example of a state including force or incapacity within the definition of consent for penetration, but allowing a true non-consent standard (not requiring force or incapacity) for sexual contact.

The remaining sixteen true non-consent states do not have statutory definitions of "consent" or "without consent."[51] Section C below explores the state courts' interpretations of "consent" when there is no legislative guidance as well as how the courts interpret and apply the statutory definitions.

B. CONTRADICTORY NON-CONSENT STATES

The high number of true non-consent states gives the initial impression that state legislatures are moving towards the use of non-consent standards in sex crimes. However, while twenty-eight state legislatures have adopted non-consent provisions,[52] the number shrinks significantly when statutory definitions are further reviewed. Nine states' statutory definitions minimize, contradict, or entirely defeat any non-consent language in their

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[50] KY. REV. STAT. ANN. § 510.020 (LexisNexis 2008).

[51] *See, e.g.*, TENN. CODE ANN. § 39-13-503 (2010) (defining rape as "unlawful sexual penetration of a victim by the defendant or of the defendant by a victim . . . [when] the sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent").

[52] COLO. REV. STAT. §§ 18-3-402, -404 (2011); CONN. GEN. STAT. ANN. § 53a-73a (West 2007); FLA. STAT. ANN. § 794.011 (West 2007); GA. CODE ANN. §§ 16-6-22.1 to .2 (West 2009); HAW. REV. STAT. ANN. §§ 707-731 to -733 (LexisNexis 2007 & Supp. 2010); KAN. STAT. ANN. § 21-5501(a) (West, Westlaw through 2010 Legis. Sess.); KY. REV. STAT. ANN. § 510.130; LA. REV. STAT. ANN. § 14:41 (2007); ME. REV. STAT. ANN. tit. 17-A, § 255-A (2006 & Supp. 2010); MD. CODE ANN., CRIM. LAW § 3-308 (LexisNexis 2002 & Supp. 2010); MINN. STAT. ANN. § 609.3451 (West 2009); MO. ANN. STAT. §§ 566.040, .070 (West 1999); MONT. CODE ANN. § 45-5-502; NEB. REV. STAT. §§ 28-319, -320 (2008); NEV. REV. STAT. ANN. § 200.366 (LexisNexis 2006 & Supp. 2009); N.H. REV. STAT. ANN. § 632-A:2(m) (LexisNexis 2007 & Supp. 2010); N.M. STAT. ANN. § 30-9-12 (2004); N.Y. PENAL LAW §§ 130.05, 52, .55 (McKinney 2009 & Supp. 2011); OKLA. STAT. ANN. tit. 21, § 1111.1 (West 2002 & Supp. 2011); OR. REV. STAT. §§ 163.415, .425 (2009 & Supp. 2010); 18 PA. CONS. STAT. ANN. §§ 3124.1, 3125–3126 (West 2000 & Supp. 2011); S.D. CODIFIED LAWS § 22-22-7.4 (2006); TENN. CODE ANN. §§ 39-13-503, -505; UTAH CODE ANN. § 76-5-406 (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 3252 (2009); WASH. REV. CODE ANN. § 9A.44.060 (West 2009); W. VA. CODE ANN. § 61-8B-2 (LexisNexis 2010); WIS. STAT. ANN. §§ 940.225(3), (3)(m) (West 2005 & Supp. 2010).

sexual assault or rape statutory schemes.[53]

For instance, Alabama's criminal code states: "Whether or not specifically stated, it is an element of every offense defined in this article, with [one] exception . . . , that the sexual act was committed without consent of the victim."[54] Although the statute's plain language appears to criminalize sex crimes so long as there is proof that the victim did not consent to the sexual act, the definition of "without consent of the victim" destroys the plain-language meaning. The Alabama code defines lack of consent as resulting from "(1) Forcible compulsion, or (2) Incapacity to consent, or (3) If the offense charged is sexual abuse, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct."[55] By including this definition of non-consent, Alabama effectively negates its non-consent provision, requiring a showing of force or incapacity to prove the lack of consent in order to convict defendants of committing sex crimes.[56]

The criminal codes of Alabama, Alaska, Arizona, Delaware, Iowa, Kentucky, Montana, New York, and Texas contain at least one statute in which a sex crime appears punishable solely with evidence of the victim's lack of consent.[57] However, these states' codes include contradictory definitional language negating the effect of some non-consent sex offense statutes.[58] Some of the aforementioned states only criminalize "lesser" sex offenses when there is no evidence of force or threat of force. Because of these distinctions between non-consensual sexual acts that many states make, this Part will also consider the "type" of sexual acts state lawmakers criminalize.

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[53] ALA. CODE § 13A-6-65 (LexisNexis 2005); ALASKA STAT. § 11.41.410 (2010); ARIZ. REV. STAT. ANN. §§ 13-1404(A), -1406 (2010); DEL. CODE ANN. tit. 11, §§ 761(j)(1), 772 (2007 & Supp. 2010); IOWA CODE ANN. § 709.4 (West 2003); KY. REV. STAT. ANN. §§ 510.140; MONT. CODE ANN. § 45-5-502 to -503; N.Y. PENAL LAW §§ 130.05, .20; TEX. PENAL CODE ANN. § 22.011 (West 2011).

[54] ALA. CODE § 13A-6-70(a). Alabama does not require a showing of lack of consent for "deviate sexual intercourse" between parties for whom non-deviate sexual intercourse would otherwise be legal. §§ 13A-6-60, -65(a)(3).

[55] § 13A-6-70(b).

[56] *Id.* While the legislature exempts sexual abuse from this limited definition of "lack of consent," the offenses of sexual abuse in the first degree and sexual abuse in the second degree both require either forcible compulsion or incapacity to consent. ALA. CODE §§ 13A-6-66 to -67 (LexisNexis 2005 & Supp. 2010).

[57] ALA. CODE § 13A-6-65; ALASKA STAT. § 11.41.410; ARIZ. REV. STAT. ANN. §§ 13-1404(A), -1406; DEL. CODE ANN. tit. 11, § 772; IOWA CODE ANN. § 709.4; KY. REV. STAT. ANN. §§ 510.130, .140; MONT. CODE ANN. §§ 45-5-502 to -503; N.Y. PENAL LAW § 130.20; TEX. PENAL CODE ANN. § 22.011.

[58] *See, e.g.*, ALA. CODE § 13A-6-70(b).

1. Contradictory States with Non-Consensual Intercourse and Contact Provisions

Of the nine states with non-consent statutes and contradictory definitional language, seven criminalize both non-consensual intercourse and non-consensual sexual contact.[59] However, contradictory definitions negate the "non-consent" effect of many of these provisions. For example, on its face, Alaska's code criminalizes both non-consensual sexual contact and non-consensual sexual intercourse. Alaska's first-degree sexual assault statute states that an offender commits the crime if "[t]he offender engages in sexual penetration with another person without consent of that person."[60] Likewise, Alaska's second-degree sexual assault statute states that the crime is committed when "[t]he offender engages in sexual contact with another person without consent of that person."[61] Despite these seemingly unambiguous non-consent provisions, the Alaskan statutes are qualified by a provision stating that "without consent" means that the victim, "with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted to anyone."[62] This definition invalidates the non-consent language for both the penetration and contact provisions, effectively placing Alaska in the same category as the "force states" discussed above.

The Delaware code includes similar contradictory language. Delaware's rape in the second degree statute reads: "A person is guilty of rape in the second degree when the person . . . [i]ntentionally engages in sexual intercourse with another person, and the intercourse occurs without the victim's consent."[63] Similar non-consent language is used in the state's unlawful sexual contact in the third degree[64] and rape in the fourth degree statutes,[65] which criminalize non-consensual sexual contact and sexual

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[59] ALA. CODE § 13A-6-65; ALASKA STAT. §§ 11.41.410, .420; ARIZ. REV. STAT. ANN. §§ 13-1404(A), -1406; DEL. CODE ANN. tit. 11, §§ 767, 770, 772; KY. REV. STAT. ANN. §§ 510.130, .140; MONT. CODE ANN. §§ 45-5-502 to -503; N.Y. PENAL LAW §§ 130.05(1), (2)(a)–(b).

[60] ALASKA STAT. § 11.41.410.

[61] § 11.41.420.

[62] § 11.41.470(8)(A).

[63] DEL. CODE ANN. tit. 11, § 772.

[64] § 767 ("A person is guilty of unlawful sexual contact in the third degree when the person has sexual contact with another person or causes the victim to have sexual contact with the person or a third person and the person knows that the contact is either offensive to the victim or occurs without the victim's consent.").

[65] § 770 ("A person is guilty of rape in the fourth degree when the person . . . [i]ntentionally engages in sexual penetration with another person [and] [t]he sexual penetration occurs without the victim's consent.").

intercourse, respectively. Despite these three non-consent provisions, which appear to criminalize all non-consensual sexual acts, the Delaware code defines "without consent" to mean that the defendant

> compelled the victim to submit by any act of coercion as defined in §§ 791 and 792 of this title, or by force, by gesture, or by threat of death, physical injury, pain or kidnapping to be inflicted upon the victim or a third party, or by any other means which would compel a reasonable person under the circumstances to submit.[66]

A very similar analysis applies to Alabama's sexual misconduct[67] statute, Arizona's sexual abuse[68] and sexual assault[69] statutes, and Montana's sexual intercourse without consent[70] and sexual assault[71] statutes.

New York's sex crime statutes are anomalous in that the state code defines "lack of consent" differently for different provisions.[72] Most of New York's sex crime statutes fall under the state's catchall definition, which specifically states that lack of consent results from forcible compulsion or incapacity to consent.[73] Like the other "contradictory definition" states, this provision negates the "non-consent" effect of many of the original provisions. However, the state's sexual abuse and forcible touching statutes[74] are specifically excluded from this provision and are

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[66] § 761(j)(1). This statute includes the phrases "by gesture" and "or by any other means," which suggests that force may not always be required. *Id.* However, given the ambiguity in this contradictory definition and the lack of relevant case law, one cannot assume that the statute was intended to allow for convictions with a showing less than force.

[67] ALA. CODE § 13A-6-65 (LexisNexis 2005).

[68] ARIZ. REV. STAT. ANN. § 13-1404(A) (2010) ("A person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person who is fifteen or more years of age without consent of that person or with any person who is under fifteen years of age if the sexual contact involves only the female breast.").

[69] § 13-1406 ("A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person.").

[70] MONT. CODE ANN. § 45-5-503 (2010) ("A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent.").

[71] § 45-5-502 ("A person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault.").

[72] Because most of New York's sex crime statutes are governed by a contradictory definition of "lack of consent," this Article includes it in the Type Two category. However, the separate definitions for rape in the third degree, criminal sexual act in the third degree, sexual abuse, and forcible touching also place New York in the Type One category of true non-consent states.

[73] N.Y. PENAL LAW § 130.05(1), (2)(a)–(b) (McKinney 2009 & Supp. 2011).

[74] § 130.52 ("A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person; or for the purpose of gratifying the actor's sexual desire.").

instead governed by a separate definition of "lack of consent." This separate definition states that lack of consent may be proven in any circumstance in which the victim does not expressly or impliedly acquiesce in the actor's conduct.[75] Rape in the third degree[76] and criminal sexual act in the third degree[77] are also excluded from the state's catchall definition of consent. These two offenses are governed by yet another separate definition of consent, stating that a person is guilty if he engages in sexual intercourse with another person without such person's consent, where the lack of consent is by reason of some factor other than incapacity to consent.[78] Altogether, New York applies three different definitions of consent to different sex offenses.

Kentucky and Montana each have only one contradictory definition of non-consent. However, both states apply the contradictory definitions of non-consent to certain sex crimes in their criminal codes and exclude others. For example, at first glance, Kentucky looks like a non-consent state. The third-degree sexual abuse[79] and sexual misconduct[80] statutes specifically state that a person is guilty of a sex crime if he subjects another person to sexual contact or sexual intercourse, respectively, "without the [victim's] consent."[81] While these statutes appear to be unambiguous, a contradictory definition muddies the water. One provision states: "Whether or not specifically stated, it is an element of every offense defined in this chapter that the sexual act was committed without the consent of the victim."[82] However, another provision states that lack of consent results from forcible compulsion, incapacity to consent, or, "[i]f the offense charged is sexual abuse, any circumstance in addition to forcible compulsion or incapacity to consent in which the victim does not expressly

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[75] § 130.05(2)(c).

[76] § 130.25.

[77] § 130.40 ("A person is guilty of criminal sexual act in the third degree when [in relevant part]: He or she engages in oral sexual conduct or anal sexual conduct with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent.").

[78] § 130.05(2)(d) ("Where the offense charged is rape in the third degree . . . , or criminal sexual act in the third degree . . . , the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances.").

[79] KY. REV. STAT. ANN. § 510.130(1) (LexisNexis 2008) ("A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent.").

[80] § 510.140(1) ("A person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent.").

[81] §§ 510.130, .140.

[82] § 510.020(1).

or impliedly acquiesce in the actor's conduct."[83]

In summary, Kentucky's "contradictory definition" of non-consent accomplishes two things. First, it negates the "non-consent" effect of most of the state's sex crime statutes (including sexual misconduct, which, on its face, is a "non-consent" law) by requiring a showing of force or incapacity. Second, it specifically excludes sexual abuse from the contradictory definition, thereby turning the sexual abuse statute into a "true non-consent" provision.

2. Contradictory States with Non-Consensual Sexual Intercourse Provisions

Texas and Iowa are the only two states in this Part that criminalize non-consensual sexual intercourse without criminalizing any non-consensual sexual contact offenses. Texas's sexual assault statute reads:

> A person commits an offense if the person: (1) intentionally or knowingly: (A) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent; (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor.[84]

As with the other states in this Part, the "non-consent" effect of Texas's sexual assault statute is quickly undone when the lawmakers require a showing of force or threat of force to prove that an act was committed "without consent of the other person."

The same "contradictory definition" analysis applies to Iowa's sexual abuse in the third degree offense,[85] which on its face appears to be a true non-consent sexual intercourse provision.[86] However, sexual abuse in the third degree occurs if it is "against the will of the other person."[87] Iowa defines the phrase "against the will of the other person" to mean "the consent or acquiescence of the other is procured by threats of violence toward any person or . . . the act is done while the other is under the influence of a drug inducing sleep or is otherwise in a state of

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[83] § 510.020(2).

[84] TEX. PENAL CODE ANN. § 22.011 (West 2011).

[85] Sex acts are defined as "penetration of the penis into the vagina or anus; contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person; contact between the finger or hand of one person and the genitalia or anus of another person, . . . or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus." IOWA CODE ANN. § 702.17 (West 2003 & Supp. 2011).

[86] § 709.4 ("A person commits sexual abuse in the third degree when the person performs a sex act [when] [t]he act is done by force or against the will of the other person, whether or not the other person is the person's spouse or is cohabiting with the person.").

[87] *Id.*

unconsciousness."[88] Effectively, the statute's definition makes sexual abuse in the third degree provable by force or incapacity to consent, instead of by lack of consent.

In light of the foregoing discussion, states should rethink their approach to sex crimes and adopt true non-consent language to resolve the sham that is the "non-consent statute with a contradictory definition" trend. Several states have begun that resolution. New York and Kentucky have adopted true non-consent language for at least one of their sex crime statutes; however, they still require force or threat of force for many of their sex offenses through "catchall" contradictory definitions that subvert the substantive non-consent offenses. True non-consent language continues to elude every state discussed in this Section.

C. CASE LAW

This Section discusses case law that illustrates state courts' interpretations of non-consent or force statutes in sex offense prosecutions.[89] Case law in the majority of both true non-consent states and contradictory non-consent states confirms that courts apply a plain reading of the sex offense statutes.[90] However, some true non-consent states and contradictory states have case law that liberally interprets the language of the statutes. This Section also notes the surprising dearth of case law in many states on the issue of non-consent. This lack of case law is more pronounced for sexual contact cases, particularly those with non-consent standards.

1. Case Law That Liberally Interprets the Language of the Statutes

Some state courts have broadened definitions, misapplied definitions, or created new definitions of non-consent, thus expanding the scope of the language in their statutory provisions.[91] First, where state statutes fail to define "consent" or "lack of consent," some courts define those terms in case law, providing non-consent standards for sexual assault offenses that are not immediately apparent in the criminal codes.

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[88] § 709.1.

[89] *See infra* notes 90–126.

[90] Colorado, Delaware, Georgia, Kansas, Minnesota, Nebraska, Nevada, New Hampshire, South Dakota, and Tennessee fit into this category. *See, e.g.*, People v. Pahlavan, 83 P.3d 1138, 1141–42 (Colo. App. 2003) (concluding that a jury instruction defining "consent" which simply followed the statutory language was proper).

[91] Alabama, Alaska, Arizona, Connecticut, Montana, and Oregon fit into this category. *See, e.g.*, *Ex parte* Gordon, 706 So. 2d 1160 (Ala. 1997); State v. Witwer, 856 P.2d 1183 (Ariz. Ct. App. 1993); State v. Coleman, 727 A.2d 246 (Conn. App. Ct. 1999); State v. Detonancour, 34 P.3d 487 (Mont. 2001).

In Montana, for example, courts have created a non-consent standard for sexual contact offenses.[92] As discussed above, both penetration and sexual contact offenses in Montana require that the acts be committed without the victim's consent.[93] Although the Montana legislature specifically defined "without consent" in the offense of "sexual intercourse without consent" to mean that the perpetrator forcibly compels the victim to submit to intercourse, the criminal code does not define "without consent" as it relates to the offense of sexual contact without consent.[94]

The Montana Supreme Court filled in the gap for sexual contact offenses, holding that the "ordinary meaning of 'without consent'" applies (as opposed to the definition of "without consent" in the sexual intercourse offenses).[95] While the Montana Supreme Court has not explicitly defined the term "ordinary meaning," lower courts interpret "without consent" to mean "simply the absence of affirmative consent."[96] Therefore, in Montana bare proof that the victim did not consent to sexual contact with a perpetrator suffices to establish the element of non-consent.[97]

Other states have statutes requiring a showing of force for various sex offenses, but some have case law defining force more broadly than the statutory language implies. For example, a plain reading of the Connecticut criminal code suggests that most sex offenses require a showing of force or threats of force to convict a defendant, but fourth-degree sexual assault only requires a showing that sexual contact occurred without a victim's consent.[98] Although Connecticut courts do not apply a true non-consent standard to penetration offenses, they do apply relaxed standards for what constitutes "force" in all sexual contact cases, not just fourth-degree sexual assault.

In *State v. Coleman*,[99] the Connecticut Court of Appeals expanded the meaning of the term "force" for first-degree sexual assault (a penetration offense). In *Coleman*, the defendant pulled down the victim's shorts and underwear, fondled her genitalia, performed oral sex on her, and penetrated her vagina with his penis after confronting her in the bathroom of a nightclub.[100] The victim stated that the defendant did not use physical

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[92] *See infra* notes 95–97.

[93] *See supra* notes 44–49.

[94] MONT. CODE ANN. §§ 45-5-501(1)(a), -502 (2010).

[95] *Detonancour*, 34 P.3d at 495.

[96] *See*, *e.g.*, State v. Mihalko, No. DC-02-138(B), 2003 Mont. Dist. LEXIS 3398, at *2–5 (Jan. 20, 2003) (citing State v. Lundblade, 717 P.2d 575 (Mont. 1986)).

[97] *Mihalko*, 2003 Mont. Dist. LEXIS 3398, at *1.

[98] CONN. GEN. STAT. ANN. § 53a-73a (West 2007).

[99] State v. Coleman, 727 A.2d 246 (Conn. App. Ct. 1999).

[100] *Id.* at 248.

violence against her, but rather that he held her shoulder and pushed his body weight against her.[101] She also testified that she was too weak and sick from the alcohol she consumed at the club to fight or call for help.[102]

The defendant argued that because the state did not prove that he used physical force to overcome the victim's "earnest" resistance, there was insufficient evidence to establish the use of force, as required for first-degree sexual assault.[103] In rejecting the defendant's argument, the appellate court stated that resistance is not required under Connecticut law and explained that the "use of force" is defined broadly as the "use of actual physical force or violence or [the use of] superior physical strength against the victim."[104] Therefore, although the defendant did not use physical violence against the victim, the court found that because the defendant used his superior size and strength to his advantage, a reasonable jury could find him guilty of first-degree sexual assault.[105]

Finally, despite contradictory definitions of non-consent in state statutes that require a showing of force, some state courts refuse to require a showing of force to convict a perpetrator of a sex crime. For example, Arizona's sexual abuse and sexual assault offenses state that the offenses are committed when sexual contact or sexual penetration occurs without the consent of the victim.[106] However, a separate provision in the criminal code states that the "without consent" standard is met by force or threats of force, incapacity to consent, deception as to the nature of the act, or spousal deception.[107]

Without examining case law, Arizona looks like a classic contradictory state: a non-consent standard is effectively negated by a contradictory definition of consent. However, the case law relating to jury instructions illustrates the Arizona courts' different interpretation of "without consent." In *State v. Witwer*,[108] the defendant engaged in sexual contact with the victim during her training as a chiropractic assistant. He continued to touch her genitals and breasts after she asked him to stop. The appellate court

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[101] *Id.* at 249.

[102] *Id.* at 250.

[103] *Id.* at 249.

[104] *Id.*

[105] *Id.*; *see also* State v. Malon, 898 A.2d 843, 850 (Conn. App. Ct. 2006) (holding that the following jury instructions were acceptable: "[Consent] must have been actual and not simply acquiescence brought about by force, by fear, or by shock. The act must have been truly voluntary on the part of the complainant.").

[106] ARIZ. REV. STAT. ANN. §§ 13-1404, -1406 (2010).

[107] § 13-1401.

[108] State v. Witwer, 856 P.2d 1183 (Ariz. Ct. App. 1993).

affirmed the defendant's conviction for sexual abuse.[109] Although the defendant argued that the jury instructions should have defined "without consent" within the four examples listed in the statute, the appellate court determined that the meaning of "without consent" was not limited to those four situations.[110] Instead, the court held that it was acceptable in a sexual abuse case to give the words "without consent" their "ordinary meaning."[111] In *State v. Kelley*, an Arizona appellate court approved jury instructions stating that if a rape victim's conduct reasonably manifested her lack of consent, that conduct was sufficient to show non-consent.[112]

Similarly, although the Alabama statute defines "lack of consent" as resulting from forcible compulsion or incapacity to consent,[113] the Alabama courts have stated that they are not requirements for every sex offense. In *Ex parte Gordon*, the victim did not object to the defendant's initial advances but verbally resisted when the defendant pushed her onto the bed and made further sexual advances.[114] Despite the victim's verbal resistance, the defendant held her down and engaged in sexual intercourse.[115] Alabama's sexual misconduct statute states in pertinent part: "A person commits the crime of sexual misconduct if . . . being a male, he engages in sexual intercourse with a female without her consent . . . ."[116] However, according to a separate provision in the Alabama criminal code, "lack of consent" results from forcible compulsion or incapacity to consent.[117]

The defendant argued that the state did not prove "lack of consent" because he did not use forcible compulsion and the victim was not incapacitated.[118] However, the Alabama Supreme Court affirmed the defendant's conviction, holding that force is not a necessary element of sexual misconduct, despite the contradictory definition in the code.[119] The court reasoned that the Alabama legislature created two offenses relating to non-consensual intercourse: rape, which requires a showing of force, and sexual misconduct, which does not.[120] A defendant can be convicted of

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[109] *Id.* at 1184.

[110] *Id.* at 1185–86.

[111] *Id.*

[112] State v. Kelley, 516 P.2d 569, 570–71 (Ariz. Ct. App. 1973) ("[T]he conduct of the female person need only be such as to make non-consent and actual resistance reasonably manifest.").

[113] ALA. CODE § 13A-6-60 (LexisNexis 2005).

[114] *Ex parte* Gordon, 706 So. 2d 1160, 1162 (Ala. 1997).

[115] *Id.*

[116] ALA. CODE § 13A-6-65.

[117] § 13A-6-70(b)(1)–(2).

[118] *Gordon*, 706 So. 2d at 1163–64.

[119] *Id.* at 1163.

[120] *Id.* at 1164.

sexual misconduct even if the state fails to prove the defendant applied or threatened force.[121] Despite establishing this fairly progressive "non-consent" standard, the court did not articulate a specific definition for "lack of consent" for the offense of sexual misconduct.

2. Lack of Relevant Case Law

In some states, while there is case law interpreting sex offenses that require a showing of forcible compulsion, there is a dearth of case law involving adult victims for the non-consent offenses.[122] In Georgia, for example, the offense of rape requires a showing of force, while the offense of sexual battery requires only a lack of consent.[123] In the Georgia rape cases involving adult victims, the courts require some evidence of force or threat of force.[124] While some Georgia courts have affirmed convictions of rape where the victims seemed to consent and there was no evidence of force, these cases involve victims under the age of eighteen.[125] Furthermore, the Georgia cases focusing on the issue of non-consent in sexual battery and aggravated sexual battery cases involve persons who are incapable of consenting to sexual activity, including children and victims with diminished mental capacity.[126] There is no Georgia case law on non-consent in the context of sexual battery or aggravated sexual battery.

An examination of case law in true non-consent states and contradictory states reveals that most state courts are applying the non-consent provisions as they are written in the applicable statutes. However, there is a trend among some non-consent states of broadening or creating definitions of non-consent, or applying definitions of non-consent that liberally expand a particular statute's reach as it relates to non-consent. There is also a dearth of relevant case law in a significant number of non-

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[121] *Id.* at 1163–64.

[122] Florida, Hawaii, Iowa, Kentucky, Louisiana, Maine, Maryland, Missouri, New Mexico, and Utah all fall under this category.

[123] GA. CODE ANN. §§ 16-6-1(a)(1), -22.1 (West 2009).

[124] *See, e.g.*, Curtis v. State, 223 S.E.2d 721, 723 (Ga. 1976) ("'A person commits rape when he has carnal knowledge of a female, forcibly and against her will.' . . . Intimidation may substitute for force." (quoting GA. CODE ANN. § 16-6-1(a)(1)).

[125] *See, e.g.*,Wightman v. State, 656 S.E.2d 563, 566 (Ga. Ct. App. 2008) (finding the element of force present even though defendant had sex with victim without actual use or threat of force, where child rape victim testified that defendant stated that he would distribute nude photographs of the victim at school and get the victim in trouble with her father if she did not comply, that no one would believe victim, and that she would be sent to a foster home if she attempted to report the sexual abuse).

[126] *See, e.g.*, Driggers v. State, 662 S.E.2d 872 (Ga. Ct. App. 2008); Melton v. State, 639 S.E.2d 411 (Ga. Ct. App. 2006); Weldon v. State, 607 S.E.2d 175 (Ga. Ct. App. 2004); Carson v. State, 576 S.E.2d 12 (Ga. Ct. App. 2002).

consent states, suggesting that either the state is not prosecuting sex offenses using a non-consent standard or such cases are not being appealed.

D. PROSECUTORS MUST TAKE NON-CONSENT PROHIBITIONS SERIOUSLY

Despite a seeming trend toward rejecting antiquated force requirements and embracing non-consent standards for sex crimes, the reality is far from progressive. First, many states still require a showing of forcible compulsion or a victim's incapacity to consent for a sex crime conviction. Second, although there are twenty-eight true non-consent states, eleven of those states only have non-consent provisions for sexual *contact* offenses. In these states, the more egregious penetration offenses still require a showing of force or threat of force. Third, while the contradictory states *appear* to be non-consent states, statutory definitions of "consent," either in the sex-crime statutes or elsewhere in the codes, negate the non-consent standards of these statutes.

Additionally, there is a striking dearth of relevant case law in a significant number of non-consent states. This suggests that either the states are not prosecuting non-consent sex offenses, that defendants in such cases are being acquitted, or that defendants are convicted and opting not to appeal. Given the novelty of the non-consent movement and the apparent resistance to it, it is difficult to imagine many instances in which defendants are convicted without any showing of force and then waiving their right to appeal. Thus, unless all these defendants are being acquitted, it appears much more likely that prosecutors are not pursuing these cases. If this is true, it is disheartening to see the movement's attempts at reform minimized by a lack of prosecution.

III. RESISTANCE

At common law, rape law required that a victim resist a defendant.[127] This Part analyzes the existence or absence of that antiquated requirement in all fifty states' current sex offense statutes and discusses whether there remains a judicial reliance on resistance to prove either a victim's non-consent or a defendant's use of force. This portion of the Article argues that resistance continues to be a decisive indicator of both a victim's non-consent and a defendant's use of force, whether states' statutes retain resistance requirements or not.

Section A provides a brief description of the history of the resistance requirement in rape law and the progression from an utmost resistance

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[127] *See infra* notes 135–138 and accompanying text.

requirement to either a reasonable resistance requirement or the elimination of a resistance requirement.[128] Section B reviews the status of the resistance requirement in all fifty states' current sex offense statutes.[129] It divides state statutes into four categories. The first category includes states that have retained an explicit requirement for a victim to resist a defendant in order to prove that she did not consent or that the defendant used force or forcible compulsion.[130] The second category encompasses state statutes that may not explicitly reference "resistance" but still retain comparable language requiring the offender to cause "submission against the victim's will" or "overcome the victim."[131] The third category includes states that have explicitly eliminated a resistance requirement.[132] The last category comprises states that do not formally demand resistance as an affirmative requirement but define the elements of offenses in a manner merely requiring the victim to be "incapable of resisting" to prove that she did not consent or that the defendant committed a sex offense.[133] Section C outlines state court decisions interpreting the four categories of statutes described in Section B.[134]

A. TRADITIONAL RAPE LAW AND THE RESISTANCE REQUIREMENT

Under English common law, rape was defined as "carnal knowledge of a woman forcibly and against her will."[135] Traditional rape law emphasized the victim's resistance to indicate whether consent had been withheld or force used.[136] "At common law, the state had to prove beyond a reasonable doubt that the woman resisted her assailant to the utmost of her physical capacity to prove that an act of sexual intercourse was rape."[137] Thus, the focus shifted from the alleged offender's conduct to the victim's conduct.[138]

The Model Penal Code (MPC) sought to move away from the common

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[128] *See infra* notes 135–142 and accompanying text.

[129] *See infra* notes 143–202 and accompanying text.

[130] *See infra* notes 144–162 and accompanying text.

[131] *See infra* notes 163–165 and accompanying text.

[132] *See infra* notes 166–193 and accompanying text.

[133] *See infra* notes 194–202 and accompanying text.

[134] *See infra* notes 203–251 and accompanying text. The cases in this portion of the Article illustrate instances where courts have implemented a resistance requirement where none was required or have interpreted a resistance requirement in a particular way of note.

[135] SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES 296 (8th ed. 2007).

[136] Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962.

[137] *Id.*

[138] *See* Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L.J. 72, 75 (2001).

law approach by downplaying—but not eliminating—the resistance requirement.[139] Although it "removed 'against her will' from the definition of rape, it included a requirement that the [defendant] had 'compelled her to submit.'"[140] Most states did not follow the MPC's recommendation to eliminate a resistance requirement and instead followed the MPC's emphasis on force instead of the victim's non-consent.[141] Thus, the victim's resistance remained an explicit element in most states' rape statutes as an indicator of the defendant's use of force and the victim's non-consent.[142]

B. STATUS OF THE RESISTANCE REQUIREMENT IN THE STATES' CURRENT RAPE LAWS

Some states have liberalized the common law resistance requirement by requiring "earnest resistance," "reasonable resistance," or simply "resistance" on the part of the victim in order to prove the elements of force or non-consent. Only one state maintains the common law resistance requirement of "utmost resistance."[143] Other states, while not explicitly requiring resistance, require something comparable by requiring "submission against the victim's will." Similarly, while not formally requiring resistance, some states continue to define the elements of force and non-consent in terms of resistance by requiring that the victim either be "incapable of resisting," "unable to resist," "prevented from resisting," or some variant of the same. Finally, while many states are silent with regard to requiring resistance, some have codified that resistance is not required.

1. Statutory Resistance Requirement

Eight states require that the victim resist.[144] In this category, there are four types of resistance requirements. There are three states with what this Article labels "Type One resistance." Type One resistance requires that the victim resist in order to prove that the victim did not consent due to the

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[139] *Id.* at 75–76.

[140] *Id.* at 76; *see also* MODEL PENAL CODE § 213.1(1)(a) (1962).

[141] Lyon, *supra* note 5, at 287.

[142] *Id.* at 285–87.

[143] *See* LA. REV. STAT. ANN. § 14:42(A)(1) (2007) (requiring that "the victim resist[] the act to the utmost" for the crime of aggravated rape).

[144] ALA. CODE § 13A-6-60(8) (LexisNexis 2005); DEL. CODE ANN. tit. 11, § 761(j)(1) (2007 & Supp. 2010); IDAHO CODE ANN. §§ 18-6101(4), -6108(4) (2004 & Supp. 2011); LA. REV. STAT. ANN. § 14:42(A)(1) (2007) (requiring resistance for aggravated rape but not for forcible or simple rape); MO. ANN. STAT. § 556.061(12)(a) (West 1999 & Supp. 2011); NEB. REV. STAT. § 28-318(8)(b)–(c), (9)(a) (2008 & Supp. 2010); WASH. REV. CODE ANN. § 9A.44.010(6) (West 2009); W. VA. CODE ANN. § 61-8B-1(1)(a) (LexisNexis 2010). Note that the total number of states will equal nine because Nebraska is counted twice: it requires resistance for both "force" and "without consent."

defendant's use of "forcible compulsion"[145] or "force,"[146] unless the victim was in fear of harm or death to herself or to another person.[147] There are two states with what this Article calls "Type Two resistance." Type Two resistance requires that the victim resist in order to prove that the defendant engaged in the sexual act with the victim by "forcible compulsion,"[148] unless the victim was in fear of harm or death to herself or to another person.[149] There are two states with what is described herein as "Type Three resistance." Type Three resistance requires that the victim resist to the extent that it is reasonable for the defendant to know that the victim did not consent in order to prove that the defendant acted without the victim's consent.[150]

The Type One and Type Two states have different standards of resistance and all focus on the victim's actions or inactions. In Alabama, the defendant must use "[p]hysical force that overcomes earnest resistance" to prove that the victim did not consent due to the defendant's use of "forcible compulsion" for the crimes of first-degree rape and first-degree sexual abuse, but not for sexual misconduct.[151] In West Virginia, the defendant must use physical force that overcomes "earnest resistance as might reasonably be expected under the circumstances" to prove the victim did not consent due to the defendant's use of "forcible compulsion" for the crimes of second- and third-degree sexual assault and first-, second-, and third-degree sexual abuse.[152] In Nebraska, the defendant must use physical force that "overcomes the victim's resistance" to prove that the victim did

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[145] ALA. CODE § 13A-6-60(8); W. VA. CODE ANN. § 61-8B-1(1)(a).

[146] NEB. REV. STAT. § 28-318(9)(a).

[147] ALA. CODE § 13A-6-60(8); NEB. REV. STAT. § 28-318(9); W. VA. CODE ANN. § 61-8B-1(1)(b). West Virginia also provides that resistance is not required to prove "forcible compulsion" where the victim is in fear that she or another will be kidnapped or where the defendant intimidates a person under the age of sixteen. In addition, Nebraska requires that the victim believe the defendant has the ability to execute the threat.

[148] MO. ANN. STAT. § 556.061(12)(a); WASH. REV. CODE ANN. § 9A.44.010(6).

[149] Washington and Missouri also provide that resistance is not required to prove "forcible compulsion" where the victim is in fear that herself or another will be kidnapped. MO. ANN. STAT. § 556.061(12)(b); WASH. REV. CODE ANN. § 9A.44.010(6).

[150] DEL. CODE ANN. tit. 11, § 761(j)(1) (2007 & Supp. 2010); NEB. REV. STAT. § 28-318(8)(b).

[151] ALA. CODE § 13A-6-70(b)(1) (LexisNexis 2005) (defining lack of consent); § 13A-6-60(8) (defining forcible compulsion); § 13A-6-65 (sexual misconduct); ALA. CODE § 13A-6-66 (LexisNexis Supp. 2010) (sexual abuse in the first degree).

[152] W. VA. CODE ANN. § 61-8B-1(1) (defining forcible compulsion); § 61-8B-2 (defining lack of consent); § 61-8B-4 (sexual assault in the second degree); § 61-8B-5 (sexual assault in the third degree); 61-8B-7 (sexual abuse in the first degree); § 61-8B-8 (sexual abuse in the second degree); § 61-8B-9 (sexual abuse in the third degree).

not consent due to the defendant's use of "force."[153] In Missouri, the defendant must use physical force that overcomes "reasonable resistance" to prove that the defendant engaged in the sexual act with the victim by "forcible compulsion."[154] Finally, in Washington, the defendant must use physical force that overcomes "resistance" to prove that the defendant engaged in the sexual act with the victim by "forcible compulsion."[155]

The Type Three states focus not only on the victim's actions or inactions, but also on the defendant's mental state. In Delaware, the victim need not resist if doing so would be futile, and otherwise the victim must resist "only to the extent that is reasonably necessary to make the victim's refusal to consent known to the defendant."[156] Similarly, in Nebraska, the victim need not resist if resistance would be futile, and "[t]he 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."[157] The victim can also contend that she did not consent due to the defendant's use of "force"[158] or that she did not consent because she expressed her lack of consent to the defendant through words or conduct.[159] For the former, the defendant must use physical force that overcomes the victim's "resistance."[160] However, in both cases, the victim must resist "so as to make the victim's refusal to consent genuine and real" and so as to reasonably make her lack of consent known to the defendant.[161]

West Virginia provides the only definition of resistance in all the states that have a resistance requirement. West Virginia defines resistance as "physical resistance or any clear communication of the victim's lack of consent."[162]

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[153] NEB. REV. STAT. § 28-318(8) (2008 & Supp. 2010) (defining "without consent"); § 28-318(9) (defining force or threat of force).

[154] MO. ANN. STAT. § 556.061(12) (West 1999 & Supp. 2011) (defining forcible compulsion).

[155] WASH. REV. CODE ANN. § 9A.44.010(6) (West 2009) (defining forcible compulsion).

[156] DEL. CODE ANN. tit. 11, § 761(j) (2007 & Supp. 2010).

[157] NEB. REV. STAT. § 28-318(8)(b)–(c).

[158] § 28-318(8)(a)(i) (defining "without consent" as "the victim was compelled to submit due to the use of force or threat of force or coercion").

[159] § 28-318(8)(a)(ii) (defining "without consent" as "the victim expressed a lack of consent through words"); § 28-318(8)(a)(iii) (defining "without consent" as "the victim expressed a lack of consent through conduct").

[160] § 28-318(9) (defining force or threat of force).

[161] § 28-318(8)(b).

[162] W. VA. CODE ANN. § 61-8B-1(1) (LexisNexis 2010).

2. Comparable Language to a Resistance Requirement

Seven states do not specifically require "resistance" in their statutes; however, they mandate something comparable, such as "submission against the victim's will"[163] or action by the defendant to "overcome the victim."[164] For example, in Colorado, a defendant who "causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will" is guilty of sexual assault.[165]

3. Statutory Provision Eliminating a Resistance Requirement

Although twenty-four states are silent regarding a resistance requirement,[166] fourteen state statutes ostensibly do not require resistance on the part of the victim.[167] Of these fourteen states, eight distinguish

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[163] COLO. REV. STAT. § 18-3-402(1)(A) (2011); *see* CAL. PENAL CODE § 261(a)(2) (West 2008) (defining a circumstance constituting rape where the defendant engages in sexual intercourse with the victim "against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another"); VA. CODE ANN. § 18.2-61(A) (2009) (defining a circumstance constituting rape where the defendant engages in sexual intercourse with the victim "against the complaining witness's will").

[164] 720 ILL. COMP. STAT. ANN. 5/11-0.1 (West Supp. 2011) (defining a circumstance constituting "force or threat of force" as when the defendant has "overcome[] the victim by use of superior strength or size, physical restraint, or physical confinement"); R.I. GEN. LAWS § 11-37-2(3) (2002) (defining a circumstance constituting first-degree sexual assault as a defendant engaging in sexual penetration with the victim and through concealment or surprise "is able to overcome the victim"); S.C. CODE ANN. § 16-3-651(b)–(c) (2003) (defining "aggravated coercion" and "aggravated force" as the defendant using coercion or force "to overcome the victim"); UTAH CODE ANN. § 76-5-406(2)–(3) (LexisNexis 2008) (defining two circumstances constituting "sexual offenses against the victim without consent of the victim" as the defendant using force, concealment, or surprise "to overcome the victim").

[165] COLO. REV. STAT. § 18-3-402(1)(A); *see infra* Part III.C (discussing Colorado in terms of defining "submission against the victim's will" because, in *People v. Schmidt*, 885 P.2d 312, 316 (Colo. App. 1994), the statement "no" was sufficient for a jury to conclude that the victim resisted and that the defendant thereafter caused "submission against the victim's will").

[166] Arizona, Arkansas, California, Connecticut, Georgia, Hawaii, Indiana, Kansas, Maryland, Massachusetts, Mississippi, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, and Wisconsin.

[167] ALASKA STAT. § 11.41.470(8)(A) (2010); FLA. STAT. ANN. § 794.011(1)(a) (West 2007); 720 ILL. COMP. STAT. ANN. 5/11-1.70(a); IOWA CODE ANN. § 709.5 (West 2003); KY. REV. STAT. ANN. § 510.010(2) (LexisNexis 2008); ME. REV. STAT. ANN. tit. 17-A, § 251(1)(E) (2006); MICH. COMP. LAWS ANN. § 750.520i (West 2004); MINN. STAT. ANN. § 609.341(4)(a) (West 2009 & Supp. 2011); MONT. CODE ANN. § 45-5-511(5) (2010); N.M. STAT. ANN. § 30-9-10(A) (2004 & Supp. 2011); OHIO REV. CODE ANN. § 2907.02(C) (West 2006 & Supp. 2011); OR. REV. STAT. § 163.315(2) (2009); 18 PA. CONS. STAT. ANN. § 3107 (West 2000); VA. CODE ANN. § 18.2-67.6 (2009).

between verbal and physical resistance,[168] while six do not.[169] Typically, active resistance on the part of the victim is not required to prove the defendant used "forcible compulsion" or "force," or to prove a sex offense occurred.[170] However, some states qualify this elimination of a resistance requirement by conditioning the application of the rule on the defendant's ability to show that the victim consented[171] or by setting the degree of force required in terms of the victim's resistance.[172] In the states where these "resistance-not-required" provisions pertain to the element of consent, most states provide that (1) the victim's lack of resistance does not affirmatively establish the presence of consent[173] or (2) the victim is not required to resist in order to establish lack of consent.[174] However, some states provide that the victim is not required to resist, yet allow the victim's lack of resistance to be considered evidence of consent.[175]

The fourteen states which provide that no resistance is required offer

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[168] FLA. STAT. ANN. § 794.011(1)(a); 720 ILL. COMP. STAT. ANN. 5/11-1.70(a); IOWA CODE ANN. § 709.5; KY. REV. STAT. ANN. § 510.010(2); N.M. STAT. ANN. § 30-9-10(A); OHIO REV. CODE ANN. § 2907.02(C); OR. REV. STAT. § 163.315(2); VA. CODE ANN. § 18.2-67.6.

[169] ALASKA STAT. § 11.41.470(8)(A); ME. REV. STAT. ANN. tit. 17-A, § 251(1)(E); MICH. COMP. LAWS ANN. § 750.520i; MINN. STAT. ANN. § 609.341(4)(a); MONT. CODE ANN. § 45-5-511(5); 18 PA. CONS. STAT. ANN. § 3107.

[170] *See, e.g.*, IOWA CODE ANN. § 709.5; KY. REV. STAT. ANN. § 510.010(2); ME. REV. STAT. ANN. tit. 17-A, § 251(1)(E); MICH. COMP. LAWS ANN. § 750.520i; MONT. CODE ANN. § 45-5-511(5); N.M. STAT. ANN. § 30-9-10(A); OHIO REV. CODE ANN. § 2907.02(C); 18 PA. CONS. STAT. ANN. § 3107; VA. CODE ANN. § 18.2-67.6.

[171] *See, e.g.*, 18 PA. CONS. STAT. ANN. § 3107 ("The alleged victim need not resist the actor in prosecutions under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question.").

[172] *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520i.

[173] FLA. STAT. ANN. § 794.011(1)(a) ("'Consent' shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the [defendant]."); 720 ILL. COMP. STAT. ANN. 5/11-1.70(a) (providing that "[l]ack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent"); MINN. STAT. ANN. § 609.341(4)(a) (providing that "[c]onsent does not mean . . . that the complainant failed to resist a particular sexual act"); OR. REV. STAT. § 163.315(2) (providing that "lack of verbal or physical resistance does not, by itself, constitute consent").

[174] *See, e.g.*, MONT. CODE ANN. § 45-5-511(5) ("Resistance by the victim is not required to show lack of consent.").

[175] *See, e.g.*, VA. CODE ANN. § 18.2-67.6 ("The Commonwealth need not demonstrate that the complaining witness cried out or physically resisted the accused in order to convict the accused of an offense under this article, but the absence of such resistance may be considered when relevant to show that the act alleged was not against the will of the complaining witness.").

no definition of resistance, physical resistance, or verbal resistance.[176] Of the eight states that distinguish between verbal and physical resistance, four states apply the distinction to "forcible compulsion," "force," or certain or all sex offenses.[177] Iowa and Kentucky provide that physical resistance is not required to prove "forcible compulsion."[178] New Mexico provides that neither physical nor verbal resistance is required to prove "force or coercion."[179] And Ohio provides that physical resistance is not required for certain offenses.[180] The remaining four states' "resistance-not-required" provisions pertain to the element of consent.[181] Illinois states that "[l]ack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent."[182] Florida provides that lack of physical resistance does not constitute consent,[183] and Oregon provides that lack of physical or verbal resistance does not constitute consent.[184] In Virginia, physical resistance

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[176] *See* ALASKA STAT. § 11.41.470(8)(A) (2010) ("without consent" is established "with or without resisting" by the victim); FLA. STAT. ANN. § 794.011(1)(a) (West 2007) ("failure . . . to . . . physically resist" is not equated with "consent"); 720 ILL. COMP. STAT. ANN. 5/11-1.70(a) ("Lack of verbal or physical resistance. . . shall not constitute consent."); IOWA CODE ANN. § 709.5 (West 2003) (it is not "necessary to establish physical resistance" to prove sexual abuse); KY. REV. STAT. ANN. § 510.010(2) (LexisNexis 2008) ("[p]hysical resistance" by the victim is not required to establish "[f]orcible compulsion"); ME. REV. STAT. ANN. tit. 17-A, § 251(1)(E) (2006) (victim has "no duty . . . to resist" compulsion, which is defined as "the use of physical force"); MICH. COMP. LAWS ANN. § 750.520i (West 2004) ("A victim need not resist the actor . . . ."); MINN. STAT. ANN. § 609.341(4)(a) (West 2009 & Supp. 2011) ("[C]onsent does not . . . [arise because] the complainant failed to resist . . . ."); MONT. CODE ANN. § 45-5-511(5) (2010) ("Resistance by the victim is not required to show lack of consent."); N.M. STAT. ANN. § 30-9-10(A) (2004 & Supp. 2011) ("Physical or verbal resistance of the victim is not an element of force or coercion . . . ."); OHIO REV. CODE ANN. § 2907.02(C) (West 2006 & Supp. 2011) ("A victim need not prove physical resistance . . . ."); OR. REV. STAT. § 163.315(2) (2009) ("A lack of . . . physical resistance does not, by itself, constitute consent . . . ."); 18 PA. CONS. STAT. ANN. § 3107 (West 2000) ("The alleged victim need not resist the actor in prosecutions under this chapter . . . ."); VA. CODE ANN. § 18.2-67.6 (2009) ("The Commonwealth need not demonstrate that the complaining witness cried out or physically resisted the accused in order to convict . . . .").

[177] IOWA CODE ANN. § 709.5 (West 2003); KY. REV. STAT. ANN. § 510.010(2) (LexisNexis 2008); N.M. STAT. ANN. § 30-9-10(A) (2004 & Supp. 2011); OHIO REV. CODE ANN. § 2907.02(C) (West 2006 & Supp. 2011).

[178] IOWA CODE ANN. § 709.5; KY. REV. STAT. ANN. § 510.010(2).

[179] N.M. STAT. ANN. § 30-9-10(A).

[180] OHIO REV. CODE ANN. § 2907.05(D) (gross sexual imposition); § 2907.02(C) (rape).

[181] FLA. STAT. ANN. § 794.011 (1)(a) (West 2007); 720 ILL. COMP. STAT. ANN. 5/11-1.70(a) (West Supp. 2011); OR. REV. STAT. § 163.315(2) (2009); VA. CODE ANN. § 18.2-67.6 (2009).

[182] 720 ILL. COMP. STAT. ANN. 5/11-1.70(a) (defenses to the element of "consent").

[183] FLA. STAT. ANN. § 794.011(1)(a).

[184] OR. REV. STAT. § 163.315(2).

and "crying out" are not required to convict the defendant; however, the victim's "lack of resistance" can still be considered as evidence that the victim consented to the act.[185]

Of the six states that do not distinguish verbal and physical resistance, three have resistance-not-required provisions or sections that either pertain to the definition of "compulsion" or apply to all sex offenses.[186] Pennsylvania and Michigan have sections stating that resistance is not required for all sex offenses.[187] However, Pennsylvania's rule allows the defendant to introduce evidence that the victim consented to the act—thus inviting the defendant to use the victim's lack of resistance as evidence suggesting the victim's consent.[188] Maine has a provision stating that the victim does not have a "duty to resist" to show "compulsion"; however, the force or threat of force required to prove compulsion must make the victim unable to "physically repel the actor."[189] The remaining three states have resistance-not-required provisions pertaining to the element of consent.[190] Alaska provides that consent can be shown "with or without resistance."[191] Minnesota provides that lack of resistance does not constitute consent.[192] And Montana provides that resistance is not required to show lack of consent.[193]

4. Incapable of Resisting, Unable to Resist, Defendant Prevents Resistance, or Comparable Language

Sixteen states do not formally require resistance, but they continue to define the elements of force and consent in terms of a victim's resistance by requiring the victim to be "incapable of resisting," "unable to resist," "prevented from resisting," or some variant thereof to prove that she did not consent or that the defendant committed a sex offense.[194] Eleven states

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[185] VA. CODE ANN. § 18.2-67.6.

[186] ME. REV. STAT. ANN. 17-A, § 251(1)(E) (2006); MICH. COMP. LAWS ANN. § 750.520i (West 2004); 18 PA. CONS. STAT. ANN. § 3107 (West 2000).

[187] MICH. COMP. LAWS ANN. § 750.520i; 18 PA. CONS. STAT. ANN. § 3107.

[188] 18 PA. CONS. STAT. ANN. § 3107.

[189] ME. REV. STAT. ANN. tit. 17-A, § 251(1)(E) (defining "compulsion").

[190] ALASKA STAT. § 11.41.470(8)(A) (2010); MINN. STAT. ANN. § 609.341(4)(a) (West 2009 & Supp. 2011); MONT. CODE ANN. § 45-5-511(5) (2010).

[191] ALASKA STAT. § 11.41.470(8)(A).

[192] MINN. STAT. ANN. § 609.341(4)(a).

[193] MONT. CODE ANN. § 45-5-511(5).

[194] CAL. PENAL CODE § 261(a)(3)–(4) (West 2009) (defining two circumstances constituting rape where the victim is (1) "incapable of resisting" or (2) "prevented from resisting" by an intoxicating substance); § 262(a)(2)–(3) (defining two circumstances constituting spousal rape where the victim is (1) "incapable of resisting" or (2) "prevented from resisting" by an intoxicating substance); FLA. STAT. ANN. § 794.011(1)(j) (West 2007)

(defining "physically incapacitated" as "bodily impaired or handicapped and substantially limited in ability to resist or flee"); IDAHO CODE ANN. § 18-6101(5)–(6) (2004 & Supp. 2011) (defining three circumstances constituting rape where the victim is (1) "prevented from resistance by the infliction, attempted infliction, or threatened infliction of bodily harm," (2) "unable to resist" due to any intoxicating substance, and (3) "incapable of resisting"); § 18-6108(5)–(6) (defining two circumstances constituting male rape where the victim is (1) "prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution," or (2) "prevented from resistance by the use of any intoxicating, narcotic, or anesthetic substance administered by or with the privity of the accused"); LA. REV. STAT. ANN. § 14:42.1(A)(1)–(2) (2007) (defining "forcible rape" as sexual intercourse without the consent of the victim when (1) the victim is "prevented from resisting" and (2) the victim is "incapable of resisting"); LA. REV. STAT. ANN. § 14:43(A)(1) (2007 & Supp. 2011) (defining "simple rape" as sexual intercourse without the consent of the victim when the victim is "incapable of resisting"); ME. REV. STAT. ANN. 17-A, § 253(2)(D) (2006 & Supp. 2010) (defining a circumstance constituting gross sexual assault where the victim is "physically incapable of resisting"); § 255-A(1)(C)–(D) (defining a circumstance constituting unlawful sexual contact where the victim is "physically incapable of resisting"); MD. CODE ANN., CRIM. LAW § 3-301(b) (LexisNexis 2002 & Supp. 2010) (defining "mentally defective individual" as "an individual who suffers from mental retardation or a mental disorder, either of which temporarily or permanently renders the individual substantially incapable of . . . resisting"); § 3-301(c) (defining "mentally incapacitated" as "an individual who, because of the influence of a drug, narcotic, or intoxicating substance, or because of an act committed on the individual without the individual's consent or awareness, is rendered substantially incapable of . . . resisting"); MISS. CODE ANN. § 97-3-65(4)(a) (Supp. 2011) (providing an enhanced penalty where the defendant engages in sexual intercourse with a victim without the victim's consent "by administering to the victim any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance"); NEB. REV. STAT. § 28-319(1) (2008) (proscribing sexual penetration without the consent of the victim where the victim is "mentally or physically incapable of resisting"); § 28-320(1) (proscribing sexual contact without the consent of the victim where the victim is "mentally or physically incapable of resisting"); NEV. REV. STAT. ANN. § 200.366(1) (LexisNexis 2006 & Supp. 2009) (defining a circumstance constituting sexual assault where the victim is "mentally or physically incapable of resisting"); N.J. STAT. ANN. § 2C:14-1(g) (West 2005) (defining "physically helpless" as a "condition in which a person is unconscious or is physically unable to flee or is physically unable to communicate unwillingness to act"); N.C. GEN. STAT. § 14-27.1(1)–(3) (2009) (defining "mentally disabled" as "a victim who suffers from mental retardation or a mental disorder, either of which temporarily or permanently renders the victim substantially incapable . . . of resisting the act of vaginal intercourse or a sexual act;" "mentally incapacitated" as "a victim who due to any act committed upon the victim is rendered substantially incapable . . . of resisting the act of vaginal intercourse or a sexual act;" and "physically helpless" as "a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act"); N.D. CENT. CODE § 12.1-20-03(1)(b) (Supp. 2011) (defining a circumstance constituting gross sexual imposition where the defendant uses intoxicants against the victim with the intent to "prevent resistance"); § 12.1-20-04(1) (defining a circumstance constituting sexual imposition where the defendant "compels the other person to submit by any threat or coercion that would render a person reasonably incapable of resisting"); OHIO REV. CODE ANN. § 2907.02(A)(1)(a)–(c) (West 2006 & Supp. 2011) (defining two circumstances constituting rape as (1) for the purpose of "preventing resistance," the defendant substantially impairs the victim's judgment or control, and (2) the

require the victim to be "incapable of resisting" in order to prove the defendant committed a sex crime or the defendant acted "without consent."[195] Seven states require the victim to be "prevented from resisting" by the defendant.[196] Two states require the victim to be "unable to resist" due to any intoxicating narcotic[197] or to be "physically helpless" because the victim is "unable to resist"[198] to prove the defendant committed specific sex offenses. In Maine, while the victim does not have a "duty to resist" to show "compulsion," the force or threat of force required to prove compulsion must make the victim unable to "physically repel the actor."[199] Finally, three states with comparable language require, as elements of sex offenses, that the victim is (1) "physically incapacitated" because the victim is "substantially limited in ability to resist or flee,"[200] (2) "physically helpless" because the victim is "physically unable to flee,"[201] or (3) possessing an "ability to resist [that] is substantially impaired by mental or physical condition or advanced age."[202]

C. CASE LAW

Whether a state codifies a resistance requirement or no resistance requirement, for many courts a victim's resistance still determines whether

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victim's ability to resist is substantially impaired by mental or physical condition, or advanced age); TEX. PENAL CODE ANN. § 22.011(b)(3) (West 2011) (defining a circumstance constituting sexual assault where the sexual act occurs without the victim's consent when the victim is "unable to resist"); UTAH CODE ANN. § 76-5-406(5)–(6) (LexisNexis 2008) (defining a circumstance constituting a sexual offense without the consent of the victim where the victim is "physically unable to resist"); WYO. STAT. ANN. § 6-2-303(a)(ii) (2011) (defining a circumstance constituting second degree sexual assault where the defendant causes submission of the victim by any means that would "prevent resistance"). Note that the total number of states equals twenty-four because California, Idaho, Louisiana, Maine, North Carolina, North Dakota, and Ohio are counted more than once. These states require more than one of the variants of a resistance requirement described in this Section—namely, "incapable of resisting," or some variant thereof.

[195] CAL. PENAL CODE § 261(a)(4); IDAHO CODE ANN. § 18-6101(6); LA. REV. STAT. ANN. §§ 14:42.1(A)(2), :43; ME. REV. STAT. ANN. tit. 17-A, §§ 253(2)(D), 255-A(1)(C)–(D); MD. CODE ANN., CRIM. LAW § 3-301(b)–(c); NEB. REV. STAT. §§ 28-319(1), -320(1); NEV. REV. STAT. ANN. § 200.366(1); N.C. GEN. STAT. § 14-27.1(1)–(3); N.D. CENT. CODE § 12.1-20-04(1); TEX. PENAL CODE ANN. § 22.011(b)(3); UTAH CODE ANN. § 76-5-406(5)–(6).

[196] CAL. PENAL CODE § 261(a)(3); IDAHO CODE ANN. § 18-6101(5); LA. REV. STAT. ANN. § 14:42.1(A)(1) (2007); MISS. CODE ANN. § 97-3-65(4)(a); N.D. CENT. CODE § 12.1-20-03(1)(b); OHIO REV. CODE ANN. § 2907.02(A)(1)(a); WYO. STAT. ANN. § 6-2-303(a)(ii).

[197] IDAHO CODE ANN. § 18-6101(5).

[198] N.C. GEN. STAT. § 14-27.1(3).

[199] ME. REV. STAT. ANN. tit. 17-A, § 251(1)(E) (2006) (defining compulsion).

[200] FLA. STAT. ANN. § 794.011(1)(j) (West 2007).

[201] N.J. STAT. ANN. § 2C:14-1(g) (West 2005).

[202] OHIO REV. CODE ANN. § 2907.02(A)(1)(C) (West 2006 & Supp. 2011).

she consented or whether the defendant used force. As applied, the definitions of "force," "forcible compulsion," and "without consent" often make the victim's resistance a necessity for convicting a defendant of a sex offense.

1. Statutory Resistance Requirement

In states that explicitly require the victim to resist by statute, courts often apply a "totality of the circumstances" standard to determine whether the evidence establishes the resistance element. While applying this standard, courts often rely on the victim's actions or inactions as determinative.[203] There is little difference in how courts interpret "earnest resistance," "reasonable resistance," and "resistance." In the states that require the victim to resist, to the extent that the defendant knows the victim does not consent, courts scrutinize more heavily the victim's actions or inactions since the degree of resistance required is dependent on the defendant's knowledge of the victim's refusal to consent.[204]

In the states where the victim must resist in order to establish the victim's lack of consent to the sexual act due to the defendant's use of force or forcible compulsion, the resistance inquiry focuses on the circumstances surrounding the encounter. The victim's actions or inactions are more determinative than the defendant's misconduct.[205] For example, in Alabama, much of the case law discussing whether the defendant's use of force overcame the victim's "earnest resistance" involves a minor victim and an adult defendant.[206] However, in *Ex parte Cordar*, the defendant had been convicted of rape in the circuit court without having the jury instructed on the lesser offense of sexual misconduct.[207] On appeal, the defendant

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[203] For states requiring the victim to resist to prove the defendant used force or forcible compulsion, see *State v. Vandevere*, 175 S.W.3d 107, 108 (Mo. 2005) (en banc) (holding when determining whether the force employed during the commission of a crime is sufficient to overcome the victim's reasonable resistance, a court must look at the "totality of the circumstances") (citing State v. Niederstadt, 66 S.W.3d 12, 15 (Mo. 2002) (en banc)), and *State v. McKnight*, 774 P.2d 532, 534 (Wash. Ct. App. 1989) (holding that whether the evidence establishes the element of resistance is a fact-sensitive determination based on the totality of the circumstances, including the victim's words and conduct).

[204] Parrish v. State, 494 So. 2d 705, 706 (Ala. Crim. App. 1985); Richards v. State, 475 So. 2d 893, 894 (Ala. Crim. App. 1985).

[205] West Virginia and Alabama are the two states that require the victim to resist to prove that the victim did not consent due to the defendant's use of "forcible compulsion." *See* ALA. CODE § 13A-6-70(b)(1) (LexisNexis 2005); W. VA. CODE ANN. § 61-8B-1(1) (LexisNexis 2010); *supra* notes 151–152 and accompanying text. Relevant case law for West Virginia is sparse.

[206] *Parrish*, 494 So. 2d at 706; *Richards*, 475 So. 2d at 894.

[207] *Ex parte* Cordar, 538 So. 2d 1246, 1247 (Ala. 1988).

argued such an instruction was necessary because he could have been found guilty of having had sexual intercourse with the victim without her consent, but not by forcible compulsion.[208] In reviewing the record, the Alabama Supreme Court acknowledged that there was some question as to why the victim did not scream for help during the assault and that no external signs of trauma to the victim's body or pelvic region existed.[209] Accordingly, the court found that a jury could reasonably conclude that the victim did not earnestly resist, and, therefore, determined that the defendant was entitled to a jury instruction on the lesser offense of sexual misconduct.[210]

In states where the victim must resist before the defendant should reasonably have known that the victim did not consent, the inquiry focuses on the defendant's mental state at the time of the sexual act. As a result, the courts scrutinize the victim's conduct rather than the defendant's.[211] In Nebraska, the prosecution must either prove that the victim did not consent through words or conduct, or prove that the victim did not consent due to the defendant's use of force.[212] In both cases, the victim still must resist physically or verbally "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."[213] If the victim contends that she did not consent due to the defendant's use of force, the prosecution must also prove that the force "overc[ame] the victim's resistance."[214] Thus, in Nebraska, both "force" and "without consent" are defined in terms of the victim's resistance.

For example, in *State v. Gangahar*,[215] the defendant put his arm around the victim's waist while describing her duties for work. Shortly thereafter, the defendant and the victim began watching TV. The defendant attempted to kiss her; however, the victim avoided the kiss. When the defendant asked, "Do you like that?" the victim responded "Well, yeah . . . [i]t's just, I don't know, it's not right to do at work." The victim then went into a hotel room with the defendant, sat on the edge of the bed, and kicked off her

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[208] *Id.* at 1248.

[209] *Id.* at 1249.

[210] *Id.*

[211] *See* Johnson v. State, No. 492, 2006, 2007 WL 1575229, at *1–3 (Del. 2007) (finding that the victim resisted "to the extent that it is reasonably necessary to make the victim's refusal to consent known to the defendant" to establish the sexual act occurred without the victim's consent, where the victim had told the defendant "no" several times during the incident, that she cried out in pain, and that she was crying during the sexual assault even though the victim did not have any bruising on her arms or torso).

[212] NEB. REV. STAT. § 28-318(8)(b) (2008 & Supp. 2010).

[213] *Id.*

[214] § 28-318(9).

[215] State v. Gangahar, 609 N.W.2d 690 (Neb. Ct. App. 2000).

shoes. The defendant attempted to kiss her. The victim again avoided the kiss. The defendant stopped when the victim told him to, but then he began again. The defendant fondled the victim's breast over her clothing and placed her hand on his penis over his clothing. The victim pulled away and told him to stop. The defendant then put his right leg over the victim's left leg and rolled on top of her. The victim pushed him away, got up, and left. The defendant did not attempt to stop her.[216]

The Court of Appeals of Nebraska reversed the defendant's conviction of third-degree sexual assault and remanded the matter for a new trial.[217] The court found that the victim's testimony that she had said "no" and that she did not consent to the sexual contact was sufficient to support the defendant's conviction.[218] However, the court found reversible error because the trial court failed to instruct the jury to consider whether the victim's refusal of consent was genuine, real, and would be known as such to a reasonable person in the defendant's position.[219] The court reasoned that the law places the burden on the state to prove not only whether the victim "refused consent," but also whether such refusal was sufficient to show that the defendant either knew or should have known that the victim refused consent.[220] The court explained, "while [the victim] said 'no,' the statute allows [the defendant] to argue that given all of her actions or inaction, 'no did not really mean no.'"[221]

In states that require the victim to resist to establish that (1) the defendant used force or forcible compulsion,[222] (2) the victim did not consent due to the defendant's use of force or forcible compulsion, or (3) the victim did not consent through words or conduct, the victim's actions or inaction are more determinative than the defendant's conduct. Additionally, courts are more reliant on the victim's actions or inaction where the degree of resistance required is tied to the defendant's knowledge that the victim did not consent.

2. Comparable Language to a Resistance Requirement

In the states where sex offense statutes do not contain specific resistance language but comparable language, such as requiring the defendant to cause "submission against the victim's will," courts have

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[216] *Id.* at 690, 693.
[217] *Id.* at 696.
[218] *Id.* at 694.
[219] *Id.* at 693–95.
[220] *Id.* at 694–95.
[221] *Id.* at 695.
[222] OHIO REV. CODE ANN. § 2907.02(A)(1)(C) (West 2006 & Supp. 2011).

interpreted that language liberally. For example, in interpreting the phrase "submission against the victim's will," a Colorado appellate court found that the victim saying "no" provided a sufficient basis for a jury to find that the victim resisted sexual intercourse and the defendant's actions caused "submission against the victim's will."[223] In that case, the defendant appealed his conviction of second-degree sexual assault, arguing that the trial court should have instructed the jury on the lesser-included offense of third-degree sexual assault because the victim consented to the sexual intercourse.[224] It was undisputed that the defendant had sexual intercourse with the victim.[225] The defendant admitted that the victim said "no" to his request for sexual intercourse, but he did not believe she meant it.[226] The Colorado Court of Appeals held that there was no basis for giving a third-degree sexual assault instruction.[227] The court reasoned that non-consensual sexual intercourse, as opposed to other forms of sexual contact without consent, requires submission of the victim.[228] The court concluded that the statement "no" provided a sufficient basis for a jury to find that the victim resisted sexual intercourse and the defendant caused "'submission against the victim's will.'"[229]

3. Statutory Provision Eliminating a Resistance Requirement

In states with explicit statutory provisions eliminating any requirement that the victim resist in order to prove she did not consent to the sexual act or that the defendant used force or forcible compulsion, some courts have retained the resistance factor in one form or another.[230] For example, while Pennsylvania has a resistance-not-required statute, Pennsylvania courts have conflicted in their application of this statute with regard to the elements of consent and forcible compulsion, oftentimes retaining some degree of a resistance requirement on the part of the victim.[231] In

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[223] People v. Schmidt, 885 P.2d 312, 316 (Colo. App. 1994).

[224] *Id.* at 315–16.

[225] *Id.* at 316.

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *See, e.g.*, VA. CODE ANN. § 18.2-67.6 (2009) (providing that proof of the complainant's physical or verbal resistance is not required to convict the defendant of rape, but lack of resistance may be considered as evidence that the complainant consented to the sexual act); Farish v. Commonwealth, 346 S.E.2d 736, 739 (Va. Ct. App. 1986) (holding that, although resistance was no longer required to prove rape, the woman's lack of resistance strengthened the defendant's contention that consensual sex occurred).

[231] 18 PA. CONS. STAT. ANN. § 3107 (2000) ("The alleged victim need not resist the actor in prosecutions under this chapter . . . ."). *Compare* Commonwealth v. Berkowitz, 609 A.2d

Commonwealth v. Berkowitz, for example, the Pennsylvania Supreme Court wholly ignored the resistance-not-required statute in a rape prosecution involving a victim who repeatedly said "no" to the defendant's sexual advances but offered no physical resistance.[232]

In *Berkowitz*, the victim decided to visit her friend while she was waiting for her boyfriend to return to his dormitory. Her friend was not in his dormitory; however, his roommate, the defendant, was. The defendant asked the victim to stay and asked the victim to give him a back rub and sit on his bed. The victim declined and sat on the floor. The defendant moved off the bed and onto the floor where the victim was sitting. He "kind of pushed the [victim] back with his body, straddled her, and started kissing her." The victim protested, but the defendant continued and lifted up her shirt and bra and fondled her breasts. The victim said "no." The defendant tried to insert his penis into the victim's mouth, but the victim continued to protest saying "no," "let me go," and "I gotta meet my boyfriend." The defendant locked the door, put the victim on the bed, and removed her sweatpants and underwear. The victim neither physically resisted nor screamed. After the defendant penetrated her vagina, the victim began saying "no" again. After thirty seconds, the defendant ejaculated on the victim's stomach and immediately got off of her.[233]

The trial court found the defendant guilty of rape and indecent assault.[234] On appeal, the Pennsylvania Superior Court discharged the rape conviction and reversed and remanded the indecent assault conviction.[235] The Commonwealth appealed, and the Pennsylvania Supreme Court granted allocator to address whether the defendant applied the degree of force necessary to satisfy the "forcible compulsion" element of rape.[236] The Pennsylvania Supreme Court affirmed the dismissal of the rape charge and

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1338, 1347–48 (Pa. Super. Ct. 1992) (holding that verbal protests, such as "no," while relevant to consent, are not sufficient to find forcible compulsion; thus, the victim must physically resist in order to satisfy the element of rape that the defendant engaged in sexual intercourse with the victim by forcible compulsion), *aff'd in part, rev'd in part* 641 A.2d 1161 (Pa. 1994), *and* Commonwealth v. Mlinarich, 542 A.2d 1335, 1340 (Pa. 1988) (plurality opinion) (holding that the degree of force the defendant must use to engage the victim in sexual intercourse must be enough to "prevent resistance by a person of reasonable resolution"), *with* Commonwealth v. Rhodes, 510 A.2d 1217, 1226–27 (Pa. 1986) (holding that determining whether the defendant engaged in sexual intercourse with the victim by forcible compulsion did not require the victim to "actually resist," but rather required a case-by-case analysis based on the totality of the circumstances).

[232] Commonwealth v. Berkowitz, 641 A.2d 1161, 1163–64 (Pa. 1994); *see infra* text accompanying notes 234–241.

[233] *Berkowitz*, 609 A.2d at 1339–40.

[234] *Berkowitz*, 641 A.2d at 1162.

[235] *Id.*

[236] *Id.* at 1162.

reinstated the indecent assault charge.[237] The court reasoned that the only force applied to the victim was the weight of the defendant's body on top of her and that this was not enough force to establish forcible compulsion.[238] Moreover, even though the court expressly stated that resistance is not required, the court emphasized that while the victim repeatedly said "no," she neither physically resisted nor attempted to leave the room.[239] The court reasoned that while the victim's verbal protests such as "no" are relevant in determining consent, verbal protests are not relevant to the issue of force; forcible compulsion requires more than nonconsensual sexual intercourse.[240] Thus, in Pennsylvania, where the statute does not require resistance, a victim saying "no" does not establish force sufficient to support a rape conviction.[241] A victim must offer physical resistance.

4. Incapable of Resisting, Unable to Resist, Defendant Prevents Resistance, or Comparable Language

States retain a victim-resistance requirement where the victim must be (1) incapable of resisting, (2) unable to resist, or (3) prevented from resisting. The extent of the resistance required and the degree of force required depend on the severity of the offense charged. For example, the Louisiana Court of Appeal in *State v. Schexnaider* upheld a conviction of forcible rape based on the victim's testimony that she was unable to push the defendant off of her because of his superior size and that she was unable to move during the attack because she cannot move when she is scared.[242] The victim also testified that after being penetrated several times she was finally able to tell the defendant "No!" and he ceased his attack. Her

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[237] *Id.* at 1163.

[238] *Id.* at 1164–65.

[239] *Id.* at 1164.

[240] *Id.* at 1164–65 (supporting its reasoning by citing *Commonwealth v. Mlinarich*, 542 A.2d 1335 (Pa. 1988), and comparing the rape statute with the indecent assault statute). In *Mlinarich*, the Supreme Court of Pennsylvania sustained the reversal of a defendant's conviction of rape where the victim repeatedly stated that she did not want to engage in sexual intercourse, but offered no physical resistance because "something more than a lack of consent is required to prove 'forcible compulsion.'" *Id.* at 1164 n.4. In addition, since the indecent assault statute requires non-consent of the victim, while the rape statute does not, the court reasoned that the legislature did not intend to equate non-consensual intercourse with forcible compulsion. *Id.*; *see generally* Rosemary J. Scalo, Note, *What Does "No" Mean in Pennsylvania?*, 40 VILL. L. REV. 193 (1995) (stating that the Pennsylvania legislature responded to this case by passing title 18, section 3124.1, making non-consensual intercourse a second-degree felony, as well as attempting to clarify the meaning of forcible compulsion in section 3101; however, no subsequent legislative action was taken to clarify whether or not a victim must resist despite the resistance-not-required provision).

[241] *See Berkowitz*, 641 A.2d at 1164–65. *See generally* Scalo, *supra* note 240, at 193.

[242] State v. Schexnaider, 852 So. 2d 450, 454 (La. Ct. App. 2003).

testimony was further corroborated by a medical examination that revealed evidence of forcible penetration. The court refused to disturb the jury's determination of the credibility of testimony regarding the victim's consent and instead focused its analysis on the victim's failure to actively resist the attack.[243] It ruled that the state had met its evidentiary burden and that the defendant's use of force was sufficient to sustain a conviction.[244]

While the court in *Schnexnaider* did not discuss the issue of consent in great depth, it is important to note that this ruling effectively overturned the appellate court's previous decision in *State v. Powell* and adopted the dissent's rationale.[245] In *Powell*,[246] the victim asked the defendant for a ride and he proceeded to drive her to a remote area and demand sexual intercourse. The victim testified that he slapped her several times and told her that he would kill her with a gun he had under his seat if she did not have sex with him. Both the victim and the defendant removed their own pants and he proceeded to penetrate her. The victim had testified that she was scared and that she did not try to resist him. The Louisiana Court of Appeal reversed the defendant's conviction for forcible rape because the victim showed no resistance and was not prevented from resisting by force or threat of force.[247] The court found that the victim did not consent to having sexual intercourse with the defendant, but the victim must have also been prevented from resisting the act by force or threats of physical violence to the point that the victim reasonably believed that resistance would not prevent the rape.[248] The defendant in this case drove the victim to a secluded area, slapped her several times, and threatened to kill her prior to having sexual intercourse with her, but the victim was scared and did not try to resist. The dissent disagreed with the majority's reasoning for the crime of forcible rape but not for the crime of aggravated rape.[249] The dissent argued that for forcible compulsion, the victim is not required to "actively resist"; rather, the victim must have a "reasonable belief" that resistance would not prevent the sexual act.[250] The majority's resistance standard was "more appropriate to that prescribed for aggravated rape."[251] Thus, in Louisiana, even though resistance is not explicitly required, the phrase "prevented from resisting" imposes a reasonable standard of

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[243] *Id.* at 457.
[244] *Id.* at 459.
[245] *Id.* at 458–59.
[246] State v. Powell, 438 So. 2d 1306 (La. Ct. App. 1983).
[247] *Id.* at 1307–08.
[248] *Id.*
[249] *Id.* at 1310–11 (Stoker, J., dissenting).
[250] *Id.*
[251] *Id.* at 1310.

resistance for forcible rape and actual resistance for aggravated rape.

D. FAILING TO SAY NO SHOULD NOT MEAN YES

An examination of the nation's laws on the issue of resistance reveals the need for progress in this area. Eight states still have legislation explicitly requiring victim resistance to rape, and six others have comparable language. An additional sixteen states continue to define the elements of force, consent, or specific sex offenses in terms of a victim's resistance. Nearly half of all state statutes are silent as to whether or not resistance is required, allowing courts to assume that the common law rule demanding victim resistance still applies. Today's sex offense laws largely require the victim to vigorously assert non-consent or resist, rather than require the defendant to obtain consent before committing a sexual act.

Court decisions can make matters worse. The Nebraska appellate court's proclamation in *Gangahar*—that maybe the victim's "no did not really mean no"—evoked the common law view that a verbal objection to a sexual assault was not sufficient to establish rape.[252] Additionally, when the Pennsylvania Supreme Court acknowledged in *Berkowitz* that a victim's statement that "she stated 'no' through the [entire] encounter" would *never* alone establish rape, it illustrated the willingness of the nation's judiciaries to accept legal vestiges of yesteryear instead of abandoning the archaic concept of resistance in rape cases.[253]

When a victim says "no" to a sexual overture, it clearly indicates that individual's lack of consent. Consequently, lawmakers who recognize this point should immediately move to amend their states' rape laws to protect their citizens from unwanted sex. Better yet, if an individual decides not to affirmatively agree to another's sexual advance, the criminal law should punish the aggressor.

IV. COERCION

While many states criminalize sexual acts accomplished without the consent of the victim, eighteen states also protect victims who have consented to the sexual act only as a result of coercion.[254] For this Article,

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[252] State v. Gangahar, 609 N.W.2d 690, 695 (Neb. Ct. App. 2000).

[253] Commonwealth v. Berkowitz, 641 A. 2d 1161, 1164–65 (Pa. 1994).

[254] ALASKA STAT. § 11.41.470(8)(A) (2010); ARIZ. REV. STAT. ANN. § 13-1401(5)(a) (2010); DEL. CODE ANN. tit. 11, §§ 761(j)(1), 791 (2007 & Supp. 2010); FLA. STAT. ANN. §§ 794.011(1)(a), (f), (4)(c) (West 2007); HAW. REV. STAT. ANN. § 707-700 (LexisNexis 2007); IDAHO CODE ANN. § 18-6101(9) (2004 & Supp. 2011); MICH. COMP. LAWS ANN. § 750.520d(1)(b), .520b(1)(f) (West 2004 & Supp. 2011); MONT. CODE ANN. § 45-5-501(1)(a)(ii)(C) (2010); NEB. REV. STAT. § 28-318(8)(a)(i), (9) (2008 & Supp. 2010); N.H. REV. STAT. ANN. §§ 632-A:1(II), :2(I)(d-e) (LexisNexis 2007 & Supp. 2010); N.J. STAT.

the term coercion is defined as a "non-physical threat." Non-physical threats are verbal threats—not including those threatening physical harm to the victim or a third party—made to pressure the victim to submit to the sexual act. Threatening to expose a secret or threatening to damage property are examples of non-physical threats that state statutes criminalize.[255]

A. NON-PHYSICAL THREATS

Eighteen states address non-physical threats in their sexual assault statutes, but to varying degrees. This Article will divide the varying degrees of non-physical threats into three categories. First, six states explicitly criminalize sexual acts where the perpetrator's threats to the victim's property caused the victim to submit to the sexual act.[256] Second, fourteen states criminalize the use of extortion, intimidation, public humiliation, or coercion that is undefined but may be read to include any of the previously mentioned acts. Of these fourteen states, seven criminalize the use of "extortion" in order to induce consent.[257] Three states criminalize "coercion" as a means to induce consent, but fail to define the term.[258] And three states criminalize "intimidation" or threats of "public humiliation" as a means of coercing the victim to consent.[259] Finally, only three states contain a comprehensive list of non-physical threats, including, for example, threats to "expose a secret" or accuse the victim of a crime.[260]

1. Threat of Use of Force Against Property

In six states, it is illegal to make threats to a person's property to

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ANN. §§ 2C:13-5, :14-1(j) (West 2005); N.M. STAT. ANN. § 30-9-10(A) (2004 & Supp. 2011); N.D. CENT. CODE §§ 12.1-20-02(1), -04(1) (1997 & Supp. 2011); S.C. CODE ANN. § 16-3-651(b) (2003); TENN. CODE ANN. § 39-13-501(1) (2010); UTAH CODE ANN. § 76-5-406(4) (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 3252(a) (2009); VA. CODE ANN. § 18.2-61(A)(i) (2009).

[255] *See, e.g.*, DEL. CODE ANN. tit. 11, §§ 761(j)(1), 791.

[256] ALASKA STAT. § 11.41.470(8)(A) (2010); ARIZ. REV. STAT. ANN. § 13-1401(5)(a) (2010); DEL. CODE ANN. tit. 11, §§ 761(j)(1), 791; HAW. REV. STAT. ANN. § 707-700; IDAHO CODE ANN. § 18-6101(9); N.J. STAT. ANN. §§ 2C:13-5, 2C:14-1(j).

[257] FLA. STAT. ANN. § 794.011(1)(f); MICH. COMP. LAWS ANN. § 750.520d(1)(b), .520b(1)(f); N.H. REV. STAT. ANN. §§ 632-A:1(II), :2(I)(d)–(e); N.M. STAT. ANN. § 30-9-10(A); S.C. CODE ANN. § 16-3-651(b); TENN. CODE ANN. § 39-13-501(1); UTAH CODE ANN. § 76-5-406(4).

[258] NEB. REV. STAT. § 28-318(8)(a)(i), (9); VT. STAT. ANN. tit. 13, § 3252(a); VA. CODE ANN. § 18.2-61(A)(i).

[259] HAW. REV. STAT. ANN. § 707-700; N.D. CENT. CODE §§ 12.1-20-02(1), -04(1); VA. CODE ANN. § 18.2-61(A)(i).

[260] DEL. CODE ANN. tit. 11, §§ 761(j)(1), 791; IDAHO CODE ANN. § 18-6101(9); N.J. STAT. ANN. §§ 2C:13-5, :14-1(j).

obtain the victim's consent to a sexual act.[261] For example, Alaska criminalizes sexual contact where the perpetrator acts "without consent" of the victim.[262] The statute defines "without consent" as any situation in which the victim "is coerced by the threat of use of force against a person or property."[263] Although six states criminalize threats of force against property as a way to pressure the victim to consent, most of these states fail to define "coercion by threat or use of force against property."[264] Therefore, it is unclear from the statutory language what a "threat of force against property" entails.

2. Extortion, Intimidation, Public Humiliation, or Undefined "Coercion"

Some states utilize vague or broad statutory language in order to criminalize coercion. These states use terms such as "extortion," "intimidation," or "coercion" without defining them. In seven states, it is a crime to use "extortion" to procure the victim's consent.[265] In none of these seven states, however, do the statutes further define what constitutes "extortion." For example, Florida criminalizes sexual acts accomplished by threats of "retaliation," which include "threats of future physical punishment, kidnapping, false imprisonment or forcible confinement, or extortion," but the word "extortion" is not defined in the rape statute.[266] Three states criminalize threats of public humiliation or intimidation.[267] For example, North Dakota defines coercion as exploiting "fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance."[268] Once again, however, the statute fails to offer guidance on the definitions of intimidation and similar terms. Finally,

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[261] ALASKA STAT. § 11.41.470(8)(A) (2010); ARIZ. REV. STAT. ANN. § 13-1401(5)(a) (2010); DEL. CODE ANN. tit. 11, §§ 761(j)(1), 791; HAW. REV. STAT. ANN. § 707-700; IDAHO CODE ANN. § 18-6101(9) (2004 & Supp. 2011); N.J. STAT. ANN. §§ 2C:13-5, :14-1(j) (West 2005).

[262] *See, e.g.*, ALASKA STAT. § 11.41.410.

[263] ALASKA STAT. § 11.41.470(8)(A).

[264] ARIZ. REV. STAT. ANN. § 13-1401(5)(a); DEL. CODE ANN. tit. 11, § 791; HAW. REV. STAT. ANN. § 707-700; IDAHO CODE ANN. § 18-6101(9); MONT. CODE ANN. § 45-5-501(1)(a)(ii)(C) (2010).

[265] FLA. STAT. ANN. § 794.011(1)(f) (West 2007); MICH. COMP. LAWS ANN. §§ 750.520d(1)(b), .520b(1)(f) (West 2004 & Supp. 2011); N.H. REV. STAT. ANN. §§ 632-A:1(II), :2(I)(d)–(e) (LexisNexis 2007 & Supp. 2010); N.M. STAT. ANN. § 30-9-10(A) (2004 & Supp. 2011); S.C. CODE ANN. § 16-3-651(b) (2003); TENN. CODE ANN. § 39-13-501(1) (2010); UTAH CODE ANN. § 76-5-406(4) (LexisNexis 2008).

[266] FLA. STAT. ANN. § 794.011(1)(f).

[267] HAW. REV. STAT. ANN. §§ 707-700, -731 to -732 (LexisNexis 2007 & Supp. 2010); N.D. CENT. CODE §§ 12.1-20-02(1), -04(1) (1997 & Supp. 2010); VA. CODE ANN. § 18.2-61(A)(i) (2009).

[268] N.D. CENT. CODE § 12.1-20-02(1).

three states criminalize "coercion" while failing to define the term with any specificity at all.[269]

3. Comprehensive Statutes

Outside the fifteen states that criminalize threats of force to property, threats of extortion, intimidation, public humiliation, or undefined coercion, three states include more comprehensive lists of specific acts constituting acts of coercion.[270] Delaware, for example, has one of the most comprehensive statutes criminalizing coercion. It defines coercion as one of seven acts used to "compel" or "induce" the victim to engage in a sexual act.[271] In particular these include: (1) a threat to accuse the victim or anyone else of a crime, (2) a threat to expose a secret, (3) a threat to testify falsely against any person or refuse to testify against any person, and (4) a variety of other acts meant to cause harm to the victim or another person.[272] Similarly, New Jersey's coercion statute provides a list of seven similar acts that constitute coercion.[273]

B. CASE LAW

There is a distinct lack of case law involving coercion—significantly less than the amount involving force. Many states that include "coercion" language in their sex crime statutes do not have any case law on topic.[274] Other states do have case law on this topic, but conflate coercion with

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[269] MONT. CODE ANN. § 45-5-501(1)(a)(ii)(C) (2010); NEB. REV. STAT. § 28-318(8)(a)(i), (9) (2008 & Supp. 2010); VT. STAT. ANN. tit. 13, § 3252(a) (2009).

[270] DEL. CODE ANN. tit. 11, §§ 761(j)(1), 791 (2007 & Supp. 2010); IDAHO CODE ANN. § 18-6101(9) (2004 & Supp. 2011); N.J. STAT. ANN. §§ 2C:13-5, :14-1(j) (West 2005).

[271] DEL. CODE ANN. tit. 11, § 774.

[272] *Id.* The Delaware statute provides that sexual extortion occurs when:

> [t]he person intentionally compels or induces another person to engage in any sexual act involving contact, penetration or intercourse with the person or another or others by means of instilling in the victim a fear that, if such sexual act is not performed, the defendant or another will: (1) Cause physical injury to anyone; (2) Cause damage to property; (3) Engage in other conduct constituting a crime; (4) Accuse anyone of a crime or cause criminal charges to be instituted against anyone; (5) Expose a secret or publicize an asserted fact, whether true or false, intending to subject anyone to hatred, contempt or ridicule; (6) Falsely testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (7) Perform any other act which is calculated to harm another person materially with respect to the other person's health, safety, business, calling, career, financial condition, reputation or personal relationships.

Id.

[273] *See* N.J. STAT. ANN. § 2C:13-5.

[274] Alabama, Arizona, Connecticut, Delaware, Idaho, Illinois, Kansas, Louisiana, Montana, Ohio, and Vermont fall into this category.

deception or abuse of authority.[275] Still other states only have coercion case law dealing with minors, force, or threats of force against either the victim or a third person.[276]

Although many state statutes separate sex crimes involving coercion from those where the defendant uses forcible compulsion, courts often conflate coercion with forcible compulsion in practice. For example, in New York, the elements of "forcible compulsion" for sex crimes[277] correspond to the definition of coercion.[278] However, there are other elements of "coercion" that would not be sufficient to find "forcible compulsion" for sex offenses, such as exposing the victim's prior misconduct and threatening to cause another person harm by abusing one's public office.[279] Thus, in New York, where there is sufficient evidence of coercion by physical threat, there is necessarily sufficient evidence of "forcible compulsion."

For example, in *People v. Seifert*,[280] the trial court dismissed the charge of first-degree coercion as "repugnant."[281] The victim alleged that the defendant, a police officer, accepted sex from the victim, a passenger in a motor vehicle, with the understanding that the officer would not give the driver a ticket.[282] The court found that the evidence was sufficient to sustain the indictment by citing previous cases in which sufficient evidence of force was found where the victims complied out of fear.[283] However, because the grand jury found that the evidence was insufficient to support the element of forcible compulsion for the sex crimes charged, the court

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[275] *See, e.g.*, People v. Crippen, 617 N.W.2d 760 (Mich. Ct. App. 2000); People v. Regts, 555 N.W.2d 896 (Mich. Ct. App. 1996); State v. Day, 501 N.W.2d 649 (Minn. Ct. App. 1993).

[276] Kentucky, Maine, New Jersey, New Mexico, and North Dakota are in this category.

[277] N.Y. PENAL LAW § 130.00(8) (McKinney 2009 & Supp. 2011).

[278] §§ 135.60, .65(1) (McKinney2009) ("A person is guilty of coercion . . . when he or she compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in . . . by means of instilling in him or her a fear that, if the demand is not complied with, the actor or another will . . . cause physical injury to a person . . . .").

[279] William C. Donnino, Practice Commentary, NY PENAL LAW, § 135.60 (McKinney 2009).

[280] People v. Seifert, 727 N.Y.S.2d 607 (Cnty. Ct. 2001).

[281] *Id.* at 611–12.

[282] *Id.* at 608.

[283] *Id.* at 608–09 (citing People v. Bennett, 79 N.Y.2d 464 (1992) (finding sufficient evidence of forcible compulsion where the victim acquiesced to the police officer's demands for sex after being pulled over for driving while intoxicated because she was "terrified" and felt that any attempt at escape would be futile); People v. Smolen, 564 N.Y.S.2d 105, 106 (App. Div. 1990) (finding sufficient evidence of forcible compulsion where the victim testified that she was "frozen in fear" and complied with the defendant's requests because she did not want to die)).

was forced to dismiss the coercion charge. This was the only possible outcome because the definition of "forcible compulsion" and the definition of "coercion" were the same.[284]

Furthermore, some states' statutes criminalize sex resulting from "intimidation." At first glance, intimidation looks as though it may include coercion; however, there is a scarcity of case law in these states as to what constitutes intimidation. An exception is Virginia, where the judiciary has distinguished "intimidation" from threats of force.[285]

> It is apparent that the legislative intent, in amending the statute to include a prohibition against sexual intercourse with a woman against her will by threat or intimidation, was to expand the parameters of rape. There is a difference between threat and intimidation. As used in the statute, threat means expression of an intention to do bodily harm. Intimidation may occur without threats. Intimidation, as used in the statute, means putting a victim in fear of bodily harm by exercising such domination and control of her as to overcome her mind and overbear her will. Intimidation may be caused by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure.[286]

Thus, the Supreme Court of Virginia upheld the defendant's rape conviction in *Sutton v. Commonwealth*, where a defendant did not display a weapon or verbally threaten his physically handicapped fifteen-year-old niece, but did threaten to return her to her physically abusive father if she did not agree to have sexual intercourse.[287] In that same case, the defendant's wife was also convicted as a principal in the second degree for the rape actually perpetrated by her husband; the wife exerted "relentless pressure" by stating that the victim would be returned to her abusive father if she did not agree to the defendant's advances. In addition, the defendant's wife purchased birth-control pills for the victim and suggested she had a bad attitude because she thought she was "too good to go to bed with [her] uncle." These actions established that the wife had "embarked on a common purpose of inducing [the victim] by intimidation to submit to [her husband's] advances."[288]

On the other hand, in *Sabol v. Commonwealth*, the Virginia Court of Appeals concluded a defendant had not used intimidation prior to having sex with his alleged victim, who was thirty-one years old at the time of trial.[289] In that case, where the victim described the defendant as like a

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[284] *Seifert*, 727 N.Y.S.2d at 611–12.

[285] *See* Sutton v. Commonwealth, 324 S.E.2d 665, 669–70 (Va. 1985).

[286] *Id.*

[287] *Id.* at 670–71.

[288] *Id.* at 671–72.

[289] Sabol v. Commonwealth, 553 S.E.2d 533 (Va. Ct. App. 2001). However, the defendant was properly convicted of a different count of rape on a different date where he

father to her, the defendant's earlier threat to have the victim prosecuted for the theft of $700 from her mother's bank account, as well as his contributing to the victim's fear of losing her work-free lifestyle if she did not submit to defendant's sexual advances, did not amount to intimidation for purposes of rape.[290]

A few states have prosecuted defendants accused of coercing victims to engage in sexual contact or penetration without a showing of force or threats of force. New Hampshire, for example, recognizes an offense of sexual assault induced by threats of economic retaliation. In *Lovely v. Cunningham*, the defendant threatened the victim with the loss of the victim's job, kicking the victim out of his home (where the victim was renting), and vaguely "keeping [him] out of trouble with the police," unless the victim performed sexual acts with the defendant.[291] The appellate court affirmed the New Hampshire jury conviction for felonious sexual assault, regardless of the lack of physical threats.[292]

C. COERCION OF ANY STRIPE MUST BE CONDEMNED

Although most states have some provision that criminalizes sexual relations based on non-physical coercion in their statutes, many provisions lack teeth. For example, some states use the term coercion or extortion but fail to define the term or provide the authorities with an ascertainable standard of guilt.[293] Without a clear definition of the parameters of a law, courts and prosecutors cannot adequately enforce it. Additionally, some states criminalize the use of coercion to obtain consent, but make the crime a low-level misdemeanor rather than a felony or more serious charge.[294] This suggests that the legislatures in those states are not taking a crime involving coercion seriously.

The lack of convictions also indicates that states are failing to protect their citizens. The case law is very scarce in this area, showing that defendants accused of these crimes are either: (1) never prosecuted, (2) acquitted, or (3) if convicted, almost uniformly *not* pursuing an appeal—an unlikely proposition. Outlawing non-physical coercion in a statute is meaningless unless offenders are prosecuted and convicted. Therefore, although most states have language in their statutes prohibiting the use of

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had pushed the victim down a hallway toward a bedroom where he had sex with her. *Id.* at 537.

[290] *Id.* at 537–38.

[291] Lovely v. Cunningham, 796 F.2d 1, 2 (1st Cir. 1986).

[292] *Id.*

[293] *See supra* notes 256–260 and accompanying text.

[294] *See, e.g.*, HAW. REV. STAT. § 707-733 (misdemeanor sexual assault in the fourth degree occurs where the accused used "compulsion" to accomplish a sexual contact).

coercion in the context of sexual relations, many of those provisions are essentially meaningless.

V. POSITIONS OF AUTHORITY

A majority of states have statutes that criminalize sexual conduct between a defendant in a position of authority and a subordinate victim.[295] "Position of authority" refers to any relationship in which the defendant has an opportunity to assert his dominant status over the victim. Common examples of relationships involving positions of authority include those between prison employees and inmates, doctors and patients, clergymen and members of the parish, nursing home employees and patients, and teachers and students.

This Part divides the statutory provisions into two categories. The first Section discusses "specific statutes" that criminalize sexual conduct between defendants and victims based solely on named classes of relationships. The second Section examines "broad statutes" that criminalize any situation in which a defendant perpetrates sexual conduct by asserting the power of his dominant position over the victim. Most of the broad statutes include a provision prohibiting a person from asserting one's authority to commit a sexual act and also name specific position-of-authority relationships. For purposes of this discussion, a statute is

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[295] ALASKA STAT. §§ 11.41.410, .240, .425, .427 (2010); ARIZ. REV. STAT. ANN. § 13-1419 (2010 & Supp. 2011); ARK. CODE ANN. § 5-14-126 (2006 & Supp. 2011); CAL. PENAL CODE § 261 (West 2008); COLO. REV. STAT. § 18-3-405.5 (2011); CONN. GEN. STAT. ANN. § 53a-70 (West 2007); FLA. STAT. ANN. § 794.011 (West 2007); GA. CODE ANN. § 16-6-5.1 (West 2009 & Supp. 2010); HAW. REV. STAT. ANN. § 707-731 (LexisNexis 2007 & Supp. 2010); IDAHO CODE ANN. §§ 18-919, -6110 (2004 & Supp. 2011); IOWA CODE ANN. §§ 709.15–.16 (West 2003 & Supp. 2011); KAN. STAT. ANN. §§ 21-5503, -5512 (West, Westlaw through 2010 Legis. Sess.); KY. REV. STAT. ANN. §§ 510.060, .090, .130 (LexisNexis 2008 & Supp. 2011); ME. REV. STAT. ANN. tit. 17, § 255-A (2006 & Supp. 2010); MD. CODE ANN., CRIM. LAW. §§ 3-308, -316 (LexisNexis 2002 & Supp. 2010); MICH. COMP. LAWS ANN. § 750.520b (West 2004 & Supp. 2011); MINN. STAT. ANN. §§ 609.344–345 (West 2009 & Supp. 2011); MISS. CODE ANN. § 97-3-65 (2006 & Supp. 2011); MO. REV. STAT. § 566.086 (West Supp. 2011); MONT. CODE ANN. § 45-5-501 (2010); NEB. REV. STAT. § 28-322.04 (2008); N.H. REV. STAT. ANN. § 632-A:2 to :4 (LexisNexis 2007 & Supp. 2010); N.J. STAT. ANN. § 2C:14-2 (West 2005); N.M. STAT. ANN. § 30-9-11(E) (2004 & Supp. 2011); N.Y. PENAL LAW § 130.05(3)(e)–(g) (McKinney 2009 & Supp. 2011); N.C. GEN. STAT. § 14.27.7 (2009); N.D. CENT. CODE § 12.1-20-06 (1997); OHIO REV. CODE ANN. § 2907.03(5)–(7), (10)–(11) (West 2006 & Supp. 2011); OKLA. STAT. ANN. § 1111(A)(7) (West 2002 & Supp. 2011); OR. REV. STAT. § 163.452 (2009); PA. CONS. STAT. ANN. § 3124.2 (West 2000 & Supp. 2011); S.C. CODE ANN. § 16-3-655 (2003 & Supp. 2010); S.D. CODIFIED LAWS § 22-22-7.6, -27 (2006); TENN. CODE ANN. § 39-13-501(1) (2010); TEX. PENAL CODE ANN. § 22.011 (West 2011); UTAH CODE ANN. § 76-5-412 (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 3257 (2009); VA. CODE ANN. § 18.2-67.4 (2009); WASH. REV. CODE ANN. § 9A.44.050 (West 2009); WIS. STAT. ANN. § 940.225(2) (West 2005 & Supp. 2010).

classified as a broad statute if it contains any provision prohibiting a general assertion of authority to obtain a sexual act. Some of the broad and specific statutes contain requirements beyond merely a position of authority, making them "hybrid statutes." Hybrid statutes essentially provide for circumstances in addition to the particular authoritative relationship of the defendant to the victim.[296]

A. POSITION-OF-AUTHORITY STATUTORY PROVISIONS

To date, forty-two states have statutes criminalizing sexual activity when the defendant is in a position of authority over the victim. Only eight states have no position-of-authority statutes at all.[297]

1. Specific Statutes

Of the forty-two states that have position-of-authority statutes, thirty-eight focus on specific lists of authority figures and prohibit them from having sexual relations with any person under their supervision. Under these statutes, only sexual conduct between specified parties is illegal. The most common relationship mentioned is that of an inmate in a correctional facility and an employee at that facility.[298] This includes prison guards and prisoners, juvenile offenders and correctional officers, and inmates at psychiatric detention centers and center employees. Some states also expand their statutes to include parole or probation officers and the offenders they oversee.[299]

Many states also prohibit medical professionals from engaging in sexual conduct with their patients.[300] Statutes covering medical professionals apply to conduct of a sexual nature or conduct involved in medical testing that is done with the intent to create arousal.

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[296] *See infra* notes 317–318 and accompanying text.

[297] *See* DEL. CODE ANN. tit. 11, § 761–780 (2007 & Supp. 2010); IND. CODE ANN. § 35-42-4-1 (West 2004); LA. REV. STAT. ANN. §§ 14:41–:43.3 (2007 & Supp. 2011); MASS. ANN. LAWS ch. 265, § 22 (LexisNexis 2010); NEV. REV. STAT. ANN. § 200.366 (LexisNexis 2006 & Supp. 2009); R.I. GEN. LAWS § 11-37-2 (2002); TENN. CODE ANN. 39-13-501(1) (2010) (allowing a position-of-authority exception only for minors); W. VA. CODE ANN. § 61-8B-3 to -7 (LexisNexis 2010).

[298] Of the states that have specific position-of-authority statutes, only Missouri, North Carolina, and South Carolina fail to include inmates as a protected class. *See* MO. ANN. STAT. § 566.086 (West 1999 & Supp. 2011); N.C. GEN. STAT. § 14.27.7; S.C. CODE ANN. § 16-3-655.

[299] *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520c(i)–(k).

[300] *See, e.g.*, DEL. CODE ANN. tit. 11, § 601 (2007); GA. CODE ANN. § 16-6-5.1; IDAHO CODE ANN. § 18-919 (2004); KAN. STAT. ANN. § 21-5503; N.H. REV. STAT. ANN. §§ 632-A:2 to :4; N.Y. PENAL LAW § 130.05(e)–(g).

"Psychotherapists"[301] or "medical care providers"[302] and patients are also often specifically mentioned in statutes. Another common category covers conduct between school personnel and students. These provisions can fill the gap when a student is over the age of majority but still in school.[303] For example, in Oklahoma, a sixteen-year-old can legally consent to sex.[304] The Oklahoma position-of-authority statute, however, criminalizes sexual conduct between a student ages sixteen to eighteen and a school employee.[305] Some statutes provide for a grace period; for example, New Mexico prohibits sexual conduct between psychotherapists and patients during treatment or for a year after treatment concluded.[306]

Other relationships commonly covered by statute include members of the clergy and the people they advise,[307] employees of the Department of Health and people under its supervision,[308] and police officers and detainees.[309] Some states have unique or uncommon categories in their statutes. For instance, Minnesota criminalizes sexual conduct between special transportation service employees and their passengers and between massage therapists and their clients.[310]

2. Broad Statutes

Broad statutes are those that prohibit sexual conduct involving a defendant with authority over a victim, but do not specify a type of relationship. Most broad statutes also have specific components: they criminalize sexual conduct when a position-of-authority relationship exists but also prevent any exploitation of a position of authority by the defendant.[311] Four states have broad statutes regarding positions of

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[301] *See, e.g.*, GA. CODE ANN. § 16-6-5.1; N.M. STAT. ANN. §§ 30-9-10(A)(5), -11(F) (2004 & Supp. 2011); S.D. CODIFIED LAWS §§ 22-22-27 to 29 (2006).

[302] ARIZ. REV. STAT. ANN. § 13-1418 (2010); IDAHO CODE ANN. § 18-919.

[303] *See Teacher Acquitted in Sex Case*, CNN.COM (Dec. 11, 2009), http://www.cnn.com/video/#/video/crime/2009/12/10/pn.teacher.student.legal.sex.cnn.

[304] OKLA. STAT. ANN. tit. 21, § 1111(A)(1) (2002 & Supp. 2011).

[305] § 1111(A)(8).

[306] N.M. STAT. ANN. § 30-9-10(A)(5) (2004 & Supp. 2011).

[307] *See, e.g.*, ARK. CODE ANN. § 5-14-126 (2006 & Supp. 2011).

[308] NEB. REV. STAT. §§ 28-322.04 (2008). People under departmental supervision may include youth in foster care or adults who have been civilly committed.

[309] OKLA. STAT. ANN. tit. 21, § 1111(A)(7); OR. REV. STAT. § 163.452 (2009).

[310] MINN. STAT. ANN. §§ 609.344–345 (West 2009 & Supp. 2011); *see also* WASH. REV. CODE ANN. § 9A.44.050 (West 2009) (transporation service employees).

[311] *See, e.g.*, ARK. CODE ANN. § 5-14-126 (2006 & Supp. 2011); CAL. PENAL CODE § 261(a)(7) (West 2008); OHIO REV. CODE ANN. § 2907.03(5)–(7), (10)–(11) (West 2006 & Supp. 2011).

authority.[312] For example, Arkansas's statute prohibits sexual conduct when the defendant is a "mandated reporter" who is in one of a wide variety of positions of authority over the victim and the defendant uses that position to engage in the conduct.[313]

Of the four states that have broad statutes, all specify certain positions of authority.[314] These statutes also provide general provisions criminalizing any exploitation of authority over a victim. For example, Michigan's statute criminalizes sexual conduct between a teacher and a student and makes it illegal for a defendant to use a position of authority to compel a victim to submit.[315] As discussed below, states with broad statutes typically have more case law interpreting the statutes than states that have strictly specific statutes.[316]

3. Hybrid Statutes

Hybrid statutes prohibit sexual conduct between a defendant in a position of authority and a victim who is subject to that authority, but add other requirements.[317] For example, some statutes require that the defendant holds a position of authority and the victim lacks full capacity. Examples include Michigan, which criminalizes sexual conduct between a defendant in a position of authority and a victim subject to that authority when the victim is between the ages of thirteen and sixteen or has a mental defect.[318]

4. Defenses

Consent is not a complicated issue under position-of-authority statutes. While some do not explicitly provide that the defendant will never have a defense if the victim consented,[319] most clearly provide that a victim's consent is never valid when the victim and defendant are in a position-of-

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[312] KY. REV. STAT. ANN. §§ 510.060, .090 (LexisNexis 2008 & Supp. 2011); MICH. COMP. LAWS ANN. § 750.520b (West 2004 & Supp. 2011); N.J. STAT. ANN. § 2C:14-2 (West 2005); WASH. REV. CODE ANN. § 9A.44.050 (West 2009).

[313] ARK. CODE ANN. §§ 5-14-126, 12-18-402. A "mandated reporter" includes a wide variety of supervisory positions including a domestic abuse advocate, resident intern, social worker, and teacher. § 12-18-402.

[314] MICH. COMP. LAWS ANN. § 750.520b; N.J. STAT. ANN. § 2C:14-2; TEX. PENAL CODE ANN. § 22.011 (West 2011); WASH. REV. CODE ANN. § 9A.44.050.

[315] MICH. COMP. LAWS ANN. § 750.520b.

[316] *See* discussion *infra* notes 322–339 and accompanying text.

[317] § 750.520b.

[318] *Id.*

[319] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1419 (2010 & Supp. 2011); N.Y. PENAL LAW § 130.05(e)–(g) (McKinney 2009 & Supp. 2011).

authority relationship.[320] However, in four states the position-of-authority statutes include marital exemptions.[321]

B. CASE LAW

It appears that case law interpreting position-of-authority statutes is fairly scarce. The most significant cases concern the broad statutes, and the most important issue by far is consent. This Section discusses cases that interpret the statutes.

1. Psychotherapist–Patient Cases

Courts have held that statutes criminalizing sexual conduct when a defendant is in a position of authority do not violate the Constitution, even when they exclude consent as a defense.[322] In *Ferguson v. People*, the Supreme Court of Colorado held that psychotherapists and patients did not have a fundamental right to engage in sexual intercourse.[323] The court refused to hold that the position-of-authority statute criminalizing that conduct was overbroad.[324] The court upheld the statute and noted the importance of protecting "vulnerable" psychotherapy patients.[325] The court further stated that "psychotherapist–client sex is the very antithesis of effective and responsible psychotherapy."[326]

The Missouri Court of Appeals echoed this disapproval of sexual conduct between psychotherapists and patients by virtue of their relationship. In *State v. Spencer*, the Missouri court held that the position of authority the defendant therapist held over his victims was significant, even though the state had no position-of-authority statute.[327] Missouri requires the state to prove "reasonable resistance" on the part of the victim to establish the defendant used "forcible compulsion";[328] however, the court reasoned, the fact that the victims were patients of the defendant affected

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[320] *See, e.g.*, OR. REV. STAT. § 163.452 (2009); UTAH CODE ANN. § 76-5-412 (LexisNexis 2008); WIS. STAT. ANN. § 940.225(2) (West 2005 & Supp. 2010).

[321] IDAHO CODE ANN. §§ 18-919, -6110 (2004); KAN. STAT. ANN. § 21-5512 (West, Westlaw through 2010 Legis. Sess.); ME. REV. STAT. ANN. tit. 17, § 255-A (2006 & Supp. 2010); MINN. STAT. ANN. § 609.344–345 (West 2009 & Supp. 2011).

[322] Ferguson v. People, 824 P.2d 803 (Colo. 1992).

[323] *Id.* at 809–10.

[324] *Id.*

[325] *Id.* at 811.

[326] *Id.* at 810 ("[T]here are absolutely no circumstances which permit a psychiatrist to engage in sex with his patient." (quoting Alan A. Stone, *The Legal Implications of Sexual Activity Between Psychiatrist and Patient*, 133 AM. J. PSYCHIATRY 1138, 1139 (1976))).

[327] State v. Spencer, 50 S.W.3d 869, 874 (Mo. Ct. App. 2001).

[328] MO. REV. STAT. § 556.061 (West 2009 & Supp. 2011).

their capacity to resist.[329] The court said that the defendant's "position of domination and control" over the victims amounted to "forcible compulsion."[330]

2. Prison Employee–Prisoner Cases

The most common type of position-of-authority statute criminalizes sexual conduct between persons in a correctional or detention facility and an employee at the facility. Courts have often interpreted these statutes as precluding all sexual contact between the inmates and employees, regardless of consent. In *State v. Cardus*,[331] a female prisoner consented to perform oral sex on a male guard.[332] The court held that her consent was not valid both because the guard used his position to pressure her and because consent can never be effective in that situation.[333]

3. Teacher–Student Cases

In *Chase v. State*,[334] the Georgia Supreme Court ruled that a teacher who engaged in sexual conduct with her student could not be found guilty of sexual assault when the student was (1) over the age of majority, (2) no longer taking a class from the teacher, and (3) not subject to the teacher's control or authority.[335] The court held that the statute did not prohibit consensual sexual conduct between teachers and adult students.[336] Therefore, consent is a defense to sexual assault for teacher–student relationships under certain circumstances in Georgia.

C. PROTECTING SEXUAL DIGNITY FROM ABUSES OF POWER

Though some states have comprehensive statues governing a wide variety of persons in supervisory positions, a substantial number of states cover only a few categories of individuals in positions of authority. One notable category omitted from every statutory position-of-authority offense is employers. Few people have a greater capacity to compel compliance with sexual overtures than bosses. While civil suits and employment regulations may potentially provide a legal remedy for the victim, this does not excuse the lawmaker's failure to criminalize that conduct.

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[329] *Spencer*, 50 S.W.3d at 874.
[330] *Id.*
[331] State v. Cardus, 949 P.2d 1047 (Haw. Ct. App. 1997).
[332] *Id.* at 1050.
[333] *Id.* at 1055.
[334] Chase v. State, 681 S.E.2d 116 (Ga. 2009).
[335] *Id.*
[336] *Id.*

Further, the defense of consent should not be available to a perpetrator who takes sexual gratification from one in a subservient position, as is the case in some states. Position-of-authority sex crimes should provide the same consent defense framework as statutory rape provisions, namely, a strict liability approach making it clear that each American state mandates zero tolerance of such conduct.

VI. DECEPTION

This Part considers a defendant's use of deception to procure consent or accomplish a sexual act. It analyzes state court decisions that have interpreted current deception provisions, typically limited in their application. It argues that most states do not specifically proscribe a defendant's use of deception to procure consent or accomplish a sexual act outside of instances of positions of authority or coercion. This Part further argues that deception used to achieve sexual gratification undermines a victim's consent, violates public policy, and should be considered a basis for a criminal sanction with a graduated penalty structure reflecting its lesser culpability level.

Section A reviews all fifty states' current sex offense statutes for deception.[337] It focuses on instances in which a defendant's deception as to the nature of the act, a defendant's identity, or any other deceptive circumstance that is sufficient to prove that (1) a victim did not consent to the sexual act, (2) a defendant used force, or (3) the deception amounts to conduct constituting a specific offense. This Section divides state statutes into four categories. The first category includes statutes that deem a victim's consent to a sexual act ineffective due to a defendant's use of deception when considering the states' statutory definitions of "consent" or "without consent."[338] The second category reviews statutes that proscribe a defendant's use of deception as conduct constituting a specific offense.[339] The third category describes a statute proscribing a defendant's use of deception as a circumstance constituting force.[340] The fourth category discusses statutes that penalize specific instances of deception, such as spousal deception, medical deception, therapeutic deception, and any unique form of deception.[341] Section B discusses state court decisions interpreting the four categories of statutes described in Section A.[342]

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[337] *See infra* notes 343–403 and accompanying text.
[338] *See infra* notes 345–354 and accompanying text.
[339] *See infra* notes 355–359 and accompanying text.
[340] *See infra* notes 360–361 and accompanying text.
[341] *See infra* notes 362–403 and accompanying text.
[342] *See infra* notes 404–449 and accompanying text.

A. STATUS OF DECEPTION IN STATES' STATUTES AS PROOF OF LACK OF CONSENT, FORCE, OR AS A CIRCUMSTANCE OF A SPECIFIC SEX OFFENSE

The defendant's use of "deception" to procure a victim's consent or to accomplish the sexual act is not proscribed in most states. In a majority of states, deception is not mentioned in sex offense statutes.[343] While some states specifically proscribe deception, only one provides a definition of "deception."[344] In most cases, states proscribe a specific type of deception, such as spousal deception, medical deception, or therapeutic deception, or proscribe behavior comparable to deception (although somewhat more limiting), such as concealment, surprise, fraud, artifice, or pretense. Oftentimes, these specific types of deception are situational, such as a doctor treating a patient for any reason other than a bona fide medical purpose.

1. Deception and Consent

Five states define "without consent" or "consent" so that a victim's consent to a sexual act is ineffective if a defendant uses deception to obtain it.[345] In Arizona, a victim does not consent to a sexual act if "the victim is intentionally deceived as to the nature of the act" or "the victim is intentionally deceived to erroneously believe that the person is the victim's spouse."[346] In Hawaii, if a victim consents to a sexual act, it is "ineffective consent" if it is "induced by . . . deception."[347] In Montana, a victim does not consent to a sexual act if a victim is "incapable of consent" because the victim is "overcome by deception . . . or surprise."[348] In addition, Montana contains the only definition of "deception" in all fifty states.[349] In Utah, a

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[343] Twenty-seven states do not criminally prohibit the use of deception to achieve a sexual gratification in any way.

[344] *See* MONT. CODE ANN. § 45-2-101(18) (2010).

[345] ARIZ. REV. STAT. ANN. § 13-1401(5)(c)–(d) (2010); HAW. REV. STAT. ANN. § 702-235(4) (LexisNexis 2007); MONT. CODE ANN. § 45-5-501(1)(a)(ii)(C); NEB. REV. STAT. § 28-318(8)(a)(iv) (2008 & Supp. 2010); UTAH CODE ANN. § 76-5-406(3) (LexisNexis 2008).

[346] ARIZ. REV. STAT. ANN. § 13-1401(5)(c)–(d).

[347] HAW. REV. STAT. ANN. § 702-235(4).

[348] MONT. CODE ANN. § 45-5-501(1)(a)(ii)(C).

[349] § 45-2-101(18).

> "Deception" means knowingly to:
>
> a) create or confirm in another an impression that is false and that the offender does not believe to be true;
>
> (b) fail to correct a false impression that the offender previously has created or confirmed;
>
> (c) prevent another from acquiring information pertinent to the disposition of the property involved;

sexual act is without the consent of a victim when the defendant is able to "overcome the victim through concealment or by the element of surprise."[350] Finally, in Nebraska, a victim does not consent to a sexual act when the victim is deceived as to a defendant's "identity" or the "nature or purpose" of a defendant's act.[351]

In two states, while deception is not included in the definition of "consent" or "without consent," a victim's consent procured by deception provides a basis for proving specific offenses.[352] In Alabama, a male defendant commits the crime of sexual misconduct if he has sexual intercourse with a female victim with the victim's consent if the consent was obtained by the use of "fraud or artifice."[353] In California, a defendant commits the crime of unlawful sexual intercourse when a victim's consent to the sexual act is procured by "false or fraudulent representation or pretense."[354]

2. Deception and Circumstances Constituting Specific Sex Offenses

In four states, a defendant's use of deception gives rise to a specific offense.[355] As stated, in Alabama and California, consent is invalid if procured by "fraud or artifice" and "false or fraudulent representation or pretense," respectively.[356] However, in California, a defendant also commits the crime of rape when the victim is unconscious of the nature of the act due to the defendant's "fraud in fact."[357] In Rhode Island, a defendant commits the crime of first-degree sexual assault when a defendant, through "concealment or by the element of surprise, is able to

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(d) sell or otherwise transfer or encumber property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether the impediment is or is not of value or is or is not a matter of official record; or

(e) promise performance that the offender does not intend to perform or knows will not be performed. Failure to perform, standing alone, is not evidence that the offender did not intend to perform.

Id.

[350] UTAH CODE ANN. § 76-5-406(3) (circumstances of sexual offenses against the victim without consent of the victim).

[351] NEB. REV. STAT. § 28-318(8)(a)(iv) (2008 & Supp. 2010).

[352] ALA. CODE § 13A-6-65(a)(1) (LexisNexis 2005); CAL. PENAL CODE § 266(c) (West 2008).

[353] ALA. CODE § 13A-6-65(a)(1).

[354] CAL. PENAL CODE § 266(c) (West 2008).

[355] ALA. CODE § 13A-6-65(a)(1) (sexual misconduct); CAL. PENAL CODE § 266(c) (unlawful sexual intercourse); CAL. PENAL CODE § 264 (West 2008 & Supp. 2011) (rape); R.I. GEN. LAWS § 11-37-2(3) (2002) (first-degree sexual assault); TENN. CODE ANN. § 39-13-503(a)(4) (2010) (rape); § 39-13-505(a)(4) (sexual battery).

[356] ALA. CODE § 13A-6-65(a)(1); CAL. PENAL CODE § 266(c).

[357] CAL. PENAL CODE § 261(a)(4)(C).

overcome the victim."[358] Finally, in Tennessee, a defendant commits the crime of rape or sexual battery when the sexual intercourse or sexual contact, respectively, is "accomplished by fraud."[359]

3. Deception and Force

Michigan is the only state that views a defendant's use of deception as constituting force. In Michigan, a defendant commits the crimes of first-, second-, third-, and fourth-degree criminal sexual conduct when force or coercion is used to accomplish the sexual act.[360] In each of these prohibitions, one circumstance under which "force or coercion is used to accomplish the [act]" is when "the [defendant], through concealment or by the element of surprise, is able to overcome the victim."[361]

4. Specific Circumstances of Deception

Sixteen states have codified specific circumstances of deception that may establish that the victim did not consent, that the defendant used force, or that the defendant committed a specific offense.[362] The most common examples of specific circumstances of deception are impersonating the victim's spouse,[363] engaging in a sexual act for other than a bona fide medical purpose,[364] and engaging in some form of therapeutic deception.[365]

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[358] R.I. GEN. LAWS § 11-37-2(3).

[359] TENN. CODE ANN. § 39-13-503(a)(4) (rape); § 39-13-505(a)(4) (sexual battery).

[360] MICH. COMP. LAWS ANN. § 750.520b(1)(d)(ii) (West 2004 & Supp. 2011) (criminal sexual conduct in the first degree); § 750.520c(1)(d)(ii) (criminal sexual conduct in the second degree); § 750.520d(1)(b) (criminal sexual conduct in the third degree); § 750.520e(1)(b) (criminal sexual conduct in the fourth degree).

[361] §§ 750.520b(1)(f)(v), .520c(1)(d)(ii), .520d(1)(b), .520e(1)(b)(v).

[362] *See infra* notes 363–366.

[363] ARIZ. REV. STAT. ANN. § 13-401(5)(d) (2010); CAL. PENAL CODE § 264 (West 2008 & Supp. 2011) (rape); COLO. REV. STAT. § 18-3-402(1)(c) (2011) (sexual assault); LA. REV. STAT. ANN. § 14:43(a)(3) (2007 & Supp. 2011) (simple rape); OHIO REV. CODE ANN. 2907.03(4) (West 2006 & Supp. 2011) (sexual battery); UTAH CODE ANN. § 76-5-406(7) (LexisNexis 2008) (circumstances of sexual offenses against the victim without consent of the victim); WYO. STAT. ANN. § 6-2-303 (2011) (sexual assault in the second degree); § 6-2-304 (sexual assault in the third degree).

[364] COLO. REV. STAT. § 18-3-402(1)(g) (sexual assault); § 18-3-404(1)(g) (unlawful sexual contact); CONN. GEN. STAT. ANN. § 53(a)-71(a)(7) (West 2007) (sexual assault in the second degree); KAN. STAT. ANN. § 21-5503(a)(4) (West, Westlaw through 2010 Legis. Sess.) (rape); ME. REV. STAT. ANN. 17-A, § 253(3)(A) (2006 & Supp. 2010) (gross sexual assault); MICH. COMP. LAWS ANN. §§ 750.520b(1)(f)(iv), .520c(1)(d)(ii), .520d(1)(b), .520e(1)(b)(iv); MINN. STAT. ANN. § 609.344(1)(k) (West 2009 & Supp. 2011) (criminal sexual conduct in the third degree); UTAH CODE ANN. § 76-5-406(12) (circumstances of sexual offenses against the victim without consent of the victim); WYO. STAT. ANN. § 6-2-303(vi) (sexual assault in the second degree); § 6-2-304(vi) (sexual assault in the third degree).

In addition to these three common categories of specific instances in which the defendant deceives the victim, three states have codified other circumstances of deception.[366]

i. Spousal Deception

Seven states prohibit impersonating a victim's spouse and make that conduct either a specific offense or proof that the victim did not consent to the sexual act.[367] In California, Colorado, Louisiana, Ohio, and Wyoming, deceiving a victim by pretending to be the victim's spouse amounts to a sex offense.[368] In California, a defendant commits the crime of rape when a victim "submits under the belief that the [defendant] is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief."[369] In Colorado, an actor commits the crime of sexual assault when "the actor knows that the victim submits erroneously, believing the actor to be the victim's spouse."[370] In Louisiana, a defendant commits the crime of simple rape when the "female victim submits under the belief that the [defendant] is her husband and such belief is intentionally induced by any artifice, pretense, or concealment practiced by the [defendant]."[371] In Ohio, a defendant commits the crime of sexual battery when the "[defendant] knows that the [victim] submits because the [victim] mistakenly identifies the [defendant] as the [victim's]

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[365] COLO. REV. STAT. § 18-3-405.5 (2011) (sexual assault on a client and aggravated sexual assault on a client); CONN. GEN. STAT. ANN. § 53(a)-71(a)(6) (sexual assault in the second degree); § 53(a)-73(a)(4) (sexual assault in the fourth degree); GA. CODE ANN. § 16-6-5.1(c) (West 2009 & Supp. 2010) (sexual assault by a practitioner of psychotherapy against a patient); KAN. STAT. ANN. § 21-5503(a)(4) (rape); MINN. STAT. ANN. § 609.344(i)–(j) (criminal sexual conduct in the third degree); § 609.345(i)–(j) (criminal sexual conduct in the fourth degree); OHIO REV. CODE ANN. § 2907.03(10) (sexual battery); § 2907.06(5) (sexual imposition); S.D. CODIFIED LAWS § 22-22-28 (2006) (sexual contact by a psychotherapist); § 22-22-29 (sexual penetration by a psychotherapist).

[366] 720 ILL. COMP. STAT. ANN. 5/11-1.60(a)(7) (West Supp. 2011) (aggravated criminal sexual abuse); OHIO REV. CODE ANN. § 2907.02(A)(1)(a) (West 2006 & Supp. 2011) (rape); § 2907.05(A)(2) (gross sexual imposition); OKLA. STAT. ANN. tit. 21, § 1120 (West 2002) (seduction under promise of marriage).

[367] ARIZ. REV. STAT. ANN. § 13-1401(5)(d); CAL. PENAL CODE § 264 (West 2008 & Supp. 2011) (rape); COLO. REV. STAT. § 18-3-402(1)(c) (sexual assault); LA. REV. STAT. ANN. § 14:43(a)(3) (simple rape); OHIO REV. CODE ANN. § 2907.03 (4) (sexual battery); UTAH CODE ANN. § 76-5-406(7) (circumstances of sexual offenses against the victim without consent of the victim); WYO. STAT. ANN. § 6-2-303 (sexual assault in the second degree); § 6-2-304 (sexual assault in the third degree).

[368] *See infra* notes 369–373.

[369] CAL. PENAL CODE § 264 (rape).

[370] COLO. REV. STAT. § 18-3-402(1)(c) (2011) (sexual assault).

[371] LA. REV. STAT. ANN. § 14:43(a)(3) (2007 & Supp. 2011) (simple rape).

spouse."[372] Finally, in Wyoming, a defendant commits the crimes of second- and third-degree sexual assault when the "[defendant] knows or should reasonably know that the victim submits erroneously believing the [defendant] to be the victim's spouse."[373]

In Arizona and Utah, proof that a defendant deceived a victim by impersonating the victim's spouse is sufficient to establish that the victim did not consent to the act.[374] Arizona deems consent lacking when "the victim is intentionally deceived to erroneously believe that the [defendant] is the victim's spouse."[375] In Utah, a sexual act is deemed to be without the victim's consent when "the [defendant] knows that the victim submits or participates because the victim erroneously believes that the [defendant] is the victim's spouse."[376]

ii. Medical Deception

Eight states prohibit situations in which the defendant is a medical professional who deceives a victim by engaging in a sexual act for other than a legitimate medical purpose; this conduct is a specific offense, proof that the victim did not consent to the act, or proof that the defendant used force or coercion.[377] In Colorado, Connecticut, Kansas, Maine, Minnesota, and Wyoming, deceiving a victim by engaging in a sexual act for other than a legitimate medical purpose gives rise to culpability for sex offenses.[378] In Colorado, a defendant commits the crimes of sexual assault and unlawful sexual contact when the defendant, while purporting to offer a medical service, "engages in treatment or examination of a victim for other than a bona fide medical purpose or in a manner substantially inconsistent with

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[372] OHIO REV. CODE ANN. § 2907.03(A)(4) (sexual battery).

[373] WYO. STAT. ANN. § 6-2-303(a)(iv) (2011) (sexual assault in the second degree); § 6-2-304 (sexual assault in the third degree).

[374] *See infra* notes 375–376.

[375] ARIZ. REV. STAT. ANN. § 13-1401(5)(d) (2010).

[376] UTAH CODE ANN. § 76-5-406(7) (LexisNexis 2008) (circumstances of sexual offenses against the victim without consent of the victim).

[377] COLO. REV. STAT. § 18-3-402(1)(g) (2011) (sexual assault); § 18-3-404(1)(g) (unlawful sexual contact); CONN. GEN. STAT. ANN. § 53(a)–71(a)(7) (West 2007) (sexual assault in the second degree); § 53(a)-73(a)(5) (sexual assault in the fourth degree); KAN. STAT. ANN. § 21-5503(a)(4)–(5) (West, Westlaw through 2010 Legis. Sess.) (rape); ME. REV. STAT. ANN. 17-A, § 253(3)(A) (2006 & Supp. 2010) (gross sexual assault); MICH. COMP. LAWS ANN. §§ 750.520b(1)(f)(iv), .520c(1)(d)(ii), .520d(1)(b), .520e(1)(b)(iv) (West 2004 & Supp. 2011); MINN. STAT. ANN. § 609.344(1)(k) (West 2009 & Supp. 2011) (criminal sexual conduct in the third degree); § 609.345(1)(k) (criminal sexual conduct in the fourth degree); UTAH CODE ANN. § 76-5-406(12) (circumstances of sexual offenses against the victim without consent of the victim); WYO. STAT. ANN. § 6-2-303(vi) (sexual assault in the second degree); § 6-2-304(vi) (sexual assault in the third degree).

[378] *See infra* notes 379–385.

reasonable medical practices."[379] In Connecticut, a defendant commits the crimes of second- and fourth-degree sexual assault when the defendant accomplishes the sexual intercourse by means of "false representation" that the sexual intercourse or sexual contact is for a bona fide medical purpose by a health care professional.[380]

In Kansas, a defendant commits the crime of rape when the victim's consent is obtained "through a knowing misrepresentation made by the [defendant] that the sexual intercourse was a medically or therapeutically necessary procedure . . . or . . . was a legally required procedure within the scope of the [defendant's] authority."[381] In Maine, a defendant commits the crime of gross sexual assault when the defendant has "substantially impaired [the victim's] power to appraise or control the [victim's] sexual acts by furnishing, . . . administering or employing drugs, intoxicants or other similar means."[382] Even when the victim voluntarily consumes a substance with knowledge of its nature, this is no defense when the victim is a patient of the defendant and has a reasonable belief that the defendant is administering the substance for medical or dental examination or treatment.[383]

In Minnesota, a defendant commits a crime when the defendant accomplishes sexual penetration or sexual contact by means of deception or false representation that the penetration or contact is for a bona fide medical purpose.[384] Finally, in Wyoming, a defendant commits the crime of second- or third-degree sexual assault when the "[defendant] inflicts sexual intrusion in treatment or examination of a victim for purposes or in a manner substantially inconsistent with reasonable medical practices."[385]

In Michigan and Utah, medical deception triggers a finding of "force or coercion" or "without consent," respectively.[386] In Michigan, a defendant commits the crimes of first-, second-, third-, and fourth-degree criminal sexual conduct when the defendant uses "force or coercion" to accomplish the sexual intercourse or sexual contact.[387] A defendant

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[379] COLO. REV. STAT. § 18-3-402(1)(g) (sexual assault); § 18-3-404(1)(g) (unlawful sexual contact).

[380] CONN. GEN. STAT. ANN. §§ 53(a)-71(a)(7) (sexual assault in the second degree); § 53(a)-73(a)(5) (sexual assault in the fourth degree).

[381] KAN. STAT. ANN. § 21-5503(a)(4)–(5) (rape).

[382] ME. REV. STAT. ANN. 17-A, § 253(2)(A).

[383] § 253(3)(A) (gross sexual assault).

[384] MINN. STAT. ANN. § 609.344(1)(k) (West 2009 & Supp. 2011) (criminal sexual conduct in the third degree); § 609.345(1)(k) (criminal sexual conduct in the fourth degree).

[385] WYO. STAT. ANN. § 6-2-303(a)(viii) (2011) (sexual assault in the second degree).

[386] *See infra* notes 387–390.

[387] MICH. COMP. LAWS ANN. § 750.520b(1)(f) (West 2004 & Supp. 2011) (criminal

engaging in medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable constitutes "force or coercion."[388] In Utah, medical deception is sufficient to prove the victim did not consent to the act.[389] A sexual act is deemed to be without the victim's consent when

> the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.[390]

iii. Therapeutic Deception

Seven states have criminalized deceiving a victim by purporting to engage in a sexual act for therapeutic reasons.[391] In Colorado, Connecticut, Georgia, Kansas, Minnesota, Ohio, and South Dakota, therapeutic deception is illegal.[392] In Colorado, a defendant commits the crime of sexual assault on a client (or aggravated sexual assault on a client) when the defendant is a psychotherapist, the victim is a client, and the sexual penetration or intrusion occurred by means of "therapeutic deception."[393] In Connecticut, a defendant commits the crimes of second- and fourth-degree sexual assault when the defendant is a psychotherapist, the victim is a patient or former patient of the defendant, and the sexual intercourse occurs

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sexual conduct in the first degree); § 750.520c(1)(f) (criminal sexual conduct in the second degree); § 750.520d(1)(b) (criminal sexual conduct in the third degree); § 750.520e(1)(b) (criminal sexual conduct in the fourth degree).

[388] MICH. COMP. LAWS ANN. § 750.520b(1)(f)(iv) (criminal sexual conduct in the first degree); § 750.520c(1)(f) (criminal sexual conduct in the second degree); § 750.520d(1)(b) (criminal sexual conduct in the third degree); § 750.520e(1)(b)(iv) (criminal sexual conduct in the fourth degree).

[389] UTAH CODE ANN. § 76-5-406(12) (LexisNexis 2008) (circumstances of sexual offenses against the victim without consent of the victim).

[390] *Id.*

[391] COLO. REV. STAT. § 18-3-405.5 (2011) (sexual assault on a client and aggravated sexual assault on a client); CONN. GEN. STAT. ANN. § 53(a)-71(a)(6) (West 2007) (sexual assault in the second degree); § 53(a)-73(a)(4) (sexual assault in the fourth degree); GA. CODE ANN. § 16-6-5.1(c) (West 2009 & Supp. 2010) (sexual assault by a practitioner of psychotherapy against a patient); KAN. STAT. ANN. § 21-3502(a)(4) (West, Westlaw through 2010 Legis. Sess.) (rape); MINN. STAT. ANN. § 609.344(j) (West 2009 & Supp. 2011) (criminal sexual conduct in the third degree); § 609.345(j) (criminal sexual conduct in the fourth degree); OHIO REV. CODE ANN. § 2907.03(10) (West 2006 & Supp. 2011) (sexual battery); § 2907.06(5) (sexual imposition); S.D. CODIFIED LAWS § 22-22-28 (2006) (sexual contact by a psychotherapist); § 22-22-29 (sexual penetration by a psychotherapist).

[392] *See infra* notes 393–399.

[393] COLO. REV. STAT. § 18-3-405.5 (sexual assault on a client and aggravated sexual assault on a client).

by means of "therapeutic deception."[394]

In Georgia, a defendant commits the crime of sexual assault by practitioner of psychotherapy against a patient when the defendant, as a purported practitioner of psychotherapy, engages in sexual contact with the victim who the defendant knew or should have known was the subject of the defendant's purported treatment or counseling, or if the treatment or counseling relationship was used to facilitate sexual contact between the defendant and the victim.[395] In Kansas, a defendant commits the crime of rape when the victim's consent is obtained "through a knowing misrepresentation made by the [defendant] that the sexual intercourse was a medically or therapeutically necessary procedure . . . or . . . was a legally required procedure within the scope of the [defendant's] authority."[396]

In Minnesota, a defendant commits the crimes of third- and fourth-degree criminal sexual conduct when the defendant is a psychotherapist, the victim is a patient or former patient, and the sexual contact or penetration occurred by means of "therapeutic deception."[397] In Ohio, a defendant commits the crimes of sexual battery and sexual misconduct when "the [defendant] is a mental health professional, the [victim] is a mental health client or patient of the [defendant], and the [defendant] induces the [victim] to submit by falsely representing to the [victim] that the sexual conduct is necessary for mental health treatment purposes."[398] Finally, in South Dakota, a defendant commits the crimes of sexual penetration by psychotherapist and sexual contact by psychotherapist when the defendant is a psychotherapist and knowingly engages in sexual contact or sexual penetration with a victim who is a patient and who is "emotionally dependent" on the psychotherapist at the time of the contact or penetration.[399]

iv. Other Circumstances of Deception

Three states have criminalized other forms of deception for sexual

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[394] CONN. GEN. STAT. ANN. § 53(a)-71(a)(6) (sexual assault in the second degree); § 53(a)-73(a)(4) (sexual assault in the fourth degree).

[395] GA. CODE ANN. § 16-6-5.1(c) (sexual assault by a practitioner of psychotherapy against a patient).

[396] KAN. STAT. ANN. § 21-5503(a)(4)–(5) (West, Westlaw through 2010 Legis. Sess.) (rape).

[397] MINN. STAT. ANN. § 609.344(j) (West 2009 & Supp. 2011) (criminal sexual conduct in the third degree); § 609.345(j) (criminal sexual conduct in the fourth degree).

[398] OHIO REV. CODE ANN. § 2907.03(10) (West 2006 & Supp. 2011) (sexual battery); § 2907.06(5) (sexual imposition).

[399] S.D. CODIFIED LAWS § 22-22-28 (2006) (sexual contact by a psychotherapist); § 22-22-29 (sexual penetration by a psychotherapist).

advantage.[400] In Oklahoma, a defendant commits the crime of seduction under promise of marriage when the defendant, "under promise of marriage, seduces and has illicit connection with any unmarried female of previous chaste character."[401] In Ohio, a defendant commits the crimes of rape and gross sexual imposition when the defendant has sexual contact with another and, "for the purpose of preventing resistance, the [defendant] substantially impairs the [victim's] judgment or control by administering any drug, intoxicant, or controlled substance to [the victim] surreptitiously or by . . . deception."[402] In Illinois, a defendant commits the crime of aggravated criminal sexual abuse when committing an act of criminal sexual abuse where "the [defendant] delivered . . . to the victim without his or her consent, or by threat or deception, . . . any controlled substance."[403]

B. CASE LAW

There is little case law considering a defendant's use of deception to procure consent or as a circumstance constituting a specific offense, except for instances in which the defendant is in a position of authority or impersonates a person in a position of authority. In some instances, a defendant's use of deception is interpreted as coercion.

1. Deception and Consent

A Montana Supreme Court case provides a rare example of a court interpreting "without consent" in a manner that prompted the Montana legislature to amend the criminal code to exclude deception from the definition of consent.[404] In *State v. Haser*, the defendant confessed to using his occupation as a photographer to deceive aspiring models into submitting to sexual intercourse under the guise of showing them how to pose for modeling photos.[405] The defendant appealed his conviction for sexual intercourse without consent. He alleged that his actions did not constitute the element of "without consent" under the "sexual intercourse without consent" offense.[406] He argued that the victims were neither compelled to submit by force nor "incapable of consent" as required by the code.[407] The

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[400] *See infra* notes 401–403.

[401] OKLA. STAT. ANN. tit. 21, § 1120 (West 2002) (seduction under promise of marriage).

[402] OHIO REV. CODE ANN. § 2907.02(A)(1)(a) (rape); § 2907.05(A)(2) (gross sexual imposition).

[403] 720 ILL. COMP. STAT. ANN. 5/11-1.60(a)(7) (West Supp. 2011) (aggravated criminal sexual abuse).

[404] *See infra* notes 405–410.

[405] State v. Haser, 20 P.3d 100, 107 (Mont. 2001).

[406] *Id.*

[407] *Id.*

Montana Supreme Court held that there was insufficient evidence to satisfy the force element of "without consent."[408] The court also held that the victims were not "incapable of consent" under the Montana code because they did not experience mental incapacity or physical helplessness.[409] In an apparent response to *Haser*, the Montana legislature amended the code to provide that a victim is incapable of consenting to sexual intercourse if he or she is overcome by deception, coercion, or surprise.[410]

Another case before the Intermediate Court of Appeals of Hawaii required the court to decide whether deception voids consent. There, the court affirmed a dentist's rape conviction when the dentist used nitrous oxide on a dental assistant purportedly for a legitimate purpose and sexually assaulted her while she was mentally incapacitated.[411] The dentist in this case suggested to his new dental assistant that she try nitrous oxide so she could explain what the experience was like to patients.[412] She agreed to try the drug, but soon realized its disorienting effects when the defendant touched parts of her body, including one of her breasts, asking where she was numb.[413] The defendant proceeded to touch her in inappropriate places, kiss her, remove her pants, and eventually engage in sexual intercourse with her while she was passing in and out of consciousness.[414] The court affirmed his rape conviction, reasoning, among other things, that any consent that the victim may have given to the taking of the nitrous oxide was obtained by defendant's use of deception; therefore, the deception vitiated the victim's consent to taking the drug.[415]

The Montana legislature codified a definition of deception that courts could apply to cases of sexual intercourse without consent.[416] But in

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[408] *Id.* at 109.

[409] *Id.* at 110.

[410] MONT. CODE ANN. § 45-5-501(1)(a)(ii)(C) (2010).

[411] State v. Oshiro, 696 P.2d 846, 848–49 (Haw. Ct. App. 1985).

[412] *Id.* at 849.

[413] *Id.*

[414] *Id.*

[415] *Id.* at 849–50.

[416] MONT. CODE ANN. § 45-2-101(18) (2010) provides:

"Deception" means knowingly to:

a) create or confirm in another an impression that is false and that the offender does not believe to be true;

(b) fail to correct a false impression that the offender previously has created or confirmed;

(c) prevent another from acquiring information pertinent to the disposition of the property involved;

(d) sell or otherwise transfer or encumber property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether the impediment is or is not of value or is or is not a matter of official record; or

Alabama and California, where deception is not included in the definition of "consent" or "without consent" but deception constitutes specific sex offenses, there is little to no case law involving consent procured by deception.

In some instances, a defendant's use of deception is interpreted as a use of coercion to procure consent. Although South Dakota does not criminalize sexual acts achieved through deceit, the South Dakota Supreme Court has applied the coercion provision to technically consensual, but deceptive, situations. In *State v. Klaudt*,[417] a representative to the South Dakota legislature had several foster children living with him.[418] When the victim (one of the foster children) turned seventeen, he conducted an elaborate scam in which he convinced the victim to sell her eggs to infertile couples.[419] He told the victim that he had to conduct "examinations" to determine her qualifications to donate.[420] He took the victim to a hotel where he used his hands and instruments to penetrate her as part of the fake exams.[421] The victim allowed him to perform the exams, but became upset by them and cried each time.[422] To perpetuate the scam, the defendant created a fake email address and wrote to the victim in the guise of a woman working for a fertility clinic.[423] At one point, he gave her an advance of $250, claiming it came from this woman.[424]

The jury convicted the defendant of rape and the South Dakota Supreme Court affirmed.[425] While explicitly mentioning that, "[u]nlike several states, South Dakota has not criminalized the use of deception or fraud . . . to obtain consent to sexual penetration," the court called the defendant's actions "psychological coercion."[426] The court cited the defendant's elaborate scheme and long-running deception to distinguish this case from simple deceit.[427] Therefore, the court said, although the victim technically consented to the sexual contact, the defendant's actions were so

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(e) promise performance that the offender does not intend to perform or knows will not be performed. Failure to perform, standing alone, is not evidence that the offender did not intend to perform.

Id.

[417] State v. Klaudt, 772 N.W.2d 117 (S.D. 2009).

[418] *Id.* at 118–19.

[419] *Id.* at 119–20.

[420] *Id.* at 119.

[421] *Id.*

[422] *Id.*

[423] *Id.* at 120.

[424] *Id.*

[425] *Id.* at 118.

[426] *Id.* at 126–27.

[427] *Id.* at 131–32.

extreme that her consent was coerced.[428]

2. Deception and Circumstances Constituting Specific Sex Offenses

Alabama, California, and Rhode Island have little to no case law on what constitutes deception as it pertains to a sex offense. Tennessee, however, provides some insight as to how courts apply deception offenses. The Tennessee statutes for rape and sexual battery provide specific prohibitions against accomplishing penetration or sexual contact through fraud.[429] The criminal code defines fraud by its normal conversational meaning: including, but not limited to, "deceit, trickery, misrepresentation, and subterfuge."[430] In four cases before the Tennessee Court of Criminal Appeals, the court has found defendants who impersonate boyfriends or husbands, doctors or hypnotists, or security guards as accomplishing penetration or sexual contact through fraud.[431]

The Tennessee Court of Criminal Appeals has upheld the fraud provision against a defendant who impersonated boyfriends and husbands. In *State v. Mitchell*,[432] the defendant was convicted of rape by fraud after he impersonated the boyfriends and husbands of several women to convince them to submit to intercourse while blindfolded. The court upheld his convictions for rape, holding that the fraud provision of the statute was not unconstitutionally vague.[433]

The same court has held that impersonating a doctor to achieve sexual contact can support a conviction for sexual battery by fraud. In *State v. Tizard*,[434] the defendant doctor fondled the genitals of a young male patient in the course of a physical exam, making him believe that the sexual conduct was part of the exam. The court made several important holdings involving the general interpretation of the statute.[435] First, the court held that fraud was a valid substitute for the force requirement of the old statute.[436] Second, the court held that obtaining a victim's consent through fraudulent misrepresentations vitiated that consent.[437] Third, the court held

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[428] *Id.*

[429] TENN. CODE ANN. § 39-13-503(a)(4) (2010) (rape); § 39-13-505(a)(4) (sexual battery).

[430] § 39-11-106(a)(12) (2010).

[431] *See infra* notes 432–445.

[432] State v. Mitchell, No. M1996-00008-CCA-R3-CD, 1999 WL 559930, at *5 (Tenn. Crim. App. July 30, 1999).

[433] *Id.*

[434] State v. Tizard, 897 S.W.2d 732, 742 (Tenn. Crim. App. 1994).

[435] *Id*.

[436] *Id.*

[437] *Id.* at 741–42.

that both fraud in the inducement and factual misrepresentation could support a conviction for sexual battery by fraud.[438] Some commentators have argued that misrepresentation of fact vitiates consent, while fraud in the inducement cannot support a conviction of rape or sexual battery.[439] This court rejected that view. According to the court, fraud in the inducement is particularly significant when the victim's reliance on the defendant's misrepresentations leads to the sexual encounter.[440] For this particular case, the court held that the statute criminalized the defendant's use of fraud.[441]

Tizard's holding that misrepresentations relied upon by a victim are enough to vitiate consent controlled the outcome in the more recent case of *State v. Batts*.[442] In that case, the defendant was a janitor at a bar but pretended to be the security guard when he encountered the victim in the parking lot. The defendant told the victim that he had received complaints about her stumbling around the area and that he had to perform a strip search. The victim removed her clothes voluntarily, but expressed some verbal resistance. At trial, the defendant argued that the victim had consented to the encounter. The court held that, even if the victim had consented, the consent was invalid because the defendant had misrepresented his identity and acted as if it was in his authority to command her actions.[443]

Finally, the Tennessee Court of Criminal Appeals has established that inappropriate sexual conduct done under the guise of medical care will typically support a conviction for rape by fraud. In *State v. Remsen*,[444] the victim sought counseling from the defendant, a hypnotherapist. While the victim was hypnotized, the defendant fondled her inappropriately. The court held that this constituted rape or sexual battery by fraud because the defendant committed the sexual acts by either the use of hypnosis or "under the guise of medical treatment," either of which was a crime.[445]

i. Deception and Force

As discussed earlier, Michigan has a unique statute that treats taking

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[438] *Id.* at 742.

[439] *Id.* at 741.

[440] *Id.* at 743.

[441] *Id.* at 742.

[442] State v. Batts, No. M2001-00896-CCA-R3-CD, 2002 WL 31039378, at *3 (Tenn. Crim. App. Sept. 11, 2002) (citing *Tizard*, 897 S.W.2d at 742).

[443] *Id.*

[444] State v. Remsen, No. 01C01-9204-CR-00122, 1993 WL 31988, at *3 (Tenn. Crim. App. Feb. 11, 1993).

[445] *Id.*

advantage of a victim by "concealment or surprise" as being tantamount to "force or coercion."[446] Michigan, however, has no case law interpreting the defendant's use of "concealment or surprise" to overcome the victim as a circumstance constituting "force or coercion."

ii. Specific Circumstances of Deception

There is little to no case law interpreting the defendant's use of spousal deception, medical deception, or therapeutic deception as constituting specific offenses or as a circumstance in which the victim does not consent to the act. Similarly for other circumstances of deception not in these categories, there is little to no case law. In Oklahoma, where a defendant commits the crime of seduction under promise of marriage if he seduces an unmarried female under promise of marriage,[447] almost all of the case law dates back to the early 1900s. There was one major case in 1951 that dealt primarily with the sufficiency of evidence in a prosecution of seduction under promise to marry.[448] The Court of Criminal Appeals of Oklahoma held that evidence of a woman's previous chaste character need not be corroborated, but her testimony that she was promised marriage and illicit intercourse occurred must be corroborated.[449]

C. OUTLAWING FRAUDULENT SEXUAL OVERTURES

With few exceptions, states do not specifically protect victims against a defendant's use of deception to obtain the victim's consent or accomplish a sexual act. Twenty-seven states do not criminally prohibit the use of deception to achieve sexual contact in any way. Even in the states that do criminalize deception, the provision is rarely prosecuted and, if it is, it usually involves a defendant who is in a position of authority. Indeed, most state statutes protect victims against deception when the defendant is, or purports to be, a person in a position of authority, such as a doctor or therapist. In other cases, when there is no explicit provision for deception, state courts will incorporate deception into other provisions, such as the defendant's use of coercion.

The lack of protection against the use of deception suggests that states do not find the use of deception to procure consent criminal conduct. Moreover, the lack of case law on the deception provisions that are in place indicates that either deception provisions are not being prosecuted,

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[446] MICH. COMP. LAWS ANN. §§ 750.520b(1)(f)(v), .520c(1)(d)(ii), .520d(1)(b), .520e(1)(b)(v) (West 2004 & Supp. 2011).

[447] OKLA. STAT. ANN. tit. 21, § 1122 (West 2002).

[448] Holland v. State, 229 P.2d 215 (Okla. Crim. App. 1951).

[449] *Id.* at 221–22.

prosecutions of these provisions are uniformly resulting in acquittals, or convictions based on these provisions are never appealed. The presumption remains that an offender's use of deception is not culpable—or not as culpable as the use of force is.

Furthermore, some states choose not to criminalize an offender's one-time use of deceit and view only *continuous* acts of deceit as involving coercion. A South Dakota court explained that, "[u]nlike several states, South Dakota has not criminalized the use of deception or fraud . . . to obtain consent to sexual penetration," but stated the defendant's actions reflected wrongful "psychological coercion."[450] Even though the court acknowledged the defendant's conduct was criminal, it seems a single incident, or perhaps even multiple incidents of "simple" deceit would not necessarily have been viewed as criminal. Only ongoing deception amounts to "coercion" sufficient to subject the deceiver from the bite of the criminal law.

VII. CORROBORATION

Under English common law, when victims and witnesses of crimes cried out, all who heard it were required to join in the pursuit of the felon.[451] Under this old "hue and cry" rule, "a [victim] was required to prove a timely complaint of an alleged rape in order to corroborate her claim that the assault was against her will."[452] Similar to the hue and cry rule, many American laws previously required corroborating evidence in order to convict a defendant of rape.[453]

Today, for the most part, testimony of an alleged rape victim is sufficient to uphold a conviction for rape without the need for corroborating evidence.[454] Although a number of states continue to subscribe to the common law approach, a few jurisdictions have implemented, either by statute or through case law, a corroboration requirement in connection with sexual assault crimes. Meanwhile, the case law in other jurisdictions reveals that corroborating evidence is required only when the facts of the case are contradictory or inherently improbable.

This Part initially examines various states that discuss corroboration by

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[450] State v. Klaudt, 772 N.W.2d 117, 126–27 (S.D. 2009).

[451] BLACK'S LAW DICTIONARY 740 (6th ed. 1990).

[452] Wilson v. Commonwealth, 615 S.E.2d 500, 505 n.3 (Va. Ct. App. 2005) (quoting Woodard v. Commonwealth, 448 S.E.2d 328, 330 (Va. Ct. App. 1994)).

[453] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 33.07[A] (4th ed. 2006) ("Opponents of the corroboration rule appear to be winning the day. A number of states that adopted the rule since repealed it."). Corroborating evidence is evidence that strengthens or confirms what other evidence shows. BLACK'S LAW DICTIONARY 344 (6th ed. 1990).

[454] *See* DRESSLER, *supra* note 453.

statute. This Part then reviews the case law of the states where the criminal code is silent with respect to corroboration to determine how the judiciary has dealt with the issue.

A. STATES THAT CONSIDER CORROBORATION STATUTORILY

Of the seventeen states that address corroboration by statute, thirteen states have eliminated the common law approach by expressly providing that the uncorroborated testimony of a victim is sufficient to uphold a conviction for rape.[455] Where the statute does not explicitly require corroboration for a rape conviction, the courts have a strong tendency to uphold the conviction even when there is little more than the victim's testimony. In fact, some courts take it one step further and permit expert testimony "to assist the jury in evaluating the evidence, and . . . to respond to defense claims that the victim's behavior after the alleged rape was inconsistent with the claim that the rape occurred."[456]

For example, in *State v. Kinney*, the Supreme Court of Vermont upheld the admission of expert testimony in a "he said she said" rape case.[457] The court allowed a doctor to testify that "studies have shown that victims of rape are more likely to resist their attacker by making verbal protests than by struggling or screaming."[458] The doctor was allowed to further explain why others who were present in the home at the time would be unaware of the incident or any sign of a struggle and why a victim may not tell anyone what happened immediately after the incident.[459]

The remaining four states in the statutory category each have their own unique approach. Texas requires corroboration of a victim's testimony only when the victim fails to inform "any person, other than the defendant, of the alleged offense" within one year of the assault.[460] Mississippi is the only state that has taken the opposite approach, enacting a statute providing that "[n]o person shall be convicted upon the uncorroborated testimony of the

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[455] *See* FLA. STAT. ANN. § 794.022(1) (West 2007); MICH. COMP. LAWS ANN. § 750.520(h) (West 2004); MINN. STAT. ANN. § 609.341(4)(c) (West 2009 & Supp. 2011); NEB. REV. STAT. § 29-2028 (2008); N.H. REV. STAT. ANN. § 632-A:6(13) (LexisNexis 2007); N.M. STAT. ANN. § 30-9-15 (2004); 18 PA. CONS. STAT. ANN. § 3106 (West 2000 & Supp. 2011); R.I. GEN. LAWS § 11-37-11 (2002); S.C. CODE ANN. § 16-3-657 (2003 & Supp. 2010); S.D. CODIFIED LAWS § 23A-22-15.1 (2004); VT. STAT. ANN. tit. 13, § 3255(a)(2) (2009); WASH. REV. CODE ANN. § 9A.44.020(1) (West 2009); WYO. STAT. ANN. § 6-2-311 (2011).

[456] State v. Kinney, 762 A.2d 833, 842 (Vt. 2000).

[457] *Id.* at 846.

[458] *Id.* at 840.

[459] *Id.*

[460] TEX. CODE CRIM. PROC. ANN. art. 38.07(a) (West 2005 & Supp. 2010).

injured female."[461] In other states, similar enactments have been repealed.[462] New York repealed its corroboration requirement for forcible sex offenses[463] and replaced it with a statute requiring corroboration for sex offenses where lack of consent results from mental incapacity or mental disability.[464]

New York is one of the two states that use case law to fill in the gaps that statutes leave behind. Since New York repealed its general corroboration requirement, it may be suggested that the legislature sought to have courts rely on the victim's unsupported testimony where the victim *has* the capacity to consent. However, it appears that without an express statutory direction undoing the corroboration requirement, New York courts are reluctant to accept the victim's unsupported testimony in "pure identification" cases, especially when there is credible character evidence for the defendant.[465]

Similarly, Ohio statutorily limited its corroboration requirement to only certain sexual offenses.[466] In Ohio, corroboration is necessary to convict for the misdemeanor of sexual imposition.[467] However, since the Ohio legislature did not determine whether corroboration is required to prove felony sexual offenses, the courts were again left to make a determination. Unlike those in New York, the Ohio courts determined that a victim's uncorroborated testimony was sufficient to support a rape case.[468]

B. STATES THAT ALLOW THE COURTS TO CONSIDER CORROBORATION

The remaining thirty-three states do not have a statutory provision related to corroboration; however, in all but three of these states the judiciary has addressed the issue. New Jersey is the only state that fails to address corroboration either by statute or through its case law. In Massachusetts and Alaska, although the courts fail to discuss corroboration in rape cases involving adult victims, they do consider the victim's

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[461] MISS. CODE ANN. § 97-3-69 (2006).

[462] *See* CONN. GEN. STAT. ANN. § 53a-68 (repealed 1974); GA. CODE ANN. § 26-2001 (repealed 1978).

[463] N.Y. PENAL LAW § 130.15 (repealed 1974).

[464] N.Y. PENAL LAW § 130.16 (McKinney 2009).

[465] People v. Lawrence, 447 N.Y.S.2d 793, 796 (App. Div. 1981) (defining "pure" identification as a situation when "no corroborative evidence is presented to support testimony of a single eye-witness who forcefully states that the accused person committed a criminal act upon her person").

[466] OHIO REV. CODE ANN. § 2907.06(B) (West 2006 & Supp. 2011).

[467] § 2907.06(C).

[468] State v. Love, 550 N.E.2d 951, 954 (Ohio 1988).

testimony alone sufficient to support a conviction for rape of a child under the age of sixteen.[469]

In states where the courts have addressed the corroboration issue, a review of the case law indicates that the courts have generally taken one of two approaches to corroborating evidence: (1) the victim's testimony alone is sufficient to sustain a conviction, or (2) corroborating evidence is not required except in limited circumstances.

1. Victim's Unsupported Testimony Is Sufficient

In twenty states, the case law demonstrates that a victim's testimony alone is sufficient to sustain a conviction for rape.[470] For example, in *Taylor v. State*, the Supreme Court of Indiana held that corroborating evidence is not a legal requirement under Indiana law, even when proof of the physical fact of penetration rests solely upon the victim's testimony.[471] In *Taylor*, the defendant was convicted of rape based on the testimony of the victim and challenged the sufficiency of the evidence on appeal.[472] Even though no direct or independent evidence like a medical examination was presented to support the rape charge, the court recognized that it is a well-settled principle in Indiana that the uncorroborated testimony of a rape victim is sufficient evidence to support a conviction.[473]

In *State v. Goodman*, Tennessee's Court of Criminal Appeals addressed the sufficiency of a rape conviction when the defendant testified that the sexual act was consensual, the victim admitted to smoking marijuana prior to the act, and the rape examination revealed the victim had

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[469] *See* State v. Burke, 624 P.2d 1240, 1253 (Alaska 1980); Commonwealth v. Souza, 653 N.E.2d 1127, 1133 (Mass. 1995).

[470] *See* Myers v. State, 677 So. 2d 807, 809 (Ala. Crim. App. 1995); Goodman v. State, 306 S.W.3d 443, 446 (Ark. Ct. App. 2009); People v. Poggi, 753 P.2d 1082, 1094 (Cal. 1988); State v. Dabkowski, 506 A.2d 118, 121–22 (Conn. 1986) (citing 17 S. Proc., pt. 3, 1974 Sess., pp. 1308–09; 17 H.R. Proc., pt. 4, 1974 Sess., pp. 2005–06); Hardin v. State, 840 A.2d 1217, 1224 (Del. 2003); Duran v. State, 619 S.E.2d 388, 390–91 (Ga. Ct. App. 2005); State v. Smith, 105 P.3d 242, 250 (Haw. Ct. App. 2004) (citing State v. Eastman, 913 P.2d 57, 67 (Haw. 1996)); State v. Byers, 627 P.2d 788, 789–90 (Idaho 1981); People v. Schott, 582 N.E.2d 690, 696–97 (Ill. 1991); Taylor v. State, 480 N.E.2d 907, 909 (Ind. 1985); State v. Knox, 536 N.W.2d 735, 742 (Iowa 1995); Fletcher v. Commonwealth, 63 S.W.2d 780, 781 (Ky. 1933); State v. Taylor, 774 So. 2d 379, 384–85 (La. Ct. App. 2000); State v. Preston, 581 A.2d 404, 409 (Me. 1990); Crenshaw v. State, 283 A.2d 423, 429 (Md. Ct. Spec. App. 1971); Martinez v. State, 360 P.2d 836, 838 (Nev. 1961); State v. Bailey, 245 S.E.2d 97, 99 (N.C. Ct. App. 1978); State v. Dietz, 115 N.W.2d 1, 5 (N.D. 1962); State v. Fitzmaurice, 475 P.2d 426, 428 (Or. Ct. App. 1970); State v. Goodman, No. W2007-00956-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 802, at *9 (Oct. 8, 2008).

[471] *See Taylor*, 480 N.E.2d at 909.

[472] *Id.* at 907.

[473] *Id.* at 909 (citing Lynch v. State, 316 N.E.2d 372 (Ind. 1974)).

no bruises or internal injuries."[474] The court acknowledged that all questions involving the credibility of witnesses are resolved by the trier of fact and the jury rendered a guilty verdict, despite the defendant's contentions.[475] At trial, the victim testified that she did not consent to the penetration and the jury had ample opportunity to weigh her credibility in light of the defendant's allegations.[476] The appellate court concluded that the victim's testimony provided sufficient evidence to support a guilty verdict and accordingly upheld the conviction.[477]

2. Corroborating Evidence Is Not Required Except in Limited Circumstances

In ten states, case law indicates that corroborating evidence is not required unless the victim's story is physically impossible or so inherently improbable that no reasonable person could believe it.[478] These states, however, seem to differ in what they require for a showing of inherent improbability. For example, in *State v. McPherson*, the West Virginia Supreme Court of Appeals examined a rape conviction based on the victim's uncorroborated testimony that was highly contradictory.[479] Initially, the court acknowledged that a conviction for any sexual offense could be obtained on the uncorroborated testimony of the victim unless the testimony was inherently incredible.[480] In that case, the defendant attempted to demonstrate that the victim's story was inherently incredible by pointing to a variety of evidentiary deficiencies, including (1) a lack of physical evidence to confirm intercourse, (2) the internal contradictions between the victim's out-of-court statements and her testimony, (3) the inconsistent testimony of the victim and one of the state's witnesses, and (4) the extensive use of leading questions by the prosecutor during direct examination of the victim.[481] Nevertheless, the court held that the victim's testimony was not "inherently incredible" because inherent incredibility

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[474] 2008 Tenn. Crim. App. LEXIS 802, at *9.

[475] *Id.* at *7–8.

[476] *Id.* at *11.

[477] *Id.*

[478] *See* State v. Williams, 526 P.2d 714, 716–17 (Ariz. 1974); People v. Fierro, 606 P.2d 1291, 1293 (Colo. 1980) (citing People v. McCormick, 508 P.2d 1270 (Colo. 1973)); State v. Cooper, 845 P.2d 631, 637 (Kan. 1993); State v. Cooper, 673 S.W.2d 848, 849 (Mo. Ct. App. 1984); State v. Bauer, 39 P.3d 689, 693 (Mont. 2002); Colbert v. State, 567 P.2d 996, 998 (Ok. Crim. App. 1977); State v. Studham, 572 P.2d 700, 701–02 (Utah 1977); Willis v. Commonwealth, 238 S.E.2d 811, 812–13 (Va. 1988); State v. McPherson, 371 S.E.2d 333, 337 (W. Va. 1988); Thomas v. State, 284 N.W.2d 917, 923 (Wis. 1979).

[479] 371 S.E.2d at 337.

[480] *Id.*

[481] *Id.*

was more than contradiction and lack of corroboration.[482] It proclaimed that in order to make a determination of inherent incredibility, a showing of "complete untrustworthiness" is required.[483] According to the court, "when a trial court is asked to grant a motion for acquittal based on insufficient evidence due to inherently incredible testimony, it should do so only when the testimony defies physical laws."[484]

Other states seem to require much less than West Virginia does. For instance, the courts in Missouri have recognized that a rape conviction "may be sustained upon the uncorroborated testimony of the [victim] alone, unless her testimony is contradictory and in conflict with physical facts, surrounding circumstances, and common experience so as to be so unconvincing and improbable that it is extremely doubtful."[485] Missouri's rule was best illustrated in *State v. Phillips*, where the defendant's rape conviction was reversed because the victim's testimony was uncorroborated and contradictory in nature.[486] In *Phillips*, the victim was an older female cab driver, while the defendant was a seventeen-year-old boy.[487] The victim testified she picked up the defendant at approximately 10:00 p.m. and, as the two were driving along the local lake, the defendant allegedly grabbed the steering wheel, causing the victim to stop the car.[488] Once the car was in park, the defendant started to make sexual advances and led the victim away from the vehicle; he tried to remove her pants, but was unsuccessful.[489] As they walked back toward the car, they heard the dispatcher call on the radio, and the defendant grabbed for the radio while the victim took off running.[490] The defendant caught her, revealed his fist, and told her to "take off her boots."[491] He then said, "If you don't, I'll throw you in the river."[492] The victim took off her boots, and even though not asked, voluntarily removed her pants after which the defendant penetrated her.[493] At some point, the defendant lost his erection and the victim "started to help him with it."[494] The court found the evidence to be

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[482] *Id.* at 339.

[483] *Id.* at 338.

[484] *Id.*

[485] State v. Phillips, 585 S.W.2d 517, 520 (Mo. Ct. App. 1979) (citing State v. Lee, 404 S.W.2d 740, 747 (Mo. 1966)).

[486] *Id.* at 521.

[487] *Id.* at 518.

[488] *Id.*

[489] *Id.* at 519.

[490] *Id.*

[491] *Id.*

[492] *Id.*

[493] *Id.*

[494] *Id.*

vague and contradictory and, therefore, reversed the conviction.[495] It reasoned as follows:

> A meticulous review of the evidence shows, at the very least, that the testimony of prosecutrix regarding the fear issue is contradictory and in conflict with surrounding circumstances, common experience and common sense . . . . After she took her boots off, there is no testimony that he threatened her in any way, or that she submitted out of fear. She helped him take her pants off and, after he lost his erection, was in the process of voluntarily helping him to "get it back" when her employer arrived at the scene. There was no evidence that she made a prompt outcry to him, or to the police, that she had been raped. There was no evidence that she was crying or hysterical. There was no medical evidence that she had been sexually abused.[496]

Even though *Phillips* is older precedent, the corroboration rule applied in the case has been consistently affirmed over the years.[497]

Similarly, in Virginia, a conviction for rape may be sustained solely upon the uncorroborated testimony of the victim unless the evidence is inherently incredible or so contrary to human experience that it is unworthy of belief.[498] In *Willis v. Commonwealth*, the court said that because the victim failed to report the rape for an "unreasonable period" after it had occurred, suspicion and doubt were cast on the victim's truthfulness when she did not present a credible explanation for the delay.[499] The court concluded that her unexplained failure to report the rape for nearly a month made her story incredible as a matter of law.[500] Although subsequent courts in Virginia have ruled that the credibility of the witness is for the jury to decide,[501] the court's decision in *Willis* to consider contrary evidence when weighing the credibility of a victim's uncorroborated testimony has not been overruled. Interestingly, in *Garland v. Commonwealth*, the court extended the no-corroboration requirement to other sexual offenses while not making any mention of the inherently improbable exception.[502]

It appears that in almost every state, as a general rule, corroboration is not required. There may be some variations on that rule from state to state, but in modern times it seems state laws reflect an understanding that there may not always be evidence of sexual assault outside of the victim's testimony. Usually, courts allow the entry of other evidence to consider the

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[495] *Id.* at 521.

[496] *Id.* at 520–21.

[497] *See* State v. Story, 646 S.W.2d 68, 72 n.3 (Mo. 1983); State v. Edwards, 785 S.W.2d 703 (Mo. Ct. App. 1990); State v. Pippenger, 708 S.W.2d 256, 260 (Mo. Ct. App. 1986).

[498] *See* Willis v. Commonwealth, 238 S.E.2d 811, 812–13 (Va. 1977).

[499] *Id.* at 813 (noting that the victim reported the rape one month after it had occurred).

[500] *Id.*

[501] *See* Mullis v. Commonwealth, 351 S.E.2d 919, 923 (Va. Ct. App. 1987) (citing Zirkle v. Commonwealth, 55 S.E.2d 24, 29 (Va. 1949)).

[502] 379 S.E.2d 146, 147 (Va. Ct. App. 1989).

sufficiency of a victim's testimony. However, in most states, because the question of whether a court should convict on the victim's uncorroborated testimony is so delicate, the decision of how to weigh the sufficiency of such evidence is left entirely to the jury.[503] In fact, appellate courts typically give great deference when reviewing a jury's decision to accept or reject a victim's uncorroborated testimony.[504]

As one court explained, "[b]ecause sexual offenses are typically clandestine in nature, seldom involving witnesses to the offense except the perpetrator and the victim, a requirement of corroboration would result in most sexual offenses going unpunished."[505] Nevertheless, a jury may conclude that the events did not occur without witnesses to the crime. Therefore, corroboration is useful and reliable to a victim's testimony and should be admitted when available.

C. THE ABOLITION OF THE COMMON LAW CORROBORATION REQUIREMENT: A MODEL FOR REFORM OF OTHER SEXUAL ASSAULT LAW?

Despite widespread adherence to the status quo in other areas of rape or sexual assault law, it is striking that most have almost totally eliminated the common law corroboration requirement. Although a significant minority of the states has eliminated through legislation this archaic requirement, the principal impetus for this change has been the prosecutorial willingness to pursue charges against sexual wrongdoers even where little or no evidence beyond the victim's testimony was available. The judiciary's willingness to uphold rape or sexual assault convictions where corroborative evidence was lacking must be acknowledged. However, government prosecutors successfully argued that no other crime imposed this additional burden when a citizen came forward as a victim. So it followed that a different rule should not apply to the testimony of a rape victim. In response, both judge and jury came to accept a rape victim's testimony standing alone before rendering judgments of guilty. Now, corroboration has for the most part become a relic of the past in rape and sexual assault cases.

Perhaps the change in the enforcement of sexual assault law that led to the abrogation of the corroboration requirement should be viewed as a model for addressing many of the other problems documented in this Article. If prosecutors throughout the nation are more willing to exercise

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[503] *See, e.g.*, State v. Fitzmaurice, 475 P.2d 426, 428 (Or. Ct. App. 1970).

[504] *See, e.g.*, State v. Taylor, 774 So. 2d 379, 384 (La. Ct. App. 2000) (citing State v. Bosley, 691 So.2d 347 (La. Ct. App. 1997)).

[505] *Garland*, 379 S.E.2d at 147.

their immense power to initiate charges against those using deceit or non-physical coercion to gain sexual advantage, then perhaps judges and juries will respond to the calls of innocent victims for justice as they did when they no longer insisted on proof of corroboration in sexual assault cases.

VIII. MARITAL EXEMPTION

A significant feature of common law rape was the so-called marital exemption, which criminalized only forcible sex by a man "with a female, not his wife."[506] But since 1993, some form of non-consensual sexual encounters between married persons has been a crime in all fifty states. No state retains a *complete* marital exemption within its sexual assault provisions, thus criminalizing a spouse's unwanted sexual encounter with his marital partner in at least one form. However, many of these states still maintain in some of their strictures an exemption that frees a spouse from the reach of criminal liability for taking sexual advantage of his marital partner.

A. STATUTES

Currently, fourteen states have completely abolished marital immunity for sexual offenses and treat all sex offenses between married persons the same as those between non-married persons.[507] In contrast, thirty-five states and the District of Columbia provide some form of marital immunity in their legislation.[508] Although in some of these states marital immunity

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[506] *See, e.g.*, ILL. REV. STAT. ch. 38, para. 11-1 (repealed 1983).

[507] FLA. STAT. ANN. § 794.011 (West 2007); IND. CODE ANN. §§ 35-42-4-1, -8 (West 2004); MASS. ANN. LAWS ch. 265, § 22 (LexisNexis 2010); MINN. STAT. ANN. § 609.342-3451 (West 2009 & Supp. 2011); NEB. REV. STAT. §§ 28-319 to -322.04 (2008 & Supp. 2010); N.J. STAT. ANN. § 2C:14-5(b) (West 2005); N.C. GEN. STAT. § 14-27.8 (2009); N.D. CENT. CODE § 12.1-20-07 (1997 & Supp. 2011); OR. REV. STAT. § 163.305–479 (2009 & Supp. 2010); TENN. CODE ANN. §§ 39-13-501 to -532 (2010); UTAH CODE ANN. § 76-5-402(2) (LexisNexis 2008); VA. CODE ANN. § 18.2-61(A) (2009); WIS. STAT. ANN. § 940.225(6) (West 2005 & Supp. 2010); WYO. STAT. ANN. § 6-2-307(a) (2011).

[508] ALA. CODE § 13A-6-68 (LexisNexis 2005); ALASKA STAT. § 11.41.432(a)(2), (b) (2010); ARIZ. REV. STAT. ANN. § 13-1407(D) (2010); ARK. CODE ANN. § 5-14-124(a) (2006 & Supp. 2011); CAL. PENAL CODE § 261(a) (West 2008); COLO. REV. STAT. § 18-3-405(1) (2011); CONN. GEN. STAT. ANN. § 53a-67b (West 2007); DEL. CODE ANN. tit. 11, § 770(a)(2) (2007 & Supp. 2010); D.C. CODE §§ 22-3011(b), -3017(b) (LexisNexis 2010); GA. CODE ANN. § 16-6-3(a) (West 2009); HAW. REV. STAT. ANN. § 707-730(1)(c)(ii) (LexisNexis 2007 & Supp. 2010); IDAHO CODE ANN. § 18-6107 (2004 & Supp. 2011); 720 ILL. COMP. STAT. ANN. 5/11-9.2(f)(1) (West 2010 & Supp. 2011); IOWA CODE ANN. § 709.4(2) (West 2003); KAN. STAT. ANN. §§ 21-5503(c), -5501(a) (West, Westlaw through 2010 Legis. Sess.); KY. REV. STAT. ANN. § 510.020(4) (LexisNexis 2008); LA. REV. STAT. ANN. § 14:43.1(A) (2007 & Supp. 2011); ME. REV. STAT. ANN. tit. 17-A, § 253(1)(B)–(C) (2006 & Supp. 2010); MD. CODE ANN., CRIM. LAW § 3-318(a) (LexisNexis 2002 & Supp. 2010); MICH. COMP. LAWS

for a crime involving forcible sexual penetration no longer remains, immunity exists for other sexual offenses not involving penetration.[509] For example, in several states, the crime of "spousal rape" outlaws sexual intercourse involving force or great bodily harm.[510] However, non-physical threats employed to engage in sex with one's spouse might be allowed.[511] Meanwhile, although sexual intercourse with a minor is almost always an offense, some states exempt this conduct if the accused is married to the minor.[512] Therefore, although many states may appear to have entirely eliminated the marital exemption from their sexual assault or rape statutes, aspects of this barrier to prosecution remain alive.

While fourteen states have removed any type of marital exemption from their sex crimes legislation, most states' sexual assault laws still differentiate sexual activity between spouses from that between non-married persons. There are four ways in which this marital differentiation appears in a state's criminal code: (1) separate offenses for marital and non-marital rape,[513] (2) marital immunity for sexual contact offenses only,[514] (3) exemptions for those in positions of authority who are married to the

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ANN. § 750.520l (West 2004); MISS. CODE ANN. § 97-3-99 (2006); MO. ANN. STAT. § 566.023 (West 1999); MONT. CODE ANN. § 45-5-503(1) (2010); N.H. REV. STAT. ANN. §§ 632-A:2(I)(h), (j)(1)–(2), (k), -A:2(III), -A:3(II)–(III), -A:4(I)(b)–(c) (LexisNexis 2007 & Supp. 2010); N.M. STAT. ANN. § 30-9-11(G)(1)–(2) (Supp. 2011); N.Y. PENAL LAW § 130.10(4) (McKinney 2009); OHIO REV. CODE ANN. §§ 2907.02(A)(1), .03(A) (West 2006 & Supp. 2011); OKLA. STAT. ANN. tit. 21, § 1111(A) (West 2002 & Supp. 2011); 18 PA. CONS. STAT. ANN. § 3122.1 (West 2000); R.I. GEN. LAWS § 11-37-2(1) (2002); S.C. CODE ANN. §§ 16-3-615(A), -658 (2003); S.D. CODIFIED LAWS § 22-22-7.2 (2006); TEX. PENAL CODE ANN. § 22.011(b)(11), (e)(1) (West 2011); VT. STAT. ANN. tit. 13, § 3252(c)(1) (2009); WASH. REV. CODE ANN. §§ 9A.44.050(1)(c), (f), .060(1), .073(1), .076(1), .079(1) (West 2009); W. VA. CODE ANN. §§ 61-8B-3(a)(2), -5(a)(2), -6 (LexisNexis 2010).

[509] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1407(D).

[510] *See, e.g.*, CAL. PENAL CODE § 262.

[511] *See, e.g.*, S.C. CODE ANN. § 16-3-658 ("A person cannot be guilty of criminal sexual conduct under Sections 16-3-651 through 16-3-659.1 if the victim is the legal spouse unless the couple is living apart and the offending spouse's conduct constitutes criminal sexual conduct in the first degree or second degree . . . ."); § 16-3-654 ("A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim" and "[t]he actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances.").

[512] GA. CODE ANN. § 16-6-3(a) (West 2009) (providing that "no conviction shall be had for this offense on the unsupported testimony of the victim"). Because this article focuses on sexual assault between adults, the issue of the marital exemption for minors will not be explored.

[513] *See, e.g.*, CAL. PENAL CODE §§ 261–262 (West 2008); CONN. GEN. STAT. ANN. § 53a-70b (West 2007).

[514] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1407(D) (2010); IDAHO CODE ANN. §§ 18-6101, -6107 (2004 & Supp. 2011); KAN. STAT. ANN. § 21-5501(a) (West, Westlaw through 2010 Legis. Sess.).

victim,[515] and (4) exemptions for those who have sex with a mentally impaired spouse.[516]

1. Separate Statutes for Marital Sexual Offenses

Some states have separate spousal sexual misconduct statutes that differ from statutes proscribing the same misconduct committed by a non-spouse. Five states currently have separate offenses criminalizing some form of sexual misconduct between spouses with a corresponding offense for non-spouses.[517]

South Carolina's criminal code includes the crime of spousal sexual battery,[518] as well as three separate criminal sexual offenses[519] that cannot be directed at spouses due to a marital exemption provision.[520] According to the South Carolina Code, "spousal sexual battery" is: (a) a "sexual battery," which includes sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, (b) when accomplished through threat or use of (1) a weapon or (2) "physical force or physical violence of a high and aggravated nature," and (c) when the misconduct in question is "by one spouse against the other spouse if they are living together."[521] Criminal sexual conduct in the first degree is similar to spousal sexual battery in that it prohibits a sexual battery involving "aggravated force."[522] Unlike spousal sexual battery, however, criminal sexual conduct in the first degree also outlaws a person's

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[515] *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/11-9.2(f)(1) (West 2010 & Supp. 2011) (exempting from the reach of the Illinois "custodial sexual misconduct" prohibition, for example, a probation officer from having sex with a probationer where the parties were married before the date of custody).

[516] ALASKA STAT. §§ 11.41.432(a)(2), .410(a)(3) (2010); CAL. PENAL CODE § 261(a)(1); CONN. GEN. STAT. ANN. § 53a-67(b); IOWA CODE ANN. § 709.4(2)(a) (West 2003); MISS. CODE ANN. § 97-3-99 (2006); N.H. REV. STAT. ANN. § 632-A:2(I)(h) (LexisNexis 2007 & Supp. 2010); N.Y. PENAL LAW § 130.10(4) (McKinney 2009); OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (West 2006 & Supp. 2011); OKLA. STAT. ANN. tit. 21, § 1111(A)(2) (West 2002 & Supp 2011); R.I. GEN. LAWS § 11-37-2(1) (2002); S.D. CODIFIED LAWS § 22-22-7.2 (2006); W. VA. CODE ANN. §§ 61-8B-1, 61-8B-8 (LexisNexis 2010).

[517] CAL. PENAL CODE §§ 261, 262; CONN. GEN. STAT. ANN. § 53a-70b; IDAHO CODE ANN. § 18-6107; MD. CODE ANN., CRIM. LAW § 3-318 (LexisNexis 2002 & Supp. 2010); S.C. CODE ANN. § 16-3-615(A) (2003).

[518] S.C. CODE ANN. § 16-3-615(A).

[519] S.C. CODE ANN. § 16-3-652 (2003 & Supp. 2010) (criminal sexual conduct in the first degree); S.C. CODE ANN. § 16-3-653 (2003) (criminal sexual conduct in the second degree); § 16-3-654 (criminal sexual conduct in the third degree).

[520] S.C. CODE ANN. § 16-3-658 (2003).

[521] § 16-3-615(A) (referring to § 16-3-651(h) (definition of "sexual battery")).

[522] § 16-3-652(1)(a).

commission of a sexual battery against a victim who (1) is also the victim of physical confinement, kidnapping, extortion, or other similar offense, or (2) is rendered mentally or physically helpless due to the person's use of a controlled substance or intoxicant against the victim.[523] Moreover, neither criminal sexual conduct in the second degree[524]—which requires "aggravated coercion" (such as threats to retaliate "in the future by infliction of physical harm, kidnapping or extortion . . . against the victim or any other person")[525]—nor criminal sexual conduct in the third degree—which requires *any* force or coercion[526]—contains a marital exemption. These three sexual conduct statutes offer a wider range of protection than the spousal sexual battery statute does.[527] Thus, a comparison of spousal sexual battery against all three of South Carolina's non-spousal criminal sexual conduct provisions reveals a variety of circumstances in which a spouse is completely immune from prosecution.[528]

In Connecticut, the offenses for spouses and non-spouses are respectively "sexual assault in a spousal or cohabitating relationship"[529] and "sexual assault in the first degree."[530] Under the statutory crime of sexual assault in a spousal or cohabitating relationship, if a person is married or cohabiting, that person shall not compel the spouse or cohabiter to engage in sexual intercourse by the use of force or the threat of force "which reasonably causes such other spouse or cohabiter to fear physical injury."[531] However, sexual assault in the first degree—the corresponding statute for non-married persons—provides that a person commits this offense when compelling another to engage in sexual intercourse by using or threatening force against the person *or a third person*.[532] In actuality, this latter offense is broader in its coverage than its counterpart involving spouses and

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[523] § 16-3-652(1)(b)–(c).

[524] § 16-3-653.

[525] § 16-3-651(b) (definition of "aggravated coercion").

[526] § 16-3-654.

[527] In addition, pursuant to section 16-3-658 (criminal sexual conduct where victim is spouse), a person "cannot be guilty of criminal sexual conduct under sections 16-3-651 through 16-3-659.1 if the victim is the legal spouse unless the couple is living apart and the offending spouse's conduct constitutes criminal sexual conduct in the first degree or second degree." This means that if the spouses live together, the victim must bring her complaint under the spousal sexual battery statute.

[528] Additionally, under the crime of "spousal sexual assault," the offending spouse's conduct must be reported to the appropriate law enforcement authorities within thirty days for prosecution to occur. § 16-3-615(B). No such requirement is present under the non-spousal criminal sexual conduct statutes. §§ 16-3-652, -653, -654 (2003 & Supp. 2010).

[529] CONN. GEN. STAT. ANN. § 53a-70b (West 2007).

[530] § 53a-70.

[531] § 53a-70b.

[532] § 53a-70(a)(1).

cohabitors because it contemplates threats or force directed at a third party and prohibits sexual intercourse with a mentally incapacitated person.[533] Thus, in Connecticut, the protections afforded potential victims differ between the two offenses.

2. Immunity for "Contact" Type Sexual Offenses

Another exemption for spousal sexual misconduct occurs in sexual contact offenses. Sexual contact offenses do not involve intercourse, but rather only involve types of contact, such as touching or exposure of the breasts or genitalia.[534] Five states currently have marital exemptions under one of their "contact" offenses.[535] Arizona and West Virginia have marital exemptions under their sexual abuse statutes,[536] while Kansas and Louisiana extend marital immunity in their sexual battery strictures.[537] Lastly, Alabama has a spousal exemption under the crime of indecent exposure.[538]

To illustrate, under Arizona law, a person commits "sexual abuse" by "intentionally or knowingly engaging in sexual contact with any person who is fifteen or more years of age without consent of that person."[539] Sexual contact is defined as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact."[540] However, in Arizona, it is a defense to a sexual abuse charge that the person was the spouse of the victim when the act was committed.[541] Similarly, West Virginia legislation specifies that the crime of sexual abuse in the first degree (an offense also outlawing sexual contact) cannot occur when the victim is married to the actor.[542]

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[533] § 53a-70(a)(4).

[534] ALA. CODE § 13A-6-68 (LexisNexis 2005) ("exposes his genitals"); ARIZ. REV. STAT. ANN. § 13-1401(2) (2010) ("sexual contact" includes "touching"); KAN. STAT. ANN. § 21-5501(a) (West, Westlaw through 2010 Legis. Sess.) ("touching"); LA. REV. STAT. ANN. § 14:43.1(A)(1)–(2) (2007 & Supp. 2011) ("touching"); W. VA. CODE ANN. § 61-8B-1(6) (LexisNexis 2010) ("touching").

[535] ALA. CODE § 13A-6-68; ARIZ. REV. STAT. ANN. § 13-1407(D) (2010); KAN. STAT. ANN. § 21-5501(a); LA. REV. STAT. ANN. § 43:1(A)(1)–(2); W. VA. CODE ANN. § 61-8B-7 (LexisNexis 2010).

[536] ARIZ. REV. STAT. ANN. § 13-1407(D); W. VA. CODE ANN. §§ 61-8B-1, 61-8B-7.

[537] KAN. STAT. ANN. § 21-5501(a); LA. REV. STAT. ANN. § 43:1(A).

[538] ALA. CODE § 13A-6-68.

[539] ARIZ. REV. STAT. ANN. § 13-1404(A) (2010).

[540] § 13-1401.

[541] § 13-1407(D).

[542] W. VA. CODE ANN. §§ 61-8B-1, -7 (LexisNexis 2010).

3. Exemptions for Persons in Positions of Authority Married to the Supervised Individual

A third exemption for spousal sexual conduct appears in prohibitions directed at persons in positions of authority.[543] In nine states, when the actor is in a position of authority over and married to the victim, that person is exempt from the criminal sexual offense.[544] This form of exemption is found in a wide variety of strictures focusing on those individuals taking sexual advantage of their authoritative positions, including correctional facility employees,[545] school employees,[546] custodians in a local or state agency,[547] and health care providers.[548] Although a wide range of authoritative positions are covered, all of the statutes have a common element that includes a relationship with another involving a duty of trust, care, or custody.[549] Jurisdictions that have codified this type of exemption include Arkansas, Kentucky, Illinois, New Mexico, New York, Oklahoma, Texas, Washington, and the District of Columbia.

The laws of the states of Washington and Kentucky serve as examples. In two different contexts, Washington has a marital exemption that immunizes a person in a position of authority from prosecution for engaging in sexual intercourse with another under his supervision. First, under Washington law, an individual commits the crime of rape in the second degree when he engages in sexual intercourse with a "person with a developmental disability," and that individual: (1) has "supervisory authority over the victim," (2) was "providing transportation, within the course of his or her employment, to the victim," or (3) was a health care provider and the victim was a client or patient.[550] However, this offense does not apply when the person and the victim are married.[551] Second, a person can also commit this same offense by having sexual intercourse with

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[543] *See supra* text accompanying notes 295–340 for a more in-depth discussion of positions of authority.

[544] ARK. CODE ANN. § 5-14-124(a)(1)–(3) (2006 & Supp. 2011); D.C. CODE § 22-3017(b) (LexisNexis 2010); 720 ILL. COMP. STAT. ANN. 5/11-9.2(f)(1) (West 2010 & Supp. 2011); KY. REV. STAT. ANN. § 510.020(4) (LexisNexis 2008); N.M. STAT. ANN. § 30-9-11(G)(2) (Supp. 2011); N.Y. PENAL LAW § 130.10(4) (McKinney 2009); OKLA. STAT. ANN. tit. 21, § 1111(A)(7)–(8) (West 2002 & Supp. 2011); TEX. PENAL CODE ANN. § 22.011(b)(11), (e)(1) (West 2011); WASH. REV. CODE ANN. § 9A.44.050(1)(c), (e) (West 2009).

[545] ARK. CODE ANN. § 5-14-124(a)(1).

[546] N.M. STAT. ANN. § 30-9-11(G)(2).

[547] KY. REV. STAT. ANN. § 510.020(4).

[548] ARK. CODE ANN. § 12-18-402(b) (2009 & Supp. 2011).

[549] *See, e.g.*, WASH. REV. CODE ANN. § 9A.44.050(1)(c)(i) ("Has supervisory authority over the victim . . . .").

[550] § 9A.44.050(1)(c)–(d).

[551] § 9A.44.050(1)(c).

a "victim [who] is a resident of a facility for persons with a mental disorder or chemical dependency" when the accused "has supervisory authority over the victim."[552] Again, the offense only applies where the person "is not married to the victim."[553]

Kentucky law provides a marital exemption to a person in a position of authority over individuals in the care or custody of state or local agencies.[554] Kentucky codifies its exemption under its definition of "lack of consent."[555] Under the Kentucky statutory definition of "lack of consent," a person is deemed incapable of consenting to a sexual encounter when he or she is "[u]nder the care or custody of a state or local agency pursuant to court order and the actor is employed by or working on behalf of the state or local agency."[556] However, another provision clarifies that the section shall not apply when the custodian or caregiver and the alleged victim are lawfully married to each other.[557] Therefore, a person having sex with someone under his care in a state or local agency cannot be prosecuted under a Kentucky offense requiring "lack of consent" if he is married to the victim.

4. Exemptions for Sexual Misconduct with a Mentally Impaired Spouse

The final category of marital exemptions provides immunity to persons who engage in sexual acts with their spouses when the spouse suffers from a mental condition, defect, or incapacity that impairs his or her ability to give consent. Although this type of exemption is the least common marital exemption, twelve states retain it.[558] The exemptions are generally directed toward situations in which the victims are mentally incapable of providing consent[559] or when the victims suffer from a mental condition that substantially impairs or precludes their ability to give consent.[560] For example, Alaska provides an exemption from the crime of sexual assault in

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[552] § 9A.44.050(1)(e).

[553] *Id.*

[554] KY. REV. STAT. ANN. § 510.020(3)(e) (LexisNexis 2008).

[555] § 510.020.

[556] § 510.020(3)(e).

[557] § 510.020(4).

[558] ALASKA STAT. § 11.41.432(a)(2) (2010); CAL. PENAL CODE § 261(a)(1) (West 2008); CONN. GEN. STAT. ANN. § 53a-67(b) (West 2007); IOWA CODE ANN. § 709.4(2)(a) (West 2003); MISS. CODE ANN. § 97-3-99 (2006); N.H. REV. STAT. ANN. § 632-A:2(I)(h) (LexisNexis 2007 & Supp. 2010); N.Y. PENAL LAW § 130.10(4) (McKinney 2009); OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (West 2006 & Supp. 2011); OKLA. STAT. ANN. tit. 21, § 1111(A)(2) (West 2002 & Supp. 2011); R.I. GEN. LAWS § 11-37-2(1) (2002); S.D. CODIFIED LAWS § 22-22-7.2 (2006); W. VA. CODE ANN. §§ 61-8B-1, -8 (LexisNexis 2010).

[559] *See* ALASKA STAT. § 11.41.410(a)(3)(A); MICH. COMP. LAWS ANN. § 750.520*l* (West 2004).

[560] *See* IOWA CODE ANN. § 709.4(2)(a).

the first degree when one engages in sexual penetration with one's spouse while knowing such spouse is mentally impaired.[561] Iowa likewise provides a marital exemption to liability for sexual abuse in the third degree for persons who perform sex acts with their spouses who suffer from a mental defect or incapacity, which would otherwise preclude giving effective consent.[562]

B. CASE LAW

There are a few states that prosecute husbands for raping their wives when the marital exemption is raised. However, these cases tend to deal with instances of extreme violence and force.[563] The lack of cases on record could be due to juries and judges constantly acquitting the defendants; however, it is more likely due to a failure to prosecute husbands for raping their wives, even if no marital exemption exists.

There is a select group of cases in which the judiciary decided to abolish the marital exemption, either using the Fourteenth Amendment or declaring that there is no rational reason for the marital exemption to exist.[564] These cases provide a blueprint for eliminating the marital

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[561] ALASKA STAT. § 11.41.410(a)(3)(A).

[562] IOWA CODE ANN. § 709.4(2)(a).

[563] *See, e.g.*, State v. Eric M., 858 A.2d 767, 770 (Conn. 2004) (affirming defendant's conviction where he pounced on his wife while she checked the fuse box, placed her in a chokehold, put handcuffs on her, removed her shirt, tied her to a chair, performed cunnilingus, and tackled her through the glass storm door when she attempted to escape); State v. Gregory, 893 A.2d 912, 916 (Conn. App. Ct. 2006) (reversing defendant's conviction for sexual assault in a spousal relationship due to exclusion of evidence where defendant pinned his wife down by her neck, removed her clothes while she struggled, pried her legs apart, injured her knees, and then engaged in vaginal intercourse); Trigg v. State, 759 So. 2d 448, 450 (Miss. Ct. App. 2000) (affirming defendant's conviction for sexual battery where defendant placed antidepressants in his wife's food to render her unconscious and then videotaped himself orally and digitally penetrating her vagina); State v. Hardy, No. 96-P-0129, 1997 Ohio App. LEXIS 4588, at *6–7 (Oct. 10, 1997) (affirming defendant's conviction for rape where he attacked his wife with a gun, handcuffed her, forced her to consume pills, engaged in vaginal intercourse with her, then tried to electrocute her in the bathtub); Davis v. State, No. 05-05-01694-CR, 2007 Tex. App. LEXIS 352, at *1–3 (Jan. 18, 2007) (affirming defendant's conviction for aggravated sexual assault where he hit his wife, tied her up, forced a bat and a beer bottle into her vagina, then threatened to kill her, before having vaginal intercourse with her); Morse v. Commonwealth, 440 S.E.2d 145, 147 (Va. Ct. App. 1994) (reversing defendant's conviction due to reversible error where defendant's wife refused to have sex, he flipped the mattress over and injured her, threatened her repeatedly, and then had vaginal intercourse with her).

[564] State v. Rider, 449 So. 2d 903, 904 (Fla. Dist. Ct. App. 1984); People v. M.D., 595 N.E.2d 702, 713 (Ill. App. Ct. 1992); Commonwealth v. Chretien, 417 N.E.2d 1203, 1207–10 (Mass. 1981); State v. Willis, 394 N.W.2d 648, 650–51 (Neb. 1986); State v. Smith, 426 A.2d 38, 46–47 (N.J. 1981); People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984); Shunn v. State, 742 P.2d 775, 778 (Wyo. 1987).

exemption, and are therefore worthwhile to examine.

The paradigmatic case which first overturned the marital exemption is *State v. Smith*,[565] cited in almost every case eliminating the marital exemption.[566] In *Smith*, the defendant broke into the apartment of his estranged wife and proceeded to beat and rape her.[567] Though they were separated for one year at the time of the attack, the defendant and his wife were still legally married under New Jersey law.[568] Subsequently, the trial court dismissed the defendant's rape charge, believing that the common law marital exemption was "implicitly incorporated into [New Jersey's] statutory definition of rape," and the state appealed this dismissal.[569]

The reviewing court in *Smith* began by recounting the historical development of the marital exemption and unveiled a surprising fact: the marital exemption came into existence solely because of an extra-judicial argument written by Sir Matthew Hale in the seventeenth century: "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[570] The court then noted that Hale cited no authority for this proposition and that even Blackstone did not mention a marital exemption.[571]

The court next considered three justifications for a marital rape exemption. First, it referred to the antiquated idea that "a woman was the property of her husband or father."[572] However, the court dismissed this out of hand because the idea that a woman was owned by her husband was never a valid proposition in this country.[573] The second possible justification was based on the theory that marriage made a husband and wife one legal entity, and as such, a man could not legally "rap[e] himself."[574] The court noted that this justification did not comport with the rest of the common law at the time, as a husband could be convicted of other crimes, such as assault and battery, upon his wife.[575] In addition, even if, *arguendo*, legal marital unity existed at one point, it was rejected in this

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[565] *Smith*, 426 A.2d 38.

[566] *Rider*, 449 So. 2d at 904; *Chretien*, 417 N.E.2d at 1207; *Willis,* 394 N.W.2d at 650; *Liberta*, 474 N.E.2d at 572; *Shunn*, 742 P.2d at 777.

[567] *Smith*, 426 A.2d at 39.

[568] *Id.*

[569] *Id.* at 40.

[570] *Id.* at 41.

[571] *Id.* at 43.

[572] *Id.* at 43–44.

[573] *Id.* at 44.

[574] *Id.*

[575] *Id.*

country in the nineteenth and twentieth centuries through statutes such as the Married Women's Acts, which gave married women the legal rights to sue, own property, and enter contracts separately from their husbands.[576]

Finally, the court analyzed a third popular justification for the marital exemption, that through the marriage contract, "a wife consents to sexual intercourse with her husband," and this "irrevocable consent" eliminates the essential "lack of consent" element of rape.[577] In dismissing this justification, the *Smith* court called this theory "offensive to our valued ideals of personal liberty" and "not sound where the marriage itself is not irrevocable."[578] According to the court, if the wife can eventually terminate the marriage contract through divorce, then she must also be able to revoke a single term of that contract, in this case consent to sexual intercourse.[579] The court went on to state that, in the case of such a "'breach' of the marriage 'contract,' [the husband's] remedy is in a matrimonial court, not in violent . . . self-help."[580] After dismissing these three justifications for the marital exemption as "irrational," the court concluded that "no justification remained at this late date for believing that a rigid marital exemption rule . . . would be retained."[581]

Other courts soon followed suit in a similar vein, rejecting their states' marital exemptions as irrational and outdated. In *State v. Rider* and *Shunn v. State*, the Florida District Court of Appeals and the Wyoming Supreme Court eliminated the marital exemption in their respective states, following the arguments of *Smith*[582] and adding that "[w]hatever the traditional notions concerning spousal consent to sexual intercourse may be they certainly do not contemplate consent to acts of violence."[583] The Supreme Judicial Court of Massachusetts, in *Commonwealth v. Chretien*, used the language of the rape statute to reject the marital exemption.[584] The court determined that an earlier version of the rape statute encompassed a common law spousal exception, forbidding "unlawful carnal knowledge of a woman forcibly and against her will," which precluded a husband from raping his wife.[585] In 1974, the Massachusetts legislature eliminated the

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[576] *Id.*

[577] *Id.*

[578] *Id.*

[579] *Id.*

[580] *Id.*

[581] *Id.* at 45.

[582] State v. Rider, 449 So. 2d 903, 907 (Fla. Dist. Ct. App. 1984); Shunn v. State, 742 P.2d 775, 777–78 (Wyo. 1987).

[583] *Rider*, 449 So. 2d at 906.

[584] Commonwealth v. Chretien, 417 N.E.2d 1203, 1208–09 (Mass. 1981).

[585] *Id.* at 1206–08, 1208 n.4.

word "unlawful," which meant that a husband could now be prosecuted for raping his wife forcibly and against her will.[586] Finally, the Nebraska Supreme Court, in *State v. Willis*, eliminated the marital exemption by stating that first-degree sexual assault "proscribes a crime of violence, not a crime of sex," and a crime of violence committed by a husband against his wife has always been punishable, even at common law.[587]

The courts of New York and Illinois took another approach and used the Equal Protection Clause of the Fourteenth Amendment to eliminate the marital exemption in those states.[588] In *People v. Liberta*, the defendant appealed his conviction for the rape and sodomy of his wife, arguing that the New York rape statutes violated the Equal Protection Clause, because they unfairly burdened unmarried, but not married men, and only burdened men, not women.[589] The New York Court of Appeals agreed, ruling the rape statutes unconstitutional.[590] The court stated that "there [was] no rational basis for distinguishing between marital rape and nonmarital rape" because the rationales used to support the distinction were "based upon archaic notions" of consent and property rights, or were "unable to withstand even the slightest scrutiny."[591] The court then reiterated many of the same arguments that the *Smith* court had used a few years earlier, adding that "[a] married woman has the same right to control her own body as does an unmarried woman."[592] The court also declared that the female exemption in the law violated the Equal Protection Clause, because the classification (male–female) was not substantially related to the achievement of an important governmental objective.[593] The court felt that, though relatively infrequent, female rape of a male, or male rape of another male, was as emotionally scarring and violent as a man raping a woman, and that criminal liability needed to exist.[594]

The *Liberta* court also refuted the arguments put forth by the Colorado Supreme Court in *People v. Brown*, the only modern case in which a state

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[586] *Id.* at 1208–09.

[587] State v. Willis, 394 N.W.2d 648, 651 (Neb. 1986).

[588] In the Illinois decision of *People v. M.D.*, 595 N.E.2d 702, 708 (Ill. App. Ct. 1992), the Second District Appellate Court ruled that the availability of a marital exemption for criminal sexual assault and aggravated criminal sexual assault was contrary to the Equal Protection Clauses of the Federal and Illinois Constitutions.

[589] People v. Liberta, 474 N.E.2d 567, 569 (N.Y. 1984).

[590] *Id.* at 575, 577–78.

[591] *Id.* at 573.

[592] *Id.*

[593] *Id.* at 576–77.

[594] *Id.* at 577.

supreme court upheld the marital exemption for all rape laws.[595] In *Brown*, the Colorado court ruled that there was a rational reason for the classification of married and unmarried men because, first, the marital exemption allows for the possibility of reconciliation between estranged spouses, and second, the marital exemption "averts difficult emotional issues and problems of proof inherent" in prosecuting marital rape cases.[596] Therefore, the court concluded, the marital exemption was "neither arbitrary nor irrational," and so was constitutional.[597]

Addressing the first point, the *Liberta* court said that "if the marriage has already reached the point where intercourse is accomplished by violent assault it is doubtful that there is anything left to reconcile," especially "if the wife is willing to bring criminal charges against her husband which could result in a lengthy jail sentence."[598] In regard to the second rationale put forth by the *Brown* court, the court in *Liberta* said that marital rape is no more difficult to prove than any other rape, since "[p]roving lack of consent . . . is often the most difficult part of any rape prosecution" and it is no more likely that "vindictive" wives would fabricate stories of rape than it is that unmarried women would do so.[599] In fact, the criminal justice system "is presumed to be capable of handling any false complaints," and if it were not, then "virtually all crimes other than homicides would go unpunished."[600]

In an article on the evolution of the law, Justice Holmes wrote:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[601]

As the cases discussed above demonstrate, this is perhaps more applicable to the marital exemption for rape than it is for any other legal issue considered here. The exemption is rooted in a centuries-old extrajudicial statement and has persisted in the common law tradition ever since. The cases that have dealt with the marital exemption at length have exposed it as irrational and ungrounded, and have provided a blueprint for eliminating the marital exemption altogether.

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[595] People v. Brown, 632 P.2d 1025, 1027 (Colo. 1981).

[596] *Id.*

[597] *Id.*

[598] *Liberta*, 474 N.E.2d at 574.

[599] *Id.*

[600] *Id.*

[601] *Id.* at 574 (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

IX. CONCLUSION

This Article exposed the sex crime laws of America as fundamentally flawed as they relate to non-consent, deception, and coercion. The lack of appropriate criminal sanctions for non-consensual sex is particularly vexing in the context of adolescent and young adult sexual interaction, when hormones, curiosity, insecurity, and fear dominate the arena. Before the age of majority, most states prohibit sex of any kind with strict liability. However, upon reaching adulthood—sixteen or seventeen in most states—adolescents and young adults are free to engage in sex with anyone, unprotected from and exposed to unwanted sex.

The effort of reformers over the last several decades has led to the criminalization of some types of unwanted, non-consensual sex; however, most states do not criminalize that conduct, or only do so in a limited fashion. Using force or threatening force to have sex is abhorrent and criminal. That conduct should be punished to a greater degree than non-consent offenses. But non-consensual sex should be criminalized across the board. A victim, frozen with fear, who fails to express approval by words or actions should have that decision protected by the criminal justice system. Sex should be based on a freely given agreement between adults. In other words, sex cannot rightly occur unless each party consents before the act takes place. Establishing an objective manifestation of that agreement, and placing the onus on the aggressor to obtain consent before sex, would fix the problem. This freely-given-agreement approach relieves the victim of a burden to verbally or physically "resist" in order for non-consensual sex to be criminal. It also allows flexibility in prosecutorial charging decisions by simplifying proof requirements. Prosecutors would have to prove that (1) no objective manifestation of consent was provided by the victim, and (2) the defendant proceeded without that agreement. The burden of proof remains beyond a reasonable doubt, so the defendant's presumption of innocence is preserved. A freely-given-agreement requirement eliminates confusion and ambiguity as to the legal application of "no means no."

Use of deception is another tolerated mechanism for achieving sex. A majority of the states do not criminalize the use of deception in any way. Those states that do typically limit liability to circumstances involving treating physicians or other professional actors. Only four states have sex crimes that generally prohibit deception when it is used with the intent of achieving sex.

Many conversations that precipitate sexual encounters involve exaggerations or overt lies. This conduct becomes unacceptable if it is intended to achieve sex. The fact that deception is commonplace does not justify its tolerance. Deceiving another in order to gain control over his

property is criminalized in every state; the value of the property obtained by deception is irrelevant. Thus, pocketing an apple at a grocery store is punishable by jail time, but deceiving another to obtain sexual gratification is perfectly legal. Why is deception tolerated in the context of sex? What protection does society provide to a person's sexual integrity? Sexual activity is one of the most intimate encounters people engage in and yet under the law it is treated as less valuable than a piece of fruit if deception is used.

The solution is to establish a sex-by-deception crime prohibiting the use of deception with the intent to engage in sexual activity. A specific intent requirement would preclude idle bombast from being criminalized, prohibiting only deception utilized to obtain sex. It is time to remove deception from the realm of sexual interaction in American society. Its tolerance promotes an unseemly status quo in our social fabric that denigrates the most intimate of relationships.

Coercion in any form or taking advantage of one's position of authority to achieve sex must be outlawed everywhere. American criminal law cannot ignore the employer who uses a threat of termination of employment or a promise of promotion to sexually exploit an employee.

The arguments against these three reforms focus on a variety of myths. The first argument is that these changes de-romanticize adult sexual relationships; it suggests all sexual acts would require a written contract. This argument is specious because if a person is unclear as to his sex partner's intentions, sexual advances should cease. Removing ambiguity and requiring the initiator to procure the victim's freely given consent resolves the problem.

The second argument suggests that these changes would lead a jilted sex partner to lie about the encounter. Again, this claim is without merit. Under current law in all states, a person who wishes to frame a former sex partner can do so by making false claims of physical threats or force. One cannot automatically assume the likelihood of false charges or commission of perjury will increase due to non-consent or anti-deception law changes.

The final antagonistic argument implies that these changes are unnecessary and current law sufficiently criminalizes sex crimes. This final argument ignores our society's endemic level of sexual assault, comprised of forced and non-consensual sex. Studies reveal that the vast majority of sex crime victims are female, and between one in three and one in four women in this country have been victims of unwanted sexual contact.[602]

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[602] *See* NAT'L VICTIM CTR. & CRIME VICTIMS RESEARCH AND TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION (1992), *reviewed by* DIANA E. H. RUSSELL & REBECCA M. BOLEN, THE EPIDEMIC OF RAPE AND CHILD SEXUAL ABUSE IN THE UNITED STATES 99

Current law has inadequately addressed this problem.

Making it clear to the citizenry that society will not tolerate any form of unwanted sex sends a message to the fraternity pledges and Joe Sixpacks: no means no, and deception, non-physical coercion, or taking advantage of one's superior position cannot be the means of sexual conquest. Only then will we begin to address this profound, systemic problem and confront those who choose to take advantage of the gaps in sex crime laws in our country to the detriment of victims.

(2000) (outlining the prevalence and magnitude of sex abuse in the United States); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 7, at 21–23 (2006) (stating that one in three women reported experiencing unwanted sexual contact and over 85% of sex crime victims are female); Mary P. Koss et al., *The Scope and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 168 (1987) (stating that one in four college students reported they had been the victim of a rape or reported rape); Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1283 (1994) (summarizing a litany of rape statistical studies and finding that "the conclusion supported by all of these statistics is that 'rape and the victimization of women occur so often that they are normal occurrences'" (quoting Susanne Mayr & Joseph Price, *The Io Syndrome: Symptom Formation in Victims of Sexual Abuse*, 25 PERSP. PSYCHIATRIC CARE 36, 37 (1989))); Sally K. Ward et al., *Acquaintance Rape and the College Social Scene*, 40 FAM. REL. 1, 65–71 (1991) (stating that 34% of women respondents reported unwanted sexual contact, 20% unwanted attempted sexual intercourse and 10% unwanted sexual intercourse).