

2021

From Common Law to Affirmative Consent: Reforming Minnesota's Criminal Sexual Conduct Laws

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Recommended Citation

Summers, Nate (2021) "From Common Law to Affirmative Consent: Reforming Minnesota's Criminal Sexual Conduct Laws," *Mitchell Hamline Law Review*: Vol. 47 : Iss. 1 , Article 1.

Available at: <https://open.mitchellhamline.edu/mhlr/vol47/iss1/1>

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**FROM COMMON LAW TO AFFIRMATIVE CONSENT:
REFORMING MINNESOTA’S CRIMINAL
SEXUAL CONDUCT LAWS**

Nate Summers[†]

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I. INTRODUCTION

The time to reform Minnesota’s criminal sexual conduct (“CSC”) laws is now.¹ Conceptions of sex, rape, and consent have evolved from paternalistic ideals and given way to modern reforms and an ever-expanding understanding of sexual relationships. One need only watch cringeworthy interactions of sex symbols of earlier decades to understand how drastic this shift has been. For example, take what was an entirely acceptable scene in the PG-rated, 1964 film *Goldfinger*.² James Bond corners his female co-

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¹ See MINN. STAT. §§ 609.341-.3451 (2019).

² GOLDFINGER (EON Productions 1964).

star, Pussy Galore, in a stable and makes several sexual advances, which Galore rejects.³ He then attacks Galore, who pushes him away.⁴ Finally, Bond pins Galore to the ground and kisses her.⁵ Galore continues to resist Bond, but eventually, Galore gives in, and the scene cuts away.⁶ Galore later changes allegiances and helps Bond defeat his nemesis, Auric Goldfinger.⁷ The essential takeaway from this scene and the movie overall is clear: if not for Bond's ability to overpower Galore's initial lack of consent, Goldfinger would have been successful in his plan to destroy Fort Knox.⁸

Recently, investigative journalists have exposed gaping holes in how Minnesota's law enforcement agencies handle sexual assaults.⁹ These realizations prompted many reforms, including the use of trauma-informed interviewing techniques by investigators in cases of sexual assaults,¹⁰ and led to the repeal of some distasteful and outdated laws.¹¹ However, the Minnesota Legislature's work is not done.

While Minnesota defines consent in modern terms,¹² the definition's interplay with the CSC statutes entirely misses the mark when it comes to the criminality of nonconsensual sexual conduct. Remnants of outdated rape statutes remain in the current CSC statutory framework, which requires either force or injury to elevate an offense to a felony.¹³ Today in Minnesota, the law makes no distinction between nonconsensual

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See Brandon Stahl, Jennifer Bjorhus & MaryJo Webster, *When Rape Is Reported and Nothing Happens*, STAR TRIB. (July 22, 2018) [hereinafter Stahl et al., *When Rape Is Reported*], <https://www.startribune.com/when-rape-is-reported-in-minnesota-and-nothing-happens-denied-justice-special-report-part-one/487130861/> [https://perma.cc/W7BQ-3PP7].

¹⁰ See Abby Honold Act, S. 171, 116th Cong. (2019); see also Dana Ferguson, *Minnesota peace officers to adopt 'victim-centered' approach to sexual assault investigation*, BRAINERD DISPATCH (July 25, 2019), <https://www.brainerddispatch.com/news/government-and-politics/4038212-Minnesota-peace-officers-to-adopt-victim-centered-approach-to-sexual-assault-investigation> [https://perma.cc/3G83-CHXQ] (detailing newly-adopted training requirements for police officers to support trauma-informed and victim-centered approaches to sexual assault investigations).

¹¹ See, e.g., Act of May 30, 2019, ch. 5, art. 4, § 9, 2019 Minn. Laws 43 (removing the "buttocks exception" to Fifth Degree Criminal Sexual Conduct, which originally excluded the "intentional touching of the clothing covering" the area of the buttocks from prosecution); MINN. STAT. § 609.349 (2018) (repealed 2019) (providing a voluntary relationship defense for criminal sexual conduct crimes).

¹² See MINN. STAT. § 609.341, subdiv. 4 (2019).

¹³ See *id.* § 609.3451 (indicating nonconsensual sexual contact is generally a gross misdemeanor).

sexual intercourse without force or injury and intentional, nonconsensual touching of a victim’s inner thigh.¹⁴

The Legislature would be wise to adopt an affirmative consent standard into its CSC statutes, as it would accurately reflect the criminality of nonconsensual sexual contact and intercourse. The Legislature need not look far for a working model of affirmative consent: Wisconsin has a relatively long history of using the affirmative consent standard to criminalize nonconsensual sexual contact and intercourse, even without force or injury.¹⁵ Given recent controversy regarding Minnesota’s CSC statutes,¹⁶ the Legislature should adopt a version of Wisconsin’s sexual assault statutes to bring Minnesota’s statutes in line with modern conceptions of sex, rape, and consent.

A. *The Problem*

Joanna Howe’s Lyft driver sexually assaulted her after he walked her to her apartment.¹⁷ Howe had been drinking earlier that night—her last memory was of a man standing over her as she lay naked on her bed.¹⁸ Police collected bedding and clothing from her room, and Howe underwent a sexual assault exam, but the results were inconclusive.¹⁹ Eventually, police were able to make contact with the suspect, and he admitted that Howe “seemed drunk, but . . . coherent.”²⁰ He also admitted to staying at Howe’s apartment “for an ‘hour or so. We cuddled, and we had . . . both ways.”²¹

The case was referred to the Ramsey County Attorney’s Office in August 2017, but the office declined charges.²² The prosecutor told Howe that “because [the suspect] texted that she was coherent and that she walked up to the apartment with him, it would be reasonable for a jury to believe that she was not physically helpless,” as defined under Minnesota law.²³ The suspect’s behavior was “absolutely outrageous,” Ramsey County Attorney John Choi said in an interview, “but from a prosecutor’s standpoint, there’s a question as to whether it violates the law.”²⁴ From Howe’s standpoint,

¹⁴ See *id.* (defining fifth degree criminal sexual conduct).

¹⁵ WIS. STAT. ANN. § 940.225 (West 2020).

¹⁶ Stahl et al., *When Rape Is Reported*, *supra* note 9; Ferguson, *supra* note 10.

¹⁷ Brandon Stahl, Jennifer Bjorhus & MaryJo Webster, *How Alcohol Foils Rape Investigations*, STAR TRIB. (Aug. 12, 2018) [hereinafter Stahl et al., *How Alcohol Foils Rape Investigations*], <https://www.startribune.com/how-alcohol-foils-rape-investigations-in-minnesota-denied-justice-part-three/488413421/> [https://perma.cc/RV49-774G].

¹⁸ See *id.* (containing Joanna Howe’s description of her sexual assault).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (ellipsis in original).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

however, “[t]here’s no way I could consent But because of the narrow way that laws have been interpreted in Minnesota in cases like mine, I won’t see any justice.”²⁵

On June 15, 2019, the St. Paul Police Department received a report of a sexual assault from a 911 caller.²⁶ The caller stated that his friend “seems to be sexually assaulted and is not okay[.]”²⁷ The caller continued, “[s]he left with a couple of guys and she is absolutely bawling her eyes out and doesn’t know what happened.”²⁸ The victim went to a hospital, obtained treatment, and forensic evidence, including DNA, was collected.²⁹ Two suspects were arrested and held, but charges were not filed, pending further investigation.³⁰

In a December 20, 2019 press conference, Hennepin County Attorney Mike Freeman announced that charges would not be filed in the case.³¹ This decision was made despite the appropriate interviewing techniques and prompt investigation Minnesota’s more recent reforms require.³² Freeman noted with frustration that “given Minnesota’s current laws regarding intoxication and a victim’s ability to give consent, we were working under some significant constraints.”³³ While he would not say whether charges would have been filed had Minnesota’s laws reflected those in Wisconsin, he did ask the Minnesota Legislature to “seriously consider making changes to the criminal sexual conduct statute” during the 2020 session.³⁴

B. *Outline*

This article seeks to provide context and analysis to the debate over affirmative consent and proposes the Minnesota Legislature adopt language that would absorb the affirmative consent standard into Minnesota’s CSC statutes. To this end, Part II discusses the origin of Minnesota’s current statutory scheme and describes the evolution of common law and Minnesota’s rape statutes from a patriarchic property-type crime to the

²⁵ *Id.*

²⁶ *No charges in University of Minnesota wrestling sexual assault investigation*, FOX 9 (Dec. 20, 2019), <https://www.fox9.com/news/no-charges-in-university-of-minnesota-wrestling-sexual-assault-investigation> [<https://perma.cc/RD4T-6RFQ>] (detailing the investigation and decision not to pursue charges in a student-involved sexual assault case).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Hennepin Attorney, *No Charges Filed Against University of Minnesota Wrestlers*, YOUTUBE (Dec. 20, 2019), <https://www.youtube.com/watch?v=Sor6uVMHt4o>, [<https://perma.cc/C77N-PVYR>]; see also *No charges in University of Minnesota wrestling sexual assault investigation*, *supra* note 26.

³¹ Hennepin Attorney, *supra* note 30.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

complicated statutory scheme we have today. In Part III, this article will discuss affirmative consent and show how, at least by its statutory definition, Minnesota has already adopted a form of affirmative consent, though affirmative consent is not represented in the broader CSC statutory structure. Part IV discusses arguments against affirmative consent and their counterarguments. Finally, in Parts V and VI, this article argues for a complete rehaul of Minnesota's CSC statutes, with a focus on reforming what is currently defined in third-degree and fourth-degree CSC to cover sexual intercourse and contact without affirmative consent, and to generally simplify the CSC statutes. Proposed model language for the amended laws is provided as a guide for the Minnesota Legislature in Part VI.

II. A HISTORY OF PAST REFORMS OF MINNESOTA CRIMINAL SEXUAL CONDUCT LAWS

Minnesota's CSC statutes represent a complicated amalgamation of prohibited conduct. What began as a property offense against a victim's husband or father has evolved steadily through the years to cover some forms of nonconsensual sexual contact and intercourse.³⁵ The laws have grown overly complicated as more and varied conduct has been proscribed, though even these reforms miss the crux of what constitutes rape in modern society: sexual conduct without consent. To better understand the Minnesota CSC statutes today, one must first understand the history behind the state's current statutes.

A. *First Rape Statutes and Early Reforms*

In the early years of statehood, Minnesota statutes did not specifically define rape; however, statutes did allow for punishment of rape based on its common law definition.³⁶ However, this common law definition was highly prejudicial to victims and considered rape to be a property crime.³⁷ The crime was based more on the supposed economic harm to a victim's father or husband than the harm to the rape victim, and the punishment for rape had more to do with repaying the father or husband

³⁵ Compare MINN. STAT., ch. 89, § 38 (1858) (repealed 1891) ("If any person shall ravish, and carnally know any female of the age of ten years or more, by force and against her will, he shall be punished by imprisonment in the territorial prison, not more than thirty years, nor less than ten years; but if the female on trial shall be proven to have been at the time of the offense, a common prostitute, he may be imprisoned not more than one year."), with MINN. STAT. § 609.342 (2019).

³⁶ See *State v. Pulte*, 12 Minn. 164, 170 (1866) ("Our statutes do not create or define rape . . . Yet such crimes are recognized and punished by statute . . ."); see also MINN. STAT., ch. 89, § 38 (1858) (repealed 1891).

³⁷ See *State in Interest of M.T.S.*, 609 A.2d 1266, 1273 (1992) ("[R]ape had its legal origins in laws designed to protect the property rights of men to their wives and daughters.").

for his supposed loss than censuring the offender or obtaining justice for the victim.³⁸

Early common law generally defined rape as “the carnal knowledge of a woman forcibly and against her will.”³⁹ The common law definition was essentially codified in Minnesota’s first Territorial Statute of 1851.⁴⁰ This definition, however, was highly problematic.

First, the use of gendered terms meant the outright denial that a male could be a rape victim—a flawed norm that persisted well into the late 20th century.⁴¹ In the rare case that sexual assault against a male was investigated and prosecuted, it was not recognized as a sexual assault but instead fell under the general assault statute.⁴² Thus, if successfully prosecuted, the assailant would receive a considerably lesser penalty than if he or she had been convicted of rape.⁴³

Second, the force requirement meant a victim had to issue “the utmost” resistance for the force element to be met.⁴⁴ Courts held that “[n]ot only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.”⁴⁵ Thus, the

³⁸ See, e.g., *Deuteronomy* 22: 28–29 (New Int’l Version) (“If a man happens to meet a virgin who is not pledged to be married and rapes her and they are discovered, he shall pay her father fifty shekels of silver. He must marry the young woman, for he has violated her. He can never divorce her as long as he lives.”).

³⁹ *Rape*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁴⁰ Compare MINN. STAT., ch. 92a., § 6523 (1894) (repealed 1967) (“Rape is an act of sexual intercourse with a female not the wife of the perpetrator, committed against her will or without her consent.”), with *Askew v. State*, 118 So. 2d 219, 221 (Fla. 1960) (“The common law crime of rape is composed of three essential elements: carnal knowledge, force, and the commission of the act without the consent or against the will of the female victim.”).

⁴¹ See generally MINN. STAT. §§ 609.291–.292 (repealed 1975); see *State v. Witt*, 310 Minn. 211, 217, 245 N.W.2d 612, 616–17 (1976) (noting that the gendered language of now-repealed Minnesota Statute section 609.291–.292 showed the Minnesota Legislature made a “factual determination that the rape of women by men is a significant social problem, involving unique and potentially severe physiological, psychological, and social injuries and traumas, and that other forms of sexual penetration, including a woman forcing sexual intercourse upon a man, are much less serious social problems because they occur extremely infrequently or because the harms they inflict are less grave, or because of both of these factors.”) (internal citation omitted).

⁴² See generally Charlie Savage, *U.S. to Expand Its Definition of Rape in Statistics*, N.Y. TIMES (Jan. 6, 2012), <https://www.nytimes.com/2012/01/07/us/politics/federal-crime-statistics-to-expand-rape-definition.html> [<https://perma.cc/65GT-U2H7>] (detailing the history of terminology in criminal sexual conduct cases that excluded types of assault that victimized men).

⁴³ See MINN. STAT., ch. 100, § 45 (1851) (repealed 1858) (setting a maximum of 3 years and a minimum 6 months in prison for assault with intent).

⁴⁴ *Brown v. State*, 106 N.W. 536, 541 (Wis. 1906).

⁴⁵ *Id.* at 538.

victim's actions were put on trial. Victims could not simply state that they resisted their assaulters, they had to "relate the very acts done [to resist], in order that the jury and the court may judge whether any were omitted."⁴⁶ Victims were expected to "interpose most effective obstacles by means of hands and limbs and pelvic muscles,"⁴⁷ without which even guilty verdicts would be overturned.

Because of the force and resistance requirements, common law shifted the focus of rape trials away from the defendant and onto the victim in ways otherwise unheard of in criminal law.⁴⁸ Judges and juries questioned whether a rape victim resisted their assailant and whether that resistance was enough to constitute a rape.⁴⁹ According to early courts, "[m]ere verbal unwillingness does not amount to want of consent, and may amount to invitation."⁵⁰ Thus, in order for the force element to be met, courts looked at "the circumstances of each case, such as the time, place, and character of the assault, and the age, intelligence, courage, and temperament of the female."⁵¹ Clearly, the latter elements of the victim's intelligence, courage, and temperament subjected victims to substantial personal examination. After that examination, "whatever the circumstances may be, there must be the greatest effort of which she is capable therein to foil the pursuer and preserve the sanctity of her person" for a rape conviction to stand.⁵² This element, flawed as it is, remains present in most of Minnesota's current CSC statutes.⁵³

Finally, the common law definition completely excluded the possibility of marital rape—a standard which continued in Minnesota until 2019.⁵⁴ This definition reflected the patriarchal nature of marital and sexual relationships. When a woman married her husband, she gave up the ability to withdraw consent to sexual intercourse—all the law required in terms of

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See Daphne Edwards, *Acquaintance Rape & the "Force" Element: When "No" Is Not Enough*, 26 GOLDEN GATE U. L. REV. 241, 251 (1996) ("The element of lack of consent and resistance had enabled courts to focus attention solely on the propriety of the victim's behavior.").

⁴⁹ *Id.*

⁵⁰ *State v. Cowing*, 99 Minn. 123, 126, 108 N.W. 851, 852 (1906).

⁵¹ *State v. Ingraham*, 118 Minn. 13, 14, 136 N.W. 258, 259 (1912).

⁵² *Cowing*, 99 Minn. at 129, 108 N.W. at 853 (quoting *People v. Dohring*, 59 N.Y. 374, 383 (N.Y. Ct. App. 1874)).

⁵³ See, e.g., MINN. STAT. § 609.345, subdiv. 1(c) (2019). The force and coercion requirements harken back to the days where a showing of resistance was necessary, requiring the perpetrator to exhibit characteristics necessary to overcome resistance. *Id.*

⁵⁴ *Id.* § 609.349 (2018), *repealed by* Act of May 2, 2019, ch. 16, § 1, 2019 Minn. Laws 1 (removing the voluntary relationship defense in criminal sexual conduct cases.).

her consent was “I do” at the marriage ceremony.⁵⁵ From that point onward, consent was assumed in terms of marital sexual intercourse, even if force or injury were involved.⁵⁶

In the late nineteenth century, the Minnesota Legislature defined the crime of rape and established several principles that would survive until today, including the first use of consent in the statutes.⁵⁷ The Legislature defined rape as sexual intercourse with a female who is not the wife of the perpetrator against her will or without her consent.⁵⁸ The definition made sexual intercourse with a female under the age of ten illegal, so long as the female was not the perpetrator’s wife, and outlined five circumstances under which a female victim could be raped.⁵⁹

First, a victim could be incapable of consent if she had what was called an “idiocy, imbecility, or any unsoundness of mind.”⁶⁰ This definition allowed the protection of the mentally ill and covered both temporary and permanent mental illnesses.⁶¹ Next, the statute codified the resistance requirement, requiring that a victim either have “her resistance forcibly overcome”⁶² or show that “her resistance is prevented by fear of immediate and great bodily harm which she has reasonable cause to believe will be inflicted upon her.”⁶³ The statute also allowed the resistance requirement to be met when a victim’s “resistance is prevented by stupor or by weakness of mind, produced by an intoxicating narcotic or anesthetic agent,” though the intoxicant had to be administered by the defendant or with his knowledge.⁶⁴ Finally, the statute prohibited sexual intercourse with an unconscious victim, so long as the defendant knew the victim was unconscious.⁶⁵

This definition statutorily enshrined many of the common law problems discussed above and simultaneously laid the groundwork for a modern CSC statutory framework. First, the statute codified the common

⁵⁵ See *id.* (“A person does not commit criminal sexual conduct . . . if the actor and complainant were adults cohabiting in an ongoing voluntary sexual relationship at the time of the alleged offense, or if the complainant is the actor’s legal spouse”); see also Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1396–98 (2000).

⁵⁶ See MINN. STAT. § 609.349 (2018) (repealed 2019). Presumably, a forward-thinking prosecutor could charge the husband with assault in the same way she could charge the assailant of a male victim, though the likelihood of a jury returning a guilty verdict would be slim.

⁵⁷ See *id.* § 6191 (1891) (amended 1967).

⁵⁸ *Id.*

⁵⁹ See *id.*; see also *id.* § 6192.

⁶⁰ *Id.* § 6191, subd. 1.

⁶¹ *Id.* § 6191, subd. 4.

⁶² *Id.* § 6191, subd. 2.

⁶³ *Id.* § 6191, subd. 3.

⁶⁴ *Id.* § 6191, subd. 4.

⁶⁵ *Id.* § 6191, subd. 5.

law doctrine that a married woman cannot be raped by her husband.⁶⁶ It also cemented the gendered terms, which ignored the possibility of rape perpetrated against a non-female.⁶⁷ The statute also failed to criminalize sexual conduct not amounting to intercourse, thus without “any sexual penetration, however slight,” the crime could not occur.⁶⁸ Most importantly, the statute codified the above-mentioned force requirement.⁶⁹ If a victim was not mentally impaired, intoxicated, or unconscious, she was required to resist “to the utmost” in order to meet the force element.⁷⁰

However, the statute did take several positive steps toward recognizing the importance of consent and the criminality of a lack of consent. Subdivisions 1, 4, and 5 of the statute prohibited sexual intercourse with a person who is incapable of giving consent, whether due to mental condition, intoxicant, or unconsciousness.⁷¹ These subdivisions recognized that, in some situations, consent and resistance are not possible and created a method of prosecuting rape without inquiry into the victim’s resistance.⁷² Additionally, in subdivision 3, the statute recognized that fear of bodily harm could cause a victim to be unable to resist.⁷³ While the statute required the fear to be of immediate and great bodily harm, it did provide another avenue for prosecution.⁷⁴ However, the victim would still be subjected to scrutiny by the judge or jury, as fear was required to be “reasonable” in their eyes.⁷⁵

These statutes were re-codified as sections 617.01 and 617.02 of the Minnesota Statutes in 1941 and remained unchanged for decades.⁷⁶ Then, in 1967, the Minnesota Legislature divided rape into two classifications: rape and aggravated rape.⁷⁷ Aggravated rape absorbed much of 1891’s earlier definition.⁷⁸ Aggravated rape was defined as sexual intercourse with a female who is not the perpetrator’s wife, without consent,

⁶⁶ *Id.* § 6191 (defining rape as “an act of sexual intercourse with a female not the wife of the perpetrator.”).

⁶⁷ *Id.*

⁶⁸ *Id.* § 6194.

⁶⁹ *Id.* § 6191, subd. 2.

⁷⁰ *State v. Ingraham*, 118 Minn. 13, 17, 136 N.W. 258, 260 (1912) (“To constitute the crime of rape, the will of the female must have been outraged, and her will must have been forcibly overcome, and, as I have stated, she must resist to the utmost of her ability, to the utmost extent of her ability.”).

⁷¹ MINN. STAT. § 6191, subdivs. 1, 4, and 5 (1891) (amended 1967).

⁷² *See id.*

⁷³ *Id.* § 6191, subd. 3.

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ *Id.* §§ 617.01–.02 (repealed 1967).

⁷⁷ *Id.* §§ 609.291–.292 (1967) (repealed 1975).

⁷⁸ *Compare id.* § 609.291 (1967) (repealed 1975), *with id.* § 6194 (1891) (amended 1967).

under one of three circumstances.⁷⁹ These required circumstances are that: (1) the victim's resistance must have been overcome by force, (2) the victim's resistance was prevented by a reasonable fear of imminent and great bodily harm to herself or another, or (3) the victim was physically unconscious, physically powerless to resist, or incapable of consent because of a mental illness and that condition was known to the defendant.⁸⁰ A conviction for aggravated rape carried a maximum sentence of thirty years in prison.⁸¹ Where an intoxicant stopped a victim's resistance to rape, the charge was relegated to non-aggravated rape.⁸² The statute was also expanded to include situations where the victim was induced to believe the perpetrator was their husband and where the victim was misled regarding the nature of the acts committed.⁸³ Non-aggravated rape was punishable by no more than ten years in prison.⁸⁴

These amendments represented the first instance of gradation of different degrees of rape. They also represent the first example of the Legislature determining that one type of rape should be punished more severely—indeed up to three times more severely—depending on the circumstances of the assault.⁸⁵ Interestingly, in making that distinction, the Legislature signaled that an assailant who used an intoxicant to “destroy the victim's resistance” was somehow less culpable than an assailant who sexually assaulted a victim while she was unconscious.⁸⁶ This early distinction likely reflected a still-emerging conception of a type of rape that could occur without consent and without force or coercion.⁸⁷

B. Modern CSC Statutory Scheme

In 1975, the aforementioned rape statutes were repealed entirely and replaced with the first version of Minnesota's CSC statutes.⁸⁸ Today, these statutes begin with a definitions section and then proceed to describe

⁷⁹ *Id.* § 609.291 (1967) (repealed 1975).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* § 609.292.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *See id.* §§ 609.291-.292.

⁸⁶ *Compare id.* § 609.291, with *id.* § 609.292.

⁸⁷ Kyla Bishop, *A Reflection on the History of Sexual Assault Laws in the United States*, ARK. J. OF SOC. CHANGE AND PUB. SERV. (Apr. 15, 2018), <https://ualr.edu/socialchange/2018/04/15/reflection-history-sexual-assault-laws-united-states/> [https://perma.cc/EKJ7-W6GC]. The 1960s onward ushered in significant progress in American rape law as the anti-rape movement emerged as violence against women became a central point in the second-wave feminist movement. *Id.*

⁸⁸ MINN. STAT. §§ 609.341-.345 (1975).

five varying degrees of CSC.⁸⁹ These varying degrees of CSC have been expanded upon substantially through the years⁹⁰ but have, to date, missed the mark as to the criminality of sexual intercourse without consent.

1. *Consent Definition*

Minnesota has a strong, accurate, and well-worded definition of consent. The Legislature has defined consent as “words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor.”⁹¹ Using language strikingly similar to the Wisconsin definition,⁹² Minnesota’s definition allows for the indication of consent through both words and actions, requires consent be freely given, and applies only to the current agreement to perform the particular act in question.⁹³

This definition fits nicely into the affirmative consent model and does not require amendment.⁹⁴ Indeed, the definitional statute takes further steps to ensure corroboration of victim testimony is not required to prove lack of consent, and to define what does not constitute consent: “[c]onsent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act.”⁹⁵ The consent definition also notes that a person who is mentally incapacitated or physically helpless cannot provide consent.⁹⁶ Therefore, Minnesota’s consent definition accurately reflects the affirmative

⁸⁹ See *id.* §§ 609.341–.345 (2019).

⁹⁰ The amendments following 1975 focus almost entirely on broadening or narrowing specific definitions. This is particularly true of the definition of “position of authority,” which will not be discussed in this paper as consent is not relevant if the defendant was in a position of authority at the time of the assault.

⁹¹ MINN. STAT. § 609.341, subdiv. 4(a) (2019).

⁹² In pertinent part, “[c]onsent”, as used in this section, means 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.” WIS. STAT. ANN. § 940.225(4) (West 2020).

⁹³ MINN. STAT. § 609.341, subdiv. 4 (2019).

⁹⁴ Though specifically adding the word “informed” before “consent” as in the Wisconsin statute would more clearly articulate that Minnesota has intentionally adopted the informed consent standard, the definition as it stands would suffice if the rest of the CSC framework were amended.

⁹⁵ MINN. STAT. § 609.341, subdiv. 4(a) (2019).

⁹⁶ *Id.* § 609.341, subdiv. 7 (“[A] person [who], as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration.”); *id.* § 609.341, subdiv. 9 (“[A] person [who] is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.”).

consent model, but issues arise from its interplay with the five degrees of Minnesota's CSC statutes.

2. *CSC Framework*

Minnesota breaks the CSC crimes into five degrees based on the degree of force or injury a victim sustains and the distinction between sexual penetration and sexual contact.⁹⁷ Interestingly, with the 1975 retooling of rape law in Minnesota, the Legislature proposed to do away entirely with the resistance requirement, stating specifically that in prosecution under the new CSC statutes, "there is no need to show that the victim resisted the accused."⁹⁸ The change was laudable as an attempt to shift the focus of rape prosecutions away from the victim's actions and onto the defendant. However, in using force, injury, or contact, combined with penetration to rank offenses, the current Legislature has failed to recognize the specific criminality of nonconsensual sexual penetration without force, injury or contact.⁹⁹

Fifth-degree CSC represents the base CSC offense and prohibits nonconsensual sexual contact.¹⁰⁰ Fifth-degree CSC was added to the CSC statutes in 1988 and represents the only CSC level that does not require additional elements aside from nonconsensual sexual contact.¹⁰¹ Fourth-degree CSC adds to nonconsensual contact, the additional element of force or coercion.¹⁰² Third-degree CSC prohibits sexual penetration by force or coercion.¹⁰³ Second- and first-degree CSC prohibit sexual contact or penetration, respectively, by force or coercion, resulting in personal injury.¹⁰⁴

As it stands, Minnesota law fails to distinguish nonconsensual sexual intercourse from nonconsensual sexual contact without force or an injury.¹⁰⁵ Without some additional element, nonconsensual sexual intercourse would have to be punished under the same statute as nonconsensual sexual contact, fifth-degree CSC, which prohibits, among

⁹⁷ The distinction between sexual contact and sexual penetration is particularly relevant here. Sexual contact is defined as intentional touching of a victim's intimate parts. *Id.* § 609.341, subdiv. 11. While sexual penetration includes sexual intercourse or other acts where the intrusion, however slight, of a body part or object into the genital or anal openings. *Id.* § 609.341, subdiv. 12. Sexual contact and sexual penetration are both considered sexual conduct under Minnesota law.

⁹⁸ *Id.* § 609.347, subdiv. 2 (1975).

⁹⁹ *See id.* §§ 609.342-.3451 (2019) (equating unconsented touching with penetration under Minnesota's statutory scheme).

¹⁰⁰ *Id.* § 609.3451, subdiv. 1(1).

¹⁰¹ *Id.* § 609.3451.

¹⁰² *Id.* § 609.345, subdiv. 1(c) (2019).

¹⁰³ *Id.* § 609.344, subdiv. 1(c).

¹⁰⁴ *Id.* § 609.343, subdiv. 1(e)(i); *Id.* § 609.342, subdiv. 1(c)(i).

¹⁰⁵ *See id.* § 609.3451, subdiv. 1.

other things, nonconsensual touching of a victim's inner thigh over clothing.¹⁰⁶ Perhaps because of the lack of a specific statute criminalizing nonconsensual sexual intercourse, Minnesota case law has so broadly defined force and injury that the terms almost lack real meaning.¹⁰⁷

Both sexual contact and intercourse, like any crime committed by one person against another, undoubtedly require some amount of force to execute. The force required to complete sexual intercourse is defined as intrinsic force; thus, any force “above and beyond” that required to complete sexual intercourse is defined as extrinsic force.¹⁰⁸ Since force in this context is used as an enhancement, one might assume extrinsic force, which is necessary to complete the act, would be required. However, the Minnesota Supreme Court has essentially adopted an intrinsic force standard for the element of force in the CSC statutes. In *Matter of Welfare of D.L.K.*, a fourteen-year-old came up behind a classmate, tapped her on the shoulder and grabbed and pinched her breast.¹⁰⁹ The only force used in the assault was the pinching itself.¹¹⁰ However, the Court held that the defendant's “sudden and painful grabbing and pinching of the victim's breast [was] sufficient use of force” to sustain a fourth-degree CSC conviction.¹¹¹ Therefore, even the intrinsic force required to complete a sexual act may be considered enough to meet the required force element in Minnesota's CSC statutes.

Similarly, the level of injury required to meet the injury enhancement is quite low. The statute defines personal injury as “bodily harm [including physical pain or injury, illness, or any impairment of physical condition], or severe mental anguish or pregnancy.”¹¹² Thus if a victim testifies they felt even a “minimal amount of physical pain or injury,” the element is satisfied.¹¹³ Moreover, the injury “need not necessarily be coincidental with actual sexual penetration, they need only be sufficiently related to the act to constitute ‘personal injury’” as defined in section 609.314 of the Minnesota Statutes.¹¹⁴ Consequently, evidence that a victim

¹⁰⁶ Compare *id.*, with *id.* § 609.344 (illustrating that sexual penetration is only punished more severely when accompanied by force, coercion or perpetrated against a minor, an impaired individual, or where specific trustee relationships exist).

¹⁰⁷ In practice, bodily harm in the form of vaginal redness and soreness from the surprise sexual contact suffices to show force. *State v. Stufflebean*, 329 N.W.2d 314, 316 (Minn. 1983). Coercion exists where a defendant creates subjective fear by telling a victim to “shut up” while holding the victim down and pushing the victim's dress up. *State v. Meech*, 400 N.W.2d 166, 168 (Minn. Ct. App. 1987).

¹⁰⁸ WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 17.3(a) (3d ed. 2017).

¹⁰⁹ *In re Welfare of D.L.K.*, 381 N.W.2d 435, 436 (Minn. 1986).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 438.

¹¹² MINN. STAT. § 609.431, subdiv. 8 (2019) (referencing *id.* § 609.02, subdiv. 7 (2019)).

¹¹³ *State v. Jarvis*, 665 N.W.2d 518, 522 (Minn. 2003).

¹¹⁴ *State v. Sollman*, 402 N.W.2d 634, 636 (Minn. Ct. App. 1987).

felt even a minimum amount of pain or sustained injuries only minimally related to the assault is sufficient for the injury enhancement.

These relatively low standards for force and injury are likely a response to the fact that Minnesota law requires additional elements to properly distinguish nonconsensual intercourse from nonconsensual contact.¹¹⁵ The lack of a clear statute likely led the courts to these low standards; however, these decisions have left us with a strange situation where almost all CSC statutes overlap significantly.¹¹⁶ As one commentator noted, because of these low thresholds:

[t]he personal injury element will be satisfied in every case involving a nonconsensual sexual act. Nonconsensual sexual acts necessarily involve pain or mental anguish, either of which can constitute bodily harm. The only difference between third- and first-degree CSC is the addition of the aggravating element of personal injury. The same is true of fourth- and second-degree CSC. Because the injury element will be satisfied in every case, by proving third-degree CSC, the state can necessarily prove first-degree CSC and likewise, by proving fourth-degree CSC, the state can necessarily prove second-degree CSC.¹¹⁷

While the low thresholds have certainly made the CSC statutes workable for the last few decades, it is time to reform the statutes to make a clear, workable statutory scheme that does not require loose definitions and overlapping factors to function.

3. *Physically Helpless*

Another workaround to Minnesota's lack of a strong, nonconsensual sexual intercourse statute has been the use of third-degree CSC, where a defendant knows the victim is physically helpless.¹¹⁸ This provision has been used when a victim is voluntarily extremely intoxicated and cannot consent to sexual conduct.¹¹⁹ An earlier version of the definition of physically helpless defined the term as, among other things, when a victim was "unable to withhold consent or to withdraw because of a physical

¹¹⁵ See MINN. STAT. § 609.3451.

¹¹⁶ Compare *id.* § 609.342, subdiv. 1(e)(i), with *id.* § 609.344, subdiv. 1(c) (illustrating the *de minimus* nature of an injury necessary to show first-degree sexual assault, rendering third-degree assault practically redundant).

¹¹⁷ Jenna Yauch-Erickson, *Minnesota's Criminal Sexual Conduct Statutes: A Call for Change*, 39 WM. MITCHELL L. REV. 1623, 1632 (2013).

¹¹⁸ MINN. STAT. § 609.344, subdiv. 1(d).

¹¹⁹ See *e.g.*, *State v. Berrios*, 788 N.W.2d 135, 142 (Minn. Ct. App. 2010); *State v. Owen*, No. A18-0318, 2018 WL 6273120, at *3 (Minn. Ct. App. Dec. 3, 2018); *State v. Wille*, No. A16-1710, 2017 WL 3585108, at *5 (Minn. Ct. App. Aug. 21, 2017).

condition.”¹²⁰ Thus, if a victim was so intoxicated they could not withdraw from the situation, a jury could find the defendant guilty of felony third-degree CSC.¹²¹ This was until 1994 when the Minnesota Legislature inserted a single word into the definition: “consent.”¹²²

In *State v. Blevins*, the Minnesota Court of Appeals explained the result of the Legislature’s addition of the word “consent” into the physically helpless definition.¹²³ In *Blevins*, the victim voluntarily consumed ten to twelve alcoholic beverages and became intoxicated.¹²⁴ Blevins, the defendant, approached the victim and told her he would help her find her car.¹²⁵ Instead, Blevins took the victim to the back porch of a house and downstairs to a crawl space under the porch.¹²⁶ There, Blevins made sexual advances and eventually engaged in oral and vaginal intercourse with the victim.¹²⁷ The victim testified “she felt stuck, uncomfortable, and afraid, she ‘just let it happen’ and ‘waited for it to be over.’”¹²⁸ Blevins was charged with and convicted of third-degree CSC, sexual penetration of a physically helpless victim, and challenged the sufficiency of evidence for his conviction.¹²⁹

In an earlier case, *State v. Griffith*,¹³⁰ the same court was presented with very similar facts and sustained the conviction because the victim in *Griffith* “felt helpless to stop the attack,” and the complainant’s “‘helplessness’ was due to her ‘physical condition,’” Griffith’s conviction was upheld.¹³¹ In *Griffith*, physically helpless was defined as “unable to withhold consent or to withdraw because of a physical condition,”¹³² and “withdraw” was interpreted as referring to the physical ability to withdraw from the attack.¹³³ Because the victim’s extreme intoxication made her unable to physically withdraw from the assault, the court upheld the conviction.¹³⁴

¹²⁰ MINN. STAT. § 609.341, subdiv. 9 (1982) (amended 1994).

¹²¹ See *State v. Griffith*, 480 N.W.2d 347 (Minn. Ct. App. 1992) (upholding defendant’s conviction where victim was too drunk to leave the situation), *superseded by statute*, MINN. STAT. § 609.341, subdiv. 9(b) (1994), *as recognized in State v. Cobb*, No. A14-0422, 2015 WL 853421, at *6 (Minn. Ct. App. Mar. 2, 2015).

¹²² MINN. STAT. § 609.341, subdiv. 9 (1994).

¹²³ *State v. Blevins*, 757 N.W.2d 698 (Minn. Ct. App. 2008).

¹²⁴ *Id.* at 699.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 700–01.

¹³⁰ 480 N.W.2d 347 (Minn. Ct. App. 1992).

¹³¹ *Id.* at 350.

¹³² *Id.* at 349.

¹³³ *Id.* at 351.

¹³⁴ *Id.* (upholding a conviction whereby the victim passed out and remained unconscious during most of the assault).

However, in *Blevins*, the court noted the Legislature amended the physically helpless statute, which now reads “unable to withhold consent or to withdraw *consent* because of a physical condition.”¹³⁵ The State now had to prove the victim was unable to withhold or withdraw *consent*, rather than simply being unable to withdraw *physically*.¹³⁶ Because the victim was able to verbalize her lack of consent, and indeed repeatedly verbalized her lack of consent before and during the assault, the court found she was not physically helpless as defined by the newly amended statute, and the defendant’s conviction was reversed.¹³⁷

Under this holding, the level of intoxication necessary for a victim to be physically helpless, and thus unable to consent to sexual conduct, is exorbitantly high.¹³⁸ Indeed, the 1994 amendment had the effect of comingling two of the three-pronged definition of physically helpless.¹³⁹ Physically helpless is defined as “(a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent.”¹⁴⁰ In the *Blevins* holding, what difference is there between a victim being (b) unable to withhold or withdraw consent because of a physical condition and (c) unable to communicate nonconsent?¹⁴¹ The Minnesota Legislature must act to set a reasonable standard for when a person is too intoxicated to consent to sexual conduct. It can do so by codifying a definition of affirmative consent.

III. AFFIRMATIVE CONSENT

While Minnesota’s statutory definition of consent largely comports with other definitions of affirmative consent, it is important to understand the standard and how it should be adopted into Minnesota’s broader CSC statutes. Affirmative consent standards have been adopted by the vast majority of higher education institutions and have worked well in Wisconsin for many years.¹⁴²

¹³⁵ *State v. Blevins*, 757 N.W.2d 698, 700 (Minn. Ct. App. 2008) (emphasis added).

¹³⁶ *Id.* at 701.

¹³⁷ *Id.*

¹³⁸ *See id.* (inferring that the level of intoxication must be elevated to the point of preventing speech).

¹³⁹ MINN. STAT. § 609.341, subdiv. 9 (1994).

¹⁴⁰ *Id.* § 609.341, subdiv. 9 (2019).

¹⁴¹ *See id.*

¹⁴² *See* Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 442 (2016) (“An estimated 1,400 institutions of higher education have adopted disciplinary standards that codify an affirmative definition of sexual consent.”); *see also, e.g.*, WIS. STAT. ANN. § 940.225(4) (West 2020) (defining “consent” as meaning “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”).

A. *Defining Affirmative Consent*

Affirmative consent is generally defined as “a rebuttable presumption of nonconsent, which would be overcome by any affirmative expression of desire for sex.”¹⁴³ A participant must be legally able to give consent, meaning they are of age and in an appropriate mental state.¹⁴⁴ The consent must be freely given and not made based on a threat or perceived threat to the participant or another.¹⁴⁵ Finally, the consent must be to the present sexual encounter—one cannot assume that consent was given based on a prior sexual relationship.¹⁴⁶ While these elements may seem overly rigid, affirmative consent is a relatively flexible standard, which comports with modern concepts of consent and sexuality, and has worked as an effective standard in Wisconsin.

1. *“Yes Means Yes”*

Affirmative consent may be best known by the “Yes Means Yes” catchphrase.¹⁴⁷ However, the phrase itself is more of a response to the “No Means No” campaign, as proponents realized the ineffectiveness of that campaign.¹⁴⁸ “No Means No” was originally designed to highlight that when a person says “no” to sexual conduct, they mean it.¹⁴⁹ However, “No Means No” misses the important point that there are more ways to decline sexual conduct than by saying no, and that a person is responsible for interpreting nonverbal signals and cues as well as listening to verbal ones.¹⁵⁰ More

¹⁴³ David P. Bryden, *Redefining Rape*, 3 BUFFALO CRIM. L. REV. 317, 400 (2000).

¹⁴⁴ See MINN. STAT. § 609.345, subdiv. 1(f) (defining Minnesota’s graduated age of consent, which adjusts with the age of the perpetrator).

¹⁴⁵ See *id.* § 609.345, subdiv. 1(c) (prohibiting the use of force or coercion in obtaining consent).

¹⁴⁶ See WIS. STAT. ANN. § 940.225(3) (West 2020); see also *State v. Anchico*, No. 87-1414, 1988 WL 112263, at *2 (Wis. Ct. App. Aug. 25, 1988) (holding that evidence of a prior consensual sexual relationship was neither material nor relevant to consent as to the alleged nonconsensual encounter).

¹⁴⁷ See JACLYN FRIEDMAN & JESSICA VALENTI, *YES MEANS YES!: VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE* (2008) (Friedman’s 2008 book popularized the phrase).

¹⁴⁸ Megan Garber, *The Dangerous Insufficiency of ‘No Means No’*, THE ATLANTIC (Aug. 1, 2018), <https://www.theatlantic.com/entertainment/archive/2018/08/the-dangerous-insufficiency-of-no-means-no/566465/> [https://perma.cc/C8ZQ-YZDL].

¹⁴⁹ See Karen Lehrman, *When ‘No’ Means ‘No’*, N.Y. TIMES (June 9, 1996), <https://www.nytimes.com/1996/06/09/books/when-no-means-no.html>, [https://perma.cc/3GPV-6MSV].

¹⁵⁰ See Garber, *supra* note 148 (“[E]ven Harvey Weinstein . . . understood the basic sanctity of *no means no*. His method, it seems, was simply to try everything he could to greasily manipulate the *no* into a *yes*: ignoring the *no*, effectively, while . . . abiding by the wishes of the woman.”).

importantly, “Yes Means Yes” represents the idea that consent is an affirmative action and not the lack of declination to act.¹⁵¹ “Yes Means Yes” stands for the proposition that consent standards should look for an affirmative agreement to sexual conduct, rather than assuming that the lack of a “no” means the party consented.

The “Yes Means Yes” standard has especially gained popularity on college campuses as schools define sexual assault and consent for Title IX purposes,¹⁵² though the precise language of the standard varies. More than 800 colleges and universities have adopted the standard in one way or another.¹⁵³ The University of St. Thomas, for example, expounds a “Yes Means Yes” standard; however, even the language of this policy indicates nonverbal conduct may also be construed as affirmative consent.¹⁵⁴ Mitchell Hamline School of Law similarly defines consent,¹⁵⁵ as does the University of Minnesota.¹⁵⁶ Under these definitions, affirmative consent does not literally mean that “yes means yes.” Parties are not required under the affirmative consent doctrine to literally ask for verbal reassurance that their partner is affirmatively consenting to sexual relations. These policies illustrate that a clear indication of free agreement, through conduct or words, to engage in the sexual act is all that is required.

These policy statements also include another important portion of the affirmative consent doctrine, that “[c]onsent to one form of sexual activity does not imply consent to other forms of sexual activity.”¹⁵⁷ Thus, affirmative consent to one act is not affirmative consent to another. Affirmative consent must occur before any sexual activity escalates.

While other definitions of affirmative consent exist in the Title IX realm, affirmative consent is simply the requirement that, just like in

¹⁵¹ *See id.* (noting affirmative consent represents “active affirmation, rather than passive acquiescence, that feminists have fought for.”).

¹⁵² Education Amendments of 1972, 20 U.S.C § 1681 (addressing sex-based discrimination against students or employees at federally funded educational institutions).

¹⁵³ The NCHERM Group, LLC, *The NCHERM Group Continues to Advocate for Affirmative Consent Policies in Colleges and Schools Across the Nation*, CISION PR NEWSWIRE (Oct. 10, 2014), <https://www.prnewswire.com/news-releases/the-ncherm-group-continues-to-advocate-for-affirmative-consent-policies-in-colleges-and-schools-across-the-nation-278778841.html> [https://perma.cc/HQR4-FBC7].

¹⁵⁴ UNIV. OF ST. THOMAS, *Consent, in* SEXUAL MISCONDUCT POLICY § IV(A)(2)(c), 7-8 (Aug. 14, 2020), <https://www.stthomas.edu/title-ix/sexualmisconduct/> [https://perma.cc/3S44-5KYZ].

¹⁵⁵ MITCHELL HAMLINE SCH. OF L., *Consent, in* SEXUAL MISCONDUCT POLICY FOR STUDENTS § III(V) (2020), <https://mitchellhamline.edu/catalog/sexual-misconduct-policy-for-students/> [https://perma.cc/VE59-7F4Y].

¹⁵⁶ UNIV. OF MINN., *Definitions: Sexual Assault, in* SEXUAL HARASSMENT, SEXUAL ASSAULT, STALKING AND RELATIONSHIP VIOLENCE POLICY STATEMENT 23 (Aug. 13, 2020), <https://policy.umn.edu/operations/sexualassault> [https://perma.cc/6R78-Z237].

¹⁵⁷ UNIV. OF ST. THOMAS, *supra* note 154, at 8.

contracts, medical procedures, or any other potentially life-altering agreement, both parties knowingly agree to the action to be taken.¹⁵⁸ As comedian John Oliver put it, “sex is like boxing, if one of the parties didn’t agree to participate, the other one is committing a crime.”¹⁵⁹ The form the affirmative consent takes, whether verbal or nonverbal, does not matter so much as the fact that all parties’ affirmatively consent. Whether the boxers sign a form saying they consent to the match, verbally agree just before bumping gloves, or exert overt and clear actions indicating their present willingness to spar, affirmative consent is the standard required.¹⁶⁰

B. *Affirmative Consent in Action*

Minnesota should strive to emulate Wisconsin’s affirmative consent sexual assault statutes. Adopting a statutory scheme similar to that of Wisconsin would give teeth to Minnesota’s consent definition and allow prosecution of rape regardless of how the victim reacted to it.¹⁶¹ Wisconsin divides sexual assaults into four levels, with additional factors aggravating nonconsensual contact up to a class B felony, punishable by a maximum of 60 years in prison.¹⁶²

On the lowest end of the spectrum, Wisconsin defines fourth-degree sexual assault simply as “sexual contact with a person without the consent of that person,”¹⁶³ so long as that contact does not involve additional aggravating factors.¹⁶⁴ This statute mirrors Minnesota’s fifth-degree CSC, as

¹⁵⁸ See, e.g., *Cornfeldt v. Tongen*, 262 N.W.2d 684, 701 (Minn. 1977) (noting that doctors must disclose information that a reasonable patient would find material to treatment to illustrate consent); *State v. Schweich*, 414 N.W.2d 227, 230 (Minn. Ct. App. 1987) (citing *U.S. v. Briley*, 726 F.2d 1301, 1304 (8th Cir. 1984)) (holding that under Fourth Amendment jurisprudence, “[m]isrepresentation used to obtain consent to a search will invalidate the consent”); *Carpenter v. Vreeman*, 409 N.W.2d 258, 260 (Minn. Ct. App. 1987) (citing Restatement of Contracts (Second) § 164(1) (Am. Law Inst. 1981)) (“A contract is voidable if a party’s assent is induced by either a fraudulent or a material misrepresentation by the other party . . .”).

¹⁵⁹ LastWeekTonight, *Sex Education: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Aug. 9, 2015), <https://www.youtube.com/watch?v=L0jQz6jqQS0> [<https://perma.cc/5ZXX-CT3S>].

¹⁶⁰ *State v. Peek*, A04-1535, 2005 WL 2495773, at *5 (Minn. Ct. App. Oct. 11, 2005) (“[I]t does not follow that where consent is present, such as in the ‘mutual combat’ situation posited by Peek, that consent is a defense to assault.”).

¹⁶¹ See Hennepin Attorney, *supra* note 30.

¹⁶² WIS. STAT. ANN. § 939.50(3)(b) (West 2020).

¹⁶³ *Id.* § 940.225(3m).

¹⁶⁴ *Id.* at (5)(b)(2) (intentional ejaculation or emission of urine or feces by defendant upon any part of complainant’s body, clothed or unclothed); *Id.* at (5)(b)(3) (“For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant’s body, whether clothed or unclothed.”).

it criminalizes nonconsensual sexual contact, though fifth-degree CSC is punishable by not more than one-year imprisonment,¹⁶⁵ while Wisconsin's fourth-degree sexual assault is punishable by no more than nine months imprisonment.¹⁶⁶

Importantly, the next step up in Wisconsin's sexual assault statutory scheme proscribes "sexual intercourse with a person without the consent of that person."¹⁶⁷ In conjunction with Wisconsin's consent definition, this statute is the key element missing from Minnesota's CSC statutory scheme. It simply makes sexual intercourse without consent illegal—full stop.¹⁶⁸ There is no force, injury, coercion, position of authority, or special victim requirement.¹⁶⁹ Importantly, it also makes nonconsensual sexual intercourse a felony, punishable by imprisonment for up to ten years.¹⁷⁰ The adoption of similar language and similar punishment will move Minnesota's CSC statutory scheme out of the grasp of flawed common law doctrines and into an era where sexual intercourse requires affirmative consent. Anything less than full adoption of this standard will allow Minnesota's CSC laws to continue to miss the criminality of nonconsensual sexual intercourse.

Wisconsin has two degrees of aggravated sexual assault. Second-degree sexual assault builds on the fourth- and third-degree statutes proscribing sexual contact or intercourse with another person without their consent and adds an additional element of a threat of force or violence or personal injury.¹⁷¹ First-degree sexual assault is reserved for when the assault results in great bodily harm or pregnancy, or when the defendant uses or threatens to use a dangerous weapon to complete the assault.¹⁷² Rather than requiring low threshold definitions of force or injury, Wisconsin simply ranks sexual assaults based on the use of threats, minor or major injury, or the use or threat of a dangerous weapon.¹⁷³ Not only does this statutory scheme simplify sexual assaults compared to Minnesota's CSC statutes, the straightforward definitions and use of affirmative consent accurately reflects the criminality of sexual contact or intercourse without consent.

In addition, Wisconsin's second-degree sexual assault statute includes intercourse with sexual contact or intercourse with "a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent," so long as the defendant has knowledge of the

¹⁶⁵ MINN. STAT. § 609.3451, subdiv. 2 (2019).

¹⁶⁶ WIS. STAT. ANN. § 939.51(3)(a) (West 2020).

¹⁶⁷ *Id.* § 940.225(3)(a).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* § 939.50(3)(g).

¹⁷¹ *Id.* § 940.225(2)(a)–(b).

¹⁷² *Id.* § 940.225(1)(a)–(b).

¹⁷³ *Id.* § 940.225.

person's condition and acts intentionally.¹⁷⁴ This definition solves the problem of *Blevins* discussed in Part II. Minnesota's statutory scheme only directly accounts for involuntary intoxication of a victim without the knowledge of that person,¹⁷⁵ and thus misses a large swath of cases where the victim became intoxicated voluntarily.¹⁷⁶ Prosecutors attempted to solve that problem using the physically helpless statute until the *Blevins* decision eliminated that possibility.¹⁷⁷ However, Wisconsin's straightforward prohibition in the heightened second-degree sexual assault statute of intercourse or contact with anyone who is so intoxicated that they cannot consent solves that problem. Adopting just this subdivision would allow prosecutors to adequately charge the sexual assaults of victims who are too intoxicated to consent without jumping through the many hoops and pitfalls of the Minnesota statutes.

Wisconsin's actual definition of consent does not differ greatly from the Minnesota definition. Just as in Minnesota, consent under Wisconsin's definition "requires an affirmative indication of willingness. A failure to say no or to resist does not constitute consent in fact."¹⁷⁸ What makes Wisconsin's statutory scheme so effective is its simplistic use of that definition in criminalizing nonconsensual sexual contact and intercourse without the addition of other factors. Force especially is a remnant of outdated resistance requirements from common law notions of rape.¹⁷⁹ Force and injury definitions have become so convoluted through attempts to bring the CSC statutes in line with the real world that they are almost meaningless. The way forward is to completely abandon the five degrees of the current statutory scheme and instead adopt a system based on Wisconsin's sexual assault laws.

IV. ARGUMENTS AGAINST AFFIRMATIVE CONSENT AND THEIR COUNTERARGUMENTS

While Minnesota's consent definition by itself accurately reflects the definition of affirmative consent, arguments may still be made that the

¹⁷⁴ *Id.* § 940.225(2)(cm).

¹⁷⁵ MINN. STAT. § 609.341, subdiv. 7 (2019) ("Mentally incapacitated' means that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.").

¹⁷⁶ See, e.g., Stahl et al., *When Rape Is Reported*, *supra* note 9; Stahl et al., *How Alcohol Foils Rape Investigations*, *supra* note 17; *No charges in University of Minnesota wrestling sexual assault investigation*, *supra* note 26; Hennepin Attorney, *supra* note 30.

¹⁷⁷ *State v. Blevins*, 757 N.W.2d 698 (Minn. Ct. App. 2008); see, e.g., *State v. Griffith*, 480 N.W.2d 347, 349–50 (Minn. Ct. App. 1992).

¹⁷⁸ *State v. Long*, 2009 WI 36, ¶ 31, 317 Wis. 2d 92, 107, 765 N.W.2d 557, 565.

¹⁷⁹ See Edwards, *supra* note 48, at 245. ("[U]nder the common law, the prosecution had to prove three elements beyond a reasonable doubt: carnal knowledge, force, and lack of consent.").

current statutory scheme's ultimate denial of affirmative consent in practice is a desirable result. These arguments are addressed in turn, and their counterarguments are given in the hopes of guiding debate.

A. Affirmative Consent Shifts the Burden of Proof

The initial argument against the use of affirmative consent in rape statutes is that affirmative consent shifts the burden of proof from the State to the defendant. However, this is not the case in Wisconsin and will not be the case in Minnesota if the Legislature adopts substantially similar language.

In *State v. Grunke*, the Wisconsin Supreme Court held that Wisconsin's sexual assault statutes' plain language established that lack of consent was an element of the offense that needed to be affirmatively proven by the State.¹⁸⁰ "In order to achieve a conviction for third-degree sexual assault under Wis. Stat. § 940.225(3), the State must still prove the element 'without consent' beyond a reasonable doubt."¹⁸¹ The prosecution does not need to prove that the victim actively withheld consent; instead, it must prove that no affirmative consent was made.¹⁸² This burden is entirely on the State, and must be proven beyond a reasonable doubt.¹⁸³

While proving a negative can be difficult, it is not impossible and does not shift the burden onto a defendant to prove affirmative consent was given. Of course, the defendant is free to prove consent was given, which would bring into doubt the State's case, but the defendant is not required to prove anything. Simply put, Wisconsin's requirement that "without consent" be proven beyond a reasonable doubt as an element of its sexual assault statutes does not shift the burden onto defendants.

B. Affirmative Consent Ruins Sexual Intimacy

Other commentators have complained that affirmative consent ruins traditional notions of sexual intimacy.¹⁸⁴ To some extent, this may be

¹⁸⁰ *State v. Grunke*, 2008 WI 82, ¶ 28, 311 Wis. 2d 439, 752 N.W.2d 769.

¹⁸¹ *Id.* at ¶ 25.

¹⁸² *See id.* at ¶ 28 (citing WIS. STAT. ANN. § 940.225(4) (West 2020)) ("The element 'without consent' in subsection (3) requires no affirmative act, such as the withholding of consent, on the part of the victim. Rather, the State must prove that there was *no affirmative consent*. Stated otherwise, the plain language of subsection (3) requires the State to prove beyond a reasonable doubt that the defendants attempted to have sexual intercourse with the victim without her 'words or overt actions . . . indicating a freely given agreement to have sexual intercourse.' Wis. Stat. § 940.225(4). The State does not have to prove that the victim withheld consent.") (alteration in original).

¹⁸³ *Id.*

¹⁸⁴ *See* Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1009 (2008) ("But the greatest weakness of the policy was perhaps in its requirement that there be consent each and every time there

true. Affirmative consent runs counter to traditional, common law notions surrounding consent and sexual activity.¹⁸⁵ Affirmative consent could not function during the late 1800s when by law, wives could not be raped by their husbands, and victims were required to resist “to the utmost” in order to convey their lack of consent.¹⁸⁶ However, much has changed since then. The right to vote has been universally extended to everyone of age, and substantial steps have been taken to ensure equal treatment under the law.¹⁸⁷ Indeed, as noted above, even certain James Bond scenes that were socially acceptable in the mid-sixties are reprehensible now. It makes sense that legal norms surrounding consent and sexual activity should also adjust to reflect equal treatment under the law.

Moreover, affirmative consent makes room for seduction and allows for consenting persons to change their minds. “Seduction is not rape,”¹⁸⁸ and that is still true under the affirmative consent standard. An initial lack of affirmative consent, even an initial “no,” is evidence that could easily be overcome by other evidence of affirmative consent closer to the act in question.¹⁸⁹ Even if a person initially plays “hard to get,” there should certainly be evidence that they gave affirmative consent before the act.¹⁹⁰ A finding beyond a reasonable doubt, unanimously determined by twelve uninvolved peers, is a high burden. If a defendant was successful in their seduction and acquired affirmative consent, the odds of acquittal are very high if the case is even charged and survives motions for dismissal in the first place. Affirmative consent makes room for seduction and destroys traditional sexual norms that are worth leaving behind.¹⁹¹

is sexual activity. If the couple were living together and had relations every night upon undressing and going onto the bed, under the policy there must still be the series of verbal consents before any new level (whatever precisely that may be) is reached.” (internal quotations omitted)).

¹⁸⁵ Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1359 (2005).

¹⁸⁶ See MINN. STAT. § 6191 (1891); *State v. Ingraham*, 118 Minn. 13, 17, 136 N.W. 258, 260 (1912).

¹⁸⁷ See generally e.g., U.S. CONST. amend. XIX; Civil Rights Act, 42 U.S.C. § 2000e, et seq.

¹⁸⁸ Klein, *supra* note 184, at 1012.

¹⁸⁹ Little, *supra* note 185, at 1348.

¹⁹⁰ See Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women’s Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCH. 872, 874 (1988) (discussing statistics about women initially saying no to sexual intercourse although they intended to say yes).

¹⁹¹ See Little, *supra* note 185, at 1359.

C. *Affirmative Consent Will Cause False Rape Claims*

Some may argue that adopting an affirmative consent standard may lead to a surge of false rape claims.¹⁹² This argument begins with the incorrect premise that false reporting is rampant in rape cases.¹⁹³ While it is difficult to estimate how many rape complaints are “false,” given the general underreporting of sexual assaults and difficulty in determining whether a claim was knowingly false or if an investigation simply did not find enough evidence to submit charges, studies have found that the incident of false reports is between two and ten percent.¹⁹⁴ This percentage is roughly on par with the number of false accusations with other felonies.¹⁹⁵

Additionally, even with the affirmative consent standard, sexual assault crimes would still be subject to the same procedural checks they are today. Police will still investigate allegations to determine if there is enough evidence to submit to prosecutors.¹⁹⁶ Prosecutors will provide an independent review of that evidence and determine if there is probable cause to believe a crime occurred and determine if it can reasonably be proven to a jury.¹⁹⁷ The judicial branch provides an additional check, reviewing cases—even after conviction—to determine if sufficient evidence existed to support the conviction. If anything, the adoption of affirmative consent will focus investigation of rape allegations on what is important: what evidence exists suggesting a lack of affirmative consent? Finally, prosecutors

¹⁹² See *id.* at 1357.

¹⁹³ Cameron Kimble, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. FOR JUST. (Oct. 4, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sexual-assault-remains-dramatically-underreported> [<https://perma.cc/6DCH-NMYR>] (“[N]early 80 percent of rapes and sexual assaults go unreported, according to a Justice Department analysis of violent crime in 2016”) (emphasis added).

¹⁹⁴ Melanie Heenan & Suellen Murray, *Study of Reported Rapes in Victoria 2000-2003: Summary Research Report*, NAT'L CRIM. JUST. REFERENCE SERV. (2006) (finding 2.1 percent of 812 reports of sexual assault to be false); David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1329 (2010) (describing how 5.9 percent of the 136 Boston cases of sexual assault found to be false); Kimberly A. Lonsway, Joanne Archambault & David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 43 PROSECUTOR, J. OF THE NAT'L DIST. ATTORNEYS ASS'N (2009) (describing how 140 (7 percent) of the 2,059 sexual assault reports across eight U.S. communities were found to be false).

¹⁹⁵ Little, *supra* note 185, at 1357 (“[F]alse accusations of rape are no more prevalent than false accusations of other types of major crime.”).

¹⁹⁶ Lonsway et al., *supra* note 194, at 15 (“[I]nvestigators and prosecutors must base all final judgments of a sexual assault report on the findings from a thorough, evidence-based investigation.”).

¹⁹⁷ See Little, *supra* note 185, at 1357–58 (“Prosecutors act as an effective screening mechanism here as well—given the difficulty of convicting a rapist, they tend only to prosecute the clearest cut cases, where the chances of conviction are greatest.”).

and defense attorneys will still require that victims testify under oath.¹⁹⁸ The Confrontation Clause will allow the defendant to cross-examine the victim to determine if the report was indeed false.¹⁹⁹ While some false reporting may still occur, the adoption of an affirmative consent standard is unlikely to increase the number of these occurrences.

D. Affirmative Consent Does Not Solve the Voluntarily Intoxication Problem

The final argument against affirmative consent is that it does not solve the problem of determining consent through the ambiguity of sexual signaling—especially when both parties are voluntarily intoxicated.²⁰⁰ On the one hand, adoption of a standard similar to Wisconsin’s prohibition of sexual activity with “a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent”²⁰¹ would at least make for a more exact standard than Minnesota’s current statutes. However, determining when a person is so intoxicated that they are incapable of consent remains difficult. Sexual signaling is ambiguous—an act or word may mean one thing to one person and something entirely different to another. Even a “no” spoken sarcastically to a person with a strong understanding of the speaker may be accurately interpreted to mean “yes.”²⁰²

Affirmative consent does not solve this problem, but it does mark a step in the right direction.²⁰³ Minnesota’s current statutory scheme of watered-down definitions of force and injury and overlapping enhancement elements only compounds that problem for juries—not only must they determine what the actors meant, they also have to figure out what the statutes mean, which is less than ideal. Adopting a simpler standard, such as that from Wisconsin, will allow juries to focus on the conduct at trial and not the difficult to understand statutory language. Certainly, no statutory language is perfect, but adopting language similar to Wisconsin’s is a step in the right direction.

¹⁹⁸ See *Crawford v. Washington*, 541 U.S. 36, 65 (2004) (prohibiting out of court testimony from witness available at trial).

¹⁹⁹ U.S. CONST. amend. VI.

²⁰⁰ Michal Buchhandler-Raphael, *The Conundrum of Voluntary Intoxication and Sex*, 82 BROOK. L. REV. 1031, 1048–49 (2017).

²⁰¹ WIS. STAT. ANN. § 940.225(2)(cm) (West 2020).

²⁰² Muehlenhard & Hollabaugh, *supra* note 190, at 874.

²⁰³ Buchhandler-Raphael, *supra* note 200, at 1048 (“[T]he affirmative consent standard transforms the legal meaning of passivity.”).

V. PROPOSED AMENDMENTS

Given the above discussion, Minnesota should take several steps to bring its CSC statutes in line with affirmative consent. Minnesota can do this by taking model language from Wisconsin and adopting that language into four degrees of sexual assault.

The most important step the Legislature should take is removing the force or injury requirements from third-degree and fourth-degree CSC.²⁰⁴ This removal would criminalize sexual penetration and sexual contact when a defendant fails to obtain affirmative consent, regardless of the surrounding circumstances. Nonconsensual sexual contact or penetration is the action that should be criminalized, without regard to force or injury.

Aggravating factors of threats or injuries should be used to enhance either sexual contact or sexual penetration to second-degree sexual assault.²⁰⁵ Both sexual contact and sexual penetration are treated similarly in this instance because the true level of criminality comes from the threat of injury in combination with the assault without affirmative consent. Additional aggravating factors of great bodily harm or use of a dangerous weapon should likewise elevate the crime to first-degree sexual assault.²⁰⁶ Again, the level of criminality comes from the degree of injury or use of a weapon in combination with the assault.

Additionally, Minnesota can preserve its graduated punishments by adopting Wisconsin's third- and fourth-degree assault statutes.²⁰⁷ Fourth-degree sexual assault, like fifth-degree CSC, punishes nonconsensual sexual contact as a gross misdemeanor unless aggravating factors are present.²⁰⁸ This sole use of a gross misdemeanor sentence reflects the reality that sexual contact without affirmative consent—while reprehensible—does not rise to the same level as sexual intercourse without affirmative consent. This standard was adopted by the Minnesota Legislature when it ratified fifth-degree CSC and should remain in place with the new amendments.²⁰⁹

Finally, Minnesota's current statutory scheme includes special relationship statutes, which identify specific trustee relationships that

²⁰⁴ See WIS. STAT. ANN. § 940.225(4) (West 2020).

²⁰⁵ See, e.g., MINN. STAT. § 609.342, subdiv. 1(e) (2019) (aggravating rape to first degree where a personal injury was inflicted through the use of force).

²⁰⁶ See, e.g., *id.* § 609.342, subdiv. 1(d) (2019) (aggravating rape to first degree where the perpetrator was armed).

²⁰⁷ See WIS. STAT. ANN. § 940.225(3)–(3m) (West 2020).

²⁰⁸ *Id.* § 940.225(3m).

²⁰⁹ See MINN. STAT. § 609.3451, subdiv. 1 (2019).

preclude a victim from furnishing voluntary or meaningful consent.²¹⁰ These relationship statutes have been the focus of most of the post-1975 amendments to Minnesota's CSC statutes and have been retained in the proposed second-degree assault provisions.²¹¹ These well-defined and highly specific special relationships have been of great concern to the Legislature in recent history and should be retained.

Making these changes to Minnesota's CSC statutes will allow prosecutors to punish nonconsensual sexual contact and sexual intercourse as the crimes they are. These statutes do not rely on watered-down judicial definitions of force and injury, nor do they create insurmountable hurdles in the prosecution of voluntarily intoxicated victim cases. The amendments strike an appropriate balance between proscribing criminality and clearly delineating what that criminality consists of. Minnesota should move quickly to make these changes and adopt a fully affirmative consent standard for its sexual assault statutes.

VI. MODEL LANGUAGE

1) **First degree sexual assault.** Whoever does any of the following is guilty of a felony, punishable by no more than 30 years.

(a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.

(b) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.

(c) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(2) **Second degree sexual assault.** Whoever does any of the following is guilty of a felony punishable by 25 years, except that violation of subdivision (g), (h), and (i) are punishable by 15 years:

(a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

²¹⁰ See, e.g., *id.* § 609.345, subdivs. 1(i), (l)-(m), (o)-(p) (2019) (prohibiting psychotherapists, clergy members, correctional officers, massage therapists, and police officers from engaging in sexual relations with their wards with whom they deal professionally).

²¹¹ See, e.g., Act of Aug. 10, 2010, ch. 270, § 3, 2010 Minn. Laws 1, 4 (clarifying penal custodial relationships); Act of May 7, 2007, ch. 54, § 4, 2007 Minn. Laws 1, 31 (prohibiting sex with massage therapists); Act of May 17, 2002, ch. 381, § 4, 2007 Minn. Laws 1311, 1313 (prohibiting sex with special transportation providers).

- (b) Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim.
- (c) Has sexual contact or sexual intercourse with a person
 - (i) who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition, or;
 - (ii) who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.
- (d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.
- (f) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without the consent of that person.
- (g) Has sexual contact or sexual intercourse with a person and
 - (1) has a significant relationship with that person, or
 - (2) the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred:
 - (i) during the psychotherapy session; or
 - (ii) outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists.
 - Consent by the complainant is not a defense;
 - (3) the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist;
 - (4) the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception. Consent by the complainant is not a defense;
 - (5) the actor accomplishes the sexual penetration by means of deception or false representation that the penetration is for a bona fide medical purpose. Consent by the complainant is not a defense;
 - (6) the actor is or purports to be a member of the clergy, the complainant is not married to the actor, and:

- (i) the sexual penetration occurred during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private; or
 - (ii) the sexual penetration occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private. Consent by the complainant is not a defense;
- (7) the actor is an employee, independent contractor, or volunteer of a state, county, city, or privately operated adult or juvenile correctional system, or secure treatment facility, or treatment facility providing services to clients civilly committed as mentally ill and dangerous, sexually dangerous persons, or sexual psychopathic personalities, including, but not limited to, jails, prisons, detention centers, or work release facilities, and the complainant is a resident of a facility or under supervision of the correctional system. Consent by the complainant is not a defense;
- (8) the actor provides or is an agent of an entity that provides special transportation service, the complainant used the special transportation service, and the sexual penetration occurred during or immediately before or after the actor transported the complainant. Consent by the complainant is not a defense;
- (9) the actor performs massage or other bodywork for hire, the complainant was a user of one of those services, and nonconsensual sexual penetration occurred during or immediately before or after the actor performed or was hired to perform one of those services for the complainant; or
- (10) the actor is a peace officer, as defined in section 626.84, and the officer physically or constructively restrains the complainant, or the complainant does not reasonably feel free to leave the officer's presence. Consent by the complainant is not a defense. This paragraph does not apply to any penetration of the mouth, genitals, or anus during a lawful search.
- (h) Has sexual contact or sexual intercourse with an individual who is confined in a correctional institution if the actor is a correctional staff member. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject

to prosecution for the sexual contact or sexual intercourse under this section.

(i) Has sexual contact or sexual intercourse with an individual who is on probation, parole, or extended supervision if the actor is a probation, parole, or extended supervision agent who supervises the individual, either directly or through a subordinate, in his or her capacity as a probation, parole, or extended supervision agent or who has influenced or has attempted to influence another probation, parole, or extended supervision agent's supervision of the individual. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

(3) **Third degree sexual assault.**

(a) Whoever has sexual intercourse with a person without the consent of that person is guilty of a felony punishable by no more than 10 years.

(b) Whoever has sexual contact with a person in either of the following manners is guilty of a felony punishable by 15 years:

(i) Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant

(ii) For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

(4) **Fourth degree sexual assault.** Except as provided in sub. (3)(b), whoever has sexual contact with a person without the consent of that person is guilty of a gross misdemeanor.

(4) **Consent.** "Consent", as used in this section, means 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. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act. Consent is not an issue in alleged violations of sub. (2)

(c), (d), (g), (h), and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence,

(a) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(b) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

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