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Chapter 10

Sex Offenses and Crimes Involving Force, Fear, and Physical Restraint

Among the evils that both the common law and later statutory prohibitions against kidnapping sought to address were the isolation of a victim from the protections of society and the law and the special fear and danger inherent in such isolation.

- *State v. Salaman*, cited in Section 10.4 "Kidnapping and False Imprisonment"



Source: Image courtesy of Tara Storm.

10.1 Sex Offenses

LEARNING OBJECTIVES

1. Compare common-law rape and sodomy offenses with modern rape and sodomy offenses.
2. Define the criminal act element required for rape.
3. Define the attendant circumstance element required for rape.
4. Ascertain the amount of resistance a victim must demonstrate to evidence lack of consent.
5. Ascertain whether the victim's testimony must be corroborated to convict a defendant for rape.
6. Define the criminal intent element required for rape.
7. Analyze the relationship between the criminal intent element required for rape and the mistake of fact defense allowed for rape in some jurisdictions.
8. Define the harm element required for rape.
9. Identify the primary components of rape shield laws.
10. Identify the most prevalent issues in acquaintance rape.
11. Compare spousal rape with rape.
12. Identify the elements of statutory rape, and compare statutory rape with rape.
13. Compare sodomy, oral copulation, and incest with rape.
14. Analyze sex offenses grading.
15. Identify the primary components of sex offender registration statutes.

In this section, you learn the elements of **rape**¹ and related sex offenses and examine defenses based on **consent**. In upcoming sections, you analyze the elements of other crimes involving force, fear, and physical restraint, including assault, battery, domestic violence, stalking, and kidnapping.

Synopsis of the History of Rape and Sodomy

The word **rape** has its roots in the Latin word *rapere*, which means to steal or seize. At early common law, rape was a capital offense. The elements of rape were forcible sexual intercourse, by a man, with a woman not the spouse of the perpetrator, conducted without consent, or with consent obtained by force or threat of force. Donna Macnamara, "History of Sexual Violence," Interactive theatre.org website, accessed February 8, 2011, <http://www.interactivetheatre.org/resc/history.html>. The rape prosecution required evidence of the defendant's use of

1. The forcible sexual penetration of a victim without consent.

force, extreme resistance by the victim, and evidence that corroborated the rape victim’s testimony. The common law also recognized the crime of **sodomy**. In general, sodomy was the penetration of the male anus by a man. Sodomy was condemned and criminalized even *with consent* because of religious beliefs deeming it a crime against nature. “Sex Offenses,” Lawbrain.com website, accessed February 8, 2011, http://lawbrain.com/wiki/Sex_Offenses.

In the 1970s, many changes were made to rape statutes, updating the antiquated common-law approach and increasing the chances of conviction. The most prominent changes were eliminating the marital rape exemption and the requirement of evidence to corroborate the rape victim’s testimony, creating rape shield laws to protect the victim, and relaxing the necessity for the defendant’s use of force or resistance by the victim. Matthew R. Lyon, “No means No? Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape,” Findarticles.com website, accessed February 8, 2011, http://findarticles.com/p/articles/mi_hb6700/is_1_95/ai_n29148498/pg_3/?tag=content;col1. Many jurisdictions also changed the name of rape to sexual battery, sexual assault, or unlawful sexual conduct and combined sexual offenses like rape, sodomy, and oral copulation into one statute. Although some states still have statutes that provide the death penalty for rape, the US Supreme Court has held that rape, even *child rape*, cannot be considered a **capital** offense without violating the Eighth Amendment cruel and unusual punishment clause, rendering these statutes unenforceable. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), accessed February 8, 2011, http://www.oyez.org/cases/2000-2009/2007/2007_07_343.

Sodomy law has likewise been updated to make sodomy a gender-neutral offense and preclude the criminalization of consensual sexual conduct between adults. The US Supreme Court has definitively held that consensual sex between adults may be protected by a right of privacy and cannot be criminalized without a sufficient government interest. *Lawrence v. Texas*, 539 U.S. 558 (2003), accessed February 8, 2011, http://www.oyez.org/cases/2000-2009/2002/2002_02_102.

Table 10.1 Comparing Common Law Rape and Sodomy with Modern Statutes

Crime	Criminal Act	Lack of Victim Consent?	Victim Resistance?	Other Differences
Common-law rape	Penis-vagina penetration	Yes	Yes, extreme resistance	Corroborative evidence required; no spousal rape; capital crime
Modern rape	Some states include any	Yes	Not if force is used, or threat of force that would	No corroborative evidence required;

Crime	Criminal Act	Lack of Victim Consent?	Victim Resistance?	Other Differences
	sexual penetration		deter a reasonable person from resisting (See section 10.1.2.2.2.)	spousal rape is a crime in some jurisdictions; rape is not a capital crime.
Common-law sodomy	Male penis-male anus penetration	No. Even consensual sodomy was criminal.	No. Even consensual sodomy was criminal.	
Modern sodomy	Gender-neutral penis-anus penetration	Yes	Same as modern rape, above	Consensual sodomy in prison or jail is still criminal in some jurisdictions. (See section 10.1.7.)

Rape Elements

In modern times, rape is a crime that has the elements of criminal act, criminal intent, causation, and harm. Rape also has an attendant circumstance element, which is lack of consent by the victim.

Rape Act

The **criminal act** element required for rape in many states is *sexual intercourse*, accomplished by *force or threat* of force. Md. Code Ann. § 3-303, accessed February 8, 2011, <http://law.justia.com/maryland/codes/2005/gcr/3-303.html>. Sexual intercourse is typically defined as penetration of a woman's vagina by a man's penis and can also be referred to as vaginal intercourse. Md. Code Ann. § 3-301(g), accessed February 8, 2011, <http://law.justia.com/maryland/codes/2005/gcr/3-301.html>. Some jurisdictions include the penetration of the woman's vagina by other body parts, like a finger, as sexual intercourse. K.S.A. § 21-3501(1), accessed February 8, 2011, http://law.justia.com/kansas/codes/2006/chapter21/statute_11553.html. The Model Penal Code defines the criminal act element required for rape as sexual intercourse that includes "intercourse per os or per anum," meaning oral and anal intercourse (Model Penal Code § 213.0(2)). In most jurisdictions, a man or a woman can commit rape. K.S.A. § 21-3502, accessed February 8, 2011, http://law.justia.com/kansas/codes/2006/chapter21/statute_11554.html.

Although it is common to include force or threat of force as an indispensable part of the rape criminal act, some modern statutes expand the crime of rape to include situations where the defendant does *not* use force or threat, but the victim is *extremely vulnerable*, such as an intoxicated victim, an unconscious victim, or a victim who is of tender years. K.S.A. § 21-3502, accessed February 8, 2011, http://law.justia.com/kansas/codes/2006/chapter21/statute_11554.html. The Model Penal Code includes force, threat of force, and situations where the defendant has impaired the victim's power to control conduct by administering intoxicants or drugs without the victim's knowledge or sexual intercourse with an unconscious female or a female who is fewer than ten years old (Model Penal Code § 213.1(1)). Other statutes may criminalize **unforced nonconsensual** sexual intercourse or other forms of **unforced nonconsensual** sexual contact as less serious forms of rape with reduced sentencing options. N.Y. Penal Law § 130.25(3), accessed February 10, 2011, http://law.onecle.com/new-york/penal/PEN0130.25_130.25.html.

Example of Rape Act

Alex and Brad play video games while Brad's sister Brandy watches. Brad tells Alex he is going to go the store and purchase some beer. While Brad is gone, Alex turns to Brandy, pulls a knife out of his pocket, and tells her to take off her pants and lie down. Brandy tells Alex, "No, I don't want to," but thereafter acquiesces, and Alex puts his penis into Brandy's vagina. Alex has probably committed the criminal act element required for rape in most jurisdictions. Although Alex did not use physical force to accomplish sexual intercourse, his *threat* of force by display of the knife is sufficient. If the situation is reversed, and Brandy pulls out the knife and orders Alex to put his penis in her vagina, many jurisdictions would also criminalize Brandy's criminal act as rape. If Alex does not use force or a threat of force, but Brandy is only nine years old, some jurisdictions still criminalize Alex's act as rape, as would the Model Penal Code.

Rape Attendant Circumstance

In many jurisdictions, the **attendant circumstance** element required for rape is *the victim's lack of consent* to the defendant's act. Md. Code Ann. § 3-304, accessed February 8, 2011, <http://law.justia.com/maryland/codes/gcr/3-304.html>. Thus victim's consent could operate as a **failure of proof** or **affirmative defense**.

Proving Lack of Consent as an Attendant Circumstance

Proving lack of consent has two components. First, the victim must be legally *capable* of giving consent. If the victim is under the age of consent or is mentally or intellectually impaired because of a permanent condition, intoxication, or drugs,

the prosecution does not have to prove lack of consent in many jurisdictions. K.S.A. § 21-3502, accessed February 8, 2011, http://law.justia.com/kansas/codes/2006/chapter21/statute_11554.html. Sexual intercourse with a victim under the age of consent is a separate crime, **statutory rape**, which is discussed shortly.

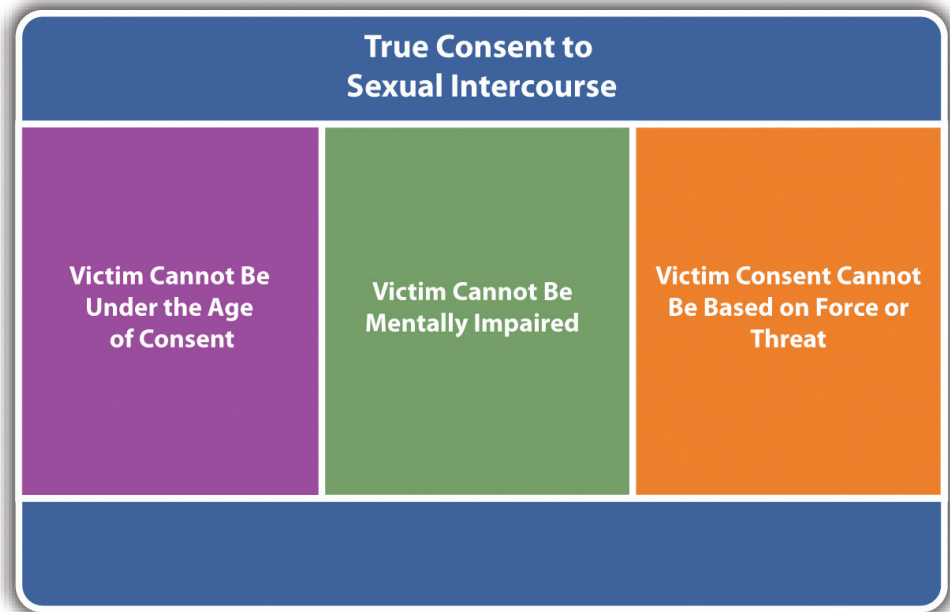
The second component to proving lack of consent is separating true consent from consent rendered *involuntarily*. Involuntary consent is present in two situations. First, if the victim consents to the defendant's act because of fraud or trickery—for example, when the victim is unaware of the *nature* of the act of sexual intercourse—the consent is involuntary. A victim is generally unaware of the nature of the act of sexual intercourse when a doctor shams a *medical procedure*. *Iowa v. Vander Esch*, 662 N.W. 2d 689 (2002), accessed February 10, 2011, http://scholar.google.com/scholar_case?case=4906781834239023314&q=rape+%22fraud+in+the+inducement%22&hl=en&as_sdt=2,5&as_ylo=2002. This is called **fraud in the factum**². **Fraud in the inducement**³, which is a fraudulent representation as to the *circumstances* accompanying the sexual conduct, does not render the consent involuntary in many jurisdictions. An example of fraud in the inducement is a defendant's false statement that the sexual intercourse will *cure* a medical condition. *Boro v. Superior Court*, 163 Cal. App. 3d 1224 (1985), accessed February 17, 2011, http://scholar.google.com/scholar_case?case=8450241145233624189&q=Boro+v.+Superior+Court&hl=en&as_sdt=2,5.

A more common example of involuntary consent is when the victim consents to the defendant's act because of **force** or **threat** of force. The prosecution generally proves this type of consent is involuntary by introducing evidence of the victim's *resistance*.

2. The defendant fraudulently conceals the nature of the sexual act, like a doctor shamming a medical procedure. Fraud in the factum could render the victim's consent involuntary.

3. The defendant fraudulently conceals the circumstances of the sexual act, like fraudulently representing that the sexual act will cure a disease. Fraud in the inducement does not render the victim's consent involuntary.

Figure 10.1 *Diagram of Consent*



Proving Involuntary Consent by the Victim’s Resistance

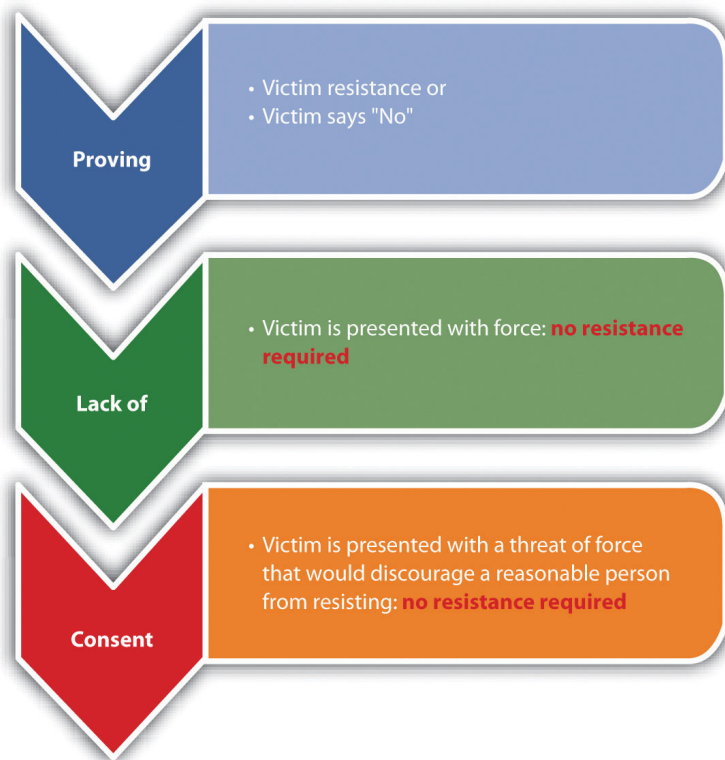
Under the common law, the victim had to manifest *extreme resistance* to indicate lack of consent. In modern times, the victim does not have to fight back or otherwise endanger his or her life if it would be futile to do so. In most jurisdictions, the victim only needs to resist to the same extent as a reasonable person under similar circumstances, which is an objective standard. Del. Code Ann. tit. II, § 761(j) (1), accessed February 9, 2011, <http://delcode.delaware.gov/title11/c005/sc02/index.shtml#761>.

The use of force by the defendant could eliminate any requirement of victim resistance to prove lack of consent. N.Y. Penal Law § 130.05, accessed February 9, 2011, http://law.onecle.com/new-york/penal/PEN0130.05_130.05.html. If the defendant obtains consent using a *threat* of force, rather than force, the victim may not have to resist if the victim experiences subjective fear of serious bodily injury, and a reasonable person under similar circumstances would not resist, which is an objective standard. Minn. Stat. Ann. § 609.343(c), accessed February 10, 2011, <https://www.revisor.mn.gov/statutes/?id=609.343>. Threat of force can be accomplished by words, weapons, or gestures. It can also be present when there is a discrepancy in size or age between the defendant and the victim or if the sexual encounter takes place in an isolated location. The Model Penal Code considers it a felony of the third degree and gross sexual imposition when a male has sexual intercourse with a female not his wife by compelling “her to submit by any threat

that would prevent resistance by a woman of ordinary resolution” (Model Penal Code § 213.1(2)(a)). Note that the Model Penal Code’s position does not require the threat to be a *threat of force*; it can be *any* type of threat that prevents physical resistance.

If the victim does not physically resist the criminal act, the prosecution must prove that the victim affirmatively indicated lack of consent in some other manner. This could be a verbal response, such as saying, “No,” but the verbal response must be unequivocal. In the most extreme case, at least one court has held that a verbal “No” *during the act* of sexual intercourse is sufficient, and the defendant who *continues* with sexual intercourse after being told “No” is committing the criminal act of rape. *In re John Z.*, 29 Cal. 4th 756 (2003), accessed February 10, 2011, <http://scocal.stanford.edu/opinion/re-john-z-32309>.

Figure 10.2 Proving Lack of Consent



The Requirement of Corroborative Evidence

4. Evidence that tends to support a victim’s testimony.

At early common law, a victim’s testimony was insufficient evidence to meet the burden of proving the elements of rape, including lack of consent. The victim’s testimony had to be supported by additional **corroborative evidence**⁴. Modern

jurisdictions have done away with the corroborative evidence requirement and allow the trier of fact to determine the elements of rape or lack of consent based on the victim's testimony alone. *State v. Borthwick*, 880 P.2d 1261 (1994), accessed February 10, 2011, http://www1.law.umkc.edu/suni/CrimLaw/calendar/Class_24_borthwick_case.htm. However, statistics indicate that rape prosecutions often result in acquittal. Thus although technically the victim's testimony need not be corroborated, it is paramount that the victim *promptly report* the rape to the appropriate authorities and submit to testing and interrogation to preserve any and all forms of relevant rape evidence.

Example of Rape Attendant Circumstance

Review the example with Brandy and Alex in Section 10 "Example of Rape Act". In this example, after an initial protest, Brandy lies down, takes off her pants, and allows Alex to put his penis in her vagina when he pulls out a knife. It is likely that the trier of fact will find the rape attendant circumstance in this case. Although Brandy acquiesced to Alex's demands *without resisting*, she did so after Alex took a knife out of his pocket, which is a **threat** of force. In addition, Brandy expressed her lack of consent verbally before submitting to Alex's demand. A trier of fact could determine that Brandy experienced a fear of serious bodily injury from Alex's display of the knife, and that a reasonable person under similar circumstances would give in to Alex's demands without physical resistance.

Change this example and assume that after Brad leaves, Alex asks Brandy to have sexual intercourse with him. Brandy responds, "No," but allows Alex to remove her pants and put his penis in her vagina without physically resisting. The trier of fact must make the determination of whether Alex accomplished the sexual act by force or threat of force and without Brandy's consent. If Brandy testifies that she said "No" and did not consent to Alex's act, and Alex testifies that Brandy's verbal response was insufficient to indicate lack of consent, the trier of fact must resolve this issue of fact, and it can do so based on Brandy's testimony, **uncorroborated**, in many jurisdictions. The trier of fact can use the criteria of the difference in age and size between Brandy and Alex, any gestures or words indicating force or threat, and the location and isolation of the incident, among other factors.

Rape Intent

The criminal intent element required for rape in most jurisdictions is the **general intent** or **knowingly** to perform the rape criminal act. *State v. Lile*, 699 P.2d 456 (1985), accessed February 8, 2011, http://scholar.google.com/scholar_case?case=5958820374035014869&hl=en&as_sdt=2&as_vis=1&oi=scholar. This may include the intent to use force to accomplish the objective if the state's rape statute includes force or threat of force as a component of the criminal act.

As Chapter 4 "The Elements of a Crime" stated, occasionally, a different criminal intent supports the other elements of an offense. In some states, **negligent** intent supports the rape attendant circumstance of lack of victim consent. This creates a viable **mistake of fact** defense if the defendant has an incorrect perception as to the victim's consent. To be successful with this defense, the facts must indicate that the defendant honestly and reasonably believed that the victim consented to the rape criminal act. *People v. Mayberry*, 542 P.2d 1337 (1975), accessed February 11, 2011, http://scholar.google.com/scholar_case?case=6471351898025391619&hl=en&as_sdt=2&as_vis=1&oi=scholar. Many jurisdictions expressly disallow the defense, requiring **strict liability** intent for the lack of consent attendant circumstance. *State v. Plunkett*, 934 P.2d 113 (1997), accessed February 11, 2011, http://scholar.google.com/scholar_case?case=17940293485668190575&hl=en&as_sdt=2&as_vis=1&oi=scholar.

Example of Rape Intent

Review the example with Alex and Brandy in Section 10 "Example of Rape Act". Change the example so that Alex does not display a knife and simply asks Brandy if she would like to have sex with him. Brandy does not respond. Alex walks over to Brandy and removes her pants. Brandy does not protest or physically resist. Thereafter, Alex asks Brandy if she "likes it rough." Brandy remains silent. Alex physically and forcibly puts his penis in Brandy's vagina. In states that allow a **negligent** intent to support the attendant circumstance of rape, Alex may be able to successfully assert **mistake of fact** as a defense. It appears that Alex has with general intent or knowingly committed forcible sexual intercourse, based on his actions. In most jurisdictions, the jury could be instructed on an *inference* of this intent from Alex's behavior under the circumstances. However, if **negligent** intent is required to support the *attendant circumstance* of the victim's lack of consent, the trier of fact may find that Alex's mistake as to Brandy's consent was honest and reasonable, based on her lack of response or physical resistance. If Alex is in a jurisdiction that requires **strict liability** intent to support the attendant circumstance element, Alex cannot raise the defense because Alex's belief as to Brandy's consent would be irrelevant.

Rape Causation

The defendant's criminal act must be the **factual** and **legal cause** of the harm, which is defined in Section 10 "Rape Harm".

Rape Harm

The **harm** element of rape in most jurisdictions is *penetration*, no matter how slight. Idaho Code Ann. § 18-6101, accessed February 10, 2011,

<http://www.legislature.idaho.gov/idstat/Title18/T18CH61SECT18-6101.htm>. This precludes virginity as a defense. In addition, modern statutes do not require male ejaculation, which precludes lack of semen as a defense. Ala. Code § 13A-6-60, accessed February 11, 2011, <http://law.justia.com/alabama/codes/2009/Title13A/Chapter6/13A-6-60.html>.

Example of Rape Harm

Review the example with Alex and Brandy in [Section 10 "Example of Rape Act"](#). Assume that Brad walks into the room while Alex and Brandy are engaging in sexual intercourse. Brad tackles Alex and pulls him off Brandy. Alex may be charged with rape, not **attempted** rape, in most jurisdictions. The fact that Alex did not ejaculate does not affect the rape analysis in any way because most jurisdictions do not require ejaculation as a component of the harm element of rape.

Rape Shield Laws

Rape prosecutions can be extremely stressful for the victim, especially when the defendant pursues a **consent** defense. Before the comprehensive rape reforms of the 1970s, rape defendants would proffer any evidence they could find to indicate that the victim was sexually promiscuous and prone to consenting to sexual intercourse. Fearing humiliation, many rape victims kept their rape a secret, not reporting it to law enforcement. This allowed serial rapists to escape punishment and did not serve our criminal justice goal of deterrence.

In modern times, most states protect rape victims with **rape shield laws**⁵. Rape shield laws prohibit the admission of evidence of the victim's past sexual conduct to prove consent in a rape trial, unless the judge allows it in a pretrial **in camera**⁶ hearing, outside the presence of the jury. Rape shield laws could include the additional protections of the exclusion of evidence relating to the victim's style of dress to prove consent, the exclusion of evidence that the victim requested the defendant to wear a condom to prove consent, and the affirmation that a victim's testimony in a rape trial need not be corroborated by other evidence. Fla. Stat. Ann. § 794.022, accessed February 11, 2011, http://law.justia.com/florida/codes/2010/TitleXLVI/chapter794/794_022.html. Most courts permit the admission of evidence proving the victim's previous consensual sex *with the defendant* because this evidence is particularly relevant to any consent defense. Colo. Rev. Stat. Ann. § 18-3-407(1) (a), accessed February 14, 2011, <http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp=>.

5. Statutes that preclude the admission of evidence in a rape trial of a victim's previous sexual history unless a judge permits it after a pretrial in camera hearing.

6. Outside the presence of the jury.

Example of the Effect of a Rape Shield Law

Review the example with Alex and Brandy in Section 10 "Example of Rape Intent". Assume that the jurisdiction in which the example takes place has a **rape shield law**. If Alex is put on trial for the rape of Brandy and he decides to pursue a consent defense, Alex would *not* be able to introduce evidence of Brandy's sexual history with *other men* unless he receives approval from a judge in an in camera hearing before the trial.

LAW AND ETHICS

Should the Media Be Permitted to Publish Negative Information about a Rape Victim?

In 2003, Kobe Bryant, a professional basketball player, was indicted for sexually assaulting a nineteen-year-old hotel desk clerk. A mistake by a court reporter listed the accuser's name on a court website. "Rape Case against Bryant Dismissed," MSNBC.com website, accessed February 27, 2011, <http://nbcsports.msnbc.com/id/5861379>. The court removed the victim's name after discovery of the mistake, but the damage was done. Thereafter, in spite of a court order prohibiting the publication of the accuser's name, the media, including radio, newspaper, Internet, and television, published the accuser's name, phone number, address, and e-mail address. Tom Kenworthy, Patrick O'Driscoll, "Judge Dismisses Bryant Rape Case," USAtoday.com website, accessed February 27, 2011, http://www.usatoday.com/sports/basketball/nba/2004-09-01-kobe-bryant-case_x.htm. Products like underwear, t-shirts, and coffee mugs with pictures of the accuser and Bryant in sexual positions were widely available for sale, and the accuser received constant harassment, including death threats. Richard Haddad, "Shield or Sieve? People v. Bryant and the Rape Shield Law in High-Profile Cases," *Columbia Journal of Law and Social Problems*, accessed February 27, 2011, <http://www.columbia.edu/cu/jlsp/pdf/Spring2%202006/Haddad10.pdf>. Although the Colorado Supreme Court ordered pretrial in camera transcripts of hearings pursuant to Colorado's rape shield law to remain confidential, an order that was confirmed by the US Supreme Court, *Associated Press et. al. v. District Court for the Fifth Judicial District of Colorado*, 542 U.S. 1301 (2004), accessed February 27, 2011, <http://ftp.resource.org/courts.gov/c/US/542/542.US.1301.04.73.html>, the accuser was subjected to so much negative publicity that she eventually refused to cooperate and the prosecution dropped the charges in 2004.

1. Do you think **rape shield laws** should include prohibitions against negative publicity? What are the *constitutional* ramifications of this particular type of statutory protection?

Check your answer using the answer key at the end of the chapter.

Kobe Bryant Video

Kobe Claims Innocence to Sexual Assault Charges

Kobe Bryant and his attorney discuss the charge of rape filed against Kobe in this video:

[\(click to see video\)](#)

Acquaintance Rape

In modern times, rape defendants are frequently known to the victim, which may change the factual situation significantly from stranger rape. **Acquaintance rape**⁷, also called **date rape**, is a phenomenon that could increase a victim's reluctance to report the crime and could also affect the defendant's need to use force and the victim's propensity to physically resist. The National Center for Victims of Crime, "Acquaintance Rape," Ncvc.org website, accessed February 14, 2011, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32306>. Although studies indicate that acquaintance rape is on the rise, The National Center for Victims of Crime, "Acquaintance Rape," Ncvc.org website, accessed February 14, 2011, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32306>. statutes have not entirely addressed the issues presented in an acquaintance rape fact pattern. To adequately punish and deter acquaintance or date rape, rape statutes should punish *nonforcible, nonconsensual* sexual conduct as severely as forcible rape. Although the majority of states still require forcible sexual intercourse as the rape criminal act element, at least one modern court has rejected the necessity of any force other than what is required to accomplish the sexual intercourse. *State of New Jersey in the Interest of M.T.S.*, 609 A.2d 1266 (1992), accessed February 14, 2011, <http://www.4lawnotes.com/showthread.php?t=1886>. Some rape statutes have also eliminated the requirement that the defendant use force and punish *any* sexual intercourse without consent as rape. Utah Code Ann. § 76-5-402(1), accessed February 14, 2011, http://le.utah.gov/~code/TITLE76/htm/76_05_040200.htm.

Spousal Rape

As stated previously, at early common law, a man could not rape his spouse. The policy supporting this exemption can be traced to a famous seventeenth-century jurist, Matthew Hale, who wrote, "[T]he husband cannot be guilty of a rape

7. The victim is raped by an acquaintance. Also called date 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” (Hale, *History of Pleas of the Crown*, p. 629). During the rape reforms of the 1970s, many states eliminated the marital or **spousal rape**⁸ exemption, in spite of the fact that the Model Penal Code does *not* recognize spousal rape. At least one court has held that the spousal rape exemption violates the equal protection clause of the Fourteenth Amendment because it discriminates against *single men* without a sufficient government interest. *People v. Liberta*, 64 N.Y. 2d 152 (1984), accessed February 14, 2011, http://scholar.google.com/scholar_case?case=1399209540378549726&hl=en&as_sdt=2&as_vis=1&oi=scholar. In several states that criminalize spousal rape, the criminal act, criminal intent, attendant circumstance, causation, and harm elements are exactly the same as the elements of forcible rape. N. H. Rev. Stat. Ann. § 632-A: 5, accessed February 14, 2011, <http://www.gencourt.state.nh.us/rsa/html/LXII/632-A/632-A-5.htm>. Many states also **grade** spousal rape the same as forcible rape—as a serious felony. Utah Code Ann. § 76-5-402(2), accessed February 14, 2011, http://le.utah.gov/~code/TITLE76/htm/76_05_040200.htm. Grading of sex offenses is discussed shortly.

Statutory Rape

Statutory rape⁹, also called **unlawful sexual intercourse**, criminalizes sexual intercourse with a victim who is under the age of legal consent. The age of legal consent varies from state to state and is most commonly sixteen, seventeen, or eighteen. Age of Consent Chart for the U.S.-2010, Ageofconsent.us website, accessed February 14, 2011, <http://www.ageofconsent.us>.

The **criminal act** element required for statutory rape in many jurisdictions is sexual intercourse, although other types of sexual conduct with a victim below the age of consent are also criminal. US Department of Health and Human Services, “Statutory Rape: A Guide to State Laws and Reporting Requirements,” ASPE.hhs.gov website, accessed February 16, 2011, <http://aspe.hhs.gov/hsp/08/SR/StateLaws/statelaws.shtml>. The **harm** element of statutory rape also varies, although many jurisdictions mirror the harm element required for rape. US Department of Health and Human Services, “Statutory Rape: A Guide to State Laws and Reporting Requirements,” ASPE.hhs.gov website, accessed February 16, 2011, <http://aspe.hhs.gov/hsp/08/SR/StateLaws/statelaws.shtml>. The **attendant circumstance** element required for statutory rape is an underage victim. Cal. Penal Code § 261.5, accessed February 15, 2011, <http://law.onecle.com/california/penal/261.5.html>. There is no requirement for *force* by the defendant. Nor is there an attendant circumstance element of lack of consent because the victim is incapable of legally consenting.

8. The victim of rape is the defendant’s spouse.

9. Sexual intercourse with a victim younger than the age of legal consent.

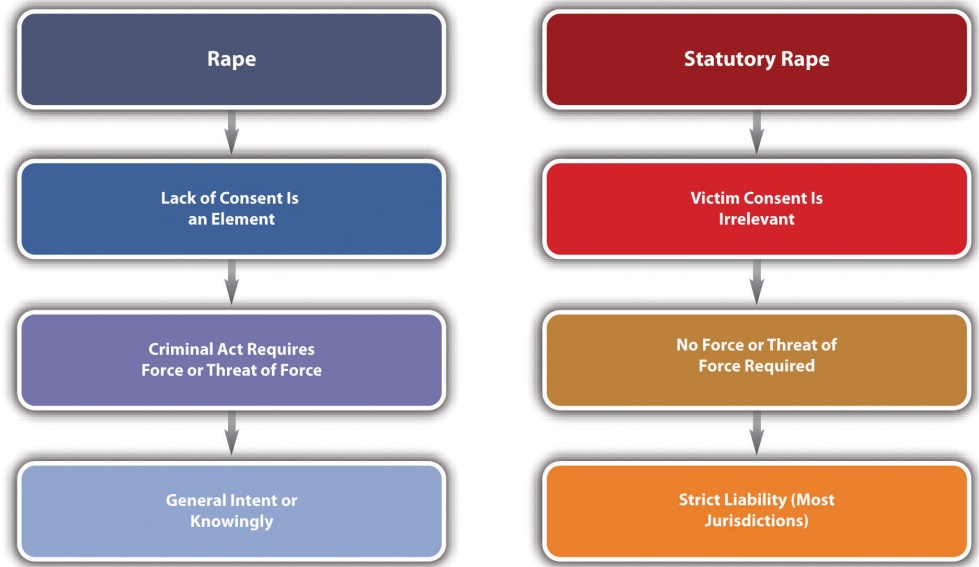
In the majority of states, the criminal intent element of statutory rape is **strict liability**. La. Rev. Stat. Ann. § 14-80, accessed February 15, 2011, <http://law.justia.com/louisiana/codes/2009/rs/title14/rs14-80.html>. However, a minority of states require **reckless** or **negligent** criminal intent, allowing for the defense of **mistake of fact** as to the victim's age. If the jurisdiction recognizes mistake of age as a defense, the mistake must be made *reasonably*, and the defendant must take *reasonable* measures to verify the victim's age. Alaska Stat. § 11.41.445(b), accessed February 15, 2011, <http://law.justia.com/alaska/codes/2009/title-11/chapter-11-41/article-04/sec-11-41-445>. The mistake of age defense can be proven by evidence of a falsified identification, witness testimony that the victim lied about his or her age to the defendant, or even the appearance of the victim.

It is much more common to prosecute males for statutory rape than females. The historical reason for this selective prosecution is the policy of preventing teenage pregnancy. *Michael M. v. Superior Court*, 450 U.S. 464 (1981), accessed February 15, 2011, http://www.oyez.org/cases/1980-1989/1980/1980_79_1344. However, modern statutory rape statutes are gender-neutral. N.Y. Penal Law § 130.30, accessed February 15, 2011, http://law.onecle.com/new-york/penal/PEN0130.30_130.30.html. This ensures that women, especially women who are older than their sexual partner, are equally subject to prosecution.

Example of Statutory Rape

Gary meets Michelle in a nightclub that only allows entrance to patrons eighteen and over. Gary and Michelle end up spending the evening together, and later they go to Gary's apartment where they have consensual sexual intercourse. In reality, Michelle is actually fifteen and was using false identification to enter the nightclub. If Gary and Michelle are in a state that requires **strict liability** for the criminal intent element of statutory rape, Gary can be subject to prosecution for and conviction of this offense if fifteen is under the age of legal consent. If Gary and Michelle are in a state that allows for **mistake of age** as a defense, Gary could use Michelle's presence in the nightclub as evidence that he acted *reasonably* in believing that Michelle was capable of rendering legal consent. If both Gary and Michelle used false identification to enter the nightclub, and both Gary and Michelle are under the age of legal consent, *both* could be prosecuted for and convicted of statutory rape in most jurisdictions because modern statutory rape statutes are gender-neutral.

Figure 10.3 Comparison of Rape and Statutory Rape



Sodomy and Oral Copulation

As stated previously, some states include rape, **sodomy**¹⁰, and **oral copulation**¹¹ in a sexual assault or sexual conduct statute that criminalizes a variety of sexual acts involving penetration. Alaska Stat. § 11.41.410, accessed February 15, 2011, <http://law.justia.com/alaska/codes/2009/title-11/chapter-11-41/article-04/sec-11-41-410>. In states that distinguish between rape and sodomy, the **criminal act** element of sodomy is often defined as forcible *penis to anus* penetration. Cal. Penal Code § 286(a), accessed February 15, 2011, <http://law.justia.com/california/codes/2009/pen/281-289.6.html>. Typically, the other sodomy elements, including the lack of consent attendant circumstance, criminal intent, causation, and harm, are the same as the elements of rape. Many jurisdictions also **grade** sodomy the same as rape. Grading is discussed shortly.

Sodomy that is *nonforcible* but committed with an individual below the age of legal consent is also criminal. Cal. Penal Code § 286(b), accessed February 15, 2011, <http://law.justia.com/california/codes/2009/pen/281-289.6.html>. As stated previously, the US Supreme Court has held that statutes criminalizing sodomy between consenting adults unreasonably encroach on a right to privacy without a sufficient government interest. *Lawrence v. Texas*, 539 U.S. 558 (2003), accessed February 15, 2011, http://www.oyez.org/cases/2000-2009/2002/2002_02_102. In some states, consensual nonforcible sodomy is criminal if it is committed in a *state penitentiary* or *local detention facility* or *jail*. Cal. Penal Code § 286(c) (3) (e), accessed

10. Forcible, nonconsensual, penis to anus penetration.

11. Forcible, nonconsensual, mouth to sexual organ or anus penetration.

February 15, 2011, <http://law.justia.com/california/codes/2009/pen/281-289.6.html>.

In states that distinguish between rape, sodomy, and oral copulation, the **criminal act** element of oral copulation is forcible *mouth to sexual organ* or *anus* penetration. Cal. Penal Code § 288a, accessed February 15, 2011, <http://law.onecle.com/california/penal/288a.html>. Typically, the other oral copulation elements, including the lack of consent attendant circumstance, criminal intent, causation, and harm, are the same as the elements of rape. Many jurisdictions also **grade** oral copulation the same as rape. Grading is discussed shortly.

A few states still criminalize oral copulation with consent. Ala. Code § 13A-6-65, accessed February 15, 2011, <http://www.legislature.state.al.us/CodeofAlabama/1975/13A-6-65.htm>. Based on the US Supreme Court precedent relating to sodomy, these statutes may be unenforceable and unconstitutional.

Incest

Incest¹² is also criminal in many jurisdictions. The **criminal act** element required for incest is typically sexual intercourse. Fla. Stat. Ann. § 826.04, accessed February 15, 2011, <http://law.onecle.com/florida/crimes/826.04.html>. The **attendant circumstance** element required for incest is a victim the defendant cannot legally marry because of a family relationship. Del. Code Ann. Tit. 11, § 766, accessed February 15, 2011, <http://law.justia.com/delaware/codes/2010/title11/c005-sc02.html>. In the majority of jurisdictions, *force* is not required, and *consent* is not an attendant circumstance element of incest. Del. Code Ann. Tit. 11, § 766, accessed February 15, 2011, <http://law.justia.com/delaware/codes/2010/title11/c005-sc02.html>. Thus consent by the victim cannot operate as a defense. If the sexual intercourse with a family member is forcible and nonconsensual, the defendant could be charged with and convicted of rape. The criminal intent element required for incest is typically **general intent** or **knowingly**. Fla. Stat. Ann. § 826.04, accessed February 15, 2011, <http://law.onecle.com/florida/crimes/826.04.html>. The causation and harm elements of incest are generally the same as the causation and harm elements of rape. Fla. Stat. Ann. § 826.04, accessed February 15, 2011, <http://law.onecle.com/florida/crimes/826.04.html>. However, incest is generally **graded** lower than forcible rape or sexual assault because force and lack of consent are not required. Del. Code Ann. Tit. 11, § 766, accessed February 15, 2011, <http://law.justia.com/delaware/codes/2010/title11/c005-sc02.html>.

12. Sexual intercourse with a victim who the defendant cannot legally marry because of a family relationship.

Example of Incest

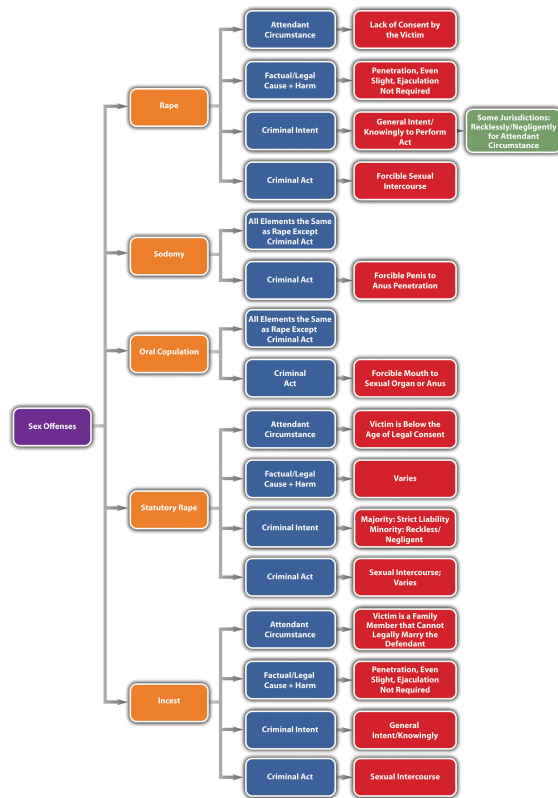
Hal and Harriet, brother and sister, have consensual sexual intercourse. Both Hal and Harriet are above the age of legal consent. In spite of the fact that there was no force, threat of force, or fraud, and both parties consented to the sexual act, Hal and Harriet could be charged with and convicted of **incest** in many jurisdictions, based on their *family relationship*.

Sex Offenses Grading

Jurisdictions vary when it comes to **grading** sex offenses. In general, forcible sex crimes involving penetration are graded as serious felonies. Factors that could aggravate grading are gang rape, Fla. Stat. Ann. § 794.023, accessed February 15, 2011, <http://law.onecle.com/florida/crimes/794.023.html>, the infliction of bodily injury, the use of a weapon, a youthful victim, the commission of other crimes in concert with the sexual offense, or a victim who has mental or intellectual disabilities or who has been compromised by intoxicants. Del. Code Ann. Tit. 11, § 773, accessed February 15, 2011, <http://law.justia.com/delaware/codes/2010/title11/c005-sc02.html>. The Model Penal Code grades rape as a felony of the second degree unless the actor inflicts serious bodily injury on the victim or another, or the defendant is a stranger to the victim, in which case the grading is elevated to a felony of the first degree (Model Penal Code § 213.1 (1)).

Sexual offenses that do not include penetration are graded lower, N.Y. Penal Law § 130.52, accessed February 15, 2011, http://law.onecle.com/new-york/penal/PEN0130.52_130.52.html, along with offenses that could be consensual. Del. Code Ann. Tit. 11, § 766, accessed February 15, 2011, <http://law.justia.com/delaware/codes/2010/title11/c005-sc02.html>. Sex offense statutes that criminalize sexual conduct with a victim below the age of legal consent often grade the offense more severely when there is a large age difference between the defendant and the victim, when the defendant is an adult, or the victim is of tender years. Cal. Penal Code § 261.5, accessed February 15, 2011, <http://law.onecle.com/california/penal/261.5.html>.

Figure 10.4 Diagram of Sex Offenses



Sex Offender Registration Statutes

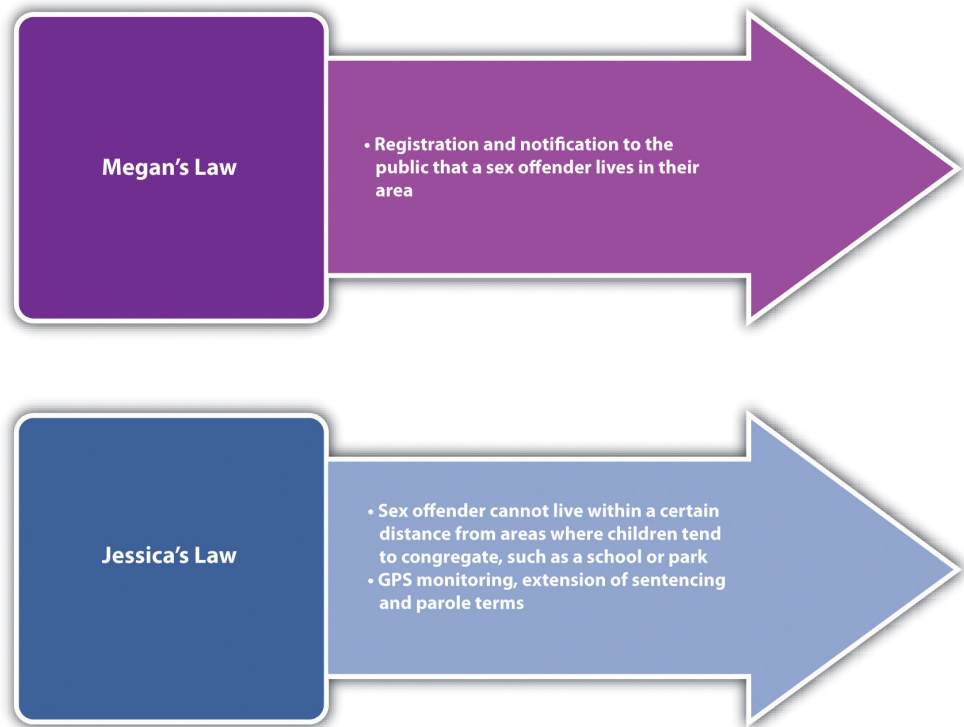
Based on a public awareness that sex offenders often reoffend, many states have enacted some form of **Megan’s law**¹³ or **Jessica’s law**¹⁴, which provide for registration, monitoring, control, and elevated sentencing for sex offenders, including those that harm children. Both laws were written and enacted after high-profile cases with child victims became the subject of enormous media attention. Megan’s and Jessica’s law statutes enhance previously enacted statutes that require the registration of sex offenders with local law enforcement agencies.

Typically, a Megan’s law statute provides for registration and notification to the public that a convicted sex offender lives in their area. 42 Pa. C. S. § 9799.1, accessed February 15, 2011, <http://www.pameganslaw.state.pa.us>. A Jessica’s law statute often includes a stay-away order, mandating that a sex offender cannot live within a certain distance from areas such as a school or park where children tend to congregate. Jessica’s law statutes also provide for GPS monitoring and extend the sentencing and parole terms of child sex offenders. Va. Code Ann. § 19.2-295.2:1, accessed February 15, 2011, <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+19.2-295.2C1>.

13. A statute requiring sex offender registration and notification to the public of the location of a sex offender.

14. A statute requiring monitoring of a sex offender.

Figure 10.5 Diagram of Megan's and Jessica's Law Statutes



KEY TAKEAWAYS

- Common-law rape was a capital offense, did not include rape of a spouse, required extreme resistance by the victim, and required evidence to corroborate a victim's testimony. Modern statutes do not make rape a capital offense, often criminalize spousal rape, and do not require extreme resistance by the victim or evidence to corroborate the victim's testimony. At early common law, sodomy was the anal penetration of a man, by a man. Modern statutes make sodomy gender-neutral and only criminalize sodomy without consent.
- The criminal act element required for rape is sexual penetration accomplished with force or threat of force in many jurisdictions.
- The attendant circumstance element required for rape is lack of consent by the victim.
- In many jurisdictions, the victim does not need to resist if the defendant uses force. If the victim is faced with a threat of force rather than force, the victim need not resist if he or she has a subjective fear of serious bodily injury, and this fear is reasonable under the circumstances.
- In modern times, a victim's testimony does not need to be corroborated by other evidence to convict a defendant of rape.
- The criminal intent element required for rape is general intent or knowingly to commit the criminal act.
- In some jurisdictions, the criminal intent element required for the rape attendant circumstance is negligent intent—providing for a defense of mistake of fact as to the victim's consent. In other jurisdictions, the criminal intent element required for the rape attendant circumstance is strict liability, which does not allow for the mistake of fact defense.
- The harm element required for rape is penetration, no matter how slight. Ejaculation is not a requirement for rape in most jurisdictions.
- Rape shield laws generally preclude the admission of evidence of the victim's past sexual conduct in a rape trial, unless it is allowed by a judge at an in camera hearing. Rape shield laws also preclude the admission of evidence of the victim's style of dress and the victim's request that the defendant wear a condom to prove victim consent. Some rape shield laws provide that the victim's testimony need not be corroborated by other evidence to convict the defendant of rape.
- Acquaintance rape often goes unreported and does not necessarily include use of force by the defendant or resistance by the victim.
- States that criminalize spousal rape generally require the same elements for spousal rape as for rape and grade spousal rape the same as rape.
- Statutory rape is generally sexual intercourse with a victim who is under the age of legal consent. Statutory rape does not have the requirement that the intercourse be forcible and does not require the attendant

circumstance of the victim's lack of consent because the victim is incapable of rendering legal consent. In the majority of jurisdictions, the criminal intent element required for statutory rape is strict liability. In a minority of jurisdictions, the criminal intent element required for statutory rape is negligent or reckless intent, providing for a defense of mistake of fact as to the victim's age.

- Sodomy has the same elements as rape except for the criminal act element, which is often defined as forcible penis to anus penetration, rather than penis to vagina penetration. In addition, in some states sodomy is criminal with consent when it occurs in a state prison or a local detention facility or jail. Oral copulation also has the same elements as rape, except for the criminal act element, which is forcible mouth to sexual organ or anus penetration. Incest is sexual intercourse between family members who cannot legally marry.
- Generally, rape, sodomy, and oral copulation are graded as serious felonies. Factors that enhance grading of sex offenses are penetration, gang rape, bodily injury, the use of a weapon, a victim who has intellectual or mental disabilities or is youthful or intoxicated, and the commission of other crimes in concert with the sex offense. Sex offenses committed with the victim's consent and without penetration are typically graded lower. If the victim is below the age of consent, a large age difference exists between the defendant and the victim, the defendant is an adult, or the victim is of tender years, grading typically is enhanced.
- Typically, a Megan's law statute provides for sex offender registration and notification to the public that a convicted sex offender lives in their area. A Jessica's law statute often includes a stay-away order mandating that a sex offender cannot live within a certain distance from areas such as a school or park where children tend to congregate. Jessica's law statutes also provide for GPS monitoring and extend the sentencing and parole terms of child sex offenders.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Jorge and Christina have consensual sexual intercourse. Could this consensual sexual intercourse be criminal? Which crime(s), if any, could exist in this fact pattern?
2. Read *Toomer v. State*, 529 SE 2d 719 (2000). In *Toomer*, the defendant was convicted of rape after having sexual intercourse with his daughter, who was under the age of fourteen. The jury instruction did not include any requirement for the defendant's use of force or victim resistance. The defendant appealed and claimed that the prosecution should have proven he used force and the victim's resistance because the charge was **rape**, not **statutory rape**. Did the Supreme Court of South Carolina uphold the defendant's conviction? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=3593808516097562509&q=Toomer+v.+State&hl=en&as_sdt=2,5.
3. Read *Fleming v. State*, 323 SW 3d 540 (2010). In *Fleming*, the defendant appealed his conviction for aggravated sexual assault of a child under fourteen because he was not allowed to present a mistake of age defense. The defendant claimed that the requirement of strict liability intent as to the age of the victim deprived him of **due process of law**. Did the Court of Appeals of Texas agree with the defendant? The case is available at this link: http://scholar.google.com/scholar_case?case=12908572719333538188&q=%22Scott+v.+State+36+SW+3d+240%22&hl=en&as_sdt=2,5.

10.2 Assault and Battery

LEARNING OBJECTIVES

1. Define the criminal act element required for battery.
2. Define the criminal intent element required for battery.
3. Define the attendant circumstance element required for battery.
4. Define the harm element required for battery.
5. Analyze battery grading.
6. Distinguish between attempted battery and threatened battery assault.
7. Define the elements of attempted battery assault.
8. Define the elements of threatened battery assault.
9. Analyze assault grading.

Assault¹⁵ and **battery**¹⁶ are two crimes that are often prosecuted together, yet they are separate offenses with different elements. Although modern jurisdictions frequently combine assault and battery into one statute called **assault**, the offenses are still distinct and are often graded differently. The Model Penal Code calls both crimes assault, simple and aggravated (Model Penal Code § 211.1). However, the Model Penal Code does not distinguish between assault and battery for grading purposes. This section reviews the elements of both crimes, including potential defenses.

Battery Elements

Battery is a crime that has the elements of criminal act, criminal intent, attendant circumstance, causation, and harm as is discussed in the subsections that follow.

Battery Act

The **criminal act** element required for battery in most jurisdictions is an unlawful touching, often described as physical contact. 720 ILCS § 12-3, accessed February 18, 2011, <http://law.onecle.com/illinois/720ilcs5/12-3.html>. This criminal act element is what distinguishes assault from battery, although an individual can be convicted of both crimes if he or she commits separate acts supported by the appropriate intent. The defendant can touch the victim with an instrumentality, like shooting the victim with a gun, or can hit the victim with a thrown object, such as rocks or a bottle. The defendant can also touch the victim with a vehicle, knife, or a substance, such as spitting on the victim or spraying the victim with a hose.

15. Generally an attempted battery or a threatened battery, although some states and the Model Penal Code combine assault and battery into one statute called assault.

16. An unlawful harmful or offensive touching.

Example of Battery Act

Recall from Chapter 1 "Introduction to Criminal Law" an example where Chris, a newly hired employee at McDonald's, spills steaming-hot coffee on his customer Geoff's hand. Although Chris did not touch Geoff with any part of his body, he did pour a substance that unlawfully touched *Geoff's body*, which could be sufficient to constitute the criminal act element for battery in most jurisdictions.

Battery Intent

The criminal intent element required for battery varies, depending on the jurisdiction. At early common law, battery was a purposeful or knowing touching. Many states follow the common-law approach and require **specific intent** or **purposely**, or **general intent** or **knowingly**. Fla. Stat. Ann. § 784.03, accessed February 18, 2011, <http://law.onecle.com/florida/crimes/784.03.html>. Others include **reckless intent**, K.S.A. § 21-3412, accessed February 18, 2011, http://kansasstatutes.lesterama.org/Chapter_21/Article_34/21-3412.html. or **negligent intent**. R.I. Gen. Laws § 11-5-2.2, accessed February 18, 2011, <http://law.justia.com/rhodeisland/codes/title11/11-5-2.2.html>. Jurisdictions that include reckless or negligent intent generally require actual injury, serious bodily injury, or the use of a deadly weapon. The Model Penal Code requires purposely, knowingly, or recklessly causing bodily injury to another, or negligently causing "bodily injury to another with a deadly weapon" (Model Penal Code § 211.1(1) (b)). If negligent intent is *not* included in the battery statute, certain conduct that causes injury to the victim may not be criminal.

Example of Battery Intent

Review the example with Chris and Geoff in Section 10 "Example of Battery Act". Assume that Chris's act of pouring hot coffee on Geoff's hand occurred when Chris attempted to multitask and hand out change at the same moment he was pouring the coffee. Chris's act of physically touching Geoff with the hot coffee may be supported by negligent intent because Chris is a new employee and is probably not aware of the risk of spilling coffee when multitasking. If the state in which Chris's spill occurs does not include **negligent intent** in its battery statute, Chris probably will *not* be subject to prosecution for this offense. If Chris's state only criminalizes negligent battery when *serious bodily injury* occurs, or when causing bodily injury to another with a *deadly weapon*, Chris will not be subject to prosecution for battery unless the coffee caused a severe burning of Geoff's hand; hot coffee cannot kill and would probably not be considered a deadly weapon.

Battery Attendant Circumstance

The **attendant circumstance** element required for battery in most jurisdictions is that the touching occur without the victim's *consent*. Thus victim's consent can operate as a **failure of proof** or **affirmative defense** in some factual situations.

Example of Battery Consent Defense

Recall from Chapter 5 "Criminal Defenses, Part 1" the example where Allen tackles Brett during a high school football game, causing Brett to suffer a severe injury. Although Allen intentionally touched Brett, and the result is serious bodily injury, Brett **consented** to the touching by voluntarily participating in a sporting event where physical contact is *frequent*. Thus the attendant circumstance element for battery is absent and Allen is probably not subject to prosecution for this offense.

Justification and Excuse Defenses to Battery

In addition to consent, there are also **justification** and **excuse** defenses to battery that Chapter 5 "Criminal Defenses, Part 1" and Chapter 6 "Criminal Defenses, Part 2" discuss in detail. To summarize and review, the justification defenses to battery are self-defense, defense of property and habitation, and the lawful apprehension of criminals. An excuse defense to battery that Chapter 6 "Criminal Defenses, Part 2" explores is the insanity defense. One other excuse defense to battery is the *reasonable discipline* of a child by a parent that is generally regulated by statute and varies from state to state. "United States statutes pertaining to spanking," Kidjacked.com website, accessed February 18, 2011, http://kidjacked.com/legal/spanking_law.asp.

Battery Causation

The defendant's criminal act must be the **factual** and **legal cause** of the harm, which is defined in Section 10 "Battery Harm".

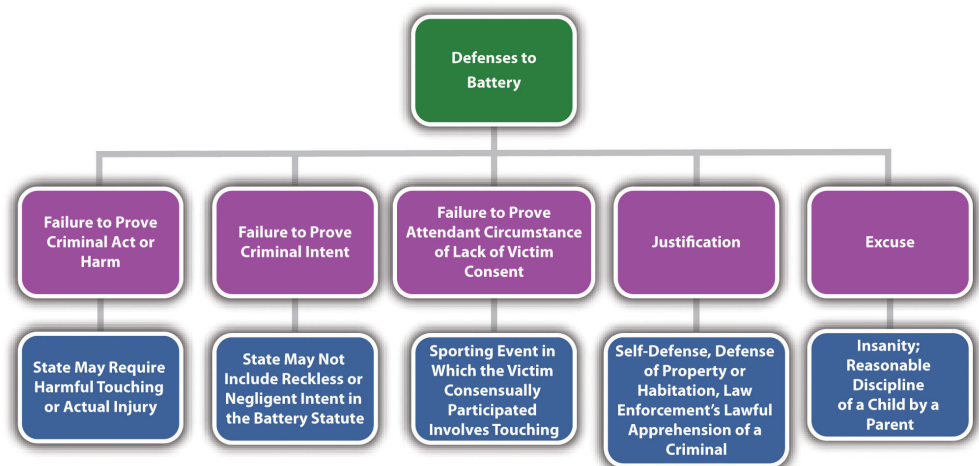
Battery Harm

The **harm** requirement for battery varies, depending on the jurisdiction. Many jurisdictions allow for harmful or *offensive* contact. 720 ILCS § 12-3, accessed February 18, 2011, <http://law.onecle.com/illinois/720ilcs5/12-3.html>. Some jurisdictions require an actual injury to the victim. Ala. Code § 13A-6-21, accessed February 18, 2011, <http://law.onecle.com/alabama/criminal-code/13A-6-21.html>. The severity of the injury can elevate grading, as is discussed in Section 10 "Battery Grading".

Example of Battery Harm

Review the example in Section 10 "Example of Battery Act" where Chris pours hot coffee on Geoff's hand. If Chris and Geoff are in a state that requires *actual injury* to the victim as the harm element of battery, Chris will not be subject to prosecution for this offense unless the hot coffee injures Geoff's hand. If Chris and Geoff are in a state that allows for harmful or *offensive* contact, Chris may be charged with or convicted of battery as long as the battery intent element is present, as discussed in Section 10 "Battery Intent".

Figure 10.6 *Diagram of Defenses to Battery*



Battery Grading

At early common law, battery was a misdemeanor. The Model Penal Code grades battery (called simple assault) as a misdemeanor unless “committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor” (Model Penal Code § 211.1(1)). The Model Penal Code grades *aggravated* battery (called aggravated assault), which is battery that causes serious bodily injury or bodily injury caused by a deadly weapon, as a felony of the second or third degree (Model Penal Code § 211.1(2)). Many states follow the Model Penal Code approach by **grading** battery that causes offense or emotional injury as a misdemeanor^{720 ILCS § 12-3}, accessed February 18, 2011, <http://law.onecle.com/illinois/720ilcs5/12-3.html>, and battery that causes bodily injury as a gross misdemeanor or a felony.^{720 ILCS § 12-4}, accessed February 18, 2011, <http://law.onecle.com/illinois/720ilcs5/12-4.html>. In addition, battery supported by a higher level of intent—such as intent to cause serious bodily injury or intent to maim or disfigure—is often graded higher. Ala. Code § 13A-6-20, accessed February 18, 2011, <http://law.onecle.com/alabama/criminal-code/13A-6-20.html>. Other factors that

can aggravate battery grading are the use of a weapon, R.I. Gen. Laws § 11-5-2, accessed February 18, 2011, <http://law.justia.com/rhodeisland/codes/2005/title11/11-5-2.html>. the commission of battery during the commission or attempted commission of a serious or violent felony, Ala. Code § 13A-6-20(4), accessed February 18, 2011, <http://law.onecle.com/alabama/criminal-code/13A-6-20.html>. the helplessness of the victim, Wis. Stat. §§ 940.19(6) (a), 940.19(6) (b), accessed February 18, 2011, <http://nxt.legis.state.wi.us/nxt/gateway.dll?f=templates&fn=default.htm&d=stats&jd=ch.%20940>. and battery against a teacher Wis. Stat. § 940.20(5), accessed February 18, 2011, <http://nxt.legis.state.wi.us/nxt/gateway.dll?f=templates&fn=default.htm&d=stats&jd=ch.%20940>. or law enforcement officer. Wis. Stat. § 940.20(2), accessed February 18, 2011, <http://nxt.legis.state.wi.us/nxt/gateway.dll?f=templates&fn=default.htm&d=stats&jd=ch.%20940>.

Assault Elements

Assault is a crime that has the elements of criminal act and intent. A certain type of assault also has a causation and harm element, as is discussed in [Section 10 "Threatened Battery Assault"](#).

Attempted Battery and Threatened Battery Assault

Two types of assault are recognized. In some jurisdictions, assault is an attempted battery. In other jurisdictions, assault is a threatened battery. The Model Penal Code criminalizes both attempted battery and threatened battery assault (Model Penal Code § 211.1). The elements of both types of assault are discussed in [Section 10 "Attempted Battery and Threatened Battery Assault"](#).

Attempted Battery Assault

Attempted battery assault is an assault that has every element of battery except for the **physical contact**. The elements of **attempted battery assault**¹⁷ are criminal act supported by criminal intent. There is no requirement of causation or harm because *attempt* crimes do not have a harm requirement. Although attempted battery assault should allow for the same defense of **consent** as battery, this is not as common with assault as it is with battery, so most statutes do not have the attendant circumstance element of lack of consent by the victim.

17. The criminal attempt to batter a victim.

Attempted Battery Assault Act

The **criminal act** element required for attempted battery assault is an act that *attempts* to make physical contact with the victim but falls short for some reason. This could be a thrown object that never hits its target, a gunshot that misses, or a punch that doesn't connect. In some states, the defendant must have the **present ability** to cause harmful or offensive physical contact, even though the contact never takes place. Cal. Penal Code § 240, accessed February 19, 2011, <http://law.justia.com/california/codes/2009/pen/240-248.html>. The present ability requirement is simply an extension of the rule that attempt crimes must progress beyond mere preparation. In the majority of jurisdictions, the criminal act element is measured by the Model Penal Code's substantial steps test described in detail in Chapter 7 "Parties to Crime". *Commonwealth v. Matthews*, 205 PA Super 92 (2005), accessed February 19, 2011, http://scholar.google.com/scholar_case?case=16367791555829234654&q=%22assault%22+%2B+%22conditional+threat%22+%2B+%22not+enough%22&hl=en&as_sdt=2,5. To summarize, the substantial steps test requires the defendant to take substantial steps toward completion of the battery, and the defendant's actions must be strongly corroborative of the defendant's criminal purpose (Model Penal Code § 5.01).

Example of Attempted Battery Assault Act

Diana points a loaded pistol at her ex-boyfriend Dan, says, "Prepare to die, Dan," and pulls the trigger. Fortunately for Dan, the gun malfunctions and does not fire. Diana has probably committed **attempted battery assault**. Diana took every step necessary toward completion of battery, and her conduct of aiming a pistol at Dan and pulling the trigger was strongly corroborative of her criminal purpose. In addition, it appears that Diana had the **present ability** to shoot Dan because her gun was loaded. Thus Diana may be charged with and convicted of the offense of attempted battery assault with a deadly weapon. Note that Diana may also be charged with or convicted of attempted murder because it appears that murder intent is present.

Attempted Battery Assault Intent

The criminal intent element required for attempted battery assault is the **specific intent** or **purposely** to cause harmful or offensive contact. *People v. Nickens*, 685 NW 2d 657 (2004), accessed February 19, 2011, http://scholar.google.com/scholar_case?case=16424953435525763156&hl=en&as_sdt=2&as_vis=1&oi=scholar. Like all attempt crimes, attempted battery assault cannot be supported by reckless or negligent intent.

Example of Attempted Battery Assault Intent

Change the example in Section 10 "Example of Attempted Battery Assault Act" so that Dan hands Diana a pistol and comments that it is unloaded. Diana says, "Really? Well, then, I can do this!" She thereafter points the gun at Dan and playfully pulls the trigger. The gun malfunctions and does not shoot, although it is loaded. Diana probably cannot be charged with or convicted of attempted battery assault in this case. Although Diana took every step necessary toward making harmful physical contact with Dan, she was acting with **negligent**, not **specific** or **purposeful**, intent. Thus the criminal intent element for attempted battery assault is absent, and Diana could only be charged with a lesser offense such as negligent handling of firearms.

Threatened Battery Assault

Threatened battery assault¹⁸ differs from attempted battery assault in that the intent is not to cause physical contact with the victim; the intent is to cause the victim to *fear* physical contact. Thus threatened battery assault is not an attempt crime and has the additional requirement of **causation** and **harm** offense elements.

Threatened Battery Assault Act

The **criminal act** element required for threatened battery assault is conduct that causes the victim apprehension of immediate harmful or offensive physical contact. In general, *words are not enough* to constitute the criminal act element required for threatened battery assault. *Clark v. Commonwealth*, 676 S.E.2d 332 (2009), accessed February 19, 2011, http://scholar.google.com/scholar_case?case=12317437845803464805&q=%22assault%22+%2B+%22words+are+not+enough%22&hl=en&as_sdt=2,5. The words must be accompanied by threatening gestures. In addition, a threat of future harm or a conditional threat is not sufficient. *Clark v. Commonwealth*, 676 S.E.2d 332 (2009), accessed February 19, 2011, http://scholar.google.com/scholar_case?case=12317437845803464805&q=%22assault%22+%2B+%22words+are+not+enough%22&hl=en&as_sdt=2,5. The physical contact threatened must be unequivocal and immediate. Some jurisdictions still require present ability for threatened battery assault. In others, only **apparent ability** is necessary; this means the victim must *reasonably believe* that the defendant can effectuate the physical contact. Fla. Stat. Ann. § 784.011, accessed February 19, 2011, <http://law.onecle.com/florida/crimes/784.011.html>.

18. The defendant unlawfully inspires reasonable fear in the victim of a battery.

Example of Threatened Battery Assault Act

Change the example given in Section 10 "Example of Attempted Battery Assault Act" so that Dan's pistol is lying on a table. Diana says to Dan, "If you don't take me back, I am going to shoot you with your own gun!" At this point, Diana has probably not committed the criminal act element required for threatened battery assault. Diana has only used *words* to threaten Dan, and words are generally not enough to constitute the threatened battery assault act. In addition, Diana's threat was **conditional**, not immediate. If Dan agrees to get back together with Diana, no physical contact would occur. Add to the example, and assume that Dan responds, "Go ahead, shoot me. I would rather die than take you back!" Diana thereafter grabs the gun, points it at Dan, and cocks it. At this point, Diana may have committed the criminal act element required for threatened battery assault. Diana's threat is accompanied by a serious *gesture*: cocking a pistol. If the state in which Dan and Diana's example occurs requires **present ability**, then the gun must be loaded. If the state requires **apparent ability**, then Dan must *believe* the gun is loaded—and if he is wrong, Diana could still have committed the criminal act element required for threatened battery assault.

Threatened Battery Assault Intent

The criminal intent element required for threatened battery assault is the **specific intent** or **purposely** to cause *fear* of harmful or offensive contact. *Commonwealth v. Porro*, 458 Mass. 526 (2010), accessed February 20, 2011, http://scholar.google.com/scholar_case?case=13033264667355058927&q=Commonwealth+v.+Porro&hl=en&as_sdt=4,22. This is different from the criminal intent element required for attempted battery assault, which is the specific intent or purposely to cause *harmful* or *offensive contact*.

Example of Threatened Battery Assault Intent

Review the example in Section 10 "Example of Threatened Battery Assault Act". Change the example so that the gun that Diana grabs is *Diana's* gun, and it is *unloaded*. Diana is aware that the gun is unloaded, but Dan is not. In this example, Diana probably has the intent required for threatened battery assault. Diana's act of pointing the gun at Dan and cocking it, after making a verbal threat, indicates that she has the **specific intent** or **purposely** to cause apprehension in Dan of imminent harmful physical contact. If Diana is in a state that only requires apparent ability to effectuate the contact, Diana has committed the criminal act supported by criminal intent for threatened battery assault. Note that Diana does not have the proper criminal intent for **attempted battery assault** if the gun is *unloaded*. This is because the intent required for attempted battery assault is the intent to *cause harmful or offensive contact*, which Diana clearly cannot intend to do with an unloaded gun.

Threatened Battery Assault Causation

The defendant's criminal act must be the **factual** and **legal** cause of the harm that is defined in Section 10 "Threatened Battery Assault Harm".

Threatened Battery Assault Harm

The **harm** element required for threatened battery assault is the victim's reasonable apprehension of imminent harmful or offensive contact. *Commonwealth v. Porro*, 458 Mass. 526 (2010), accessed February 20, 2011, http://scholar.google.com/scholar_case?case=13033264667355058927&q=Commonwealth+v.+Porro&hl=en&as_sdt=4,22. Thus the victim's lack of awareness of the defendant's criminal act could operate as a **failure of proof** or **affirmative defense** in many jurisdictions.

Example of Threatened Battery Assault Harm

Review the example in Section 10 "Example of Threatened Battery Assault Act". Change the example so that after Diana verbally threatens Dan, he shrugs, turns around, and begins to walk away. Frustrated, Diana grabs the gun off of the table and waves it menacingly at Dan's back. Dan is unaware of this behavior and continues walking out the door. Diana has probably *not* committed threatened battery assault in this situation. A key component of threatened battery assault is *victim apprehension* or *fear*. If Diana silently waves a gun at Dan's back, it does not appear that she has the specific intent or purposely to inspire fear in Dan of harmful physical contact. In addition, Dan was not cognizant of Diana's action and did not experience the fear, which is the threatened battery assault **harm** element. Thus Diana may not be convicted of assault with a deadly weapon in states that criminalize only threatened battery assault. Note that if the gun is loaded, Diana may have committed **attempted battery assault** in many jurisdictions. Attempted battery assault requires neither intent to inspire fear in the victim nor victim awareness of the defendant's criminal act. A trier of fact could find that Diana took substantial steps toward committing harmful physical contact when she picked up a loaded gun and waved it at Dan's back after making a verbal threat. Attempted battery assault has no harm element, so the crime is complete as soon as Diana commits the criminal act supported by criminal intent.

Figure 10.7 Diagram of Assault Elements

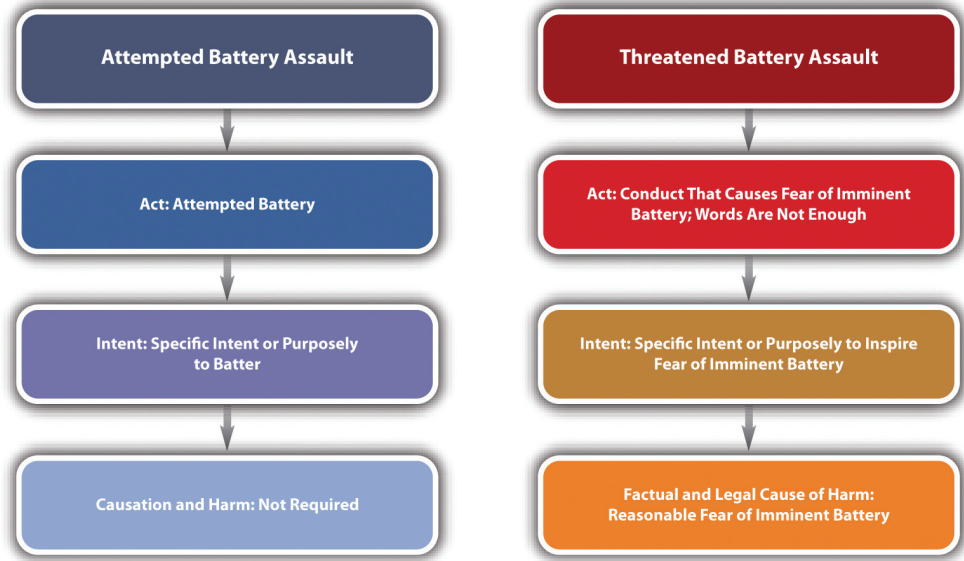


Figure 10.8 Crack the Code

Crack the Code

Compare the following state laws:

Cal. Penal Code § 240:
 An assault is an unlawful **attempt**, coupled with a present ability, to commit a violent injury on the person of another.

Fla. Stat. Ann. § 784.011: Assault
 1) An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some **act which creates a well-founded fear in such other person** that such violence is imminent.

In California, assault is attempted battery;
 in Florida, assault is threatened battery. . .

Assault Grading

Assault **grading** is very similar to battery grading in many jurisdictions. As stated previously, many modern statutes follow the Model Penal Code approach and combine assault and battery into one statute, typically called “assault.” Ariz. Rev. Stat. § 13-1203, accessed February 20, 2011, <http://law.onecle.com/arizona/criminal-code/13-1203.html>. Simple assault is generally a misdemeanor. Ariz. Rev. Stat. § 13-1203, accessed February 20, 2011, <http://law.onecle.com/arizona/criminal-code/13-1203.html>. Aggravated assault is generally a felony. Ariz. Rev. Stat. § 13-1204, accessed February 20, 2011, <http://law.onecle.com/arizona/criminal-code/13-1204.html>. Factors that could enhance grading of assault are the use of a deadly weapon and assault against a law enforcement officer, teacher, or helpless individual. Ariz. Rev. Stat. § 13-1204, accessed February 20, 2011, <http://law.onecle.com/arizona/criminal-code/13-1204.html>.

Table 10.2 Comparing Battery, Attempted Battery, and Threatened Battery Assault

Crime	Criminal Act	Criminal Intent	Harm	Grading
Battery	Unlawful touching	Specific or purposely, general or knowingly, reckless, or negligent	Harmful or offensive physical contact	Simple: misdemeanor Aggravated: felony
Attempted battery assault	Substantial steps toward a battery plus present ability	Specific or purposely to commit battery	None required	Simple: misdemeanor Aggravated: felony
Threatened battery assault	Conduct that inspires fear of physical contact; words are not enough; may require apparent rather than present ability	Specific or purposely to inspire fear of physical contact	Victim’s reasonable fear of imminent physical contact	Simple: misdemeanor Aggravated: felony
Note: Battery could also include the attendant circumstance element of lack of consent by the victim.				

KEY TAKEAWAYS

- The criminal act element required for battery is an unlawful touching.
- The criminal intent element required for battery can be specific intent or purposely, general intent or knowingly, recklessly, or negligently, depending on the circumstances and the jurisdiction. Jurisdictions that criminalize reckless or negligent battery generally require actual injury, serious bodily injury, or the use of a deadly weapon.
- The attendant circumstance element required for battery is lack of consent by the victim.
- The harm element of battery is physical contact. Jurisdictions vary as to whether the physical contact must be harmful or if it can be harmful or offensive.
- Battery that causes offense or emotional injury is typically graded as a misdemeanor, and battery that causes physical injury is typically graded as a gross misdemeanor or a felony. Factors that can aggravate grading are a higher level of intent, such as intent to maim or disfigure, use of a weapon, committing battery in concert with other serious or violent felonies, and battery against a helpless victim, teacher, or law enforcement officer.
- Attempted battery assault is an attempt crime that does not require the elements of causation or harm. Threatened battery assault requires causation and harm; the victim must experience reasonable fear of imminent physical contact.
- Attempted battery assault requires the criminal act of substantial steps toward commission of a battery and the criminal intent of specific intent or purposely to commit a battery. Because attempted battery assault is an attempt crime, it also generally requires present ability to commit the battery.
- The criminal act element required for threatened battery assault is conduct that inspires reasonable fear in the victim of imminent harmful or offensive physical contact. Words generally are not enough to constitute the criminal act element, nor are conditional threats. However, because the act need only inspire the fear, rather than culminate in a battery, apparent ability to commit the battery is sufficient in many jurisdictions. The criminal intent element required for threatened battery assault is specific intent or purposely to inspire the victim's reasonable fear. The defendant must also be the factual and legal cause of the harm, which is the victim's reasonable fear of imminent harmful or offensive physical contact.
- Simple assault is generally graded as a misdemeanor; aggravated assault is generally graded as a felony. Factors that can aggravate grading are

the use of a weapon or assault against a law enforcement officer, teacher, or helpless victim.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Bob and Rick get into an argument after drinking a few beers. Bob swings at Rick with his fist, but Rick ducks and Bob does not hit Rick. Bob swings again with the other hand, and this time he manages to punch Rick in the stomach. Identify the crimes committed in this situation. If Bob only swings once and misses, which crime(s) have been committed?
2. Read *State v. Higgs*, 601 N.W.2d 653 (1999). What criminal act did the defendant commit that resulted in a conviction for battery? Did the Court of Appeals of Wisconsin uphold the defendant's conviction? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=10727852975973050662&q=State+v.+Higgs+601+N.W.2d+653&hl=en&as_sdt=2,5.
3. Read *Commonwealth v. Henson*, 259 N.E.2d 769 (1970). In *Henson*, the defendant fired blanks at a police officer and was convicted of assault with a deadly weapon. The defendant appealed, claiming that he had no present ability to shoot the police officer because the gun was not loaded with bullets. Did the Supreme Judicial Court of Massachusetts uphold the defendant's conviction? The case is available at this link: http://scholar.google.com/scholar_case?case=11962310018051202223&hl=en&as_sdt=2002&as_vis=1.

10.3 Domestic Violence and Stalking

LEARNING OBJECTIVES

1. Identify the individuals covered by domestic violence statutes.
2. Identify some of the special features of domestic violence statutes.
3. Define the criminal act element required for stalking.
4. Define the criminal intent element required for stalking, and compare various statutory approaches to stalking criminal intent.
5. Define the harm element required for stalking, and compare various statutory approaches to ascertaining harm.
6. Analyze stalking grading.

Domestic violence¹⁹ and **stalking**²⁰ are modern crimes that respond to societal problems that have escalated in recent years. Domestic violence statutes are drafted to address issues that are prevalent in crimes between family members or individuals living in the same household. Stalking generally punishes conduct that is a *precursor* to assault, battery, or other crimes against the person, as is explored in [Section 10.3 "Domestic Violence and Stalking"](#).

Domestic Violence

Domestic violence statutes generally focus on criminal conduct that occurs between **family** members. Although family cruelty or interfamily criminal behavior is not a new phenomenon, enforcement of criminal statutes against family members can be challenging because of dependence, fear, and other issues that are particular to the family unit. In addition, historical evidence indicates that law enforcement can be reluctant to get involved in *family disputes* and often fails to adequately *protect* victims who are trapped in the same residence as the defendant. Specific enforcement measures that are crafted to apply to defendants and victims who are family members are an innovative statutory approach that many jurisdictions are beginning to adopt. In general, domestic violence statutes target crimes against the person, for example, assault, battery, sex offenses, kidnapping, and criminal homicide.

Domestic Violence Statutes' Characteristics

The purpose of many domestic violence statutes is *equal* enforcement and treatment of crimes between family members and *maximum protection* for the domestic

19. Criminal conduct between family members or those who reside together.

20. A course of conduct that poses a credible threat to safety or damage to property, including following, harassing, and pursuing the victim.

violence victim.RCW § 10.99.010, accessed February 21, 2011, <http://apps.leg.wa.gov/rcw/default.aspx?cite=10.99.010>. Domestic violence statutes focus on individuals related by blood or marriage, individuals who share a child, ex-spouses and ex-lovers, and individuals who reside together.Ariz. Rev. Stat. § 13-3601(A), accessed February 21, 2011, <http://www.azleg.state.az.us/ars/13/03601.htm>. Domestic violence statutes commonly contain the following provisions:

- Special training for law enforcement in domestic issuesRCW § 10.99.030, accessed February 21, 2011, <http://apps.leg.wa.gov/rcw/default.aspx?cite=10.99.030>.
- Protection of the victim by no-contact orders and nondisclosure of the victim's residence addressRCW § 10.99.040, accessed February 21, 2011, <http://apps.leg.wa.gov/rcw/default.aspx?cite=10.99.040>.
- Duty of law enforcement or prosecutors to inform the victim of the decision of whether to prosecute and the duty to inform the victim of special procedures available to protect domestic violence victimsRCW § 10.99.060, accessed February 21, 2011, <http://apps.leg.wa.gov/rcw/default.aspx?cite=10.99.060>, Ariz. Rev. Stat. § 13-3601(J), accessed February 21, 2011, <http://www.azleg.state.az.us/ars/13/03601.htm>.
- Ability to arrest domestic violence offenders with or without a warrantAriz. Rev. Stat. § 13-3601(B), accessed February 21, 2011, <http://www.azleg.state.az.us/ars/13/03601.htm>.
- Special factors to consider in the sentencing of domestic violence defendantsRCW § 10.99.100, accessed February 21, 2011, <http://apps.leg.wa.gov/rcw/default.aspx?cite=10.99.100>.
- Peace officer immunity for enforcement of domestic violence provisionsAriz. Rev. Stat. § 13-3601(G), accessed February 21, 2011, <http://www.azleg.state.az.us/ars/13/03601.htm>.

Stalking

California was the first state to enact a stalking law in 1990, in response to the high-profile murder of a young actress named Rebecca Schaeffer whose attacker stalked her for two years. Now *all states* and the federal government have stalking laws.¹⁸ U.S.C. § 2261A, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Federal_Interstate_Stalking_Institute163#61a. Although statutes criminalizing stalking are gender-neutral, in reality, most stalking victims are women, and most stalking defendants are men.

21. A court order forbidding the defendant from contacting or coming within a certain distance of the victim.

Before the states enacted stalking laws, a victim who was threatened and harassed but not assaulted had no remedy except to go to court and obtain a **restraining order**²¹. A restraining order is a court order mandating that the defendant neither contact nor come within a certain distance of the victim. If the defendant violated

the restraining order, law enforcement could arrest him or her. Until a restraining order was in place, however, the defendant was free to continue frightening the victim. Restraining orders typically take some time to obtain. The victim must contact and employ an attorney and also set up a court hearing. For this reason, the restraining order method of preventing a defendant from stalking was cumbersome, ineffective, and frequently resulted in force or violence against the stalking victim.

The modern crime of stalking allows law enforcement to arrest and incapacitate defendants *before* they complete an assault, battery, or other violent crime against a victim. Like all crimes, stalking requires the defendant to commit a voluntary act supported by criminal intent. In many jurisdictions, stalking also has the elements of causation and harm, as is discussed in [Section 10.3.2 "Stalking"](#).

Stalking Act

Various approaches have been made to criminalize stalking, and a plethora of descriptors now identify the stalking criminal act. In the majority of jurisdictions, the **criminal act** element required for stalking includes *any course of conduct* that **credibly** threatens the victim's safety, including following, Tex. Penal Code § 42.072, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Texas176. harassing, Cal. Penal Code § 646.9, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_California176 (accessed February 22, 2011, 1022). approaching, Md. Code Ann. § 3-802, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Maryland678. pursuing, or making an express or implied threat to injure the victim, the victim's family member, Ala. Code § 13A-6-90, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Alabama390. or the victim's property. Tex. Penal Code § 42.072(a) (1) (c), accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Texas176. In general, credible threat means the defendant has the **apparent ability** to effectuate the harm threatened. S. D. Codified Laws § 22-19A-6, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_SouthDakota123. The stalking criminal act is unique among criminal acts in that it must occur on *more than one* occasion or repeatedly. Colo. Rev. Stat. Ann. § 18-3-602, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Colorado285. The popularity of social networking sites and the frequency with which defendants use the Internet to stalk their victims inspired many states to specifically criminalize **cyberstalking**²², which is the use of the Internet or e-mail to commit the criminal act of stalking. Alaska Stat. § 11.41.270 (b) (3) (F), accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Alaska803.

22. The use of the Internet or e-mail to commit stalking.

Example of a Case Lacking Stalking Act

Elliot tells Lisa on two separate occasions that he loves her. Lisa intensely dislikes Elliot and wants nothing to do with him. Although Elliot's proclamations of love are unwelcome, Elliot probably has not committed the criminal act element required for stalking. Elliot's behavior does not threaten Lisa's *safety* or the safety of her family members or property. Thus Elliot may not be charged with and convicted of stalking in most jurisdictions.

Example of Stalking Act

Change the example in Section 10 "Example of a Case Lacking Stalking Act" so that Elliot tells Lisa he loves her on one occasion. Lisa frowns and walks away. Elliot then follows Lisa and tells her that he will "make her pay" for not loving him. Lisa ignores Elliot's statement, climbs into her car, and drives away. Later that evening, Elliot rings Lisa's doorbell. Lisa does not answer the door but yells at Elliot, telling him to leave. Disgruntled and angry, Elliot carves, "you will die for not loving me" into Lisa's front door with his pocketknife.

Elliot's conduct could constitute the criminal act element required for stalking in most jurisdictions. In this example, Elliot has *followed* Lisa and *approached* her, which is a repeated course of conduct. On two occasions Elliot threatened Lisa: once by telling her he will "make her pay" and again by carving a death threat into her front door. Keep in mind that Elliot's threat to Lisa's safety must be *credible* in many jurisdictions. Thus if Elliot is unable to actually harm Lisa for any reason, the trier of fact could find that he does not have the **apparent ability** to carry out his threat, and he could not be convicted of stalking.

Stalking Intent

The criminal intent element required for stalking also varies, depending on the jurisdiction. In most states, the defendant must commit the criminal act willfully or maliciously. Cal. Penal Code § 646.9, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_California176 (accessed February 22, 2011). This indicates a **specific intent** or **purposeful** conduct. However, in states that require the victim to experience **harm**, a different criminal intent could support the harm offense element. States that include bad results or harm in their stalking statutes require either **specific intent** or **purposely, general intent** or **knowingly, reckless intent, negligent intent**, or **strict liability** (no intent) to cause the harm, depending on the state. "Criminal Stalking Laws," Ncvc.org website, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_State-byState_Statutes117.

Example of Stalking Intent

Review the stalking act example in Section 10 "Example of Stalking Act". In the majority of states, Elliot must make the threatening statement and carve the threatening message into Lisa's front door **willfully** or **maliciously**. However, the requirement that Elliot act with the intent to **cause** Lisa's *reaction* to this conduct varies, depending on the jurisdiction. In some jurisdictions, Elliot must act with the specific intent or purposely to **cause** Lisa to suffer the stalking harm, which is generally *fear* for bodily safety, the safety of family members, or fear of damage to Lisa's property. In others, Elliot can act to cause Lisa's fear with general intent or knowingly, reckless intent, or negligent intent. In some jurisdictions, Elliot's purpose or awareness as to Lisa's feeling of fear is irrelevant because **strict liability** is the intent supporting the harm or bad results requirement.

Stalking Causation

In jurisdictions that require harm for stalking, the defendant's criminal act must be the **factual** and **legal** cause of the harm, which is defined in Section 10 "Stalking Harm".

Stalking Harm

As stated previously, some states require a specific **harm** element in their stalking statutes. This element is defined differently depending on the state but generally amounts to victim **fear**. The fear is typically fear of bodily injury or death of the victim. Ala. Code § 13A-6-90, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Alabama390. or of the victim's family member, Alaska Stat. § 11.41.270 (a), http://www.ncvc.org/src/main.aspx?dbID=DB_Alaska803. or damage to the victim's property. Tex. Penal Code § 42.072(a) (1) (C), accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Texas176. States also employ different tests to ascertain the harm element. States can require subjective *and* objective fear, Tex. Penal Code § 42.072, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Texas176. just subjective fear, Alaska Stat. § 11.41.270 (a), accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Alaska803. or just objective fear. Md. Code Ann. § 3-802, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Maryland678. Subjective fear means the victim must actually experience fear. Objective fear means a reasonable victim under similar circumstances would experience fear.

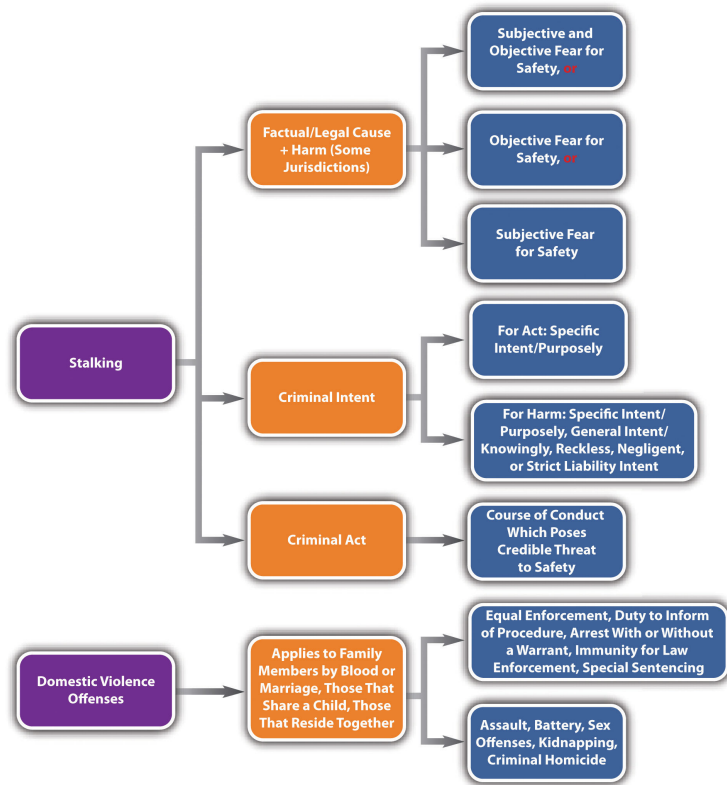
Example of Stalking Harm

Review the stalking act example in Section 10 "Example of Stalking Act". In jurisdictions that require subjective **and** objective victim fear as the harm element for stalking, Elliot must cause *Lisa* to experience fear that is *reasonable* under the circumstances. In a jurisdiction that requires only subjective victim fear, Elliot must cause Lisa to feel fear, either reasonably or unreasonably. In a jurisdiction that requires only objective fear, Elliot must act in a manner that would cause a reasonable victim under similar circumstances to experience fear. Keep in mind that if Lisa is aware of a circumstance that makes it unlikely that Elliot can carry out his threat, Elliot *could not* be convicted of stalking in a jurisdiction that requires Lisa to experience *subjective* fear.

Stalking Grading

Jurisdictions vary as to how they **grade** stalking. Many states divide stalking into degrees or grade it as simple and aggravated. First-degree or aggravated stalking is generally graded as a felony, and second-degree or simple stalking is generally graded as a misdemeanor. Alaska Stat. §§ 11.41.260, 11.41.270, accessed February 22, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Alaska803. Factors that could enhance grading are the violation of a restraining or protective order, the use of a weapon, a youthful victim, or previous convictions for stalking. Alaska Stat. § 11.41.260, accessed February 24, 2011, http://www.ncvc.org/src/main.aspx?dbID=DB_Alaska803.

Figure 10.9 Diagram of Domestic Violence and Stalking



KEY TAKEAWAYS

- Individuals covered by domestic violence statutes are relatives by blood or marriage, individuals who share a child, ex-spouses and ex-lovers, and individuals who reside together.
- Some special features of domestic violence statutes are special training for law enforcement in domestic issues, protection of the victim by no-contact orders and nondisclosure of the victim's residence address, the duty of law enforcement or prosecutors to inform the victim of the decision of whether to prosecute and the duty to inform the victim of special procedures available to protect domestic violence victims, the ability to arrest domestic violence offenders with or without a warrant, special factors to consider in the sentencing of domestic violence defendants, and peace officer immunity for enforcement of domestic violence provisions.
- The criminal act element required for stalking varies, but in general it is repeatedly engaging in a course of conduct that poses a credible threat to the victim's safety, including following, harassing, approaching, or pursuing the victim.
- The criminal intent supporting the stalking criminal act is specific intent or purposely in most jurisdictions. Some jurisdictions require a different criminal intent to support the harm requirement: either specific intent or purposely, general intent or knowingly, reckless intent, negligent intent, or strict liability.
- Some jurisdictions require the defendant to cause harm, which is victim fear of serious bodily injury, fear of death of the victim or the victim's family member, or damage to the victim's property. The test for victim fear varies and could be either subjective and objective fear, just subjective fear, or just objective fear.
- It is common to divide stalking into degrees or grade it as simple and aggravated. First-degree or aggravated stalking is generally graded as a felony, and second-degree or simple stalking is generally graded as a misdemeanor. Factors that can aggravate grading are the violation of a restraining or protective order, the use of a weapon, a youthful victim, or previous convictions for stalking.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Chris punches and slaps Rhianna, his roommate and girlfriend. Could this be considered domestic violence?
2. Read *State v. Holbach*, 2009 ND 37 (2009). In *Holbach*, the defendant appealed a conviction for stalking based on his constitutionally protected right to travel around town and do errands. The defendant was on probation for stalking the victim and subject to conditions of probation, including a stay-away order. However, the victim claimed that she saw the defendant following her around town on many occasions. Did the Supreme Court of North Dakota uphold the defendant's stalking conviction? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=14788412528928431856&q=stalking&hl=en&as_sdt=2,5&as_ylo=2009.
3. Read *Burke v. State*, 676 S.E.2d 766 (2009). Why did the Court of Appeals of Georgia reverse the defendant's conviction for aggravated stalking in this case? The case is available at this link: http://scholar.google.com/scholar_case?case=14247986447862424093&q=stalking&hl=en&as_sdt=2,5&as_ylo=2009.

10.4 Kidnapping and False Imprisonment

LEARNING OBJECTIVES

1. Define the criminal act element required for kidnapping.
2. Define the criminal intent element required for kidnapping.
3. Define the harm element required for kidnapping.
4. Define the attendant circumstance element required for kidnapping.
5. Analyze kidnapping grading.
6. Compare false imprisonment with kidnapping.
7. Identify two potential defenses to kidnapping and false imprisonment.
8. Identify two special features of interference with custody statutes.

Kidnapping²³ and **false imprisonment**²⁴ are crimes that involve physical restraint and intrude on the liberty interests of victims. In ancient times, kidnapping was used to remove members of royalty from the kingdom for ransom or to implement the overthrow of the existing monarchy. In the United States, high-profile kidnapping cases, such as the Lindbergh baby kidnapping in the 1930s, and the frequency with which organized crime participated in kidnapping led many states to impose the harshest penalties for this offense: the death penalty or life in prison without the possibility of parole.

In modern times, kidnapping is still a serious **felony**, although the US Supreme Court has held that capital punishment for any crime against an individual other than criminal homicide is unconstitutional. False imprisonment is generally a **lesser included offense** of kidnapping and is graded lower, as is discussed in [Section 10.4.2 "False Imprisonment"](#).

Kidnapping Elements

In most jurisdictions, kidnapping has the elements of criminal act, criminal intent, causation, harm, and an attendant circumstance.

Kidnapping Act

The **criminal act** element required for kidnapping is twofold. First, the defendant must **confine** the victim. 720 ILCS § 5/10-1, <http://law.onecle.com/illinois/720ilcs5/10-1.html>. Second, in many states, the defendant must move the victim, which is called **asportation**²⁵. One common issue with the kidnapping criminal act is how far

23. Unlawful confinement and movement of a victim without the victim's consent for the purpose of injuring or harming the victim or another, hiding the victim in secret, obtaining a ransom, committing a separate offense, subjecting the victim to involuntary servitude, or interfering with the purpose of government or political function.
24. Unlawful confinement of a victim without consent.
25. Movement of an individual or thing from one place to another.

the victim must be moved. In the majority of states, the movement can be slight, as long as it is not incidental to the commission of a separate offense. *People v. Dominguez*, 140 P.2d 866 (2006), accessed February 24, 2011, http://scholar.google.com/scholar_case?case=3515612573668484000&q=People+v.+Dominguez&hl=en&as_sdt=2,5. Other states do not require asportation when the kidnapping is for **ransom**. N.R.S. § 200.310, accessed February 24, 2011, <http://law.onecle.com/nevada/crimes/200.310.html>. Some states have done away with the asportation requirement altogether. N.C. Gen. Stat. § 14-39(a), accessed February 24, 2011, <http://law.onecle.com/north-carolina/14-criminal-law/14-39.html>. The Model Penal Code requires the movement to be from the victim's residence, place of business, or "a substantial distance from the vicinity where he is found" (Model Penal Code § 212.1). However, when the kidnapping is for ransom, for the purpose of committing a felony, to inflict bodily injury or terrorize the victim or another, or to interfere with the performance of a governmental or political function, the Model Penal Code does *not* require asportation, although it does require confinement for a "substantial period in a place of isolation" (Model Penal Code § 212.1).

Example of a Case Lacking Kidnapping Act

Joseph breaks into Abby's home and sees Abby sitting on the couch. A picture window in front of the couch puts Abby in full view of the street and sidewalk. To avoid detection, Joseph grabs Abby off the living room couch and drags her into the bedroom to rape her. Joseph has probably *not* committed the criminal act element required for kidnapping if the kidnapping statute in Joseph's state requires **asportation**. Joseph forcibly confined Abby when he grabbed her. However, his movement of Abby from the couch to the bedroom appears incidental to the crime of rape, which is not sufficient to constitute kidnapping asportation in most jurisdictions.

Kidnapping Intent

The criminal intent element required for kidnapping in many jurisdictions is **specific intent** or **purposely** to commit the criminal act in order to harm or injure the victim or another, confine or hold the victim in secret, N.R.S. § 200.310(2), accessed February 24, 2011, <http://law.onecle.com/nevada/crimes/200.310.html>. receive a ransom, commit a separate offense, subject the victim to involuntary servitude, or interfere with the purpose of the government or some political function. Ariz. Rev. Stat. § 13-1304, accessed February 24, 2011, <http://law.onecle.com/arizona/criminal-code/13-1304.html>.

Example of Kidnapping Intent

Review the example in Section 10 "Example of a Case Lacking Kidnapping Act" with Joseph and Abby. Change this example so that Joseph drags Abby to his car, stuffs her into the trunk, and then drives fifteen miles to a deserted field where he thereafter removes her from the trunk and rapes her. Joseph probably has the criminal intent required for kidnapping in most jurisdictions. Joseph committed the criminal act of forcible confinement and asportation with the purpose of raping Abby, which is **specific intent** or **purposely** to "commit a separate offense." Thus if the other elements of kidnapping are present, Joseph can most likely be charged with and convicted of kidnapping, along with the crime of rape.

Kidnapping Causation

In jurisdictions that require harm for kidnapping, the defendant's criminal act must be the **factual** and **legal** cause of the harm, which is defined in Section 10 "Kidnapping Harm".

Kidnapping Harm

The **harm** element required for kidnapping in most jurisdictions is *confinement* and *asportation*. As stated previously, some jurisdictions have done away with the asportation requirement or do not require asportation when the kidnapping is for ransom.

Kidnapping Attendant Circumstance

In many jurisdictions, the **attendant circumstance** element required for kidnapping is that the confinement or asportation occur against the victim's will or *without* the victim's **consent**. N.C. Gen. Stat. § 14-39, accessed February 24, 2011, <http://law.onecle.com/north-carolina/14-criminal-law/14-39.html>. Thus consent could function as a **failure of proof** or **affirmative defense** to kidnapping.

Example of a Case Lacking Kidnapping Attendant Circumstance

Thomas sees Shawna hitchhiking on the side of a busy freeway at night. Thomas pulls over, rolls down the window, and asks Shawna if she wants a ride. Shawna says, "sure," and climbs into Thomas's vehicle. Thomas drives away with Shawna in the front seat. Thomas has not committed kidnapping in this case. Although Thomas confined and moved Shawna in his vehicle, the facts do not indicate that he has the specific intent to harm her, obtain a ransom, confine her in secret, or commit a separate offense. In addition, Shawna *consented* to the confinement and asportation. Thus the **attendant circumstance** element for kidnapping is also

absent and Thomas's conduct may be perfectly legal (unless engaging in hitchhiking is illegal in Thomas's state).

Example of Kidnapping Attendant Circumstance

Change the example given in Section 10 "Example of a Case Lacking Kidnapping Attendant Circumstance" so that after fifty miles of driving, Shawna asks Thomas to pull over and let her out. Thomas refuses, threatens to harm Shawna if she tries to escape, and continues to drive another twenty miles with Shawna in the front seat. If Thomas acted with the proper kidnapping intent, Thomas might have committed kidnapping in this case. Although Shawna's original entrance into Thomas's vehicle and her asportation for the first fifty miles was *consensual*, once Shawna requested that Thomas pull over and let her out, the confinement or asportation was against Shawna's will and *without her consent*. If the trier of fact determines that twenty miles is far enough to constitute sufficient asportation for kidnapping, Thomas could be charged with or convicted of this offense.

Kidnapping Grading

Jurisdictions vary as to how they **grade** kidnapping. The Model Penal Code grades kidnapping as a felony of the first or second degree (Model Penal Code § 212.1). Many states divide kidnapping into degrees or grade it as simple and aggravated. N.R.S. § 200.310, accessed February 24, 2011, <http://law.onecle.com/nevada/crimes/200.310.html>. First-degree or aggravated kidnapping is generally graded as a serious felony, and second-degree or simple kidnapping is generally graded as a lower-level felony. N.R.S. § 200.310, accessed February 24, 2011, <http://law.onecle.com/nevada/crimes/200.310.html>. One factor that could mitigate or reduce grading is the defendant's release of the victim unharmed in a safe place. Ariz. Rev. Stat. § 13-1304(B), accessed February 24, 2011, <http://law.onecle.com/arizona/criminal-code/13-1304.html>. Factors that could enhance grading are the youth of the victim Ariz. Rev. Stat. § 13-1304, accessed February 24, 2011, <http://law.onecle.com/arizona/criminal-code/13-1304.html> or the infliction of serious bodily injury. N.C. Gen. Stat. § 14-39, accessed February 24, 2011, <http://law.onecle.com/north-carolina/14-criminal-law/14-39.html>. When kidnapping takes a victim across state lines, the defendant can also be prosecuted for the additional offense of federal kidnapping. 18 U.S.C. § 1201, accessed February 27, 2011, http://www.law.cornell.edu/uscode/18/usc_sec_18_00001201---000-.html.

False Imprisonment

In many jurisdictions, false imprisonment, also called **felonious restraint**, is a lesser included offense of kidnapping. This means that the crime of false

imprisonment is missing one or two of the kidnapping elements and is graded lower than kidnapping. Often, false imprisonment functions as a **partial defense** to kidnapping because of the less serious sentencing options. In general, false imprisonment and felonious restraint under the Model Penal Code require confinement but *not asportation* (Model Penal Code §212.2).¹⁸ Pa. C. S. § 2903, accessed February 25, 2011, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.029.003.000.html>. In some jurisdictions, false imprisonment requires only **general intent** or **knowingly** to commit the criminal act, rather than the **specific intent** or **purposely** to commit other crimes, harm the victim, or receive a ransom.⁷²⁰ ILCS § 5/10-3, accessed February 25, 2011, <http://law.onecle.com/illinois/720ilcs5/10-3.html>. False imprisonment does not require movement and has a lower level of intent, so it is generally **graded** as a gross misdemeanor or a low-level felony.¹⁸ Pa. C. S. § 2903, accessed February 25, 2011, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.029.003.000.html>. The Model Penal Code grades felonious restraint as a felony of the third degree (Model Penal Code § 212.2). Factors that can aggravate grading of false imprisonment are the youth of the victim¹⁸ Pa. C. S. § 2903, accessed February 25, 2011, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.029.003.000.html>. or the use of force or violence to carry out the criminal act.^{Cal.} Penal Code § 237, accessed February 25, 2011, <http://law.onecle.com/california/penal/237.html>.

Example of False Imprisonment

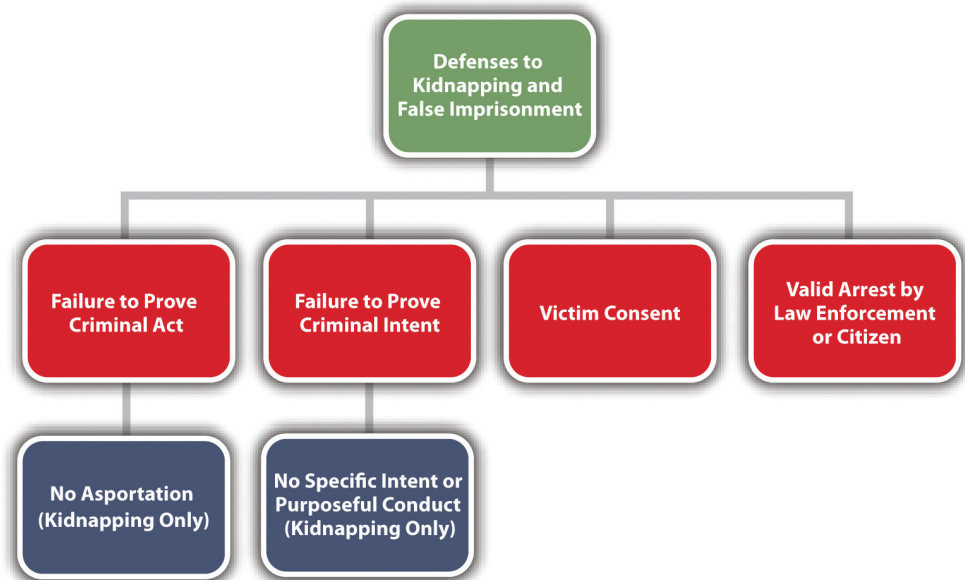
Review the case example given in Section 10 "Example of a Case Lacking Kidnapping Attendant Circumstance". Change the facts so that after fifty miles of driving, Shawna asks Thomas to pull over and let her out. Thomas pulls over but thereafter locks all the doors and refuses to let Shawna out for twenty minutes, in spite of her begging and pleading for him to unlock the doors. In this case, Thomas might have committed false imprisonment. Although Shawna's entrance into Thomas's vehicle was *consensual*, when Thomas confined Shawna to his vehicle by locking the doors, he deprived her of her liberty *against her will*. Thomas did not move Shawna without her consent because he pulled over and stopped the vehicle at her request. However, asportation is *not required* for false imprisonment. Although Thomas's actions do not indicate specific intent or purposely to injure Shawna, commit a separate offense, or seek ransom, often **general intent** or **knowingly** to commit the criminal act is sufficient for false imprisonment. Thus these facts indicate the lower-level crime of false imprisonment rather than kidnapping, and Thomas may be charged with and convicted of this offense.

Potential Defenses to Kidnapping and False Imprisonment

As stated previously, consent is a potential **failure of proof** or **affirmative defense** to kidnapping and false imprisonment in some jurisdictions. Another potential

defense is **lawful authority** to execute the kidnapping or false imprisonment. Thus when a law enforcement officer or a citizen lawfully arrests a defendant, he or she is not committing kidnapping or false imprisonment. By the same token, if an arrest is executed *unlawfully*, it *might be* kidnapping, false imprisonment, or another related offense. N.C. Gen. Stat. § 14-43.1, accessed February 25, 2011, <http://law.onecle.com/north-carolina/14-criminal-law/14-43.1.html>.

Figure 10.10 Diagram of Defenses to Kidnapping and False Imprisonment



Interference with Custody

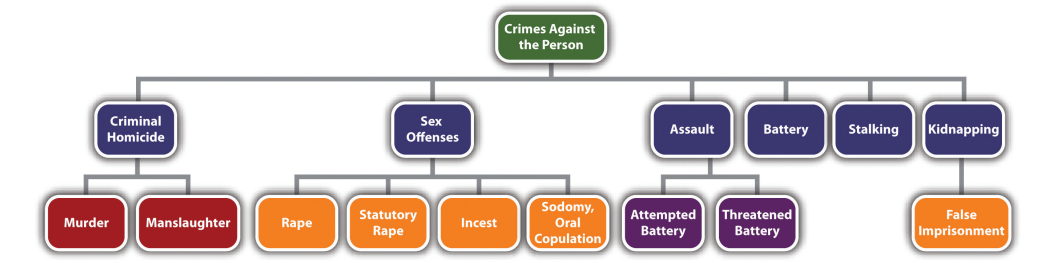
Because of a dramatic increase in the abduction of children by their estranged parents and parental interference with child custody and visitation agreements, almost all states have specifically criminalized **interference with the custody of children** 18 Pa. C. S. § 2904, accessed February 25, 2011, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.029.004.000.html>. or **unlawful visitation**. 720 ILCS § 5/10-5.5, accessed February 25, 2011, <http://law.onecle.com/illinois/720ilcs5/10-5.5.html>. The significant features of these modern offenses are their specific applicability to parents as defendants and various defenses based on the good faith belief that the child would be in danger without the allegedly criminal conduct. 18 Pa. C. S. § 2904, accessed February 25, 2011, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.029.004.000.html>. **Grading** of these offenses varies, with some states grading nonforcible parental interference with custody as a misdemeanor 720 ILCS § 5/10-5.5, accessed February 25, 2011, <http://law.onecle.com/illinois/720ilcs5/10-5.5.html>. and others as a low-level

felony.18 Pa. C. S. § 2904, accessed February 25, 2011, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.029.004.000.html>.

Table 10.3 Comparing Kidnapping and False Imprisonment

Crime	Criminal Act	Criminal Intent	Harm	Circumstance	Grading
Kidnapping	Confinement plus asportation	Specific or purposely	Confinement plus asportation	Lack of consent	Felony
False imprisonment	Confinement	General or knowingly in some jurisdictions	Confinement	Lack of consent	Gross misdemeanor or low-level felony

Figure 10.11 Diagram of Crimes against the Person



KEY TAKEAWAYS

- The criminal act element required for kidnapping in many jurisdictions is confinement and asportation of the victim. Some states do not require asportation when the kidnapping is for ransom, and others have done away with the asportation requirement altogether.
- The criminal intent element required for kidnapping in many jurisdictions is the specific intent or purposely to commit the criminal act in order to harm or injure the victim or another, confine or hold the victim in secret, receive a ransom, commit a separate offense, subject the victim to involuntary servitude, or interfere with the purpose of the government or some political function.
- The harm element required for kidnapping in many jurisdictions is confinement and asportation of the victim.
- The attendant circumstance element required for kidnapping is lack of victim consent.
- Kidnapping is generally graded as first degree or aggravated or as second degree or simple. First-degree or aggravated kidnapping is typically a serious felony, while second-degree or simple kidnapping is typically a low-level felony. One factor that could mitigate or reduce grading is the release of the victim unharmed in a safe place. Factors that could aggravate grading are the youth of the victim or the infliction of serious bodily injury.
- False imprisonment is often a lesser included offense of kidnapping, missing the asportation element, and requiring general intent or knowing commission of the criminal act. False imprisonment is also graded lower than kidnapping as either a gross misdemeanor or a low-level felony.
- Two potential defenses to kidnapping and false imprisonment are victim consent and a lawful arrest by a law enforcement officer or citizen.
- Interference with custody statutes specifically include parents as defendants and allow for a good faith defense that a child would suffer injury if not for the allegedly criminal conduct.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Coby is in the process of robbing a bank. When a security guard threatens to shoot Coby, he grabs a customer in the bank and holds a knife to her throat. Coby thereafter demands a getaway vehicle and fifty thousand dollars in cash in exchange for the hostage's release. Has Coby committed **kidnapping** in this case? Why or why not?
2. Read *State v. Salaman*, 949 A.2d 1092 (2008). In *Salaman*, the defendant grabbed the victim, pinned her to the stairs for five minutes, punched her in the face, and violently stuck his fingers down her throat. He was thereafter convicted of second-degree kidnapping and appealed, claiming his restraint of the victim was merely **incidental** to the crime of assault. In Connecticut, the state where the offense occurred, the kidnapping criminal act is restraint with the specific intent to prevent the victim's liberation. Connecticut also had case precedent holding that restraint that is incidental to the commission of a separate offense is still kidnapping. Did the Supreme Court of Connecticut uphold the defendant's conviction? The case is available at this link: http://scholar.google.com/scholar_case?case=13933358391504195031&q=kidnapping&hl=en&as_sdt=2,5&as_ylo=2008.
3. Read *Commonwealth v. Rivera*, 828 A.2d 1094 (2003). In *Rivera*, the defendant, who had a court order depriving him of custody, forcibly removed his daughter from her day care and drove around with her in his car, frequently calling and terrorizing the child's mother. The defendant's daughter disappeared, and the defendant was later convicted of felony murder, kidnapping, and other offenses. The underlying felony for the felony murder was **kidnapping**, and the defendant appealed claiming he could not legally kidnap his *own biological child*. Did the Superior Court of Pennsylvania affirm the defendant's felony murder and kidnapping convictions? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=6955582630525573237&q=%22interference+with+the+custody+of+children%22&hl=en&as_sdt=2,5.

10.5 End-of-Chapter Material

Summary

States vary as to how they categorize and grade sex offenses. In general, rape is knowing, forcible sexual intercourse without consent or with consent obtained involuntarily. Although the victim had to resist to indicate lack of consent at early common law, in modern times the victim need not resist if it would be futile to do so. Another modernization from common-law rape is the elimination of an exemption for spousal rape and the elimination of the requirement that victim testimony in a rape case be corroborated. Most states have rape shield laws that govern the admissibility of evidence of the victim's past sexual conduct at a trial for rape. Sodomy and oral copulation are sometimes combined and included with rape in one statute called sexual assault. If sodomy and oral copulation are the subject of separate statutes, sodomy is typically knowing forcible penis to anus penetration, and oral copulation is typically knowing forcible mouth to sexual organ or anus penetration. Statutory rape is generally sexual intercourse with an underage victim either recklessly, negligently, or with strict liability depending on the jurisdiction, and incest is generally knowing sexual intercourse between family members who cannot marry. States vary as to how they grade sex offenses, with force and penetration enhancing the grading to a felony in most jurisdictions.

Assault and battery are often included in the same statute (called assault) but are actually separate offenses with distinct elements. Battery is generally a purposeful, knowing, reckless, or negligent (depending on the jurisdiction) unlawful harmful or offensive touching without victim consent. Assault can be attempted battery, in which case all the elements of battery except the physical contact are present, or threatened battery, which is a purposeful act that causes apprehension of harmful or offensive physical contact in the victim. Simple battery and simple assault are typically misdemeanors, while aggravated versions of these offenses are often felonies. Factors that can aggravate the grading of assault and battery are the use of a weapon or serious injury.

Domestic violence statutes criminalize conduct such as assault, battery, sex offenses, or criminal homicide between family members and have special provisions that pertain to interfamily violence. Stalking criminalizes a purposeful course of conduct that poses a credible threat to the victim's safety. Cyberstalking is the use of the Internet or e-mail to commit stalking. Simple stalking is generally a misdemeanor, while aggravated stalking, which is stalking that causes injury or violates a restraining order, is generally a felony.

Kidnapping is the purposeful confinement and asportation (movement) of a victim for the purpose of injuring or harming the victim or another, hiding the victim in secret, obtaining a ransom, committing a separate offense, subjecting the victim to involuntary servitude, or interfering with the purpose of government or political function. False imprisonment is a lesser included offense of kidnapping that does not include asportation or specific intent. Interference with custody is parental kidnapping or violation of a child custody or visitation agreement. While kidnapping is typically a felony, false imprisonment and interference with custody are generally graded lower, as either a gross misdemeanor or low-level felony.

YOU BE THE LAW ENFORCEMENT OFFICER

You are a newly hired law enforcement officer starting out in the file room. You have been given five case files. To properly file them, first read over the facts of each case, determine **which crime** has been committed, and determine whether the crime is a **misdemeanor** or **felony**. Check your answers using the answer key at the end of the chapter.

1. The defendant was on a date with the victim. After a few drinks, the victim became extremely intoxicated, and the defendant had to have help carrying him to her vehicle. The defendant thereafter drove to a secluded area where she had sexual intercourse with the victim. The victim was unconscious and did not discover the act of sexual intercourse until two months later when the defendant told him she was pregnant. Which **crime** has been committed? Is the crime a **misdemeanor** or a **felony**?
2. The defendant, a security guard, forced the victim, a shopper in the store, to kiss him by threatening to falsely arrest her for shoplifting if she refused. Which **crime** is this? Is this a **misdemeanor** or a **felony**?
3. The defendant chased the victim with a knife for two miles. After the defendant was arrested, law enforcement determined that the “knife” was made of rubber and could not cause injury. Which **crime** has been committed? Is the crime a **misdemeanor** or a **felony**?
4. The defendant grabbed a law enforcement officer’s gun and pointed it at him while the law enforcement officer was having coffee in a local restaurant. Which **crime** has been committed? Is the crime a **misdemeanor** or a **felony**?
5. The defendant, a jilted lover, picked up her ex-boyfriend’s child from school and took her to an amusement park where they spent the afternoon going on rides and eating junk food. Which **crime** has been committed? Is the crime a **misdemeanor** or a **felony**?

Cases of Interest

- *U.S. v. Lanier*, 520 U.S. 259 (1997), discusses sexual assault by a judge as the subject of a federal criminal action: <http://www.law.cornell.edu/supct/html/95-1717.ZS.html>
- *Oregon v. Rangel*, 934 P.2d 1128 (1997), discusses the constitutionality of Oregon's stalking statute under the First Amendment: <http://www.publications.ojd.state.or.us/S44151.htm>.
- *Chatwin v. U.S.*, 326 U.S. 455 (1946), discusses federal kidnapping in the context of joining a religious cult: <http://supreme.justia.com/us/326/455/case.html>.

Articles of Interest

- High-profile criminal cases, including rape criminal cases: <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2240&context=bclr>
- The sexual assault case of former IMF chief, Dominique Strauss-Kahn: <http://www.nytimes.com/2011/05/26/nyregion/straus-kahns-lead-prosecutor-is-said-to-be-replaced.html>
- Cyberstalking among college students: <http://btci.stanford.clockss.org/cgi/reprint/5/3/279>
- Parental kidnapping and domestic violence: <http://www.vaw.umn.edu/documents/pkreport/pkreport.html>

Websites of Interest

- State statutes on statutory rape: <http://aspe.hhs.gov/hsp/08/SR/StateLaws/statelaws.shtml>
- Information about various sex offenses: http://www.sexlaws.org/what_is_statutory_rape
- Information about stalking: <http://www.stalkingbehavior.com>

Statistics of Interest

- Rape and other sex offenses: <http://www.rainn.org/statistics>
- Nationwide crime by state: <http://www.disastercenter.com/crime>

Answers to Exercises

From Section 10.1 "Sex Offenses"

1. The sexual intercourse could be **rape** or **statutory rape** if either Jorge or Christina (or both) are incapable of rendering legal consent because they are below the age of consent, have mental or intellectual disabilities, or are intoxicated. If Jorge and Christina are incapable of marrying because of a family relationship, their sexual intercourse could be **incest**.
2. The South Carolina Supreme Court upheld the defendant's conviction on the grounds that force and victim resistance are *not required* when a victim is under the age of legal consent. The court specifically stated that the victim's inability to legally consent vitiates the need to prove the defendant's use of force for rape.
3. The Court of Appeals of Texas held that state legislatures have broad powers to define crimes and criminal intent requirements, including the power to *eliminate* a culpable mental state. Thus the court upheld the defendant's conviction and did not strike the strict liability aggravated sexual assault statute. The court reviewed significant state and federal precedent to determine that the majority of states disallow the mistake of age defense, and that this does not violate federal or Texas state **due process** because it is supported by the legitimate government interest of protecting children.

Answers to Exercises

From Section 10.2 "Assault and Battery"

1. In the first scenario where Bob swings once and misses, then swings again and connects, two crimes have been committed: assault and battery. The first swing that misses is an assault. The swing that punches Rick in the stomach is a battery. In the second scenario, where Bob only swings and misses, only an assault has been committed.
2. The defendant threw a cup of urine in the victim's face. Although the battery statute in Wisconsin requires **bodily harm**, the court held that the stinging sensation in the victim's eyes was sufficient and upheld the defendant's conviction.
3. The Supreme Judicial Court of Massachusetts upheld the defendant's conviction, reasoning that the defendant's **apparent ability** to consummate the shooting is what is essential to the crime of assault with a deadly weapon, not the secret fact that the gun is loaded with blanks rather than bullets.

Answers to Exercises

From Section 10.3 "Domestic Violence and Stalking"

1. Most domestic violence statutes include **individuals residing together**, so this could be domestic violence battery or assault.
2. The Supreme Court of North Dakota upheld the defendant's conviction, stating that the constitutional right to travel is not absolute and can be restricted to protect a victim from **harm**, as in this case.
3. The Court of Appeals of Georgia reversed the defendant's conviction because aggravated stalking in Georgia requires a **course of conduct** violating a protective order. In this case, the prosecution only proved that the defendant committed *one act* violating the protective order.

Answers to Exercises

From Section 10.4 "Kidnapping and False Imprisonment"

1. If Coby's state does not require **asportation** for kidnapping when the kidnapping is for ransom, then Coby has probably committed kidnapping. He confined a victim against her will with the purpose of committing another offense (theft) and demanded a ransom, which are all the elements of kidnapping.
2. The Connecticut Supreme Court rejected precedent and *changed the rule* that an act of kidnapping could be incidental to the commission of a separate offense. Thereafter, the court ordered a new trial on the kidnapping charge, although it surmised that a jury could reasonably find the defendant guilty of kidnapping separate from the assault.
3. The Superior Court of Pennsylvania affirmed the defendant's convictions, holding that the kidnapping statute applied to *any* individual—including a **parent**.

Answer to Law and Ethics Question

1. Rape shield laws focus on the protection of the victim *at trial* and preclude the admission of evidence of the victim's sexual history (other than a sexual history with the defendant). They do not necessarily prevent the media from publishing information about the victim or from taunting the victim. Of course, in the Bryant case, this publication ended up badly demoralizing and frightening the victim, leading to the eventual demise of the rape case against Bryant. However, blanket prohibitions against publication of information by the media would be **overbroad** and would violate the **First Amendment**. A balance must be present between protection of the victim, preservation of the right to a fair trial, and freedom of speech. This case illustrates the damage the media can do to a fair trial, unprejudiced jury, and a willing and cooperative victim. However, the public's right to know is also paramount and cannot be sublimated without narrow tailoring and a compelling government interest.

Answers to You Be the Law Enforcement Officer

1. The crime is **rape**. Although *nonforcible*, sexual intercourse with an inebriated or unconscious victim is still rape. Rape can be committed by a woman in most jurisdictions. Rape is a **felony**.
2. The crime is **simple battery**, as long as your jurisdiction criminalizes “offensive” physical contact. Simple battery is a **misdemeanor**.
3. The crime is **threatened battery assault**. Threatened battery assault typically requires apparent, rather than present, ability. Threatened battery assault that does not involve a deadly weapon is a **misdemeanor**.
4. The crime is **assault with a deadly weapon**. The defendant committed the assault with a deadly weapon and inflicted it against a law enforcement officer, so the assault is a **felony**.
5. The crime is **kidnapping**. Although the child was unharmed, children cannot give legal consent, so the crime was complete once there was confinement and asportation with the proper criminal intent (most likely the intent to “confine the child in secret”). Kidnapping is a **felony**.