



End Violence Against Women International
(EVAWI)

Law and Investigative Strategy: What Kind of Sexual Assault is This?

Sergeant Joanne Archambault (Ret.)
Kimberly A. Lonsway, PhD

August 2006
Updated November 2020

Table of Contents

Table of Contents	2
OnLine Training Institute	3
Public Domain Notice	3
Recommended Citation.....	3
Authors.....	4
Acknowledgements	5
Course Objectives	6
Introduction	7
Sexual Penetration Versus Sexual Contact.....	7
Investigative Strategy: Overcoming a Denial Defense	8
Force Versus No Force Required.....	9
Force, Threat, or Fear	10
Victim Non-Consent	10
No Clear Standard.....	11
Investigative Strategy: Consent Versus Identity Defense.....	12
Identity Defense: “You’ve Got the Wrong Guy”	13
Consent Defense: He or She Consented to it	14
No Force Required	16
Unconscious Victim.....	19
Incapacitated Victim	19
Victims with a Cognitive Disability	21
Sexual Assault Based on Age and/or Position of the Suspect	22
Other Situations in Which No Force is Required	23
Other Types of Evidence.....	23
Associative Evidence	23
Reconstructive/Corroborative Evidence	24
A Note Regarding Attempt Offenses	24
Conclusion	25
For More Information.....	26



OnLine Training Institute

This module is part of EVAWI's OnLine Training Institute (OLTI), which includes review exercises, practical applications, and an end-of-course test. Participants can also download a personalized certificate of completion to use for continuing education or other purposes. For more information, please see the [EVAWI website](#).

Public Domain Notice

Unless something is excerpted directly from a copyrighted source, all the material in this document is in the public domain and may be reproduced or copied without specifically requesting permission from End Violence Against Women International (EVAWI) or the authors. Any direct quotes or excerpts should be properly cited. No one may reproduce or distribute this material *for a fee* without EVAWI's specific, written authorization.

Recommended Citation

Archambault, J. & Lonsway, K.A. (2020). *Law and Investigative Strategy: What Kind of Sexual Assault is This?* End Violence Against Women International.



Authors

Sgt. Joanne Archambault (Retired, San Diego Police Department) is the Founder and Chief Executive Officer for End Violence Against Women International (EVAWI). Prior to founding EVAWI, Sgt. Archambault worked for the San Diego Police Department for over 22 years, in a wide variety of assignments. During the last 10 years of her service, she supervised the Sex Crimes Unit, which investigated approximately 1,000 felony sexual assaults each year. Under her leadership, the San Diego Police Department's Sex Crimes Unit was recognized for pioneering research, groundbreaking victim-centered practices, and multidisciplinary collaboration that changed law enforcement responses to sexual assault across the nation. She also established and operated a highly successful for-profit training and consulting business for 22 years, providing expert guidance to hundreds of police departments and allied agencies, and training tens of thousands of practitioners.



In 2003, Sgt. Archambault founded EVAWI, a nonprofit organization dedicated to improving criminal justice responses to sexual assault and other forms of gender-based violence. Starting from scratch, she has grown EVAWI into the premier training organization on sexual assault investigations, providing superior training and resources, influencing national policy, and mentoring a new generation of leaders. In 2011, she achieved a dream first envisioned while working in the San Diego Police Department's Child Abuse Unit in 1985 – the launch of Start by Believing, a public awareness campaign designed to transform the way society responds to victims of sexual violence. With campaigns in all 50 US states, several US territories and protectorates, and numerous countries, this vision is now becoming a reality, changing the world for victims, one response at a time.

Dr. Kimberly A. Lonsway earned her PhD in the Department of Psychology at the University of Illinois, Urbana-Champaign. Her research career has focused on sexual violence and the criminal justice and community response systems, and she has written one book and over 100 training modules, bulletins, research articles, book chapters, and government reports on related topics. She has also trained thousands of professionals around the world, testified as an expert witness in criminal and civil court cases, and volunteered for over 15 years as a victim advocate. In 2012, she was awarded the first-ever Volunteer of the Decade Award from the Sexual Assault Recovery and Prevention (SARP) Center in San Luis Obispo, California. In 2003, Dr. Lonsway was invited to serve as a Founding Director for End Violence Against Women International (EVAWI), a fledgling nonprofit dedicated to improving criminal justice responses to sexual assault and other forms of gender-based violence. In 2004, she assumed the role as Director of Research, and she has since helped grow EVAWI into the premiere criminal justice training organization on sexual assault investigations, providing superior training and resources, influencing national policy, and mentoring a new generation of leaders.



Acknowledgements

Content of this module was developed partly on the basis of material from the following sources.

- “Police Response to Crimes of Sexual Assault: A Training Curriculum.” Written by Sharon M. Hunter, Bonnie R. Bentley Crewe, and Jamie L. Mills. Produced by the Connecticut Sexual Assault Crisis Services, Inc. Funded by Police Officer Standards and Training Council and STOP Violence Against Women Grant #VAW9606.
- “Model Guidelines and Sex Crimes Investigation Manual for Illinois Law Enforcement.” Produced by the Illinois Law Enforcement Training and Standards Board and Illinois Coalition Against Sexual Assault.

We are extremely grateful to the following individuals (listed in alphabetical order), for their valuable contributions to the development of this training module:

- Lieutenant Sue Welch (Ret.), EVAWI, Coeur d’Alene, ID.



Course Objectives

At the end of this training module, the learner will be able to:

- Determine the category of sexual assault case being handled.
 - Determine whether sexual penetration or sexual contact has been committed by the suspect.
 - Determine whether any reported sexual acts (whether penetration or contact) were committed using force, threat or fear – or whether the situation was one in which no force is required for sexual acts to constitute a criminal offense.
 - If the situation was one in which no force is required, determine why no force was required, such as:
 - The victim was unconscious.
 - The victim was incapacitated.
 - The victim has a severe disability affecting cognition.
 - Statutory rape based on the victim's age.
- Given the category of sexual case being handled, predict the defense most likely to be raised, including:
 - Denial
 - Identity
 - Consent
- Given the category of sexual assault case being handled and the defense most likely to be raised, develop an investigative strategy designed to overcome a particular defense.
 - Recognize the types of evidence that support the particular elements of the sexual assault case.
 - Recognize the types of evidence that effectively counter common defense strategies.
- Recognize the purposes of associative and reconstructive/corroborative evidence.
- Apply a conceptual analysis of the legal elements of a sexual assault offense to individual state law.



Introduction

Although penal code definitions of criminal sex offenses vary state by state, most are conceptually similar and can be understood by analyzing their elements. This type of analysis is represented in the charts provided with this module. By following the charts and making a series of decisions, law enforcement investigators can determine not only which specific crime was committed but also frame the entire investigative strategy based on the defense that is most likely to be raised. Criminal sex offenses will thus be discussed conceptually in this module; this discussion must be supplemented with information from relevant penal code sections in your own jurisdiction.

Resource: Expert Interview

In this [video interview](#), Detective Carlton Hershman (Ret.) describes how investigators can improve their investigation technique, which will also improve the likelihood of potential prosecution.

In this [video interview](#), Detective Justin Boardman explains what he feels is the most important thing to keep in mind during all sexual assault investigations.

Resource: Sexual Assault Penal Codes

For more information on rape and sexual assault penal code definitions in your state, you can request a statutory compilation from [AEquitas](#). You will also find statutory compilations for domestic violence, rape shield laws, reporting requirements for competent adult victims of sexual violence, among others.

Sexual Penetration Versus Sexual Contact

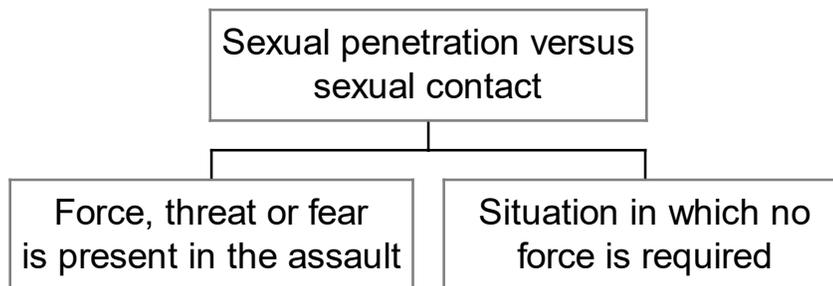
When conducting the type of analysis outlined in the charts provided with this module, the first determination to be made in the case is whether **sexual penetration** or **sexual contact** has been committed by the suspect. The specific terminology and definitions will vary, but penal code definitions generally recognize a distinction between sexual penetration (e.g., vaginal, oral, anal) and acts of sexual contact or conduct other than penetration (e.g., rubbing, grabbing, pinching).

- In some definitions, crimes involving sexual penetration are referred to as **sexual assault** whereas those involving sexual contact are described as **sexual abuse**.
- In others, criminal sex offenses are characterized as **first degree, second degree**, etc., depending on whether sexual penetration or contact was committed.

Keep in mind that most penal codes define **sexual penetration** as contact, no matter how slight, between certain body parts, such as a penis, finger, or foreign object and a vagina, anus, or mouth.

Law enforcement investigators must be familiar with the terminology and definition of these criminal sex offenses, to identify whether a case involves sexual penetration, contact, or both. Of course, any incident may involve multiple offenses, including some combination of sexual penetration and sexual contact. However, each count or charge must be identified independently.

Conceptual Organization of Criminal Sex Offenses, Typical Defenses, and Investigative Strategies



Investigative Strategy: Overcoming a Denial Defense

When a suspect is charged with a sex crime, one primary element of the offense will always be the sexual act involved (whether sexual penetration or contact). In other words, to successfully prosecute any sex crime, the prosecution must first establish that the reported sexual act was committed.

- If the offense involves sexual penetration, the prosecution must prove that sexual penetration (however slight) was committed by the suspect against the victim.
- If the offense involves sexual contact of some kind, the prosecution must prove that the reported acts were actually committed by the suspect against the victim.

Because the sexual act (penetration or contact) constitutes one element of the offense charged, it also provides the grounds for a defense strategy – **denial**. If the suspect denies that he committed the reported sexual act, and he can create reasonable doubt to that effect, he will most likely be acquitted by a judge or jury. For this reason, any investigative strategy must first focus on establishing whether or not the sexual act was committed by the suspect against the victim.

- The most traditional evidence for any sexual act committed by the suspect is seminal fluid collected from the body of the victim (or the victim's clothing).

- In addition to seminal fluid, other evidence on the victim's body can also be used to establish that the reported sexual act was committed by the suspect. This would include evidence of spermicides or lubricants that are found on the victim's body (or clothing) and match those found on the suspect's body (or clothing).
- Additional evidence of the reported sexual act(s) can be found by swabbing any areas of the victim's body that were kissed, sucked, or bitten by the suspect. This type of evidence would be collected as part of a medical forensic examination.
- As part of the medical forensic examination with a sexual assault victim, a colposcope can also be used to magnify and document evidence of genital microtrauma. In addition, nuclear stains such as toluidine blue dye can be used to help make these microscopic injuries more visible as evidence of the sexual act.

Although law enforcement has historically focused on the body of the victim for evidence of sexual acts committed by the suspect, another primary source is the suspect's body or clothing.

- For example, a forensic examination of the suspect could potentially identify evidence of transfer from the victim's body, such as vaginal fluid or cells.
- Evidence of spermicides or lubricants could also be suggestive of sexual contact if a match is found between materials present on the victim's and suspect's bodies.
- In cases where multiple suspects are involved, there can even be a transfer of bodily fluids or cells between suspects. To illustrate, seminal fluid from Suspect #1 may be found on the body of Suspect #2, if they penetrated the victim consecutively. This transfer could also involve material other than cells or bodily fluids, such as hairs or other trace evidence.

For all of these reasons, it is imperative that investigators order a forensic examination of the suspect in any sexual assault investigation. Although this is often overlooked, it can be crucial for documenting evidence of any sexual acts committed by the suspect against the victim.

Resource: DNA Evidence

For more information on the role of DNA in sexual assault investigations, including the importance of suspect examinations, please see the OLT module entitled: [Laboratory Analysis of Biological Evidence and the Role of DNA in Sexual Assault Investigations](#).

Force Versus No Force Required

The second determination to be made by the investigator is whether any reported sexual acts (whether penetration or contact) were committed using **force, threat or fear**

– or whether the situation was one in which **no force is required** for sexual acts to constitute a criminal offense.

Force, Threat, or Fear

If force, threat, or fear is used to commit a sexual act (either penetration or contact), the elements of the offense can be thought of in terms of the simple “mathematical formula” below:

Sexual Penetration + Force, Threat, or Fear OR (in some states) Victim Non-Consent = Sexual Assault

Despite their differences in wording and structure, all penal codes define any sexual acts (penetration or contact) committed using force, threat, or fear as a criminal sex offense. Some state laws also include victim non-consent as an element of the offense, but others describe consent only as a possible defense. In either case, the investigation of any sexual assault offense will always need to include efforts to document evidence of the victim’s lack of consent.

Please Note

Throughout this module, offenses will be described with reference to **sexual penetration**. However, it is important to recognize that the structure for offenses involving **sexual contact** will be parallel – but with lesser corresponding charges.

Victim Non-Consent

To clarify, some state laws do not include victim non-consent as an element of their sexual assault law. In these states, the “formula” for a sexual assault offense that is specified in the penal code definition would be:

Sexual Penetration + Force, Threat, or Fear = Sexual Assault

In these states, consent is typically described as a defense that is available to any sexual assault charge, but not as an explicit element of the offense. This formulation is based on a recognition that the victim’s lack of consent is implied by the presence of force, threat, or fear. In other words, when force, threat, or fear is present in a situation, it is assumed that the victim has not consented to any sexual acts that are committed by the suspect. However, even when victim non-consent does not appear as an element of a sexual assault offense, it will always be available to suspects as a basis for defending against the charge, so every investigation must carefully seek and document evidence to establish that a sexual assault was committed against the victim’s will.

On the other hand, some state penal codes do specify that a sexual assault can be established on the basis of victim non-consent without evidence of force, threat or fear.

An example of this is Tennessee state law which specifies that rape is unlawful sexual penetration of a victim if (1) “force or coercion is used to accomplish the act” **OR** (2) “the sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent” [39-13-503]. The formula for the offense is thus:

Sexual Penetration + Victim Non-Consent = Sexual Assault

Regardless of whether the victim’s lack of consent appears as an element of the offense and/or as a possible defense that is available to suspects charged with sexual assault, it will always need to be established with evidence that is carefully documented as part of the investigation.

Some states have statutory definitions of what constitutes **consent**. These typically look like the following example from Colorado, where consent is defined by law as: “cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent. Submission under the influence of fear shall not constitute consent” [C.R.S. 18-3-401].

However, some states do not define consent in the positive, but rather only in the negative by describing exceptions – in other words, what consent is NOT. For example, Montana state law does not offer a definition of consent in the positive, but lists situations where the victim’s lack of consent will be established (e.g., where force is used or victims are unable to legally consent due to their age, physical helplessness, severe disability, incapacitation, incarceration, or because they are overcome by “deception, coercion, or surprise”) [45-5-501].

No Clear Standard

Despite this general recognition that sexual acts are illegal when committed using force, threat, or fear, there remains no clear standard as to what factors constitute force, threat, or fear. Rather, the presence of force, threat, or fear must be determined by considering the entire context surrounding the event. For example, law enforcement investigators must consider the following:

- Was physical violence or a weapon used?
- Were physical or verbal threats made?
- Was there a discrepancy in the size and strength of the individuals involved?
- What were the surrounding circumstances that made the victim believe that real or implied threats would be carried out?
- Were the individuals physically isolated from others?

- Were there other factors that heightened the victim's vulnerability?
- What was the victim thinking and feeling at the time of the event?
- Were there multiple suspects involved or other individuals present during the assault?

Thus, there is no clear legal standard for what constitutes force, threat, or fear. Rather, the determination must be made by examining the entire context of the situation with factors such as those listed above. When making this determination, special consideration must be given to the victim's perception of events, because many situations that are threatening or frightening to one person (such as a woman) might not be for someone else (such as a man). In addition, physical resistance on the part of the victim can certainly be used as evidence that force, threat, or fear was present in a situation. However, the lack of physical resistance can never be used as proof of consent (i.e., the absence of force, threat, or fear). In other modules, we discuss reasons why victims often do not physically resist when they are being sexually assaulted. For the present purposes, it is sufficient to note that this is a very common dynamic of sexual assault as it happens in the real world – not in TV, movies, or criminal justice textbooks.

Investigative Strategy: Consent Versus Identity Defense

Any suspect charged with a sex crime can therefore deny that the reported sexual act actually took place. However, when the sexual act is stipulated by the defense or proven by the prosecution, there are two additional defenses that are available to suspects who are charged with sex crimes reportedly committed using force, threat, or fear.

- The first is a defense of **identity**, raised primarily in cases where the suspect is a stranger to the victim. This is the defense that can be characterized as, *"You've got the wrong guy. Someone else might have raped her, but it wasn't me."*
- The second is a **consent** defense, which is the defense that is typically used in cases where the victim and suspect know each other, but is now increasingly being used in cases involving strangers as well. This is the defense that usually stipulates that the sexual activity took place, but argues that it did not involve force, threat, or fear. This defense can be described as, *"Yeah, the sex took place, but she wanted it. There was no force involved."*

Although this classification generally captures the essence of the two primary defense strategies used in forcible sexual assault, it is of course difficult to pigeonhole these complex cases. Moreover, cases will sometimes change from one to the other – usually from identity to consent.

To illustrate, some suspects (particularly in cases involving strangers) may originally raise an identity defense (i.e., *"You've got the wrong guy"*). However, once the prosecution proves that the sexual act was actually committed by the suspect against the victim, perhaps on the basis of



forensic evidence, he may switch his story to assert a consent defense (i.e., “*She wanted it*”).

In fact, now that DNA evidence can reliably establish the identity of the suspect in so many cases, the identity defense is actually becoming less common. Many experienced law enforcement investigators and prosecutors have noted that suspects are now extremely likely to argue that the victim consented to the sexual acts in question, even in cases where the suspect was a stranger to the victim and/or he used a weapon or a great deal of physical violence.

For all of these reasons, it is important that investigators strategize their investigation around the defense that is most likely to be raised. At the same time, it is crucial to remain flexible and document evidence that can address any possible defense.

Identity Defense: “You’ve Got the Wrong Guy”

A suspect is more likely to raise an identity defense if he is a stranger to the victim. This defense strategy centers on the claim that although the victim might truly have been sexually assaulted or abused, it wasn’t the suspect who committed the crime. In these cases, the investigative strategy is not that different from other crimes (e.g., burglary or robbery) because it focuses on evidence such as the following:

- A complete physical description of the suspect (from the victim or other witnesses).
- DNA evidence from the suspect collected from the victim’s body, clothing, etc.
- DNA evidence from the victim collected from the suspect’s body, clothing, etc.
- Any evidence linking the suspect to the victim and/or crime scene(s).

In any case where an identity defense might ultimately be raised, it is important to first determine whether the suspect denies committing the sexual act against the victim. If the suspect does deny committing the reported sexual act(s), the types of evidence outlined above will obviously be useful in challenging this denial. In addition, if the suspect is charged with multiple crimes it will be critically important to gather information and evidence linking the incidents. For example, if the offender used a specific behavioral pattern (modus operandi or M.O.), it will be crucial to demonstrate that the same pattern was exhibited in the cases being linked.

Resource: DNA Evidence

For more information on the importance of conducting suspect exams and collecting biological evidence in sexual assault cases, please see the OLT module entitled: [*Laboratory Analysis of Biological Evidence and the Role of DNA in Sexual Assault Investigations.*](#)

To support an identity defense, the suspect will likely focus on issues such as the following:

- Factors which limited the victim’s ability to see/hear the offender during the assault.
- Factors which could have potentially biased the police identification procedures.
- Limitations of the police evidence collection or analysis (i.e., evidence contamination).
- Failure to pursue investigative leads that might point to an alternative suspect.

Clearly, the law enforcement investigation must be conducted with meticulous care and thorough documentation must be provided for all evidence collected and analyzed. Identification procedures must be conducted in compliance with all relevant laws and departmental policies, to ensure that the victim is not led toward any particular judgment. Of course, investigators must also maintain an open mind to the possibility that the suspect is in fact innocent. All investigative leads must be pursued to identify potential suspects, and evidence gathered to rule them in or out of consideration during the investigation of any criminal sex offense.

Consent Defense: He or She Consented to it

In cases where the suspect and victim know each other to some degree, a consent defense is more likely to be raised. This can be determined by finding out whether the suspect denies committing the sexual act against the victim or acknowledges committing the sexual act but claims that the victim consented. While some have described cases involving the identity defense as the “science” of sexual assault investigation, cases involving a consent defense represent the “art.” In other words, creativity is often needed to think of nontraditional approaches to the investigation to determine whether the evidence supports the legal elements of a sexual assault. Even in cases involving strangers, the suspect may claim that the victim consented to the sexual act or even switch from an identity to consent defense after the investigation conclusively established that the sexual act was committed by the suspect – perhaps on the basis of forensic evidence.

Resource: Expert Interview

In this [video interview](#), Sergeant Elizabeth Donegan responds to the perception that sexual assault cases are just “he said, she said.”

Whenever a consent defense is raised, the investigation must focus primarily on evidence to establish that force, threat, or fear was present. This will likely include the following:

- Evidence of physical or verbal resistance on the part of the victim.
- Evidence of genital or non-genital injury.



- Evidence of any factors that heightened the victim's vulnerability.
- A detailed account of the victim's thoughts and feelings during the sexual assault.
- Information regarding the suspect's size and strength, in comparison with the victim's.
- Information regarding the environment in which the assault took place (e.g., isolation).
- Information regarding the victim's post-assault behavior, including post-traumatic stress.

Evidence that the victim is experiencing post-traumatic stress could include dramatic changes in eating or sleeping patterns, social behavior, drug or alcohol use, or other symptoms of depression and/or anxiety. It is therefore helpful to get a description from the victim, as well as friends and family members, to characterize who the victim was before the sexual assault and contrast that with who the victim became afterward.

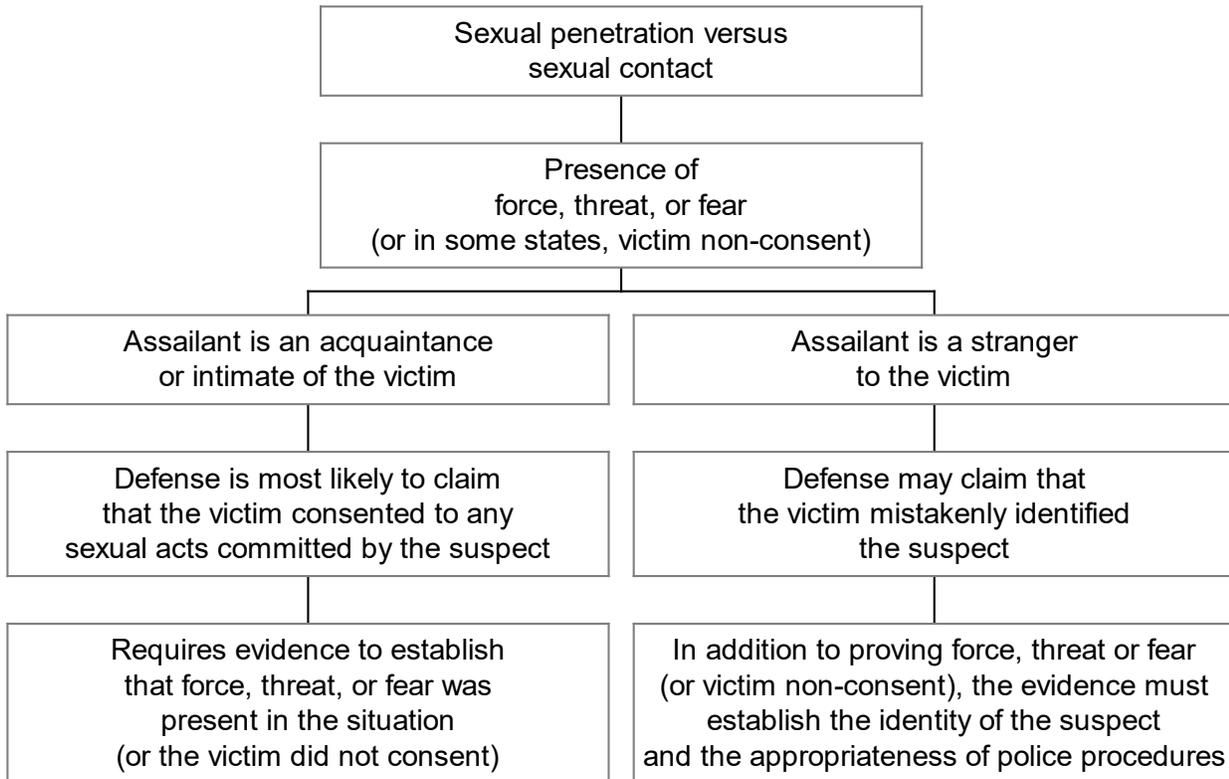
To illustrate, a woman who is the victim of sexual assault may be described by her friends and family members before the sexual assault as someone who was cheerful and outgoing, whereas after the sexual assault she became withdrawn and depressed. Such a dramatic change may serve as corroborative evidence, because it would not be expected in someone who had engaged in consensual sexual activity but is certainly consistent with a pattern of behavior that might be seen in someone who was sexually assaulted.

Resource: Overcoming a Consent Defense

For more information on the challenges of overcoming a consent defense, please see the [OLTI modules](#) Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault and Effective Report Writing: Using the Language of Non-Consensual Sex.

Information that is consistent between the victim's and suspect's description of events can also be helpful, by demonstrating that the victim and suspect describe the events in a similar way, with the only difference being whether or not the victim consented to the reported sexual act(s) committed by the suspect. Obviously, the suspect has an interest in characterizing the situation as involving victim consent. For guidance on how to conduct an investigation with an eye toward overcoming a consent defense, please see these other modules. Also keep in mind that the absence of injury or physical resistance by the victim cannot be used as proof of consent.

Criminal Sex Offenses Based on Force, Threat, or Fear



No Force Required

As previously described, any act of sexual penetration committed using force, threat, or fear constitutes a sexual assault. However, there are situations in which sexual penetration is criminal even in the absence of force, threat, or fear. These include situations where the penal code states that **no force is required** for the sexual act to constitute a criminal offense. For example, this would include situations where the victim is legally viewed as unable to consent, either due to age or some type of incapacitation (e.g., disability, lack of consciousness, drug or alcohol use).

- In these situations, a consent defense is not available to suspects, so the investigative strategy should not focus on establishing the presence of force, threat, or fear. Force, threat, or fear does not constitute an element of the offense.
- Rather, the defense is limited to (1) denying that the sexual acts were committed by the suspect, (2) disputing the status of the victim that precluded the ability to legally consent to sexual activity, or (3) claiming that the suspect did not know and could not reasonably have known about the status of the victim. The investigation must therefore focus on overcoming these potential defense claims.

This will be discussed in greater detail pertaining to each of the major types of situations in which no force is required for sexual acts to constitute criminal behavior. However,

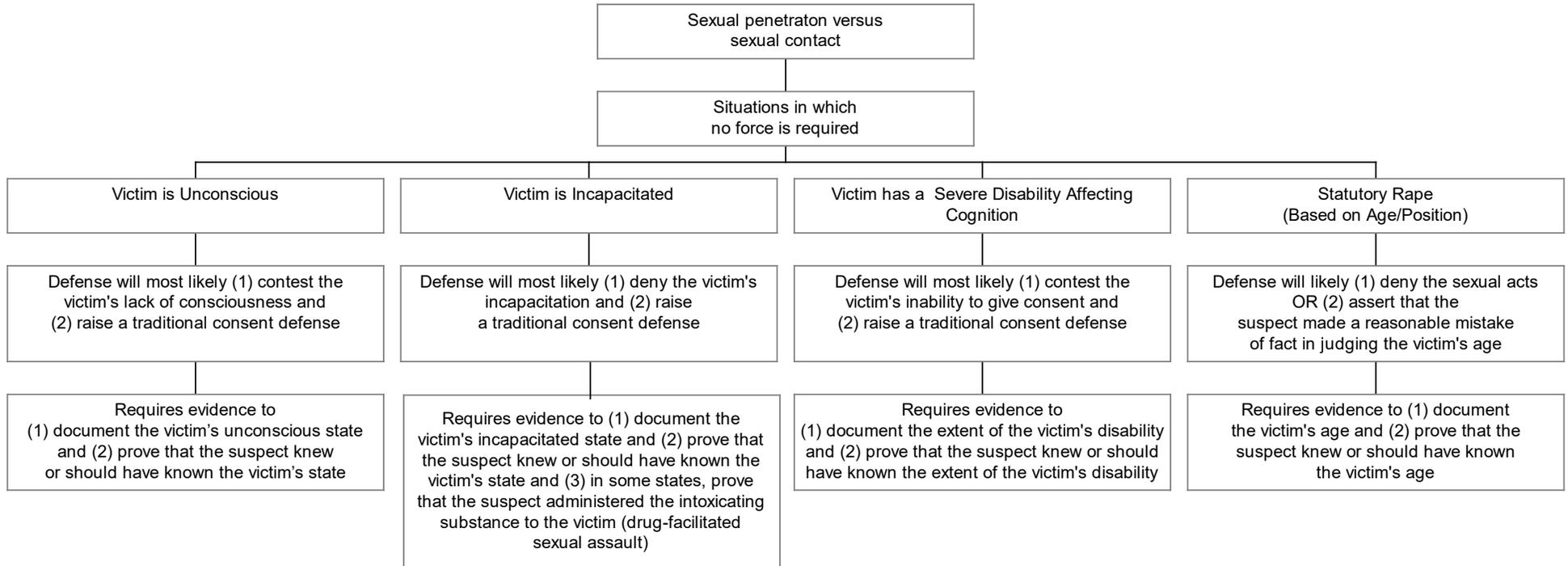
there are also cases where the suspect is charged with a forcible sexual assault crime instead of (or in addition to) the offense in which no force is required.

- For example, if the victim and suspect are of an age recognized in the penal code definition as constituting statutory rape, the investigator has only to establish that (1) the reported sexual acts were committed by the suspect, (2) the victim and/or suspect are the ages specified in the offense, and (3) the suspect knew or should have known the victim's age. Force, threat, or fear need not be proven because the situation is one in which no force is required to constitute a crime.
- However, if force, threat, or fear were present in the situation, the suspect may be charged with a forcible offense either instead of – or in addition to – statutory rape. In these cases, evidence will of course be needed to prove the element of force, threat, or fear, in order to overcome a traditional consent defense.

Successful sex crimes investigators need to recognize common theories of sexual assault offenses, but they must also maintain a flexible orientation in case an alternative charge is filed, or the defense strategy is something other than expected.



Criminal Sex Offenses with No Force Required



Unconscious Victim

Clearly, a victim who is **unconscious** cannot legally consent to any sexual acts committed by the suspect – or anything else, for that matter. When a victim is unconscious, the mathematical expression to denote the elements of a criminal sex offense is thus:

Sexual Penetration Unconscious Victim + Suspect's Knowledge of Victim's Unconscious State = Sexual Assault

As previously stated, a suspect can defend against this type of sexual assault charge by denying that (1) the sexual acts were committed by the suspect, (2) the victim was unconscious, or (3) the suspect knew or should have known that the victim was unconscious. The investigative strategy must therefore focus on establishing each of these three elements. The investigation does not, however, need to establish the presence of force, threat, or fear, because it is not an element of the offense. Rather, the victim's lack of consciousness means that he or she is unable to legally consent to any sexual acts. Now, having said this, any responsible law enforcement investigator is going to carefully document any evidence of force, threat, or fear if it is present in the sexual assault, just in case the suspect is charged with a forcible offense as well.

Incapacitated Victim

Somewhat more difficult is the case in which the victim was **incapacitated** while the suspect committed the sexual act(s). Incapacitation in this sense is typically due to alcohol or drug use, although it could also be due to some other cause creating physical or mental incapacitation.

In some jurisdictions, the element of victim incapacitation is met regardless of whether it is caused by the victim's own voluntary consumption or as a result of the suspect's administration of drugs or alcohol to the victim. In other jurisdictions, the element of victim incapacitation is only met if the suspect administered the drugs or alcohol to the victim. In these jurisdictions, the prosecution must provide evidence that the suspect was the one who provided the alcohol or drugs to the victim and thereby caused the victim's level of incapacitation.

Resource: Expert Interview

In this [video interview](#), Teresa Scalzo offers advice for investigators handling alcohol facilitated sexual assault cases.

The elements of this type of sexual assault are thus:

Sexual Penetration + Incapacitated Victim + Suspect's Knowledge of Victim's Incapacitated State + (in some states) Suspect's Administration of the Intoxicating Substance = Drug Facilitated Sexual Assault

What makes this issue difficult is that there is no clear legal standard for incapacitation, so it is inevitably going to be a matter of contention between the prosecution and defense. This is particularly challenging in cases involving GHB or other drugs that can incapacitate the victim's mental state while the victim still appears to be acting and talking "normally."

Resource: Expert Interview

In this [video interview](#), Dr. Marc LeBeau describes what first responders should look for in drug facilitated sexual assault cases.

For the purposes of illustration, it is easy to imagine a situation where the victim is so incapacitated by drug or alcohol use that he or she is near unconsciousness. Based on the victim's account of what happened, along with toxicology evidence and interviews with various witnesses, it is often possible for law enforcement investigators to demonstrate that the victim was so incapacitated that he or she could not legally consent to any sexual act.

- In this type of case, the defense is likely to argue that the victim was not incapacitated to the degree claimed by the prosecution, thereby denying the second element of our equation. Because the victim was not incapacitated, the defense will argue, he or she was able to consent to the sexual acts committed by the suspect. It is therefore critical for law enforcement investigators to establish through interviews and other evidence that the level of victim intoxication was so severe that it was impossible for the victim to have knowledge of the nature of the act and therefore provide informed consent.
- The defense may also argue that the suspect was equally intoxicated, so it becomes important to demonstrate who was in control of the situation. For example, witnesses can be interviewed about the relative levels of intoxication of both victim and suspect, which person was responsible for providing the drugs and/or serving the drinks, and who was in control of what was happening. Often, a suspect in this type of assault (typically male) will offer to "rescue" the victim (typically female) by paying the bill, driving her home, carrying her to her room, and/or removing her clothes before putting her to bed.
- In any of these cases, the defense will also need to argue that – not only could the victim consent to the reported sexual act(s) – but that the victim actually did consent to the sexual act(s) involved. Thus, even in cases where the prosecution has framed the case as one involving an incapacitated victim, the defense is likely to challenge this characterization and raise a more traditional consent defense.

When a consent defense is raised, the victim's intoxication is usually used as a means of challenging the victim's credibility and raising doubt that the elements of the offense

are met. These cases are often extremely difficult for law enforcement investigators and prosecutors.

Resource: Expert Interview

In this [video interview](#), Teresa Scalzo describes three strategies prosecutors can utilize in alcohol facilitated sexual assault cases.

Victims with a Cognitive Disability

While any disability the victim has can affect a sexual assault investigation, only cognitive disabilities have the potential to constitute a legal element of the crime. The question is whether the impairment is severe enough to prevent the person from being able to legally consent to sexual activity. If so, the investigation must establish three legal elements:

- Sexual contact or penetration was committed by the suspect against the victim.
- The victim lacked the capacity to consent to the sexual activity, based on a severe cognitive impairment.
- The suspect knew, or should have known, the severity of the victim's cognitive impairment.

There is no "bright line" for establishing how severe a cognitive impairment must be to render an individual incapable of consent. It must be determined based on the evidence gathered during a thorough law enforcement investigation, including a current assessment of the victim's disability and a formal evaluation of the victim's capacity to consent.

If an individual is determined to be unable to consent, then the only elements that remain to be established are the reported sexual act(s) and the suspect's knowledge of the victim's disability. Issues of force and consent should not be raised, as the individual is not legally recognized as able to consent to sexual activity. Again, successful investigators will still document evidence of force, threat, or fear if it is present, in case the suspect is also charged with a forcible offense.

On the other hand, if an individual with a disability is determined through the law enforcement investigation to be able to legally consent to sexual activity, the defense in a sexual assault case will likely revert to traditional issues of consent. The investigation must therefore focus on documenting evidence of force, threat or fear as in any other case where consent is in question. This may include consideration of the victim's disability as a vulnerability factor that contributed to the situation in which the victim experienced force, threat, or fear.

Resource: Victims with Disabilities

For more information on how to develop an investigative strategy for people with disabilities, as well as an overview on how to conduct an evaluation of capacity to consent, please see the OLT module entitled: [Successfully Investigating Sexual Assault Against People with Disabilities](#).

Sexual Assault Based on Age and/or Position of the Suspect

Another major category of cases in which no force is required are those involving victims who are unable to consent because of their **age**. All penal codes specify an age before which an individual is not recognized as able to consent to sexual activity. When sexual acts are committed against an individual below this age threshold it constitutes a criminal offense that is commonly referred to as child abuse or statutory rape. Most jurisdictions also specify additional sexual acts that constitute criminal offenses on the basis of **age combinations between the victim and suspect** and/or the **position of trust, authority, or supervision held by the suspect** (e.g., teacher, coach, clergy member, counselor).

- For example, Connecticut has an offense of “second degree sexual assault” that is charged when sexual penetration is committed against a victim who is 13-15 years old by an offender who is 2 or more years older than the victim.
- Illinois includes in their statutory definition of criminal sexual assault any sexual penetration committed against a victim who is 13-17 years old by an offender who is in “a position of trust, authority, or supervision in relation to the victim.”

As with other situations in which no force is required, sexual assault crimes of this type are established with the following elements:

Sexual Penetration + Victim Age / Suspect Age / Suspect Position + Suspect Knowledge of Victim Age = Sexual Assault

The investigation must therefore focus on establishing (1) the sexual acts that were committed by the suspect, (2) the age/position of the victim and suspect, and (3) the suspect’s knowledge of the victim’s age. Again, consent is not an issue in these cases because the victim is not legally recognized as being able to consent to sexual activity. For these cases, investigators do not need to provide any evidence of force, threat, or fear to establish the elements of the offense, because no force is required for the sexual act to constitute a criminal offense. Rather, the defense can only (1) deny that the sexual acts were committed by the suspect, (2) contest the age/position of the victim and/or suspect, or (3) deny that the suspect knew the victim’s real age.

Other Situations in Which No Force is Required

Many jurisdictions specify a number of additional situations in which no force is required for sexual acts to constitute criminal behavior. For example, some jurisdictions prohibit specified sexual acts committed by psychotherapists, doctors, or other service providers with their patients/clients. Some also outlaw sexual acts that are committed using a false representation of identity. Of course, all penal codes prohibit certain sexual acts committed by family members, and the elements of these offenses are spelled out in the relevant sections.

Other Types of Evidence

Throughout this module, we have primarily discussed the types of evidence required to prove elements of the various criminal sex offenses. Thus, evidence establishing that sexual acts were committed by the suspect will address one element of each offense. Other elements are met with evidence documenting the presence of force, threat, or fear in the situation, the victim's age, unconsciousness, or incapacitation, or the position of trust or authority held by the suspect. Law enforcement investigators must understand these elements of the various offenses in order to determine the purpose for each piece of evidence uncovered during the investigation.

The four primary purposes for evidence in a sexual assault case are:

- Establishing an element of the offense.
- Connecting the suspect with the victim and/or crime scene(s).
- Reconstructing or corroborating the victim's account of events.
- Reconstructing or corroborating the suspect's account of events.

We have already discussed these purposes to some extent. Further guidance is also provided in other modules such as [Preliminary Investigation: Guidelines for First Responders](#) and [Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault](#). However, we want to take a moment to discuss the last two purposes, at least briefly, because they are typically met either with **associative evidence** or evidence that is **reconstructive or corroborative** in nature. These issues are particularly relevant to the questions of law and investigative strategy highlighted in this module.

Associative Evidence

Associative evidence essentially connects one person either to a particular place or to another person. For example, fingerprints or DNA material found at the scene of the crime can establish that the suspect and/or victim was in that location at some point. Blood, semen, or other bodily fluids collected from the victim's body can similarly connect the suspect with the victim. This type of evidence is typically thought of as

identification evidence, which is one particular use for associative evidence. In addition, trace evidence such as hair, fibers, and other debris can be used to connect one person with another person or place, even though it may not be used to identify an individual with any degree of certainty.

- Associative evidence will be crucial when investigating any type of criminal sex offense, just as it is with any other crime.
- The need for associative evidence again highlights the importance of conducting a forensic examination with the suspect, in order to collect reference standards and link the suspect evidence gathered from the victim or crime scene(s).

These issues are discussed in greater detail in the module entitled: [Laboratory Analysis of Biological Evidence and the Role of DNA in Sexual Assault Investigations](#).

Reconstructive/Corroborative Evidence

Reconstructive or corroborative evidence is used to help prosecutors, judges, and jurors to visualize the entire context of the events described by the victim and other witnesses. This type of evidence is also used to demonstrate consistency between the victim's and suspect's account of events. For example, photographs of the crime scene or victim's body can help to corroborate the victim's account of what happened. A detailed account of the victim's thoughts and feelings during the assault can also reconstruct the reality of events for others to understand in its entirety. Again, these issues are discussed at greater length in [Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault](#). However, they are worth mentioning here because they constitute an important component of understanding issues of law and investigative strategy.

Resource: Expert Interview

In this [video interview](#), Shirley Paceley shares a story that demonstrates the unique strategies used by an investigator to corroborate the account of a victim with disabilities, a case which otherwise would have been declined. This story is approximately three minutes into the video interview.

A Note Regarding Attempt Offenses

Finally, investigators need to be familiar with the statutory requirements for an **attempt offense**. For example, some jurisdictions require the following elements to establish an attempt offense:

- An intent to commit a criminal offense.
- A substantial step toward committing that act.

In these cases, the investigator must make the determination that an attempted offense occurred based on the entire context of the situation. It is not possible to make a simple list of behaviors that would constitute a substantial step toward committing the offense. Rather, the determination must take into account a number of factors regarding the victim, suspect, and situation.

To illustrate, when seeking to uncover evidence of the suspect's intent in the situation, it is important to ask the victim questions such as the following:

- **What did the victim think the suspect was going to do?** This may be based on prior contact with the suspect, including such behaviors as battering or stalking.
- **What did the suspect say?** Statements made by the suspect are often key in communicating his intent to the victim.
- **What did the suspect do?** For example, did he tear at the victim's clothing, or begin removing his own?
- **What was the suspect's physical appearance?** For example, were his pants unzipped, or his penis exposed? Did he have an obvious erection? The question of intent can also be explored by investigating factors such as the following:
 - **Does the suspect's behavior match that of other crimes in the area?** If so, the suspect's behavior could potentially link together several crimes committed by the same person, and therefore establish his intent in the current situation.
 - **Does the suspect have any prior criminal history or any evidence of an existing paraphilia?** This can be addressed with the investigation, particularly if the suspect already been identified.

By investigating such factors, it is likely that critical information will emerge to establish the suspect's intent in the reported situation.

Conclusion

Hopefully, the charts provided with this module will be useful for investigators and others, by providing a conceptual framework for penal code definitions of criminal sex offenses. Clearly, this information must be adapted on the basis of local information. However, this framework is designed to help law enforcement professionals determine what "type" of case they are handling, predict which defense is most likely to be raised, and guide an investigative strategy toward overcoming that particular defense.

This kind of strategy can help an investigator to:

- Define what issues are likely to be raised in court.
- Prioritize the value of various evidence.

- Determine the value of statements made by the victim, witness, or suspect.

It bears repeating, however, that investigators must remain flexible because defenses are not entirely predictable and may change – even during the course of a single investigation.

- For example, an identification case could switch to consent, if the defense realizes that DNA or other evidence has conclusively established that the suspect did in fact commit the reported sexual act(s) against the victim.
- Of course, the fact that the suspect switches defense strategies at any point will be used against him by the prosecution. It must therefore be documented carefully.

Keeping this framework in mind can help officers and investigators avoid errors such as focusing on issues of identity in a case where the victim and suspect know each other or struggling to prove force in a case where the victim is legally recognized as unable to consent.

Resource: Expert Interview

In this [video interview](#), Detective Justin Boardman describes the most important things investigators should do throughout a sexual assault investigation.

For More Information

A number of helpful tools have been developed by the International Association of Chiefs of Police (IACP), as part of their Police Response to Violence Against Women Project. These tools include a [Model Policy on Investigating Sexual Assaults](#), a supporting [Concepts and Issues Paper](#), a [Supplemental Report Form](#), and a [Sexual Assault Report Review Checklist](#) for sexual assault that includes helpful guidelines for case documentation, effective techniques for victim and perpetrator interviews, and a pocket “tip” card for officers. There are also three [training videos](#) that can be used along with the corresponding [discussion guide](#).