

Presentation to the Special Legislative Committee on Sexual Assault in Montana

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In a survey of more than 28,000 students at 27 colleges and universities in the U.S., it was found that:

- One in 4 women and one in 20 men had been victims of unwanted sexual conduct
- Only 13% of incapacitated victims of 25% of victims of forcible rape reported their crimes to anyone
- A large majority of victims knew their attacker

- Didn't report because "It wasn't serious enough". Also because they were ashamed, embarrassed or thought it would be too emotionally difficult.

Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct, 2015

Who DOES this?

- "Have you ever forced someone to have sexual intercourse when they didn't want to by holding them down, twisting their arm, etc?"
- Civilian population: 6% of college age men said yes. Of that 6%, 63% were serial rapists averaging 4 rapes per rapist.
 - Lisak and Miller, Repeat Rape and Multiple Offending Among Multiple Offenders, *Violence and Victims*, Vol. 17, No. 1 2002
- Military population: 13% said yes. Of that 13%, 71% were serial rapists averaging 6 rapes per rapist.

By Stephanie K. McWhorter, Valerie A. Stander, and Lex L. Merrill, Naval Health Research Center; and Cynthia J. Thomsen and Joel S. Miller, Northern Illinois University Published in *Violence and Victims*, Volume 24, Number 2, 2009

Times/CNN Poll (1991)

38% of the men and
37% of the women
said that a raped woman
is partly to blame
if she dresses provocatively.

Rhode Island Study of School Children (1,700 6th to 9th grade students)

50% of the boys
And 50% of the girls said
a woman walking alone
is **asking** to be raped.

Juror Decision Making

- Studies of *actual* jurors over time demonstrate:
 - Jurors make their decisions on an “assumption of the risk” theory
 - Jurors admit to disregarding the evidence and making their decisions based on their perceptions of the victim’s character and lifestyle

– Calvin and Zeisel, Gary La Free

A Time For Change; Revisiting Montana Sexual Assault Laws

- Sexual Assault and Consent statutory structures
- Statutes of Limitations
- False Reports

Historical glance backward

- Sexual assault laws are in an evolutionary process
- Past progress; we went from
 - Women as property to eliminating the “marital rape exceptions” in the law across the US
 - Requiring women to fight to the “utmost ability” before considering criminal charges to removing “resistance” as an element of the offense
 - Making the victim’s past sexual conduct a focus of the case to passing Rape Shield Laws to protect a victim or witnesses past sexual history from unfair use by defense
 - Removing the “manner of dress” as a defense for sexual assault
 - Never considering men as victims to covering all people

Historical glance backward

- Recent progress
 - FBI broadening what is reported in the Uniform Crime Reports to include penetration without consent rather than requiring “force” and including other kinds of sexual assault
- Current trends
 - Separating out the element of “force” from the definition of “consent”
 - Take what we know about how sex offenses are committed and change the laws to reflect that reality
 - Affirmative Consent laws or policies (for colleges)
 - “Revenge Pornography” laws

C.R.S. § 18-7-107 Posting a private image for harassment (7/14)

(1)(a) An actor who is eighteen years of age or older commits the offense of posting a private image for harassment if he or she posts or distributes through the use of social media or any web site any photograph, video, or other image displaying the private intimate parts of an identified or identifiable person eighteen years of age or older:

(I) With the intent to harass the depicted person and inflict serious emotional distress upon the depicted person;

(II)(A) Without the depicted person's consent; or

(B) When the actor knew or should have known that the depicted person had a reasonable expectation that the image would remain private; and

(III) The conduct results in serious emotional distress of the depicted person.

(b) Posting a private image for harassment is a class 1 misdemeanor.

Basically, what is sexual assault?

- A prohibited act committed against a victim without the consent of the victim
- Goal: To have a law that responds to the criminal conduct committed by sex offenders without undue encumbrances in the statute

What it looks like in different states

- Prohibited act
 - Some states only require the ACT without consent
 - Some states (30) require that the ACT be forceful in some way (“without consent and with force”)
- Consent
 - Some states (including Colorado) define consent as affirmative, voluntary action
 - Some states require force before non consent can be established
 - Most states have language for when a victim is “incapable” of consenting due to alcohol or other factors

Consent Defined C.R.S. 18-3-401 (Colorado)

- Cooperation in act and attitude pursuant to an exercise of free will with knowledge of the nature of the act
- Submission under the influence of fear shall not constitute consent
- A previous relationship shall not constitute consent

Best Example First-Wisconsin

“Third degree sexual assault: Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class G Felony”

“Consent” as used in this section means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact”

Wisconsin’s law has greater penalties when other circumstances are present

- Class B
 - Causes great bodily harm or pregnancy
 - Threat of use of a dangerous weapon
 - Aided or abetted by one or more other persons
- Class C
 - Threat of force or violence
 - Causes injury, illness, mental anguish requiring psychiatric care
 - Mental illness
 - Etc.

Wisconsin's law is clear and unambiguous

- The consent of the victim is not contingent upon the conduct of the offender
- Lack of consent is not in RESPONSE to something done towards the victim (such as in Montana where the victim must be "compelled" to submit or somehow incapable of consenting)
- The consent provisions are not undermined by a requirement of force to meet the statutory requirement for sexual assault

Comparison of laws

Wisconsin

- Sexual intercourse without the consent of the victim
- "Consent" as used in this section means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact"

Montana

- Sexual intercourse without consent
- Consent: "compelled to submit by force against the victim or another"
- Or incapable of consent which means "mentally defective or incapacitated, physically helpless, overcome by deception, coercion or surprise or under 16 and under authority of someone else"

Sample Scenario

- Victim and defendant are at a party together at the victim's house. Victim goes to bed in her own room. Victim is awakened by defendant climbing into her bed, taking her under ware off. The victim tells him she does not want him to do this. Defendant penetrates the victim with his penis. Victim continues to tell him "no, please stop".

Does this meet the statutory requirements of sexual assault?

Wisconsin

- Yes
- No freely given agreement to the sexual conduct
- No
- Victim not compelled
- Not "overcome" by surprise etc.

Other impediments to clear statutory construction

- Some states include language such as “implied acquiescence”
- Some state do not have a statutory definition of “consent”; it is interpreted in the case law
- Some states are silent on the issue of withdrawn consent

Statutes of Limitations

- Montana
 - Sexual Assault Against a Minor: 10 years after the victim turns 18
 - Sexual Assault; Sexual Intercourse Without Consent: 10 years
 - Other forms of felony Sexual Assault: 5 years

Statutes of Limitations Across US

- Sexual Assaults Against Children
 - Some states have no SOL (23 states)
 - Some have X number of years after child turns 18 (10 years, 20 years, until victim reaches age 50)
 - Some states have X number of years after the offense is disclosed

Understanding False Reports

Let's talk about the elephant in the living room



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False Reporting – Research

EVAW: Making A Difference Project

- Multi-site study; 8 U.S. communities
- 2059 sexual assaults reported to police
- Police trained to apply consistent definition / findings of false report

7% False Reports

False Reporting – Research

Dr. David Lisak et al. 2010 – Research

- Extensive Research on a University Campus
- Reviewed all sexual assault cases 1998-2007

5.9% False Reports

False Reporting – Research

British Home Office Study (2643 Rapes)

- Police indicate 8% false report
- Researchers criteria for false report:
 - Clear and credible admission
 - Or strong evidential grounds
- **Researchers** determined only **2.5%** were false report

Kelly, Lovett and Regan 2005

False Reporting – Research

Australia:

- Researchers Heenan and Murray 2006
 - Examined 812 sexual assault cases
 - Used quantitative and qualitative analysis
- 2.1 % false report rate

False Reporting – Research

Research conclusion:

Estimates for the percentage of false reports begin to converge around 2% – 8%

Recommended Reading:

“False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault”

By Dr. Kimberly A. Lonsway, SGT Joanne Archambault (Ret)

Dr. David Lisak

http://ndaa.org/pdf/the_voice_vol_3_no_1_2009.pdf