

ESTABLISHING PENETRATION IN SEXUAL ASSAULT CASES

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INTRODUCTION

Criminal acts of sexual violence generally fall into three categories: exposure, contact, and penetration. While prosecutors introduce evidence to establish the statutory elements at trial, defense strategies focus on targeting any vulnerability in that evidence. Challenges to identification, consent, and attacks on victim credibility remain the most common defense tactics in any sexual violence crime. Where the charged offense includes an element of penetration, defenses may also include specific challenges to the prosecution's ability to prove that penetration occurred. If the prosecution is unable to prove the element of penetration beyond a reasonable doubt, the accused will be acquitted or convicted of a less serious offense.²

This *STRATEGIES in Brief* explains the legal requirements for establishing penetration in sexual assault prosecutions and offers strategies for effectively identifying, evaluating, and presenting evidence of penetration. First, it summarizes the categories of criminal sex offense statutes and outlines the legal requirements to establish penetration. Second, it provides strategies to prepare for and try sexual assault cases involving penetration. Third, it identifies and offers guidance for responding to common defense challenges to establishing penetration in sexual assault cases.

KNOW YOUR LAW: THE LEGAL DEFINITION OF PENETRATION

The difference between the common understanding of the term "penetration" and the legal definition of the term "penetration" can create confusion for victims, witnesses, and even criminal justice professionals. The consequences of this confusion can result in inaccurate investigative reports, failures to record or preserve critical evidence or statements, or the mischarging of a case. This section, therefore, discusses the legal elements of penetration among the 58 jurisdictions of the United States.³

Sexual penetration crimes include the penetration of the vagina,⁴ anus, or mouth⁵ by the penis or other body part, and also include the penetration of the vagina or anus, or, in rare cases, the mouth, by an object. Penetration with an object is included in all jurisdictions' sexual assault statutes except Louisiana's and American Samoa's.⁶ Penetration of a victim's mouth with an inanimate object is criminalized as a sexual offense only in Alabama, New Hampshire, and under the Uniform Code of Military Justice.⁷ Since penetration of the mouth by an object is not specifically covered by the sexual assault statutes in most jurisdictions, charges for such conduct can be filed under other assault-related crimes or under a provision for a sexually-motivated felony (*e.g.*, certain categories of assault, strangulation, or kidnapping).⁸

Vaginal penetration occurs, under the law, when the penis, other body part, or object enters the vulva or between the labia majora, which is the outermost part of the female genital organ.⁹ Anal penetration occurs, under the law, when the penis, other body part, or object enters the anal opening;¹⁰ at least one court has determined that penetration of the buttocks is insufficient to establish anal penetration under its jurisdiction's definition of sexual intercourse.¹¹ Oral penetration occurs when the penis, other body part, or object enters the lips of a victim's mouth,¹² and has also been found to occur by the act of licking a penis.¹³ In some jurisdictions, the courts have held that penetration can be proven if it occurs through clothing.¹⁴

No jurisdictions require more than “slight penetration,” but not all statutes use the term “slight” in their statutes.¹⁵ In states that have statutes that do not specifically enumerate the requirement that penetration need only be “slight,” one must consult the relevant case law for this element; treatises also provide examples and further guidance.¹⁶ No jurisdictions’ penetration statutes require ejaculation.¹⁷

EVALUATING EVIDENCE AND STRENGTHENING THE CASE WITH CORROBORATION

A sexual assault charge can be proven beyond a reasonable doubt solely with *credible* victim testimony; no corroboration is required in order to establish the elements. Some jurisdictions, however, have statutes or case law that, under limited circumstances, such as when a victim is mentally incapacitated during the assault, require corroborative evidence.¹⁸ Although corroboration is not required, where available, it strengthens the victim’s testimony given the persistence of rape myths, which cause juries to search for reasons to doubt victim testimony in sexual assault cases.¹⁹ Research concerning sexual violence supports some common explanations for the routine lack of “traditional” forms of corroborating evidence in these cases. For example, since these crimes are typically committed in solitude, there are rarely direct eyewitnesses.²⁰ In addition, because the trauma resulting from these crimes may impact the willingness or ability of victims to report,²¹ physical evidence may no longer be available or observable. Further, many sexual assaults do not result in physical injury to a victim’s genitalia. Where injury does exist, medical examinations and records may not observe or document them, due to factors including the examiner’s level of training and experience, whether enhanced observation equipment²² was used, or if there was a gap in time between the incident and the examination.²³ Even in cases where traditional corroboration is present, defense attorneys will still challenge evidence of penetration.²⁴ These prosecutorial issues demonstrate the need for the thorough and accurate identification, review, and documentation of any and all corroborating evidence in sexual assault cases.

Victim Testimony

When evaluating a case, it is important to remember that victims may be impacted by the effects of trauma when they report sexual assault crimes, which in turn may affect their ability to communicate with authorities, family, and friends.²⁵ Their communications may be nonlinear, piecemeal, disjointed, or inconsistent, and, when combined with an inaccurate or incomplete understanding of the *legal* definition of penetration, may result in various professionals’ documentation or categorization of events that fail to capture all of the facts or criminal elements. A trauma-informed approach to screening and victim interviews can improve accuracy while providing important support to victims, a critical component of maintaining victim engagement with the system.²⁶ Prosecutors using a trauma-informed approach can have the thorough discussions with victims necessary to ensure the elements can be proven, while reducing any collateral negative impact that participation in the prosecutorial process can have on the victim.

In many cases, a victim’s testimony is the best way to establish the element of penetration. Evidence of sensory details, such as what a victim heard, saw, felt, tasted, and even smelled, is highly relevant evidence. The specificity that this category of evidence provides strengthens the credibility of any witness’s testimony, but can prove particularly powerful when the ability to prove a charge rests with the victim’s testimony and her/his credibility. Regardless of whether an event occurred before, during, or after penetration, the event and its associated sensory details may be relevant to establishing penetration.

PRACTICE TIPS

The below list is not exhaustive but provides examples of topics that can be addressed in the interview and direct examination of the victim:

- A perpetrator's threats, commands, or other words can indicate an intent to penetrate the victim.
- The exposure of the perpetrator's penis, finger, or penetrating object can corroborate the intent and ability to perform penetration.
- The physical feelings that the victim experienced can also demonstrate penetration, including, if applicable, the perpetrator's failed attempts to penetrate the victim prior to achieving penetration.
- If the offender penetrated the victim's mouth, testimony regarding a gagging sensation, taste, or the feeling caused by the penis or object against the victim's mouth or clenched teeth can be sufficient to establish penetration achieved between the victim's lips.
- The perpetrator's removal of clothing (perpetrator's and/or victim's) can demonstrate the intent and ability to penetrate the victim.
- The use of a condom or questions about the victim's use of prophylactic can indicate an intent to penetrate.
- The victim's state of mind (*e.g.*, fear of sexually transmitted infection (STI) or pregnancy, or fear of the perpetrator) can corroborate the perpetrator's act of penetration.
- The victim's contraction of an STI or post-assault pregnancy.
- Leakage of semen, blood, or other fluid.
- Post-assault injury or discomfort.
- Post-assault pain during urination or bowel movement.

Additional sources of evidence can support the victim's testimony of penetration and related facts. In cases where the victim is unable to testify to the assault, *e.g.*, if she was unconscious or incapacitated during the assault, or where she is unable to communicate at the time of trial, those additional sources of evidence may be necessary to establish penetration. A discussion of different types of evidence follows below.

Witness Testimony

The act of penetration may have occurred in a public place or a place easily accessible by other persons. Where a rape or sexual assault occurs in the presence of one or more witnesses, there may be eyewitness testimony that is relevant to the act of penetration.²⁷ Witnesses may have directly observed the penetration of the anus, vagina, or mouth. Even where witnesses do not actually observe penetration by a body part or object, they may have witnessed other events that are relevant, such as the perpetrator's use of a condom, the perpetrator's or the victim's own statements, or statements by bystanders or co-conspirators, which can directly or circumstantially prove penetration occurred.²⁸ Witnesses may have observed all or part of the assault, and perhaps for just a short period of time. The act of penetration can take just one second, and the opportunity for the perpetrator to commit the act may require little time and limited privacy.

Defendant Statements

Where defendants choose to make statements to investigators, even their self-serving statements may help the prosecution establish penetration. Examples include defendants who allege the victim consented to the penetration, allege the defendant acted “by mistake,” or offer other noncriminal explanations for their actions. In their statements, perpetrators may lock themselves into a specific defense (*e.g.*, consent), in which they admit penetration, and therefore establish or corroborate a required element. Even where such statements do not discuss penetration specifically, they may still corroborate penetration by implication. A defendant’s statement can bolster a victim’s description of penetration by corroborating words spoken by the victim during the incident that are relevant to establishing penetration, such as exclamations of pain, while providing an alternative explanation for them. Defendant statements may also include discussions about the victim’s stated concern about pregnancy or sexually transmitted infections (STIs) or the perpetrator’s lack of condom use. Finally, defendants alleging consent may describe their own concerns about pregnancy or STIs. When prosecutors focus on the more obvious defense strategies, they may overlook or minimize corroborating evidence in defendants’ own statements.

Prosecutors should carefully weigh the question of whether to introduce a defendant’s self-serving statement. Although the statement may help prove the element of penetration, its introduction may provide critical support for the defense theory without necessitating the defendant’s testimony. The last thing that the prosecution wants to do is establish the element of penetration but lose the case because the prosecution handed the entire defense strategy to defense counsel by introducing an out-of-court statement that the defense would not otherwise have been able to introduce.

Where the defendant takes the stand, prosecutors can, through cross-examination, corroborate the act of penetration, thereby foreclosing any defense attempt to argue that the element of penetration was not proved beyond a reasonable doubt. In cases where the defendant does not testify, a prosecutor may choose, under some circumstances, to seek to introduce defendant’s statements, where permissible under the rules of hearsay, through the victim, or potentially through other witnesses to support other evidence of penetration.²⁹

Digital Evidence

The availability of video and photographic evidence of sexual assaults has increased along with the explosion of smartphones, apps, surveillance video, and social media. If such evidence is present in a case, it may provide important corroboration of penetration. However, even where a video clearly appears to show penetration, a defense attorney may still argue that the fact finder cannot be certain that the tape depicts penetration due to the camera angle, distance from the subject, or other factors. Prosecutors should carefully review such video evidence to determine its potential for investigative leads and weight at trial.

Showing digital evidence at trial in a public courtroom can be traumatic to the victim.³⁰ Prosecutors should consult with the victim and be very thoughtful in deciding whether and how to introduce this type of evidence. Significantly, prosecutors should take all measures to protect the victim’s privacy and integrity, to include ensuring the victim is supported, notifying the courtroom if the video is determined to be critical in order to protect privacy concerns, communicating with the victim about when the video will be shown in court, and taking other formal and informal steps to protect the victim’s privacy.

Physical Evidence

It is well-settled in the case law that the victim need not suffer vaginal or anal *injury*³¹ to establish that a sexual assault occurred. The decisional law is consistent with the overwhelming body of medical research that rejects a reliance on the presence of genital injury to determine whether penetration occurred.³² Injury, while not required to prove penetration,

can nevertheless provide critical corroborative evidence of penetration. Abrasions to the labia³³ or mucous membrane of the vagina,³⁴ redness and swelling,³⁵ lacerations,³⁶ and bruising³⁷ are some findings that can be probative evidence of penetration.

The presence and even location from which DNA, sperm, saliva, or other biological matter is recovered can also be relevant to establishing penetration,³⁸ although it is neither required nor always dispositive to the issue of penetration in a sexual assault case.³⁹ For example, in a case of anal penetration, the recovery of the victim's fecal matter from the crime scene, or on the victim's or perpetrator's clothing, could be highly relevant to establishing penetration. The recovery of physical evidence from clothing, bedding, carpets, or other surfaces or materials that may have touched the perpetrator's or victim's body parts or fluids can also strengthen a prosecution.

Medical Evidence

The findings of a medical clinician who performed a sexual assault forensic examination can be relevant to establishing penetration. First, and foremost, even when sexual assaults have recently occurred,⁴⁰ there may not be any visible injury.⁴¹ The literature discusses many reasons for this. One example is where an injury's visibility may be impeded due to an examination done with visual inspection alone, without the aid of a colposcope, or without the use of toluidine dye.⁴² Injuries may also be less visible in cases where sexual assault victims have been unable or unwilling to seek medical treatment after an assault, and, therefore, time has elapsed between the assault and an examination.⁴³

Where injuries are present, they may be found on either internal or external genitalia:

Ano-genital injury location can be classified as external (labia majora, labia minora, periurethral area, perineum, and posterior fourchette), internal (fossa navicularis, hymen, vagina, cervix), and anal (anus and rectum).⁴⁴

The *medical* definitions of "internal" and "external," however, do not align with the *legal* elements of penetration, and may be misused by the defense to create an apparent contradiction in the prosecution's evidence regarding the occurrence of penetration. To avoid confusion regarding penetration and medical evidence, prosecutors should consult the literature and medical experts, and should consider calling such an expert at trial.⁴⁵ It is important to note that evidence external to the labia majora and vulva, as well as external injuries to the victim's non-genital areas, may still provide important details relevant to the determination of whether penetration occurred by supporting and thereby strengthening the other evidence offered by the prosecution.

Penetration can also be established through testimony regarding the penis rubbing between the labia,⁴⁶ and through circumstantial evidence, including pregnancy, certain STIs, and bleeding.

CONCLUSION

Prosecutors approach sexual assault cases with the goal of providing trauma-informed support to victims while trying to gather and corroborate as much evidence as possible. Due to the complexities of such cases, it is easy to overlook vulnerabilities in what may initially appear to be the most direct elements of a charge, particularly penetration. Even the most seemingly straight-forward case is vulnerable to defense attacks on the evidence. Defense strategies most commonly rely on the ability to distract fact finders from the evidence introduced by the prosecution. In the case of penetration, prosecutors can counter defense attempts to obscure the evidence by proactively preparing to introduce evidence that clearly establishes penetration, as well as other required elements, and corroborates details wherever possible, a strategy that is crucial to keeping victims and communities safe while preventing offenders from escaping accountability.

ENDNOTES

- 1 Jennifer Long is the Director of AEQUITAS, Viktoria Kristiansson is an Attorney Advisor at AEQUITAS, and Charlene Whitman-Barr is an Associate Attorney Advisor at AEQUITAS. The authors wish to acknowledge the following individuals for their significant contributions to the research and development of this article: Christopher P. Mallios, Attorney Advisor, AEQUITAS; Teresa P. Scalzo, JD; Gretta Gardner, JD, and Sam Lipson, student, Georgetown University Law School. This article augments the “Penetration” section of CAROL TRACY, TERRY FROMSON, JENNIFER LONG, CHARLENE WHITMAN, AEQUITAS: THE PROSECUTORS’ RESOURCE ON VIOLENCE AGAINST WOMEN, RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM (2013).
- 2 Depending on the law of the particular jurisdiction, the failure to prove penetration can result in a less-seriously graded criminal offense. *See, e.g.*, 18 PA CONS. STAT. ANN. § 3126 (2006) and 720 ILL. COMP. STAT. ANN. 5/11-1.50 (a)(1) (West 2011).
- 3 The 58 jurisdictions include all 50 States, the five inhabited U.S. Territories (American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands), the District of Columbia, Federal, and Military jurisdictions. Notably, the FBI’s Uniform Crime Report (UCR) is NOT included, because it is *not* a criminal statute; the UCR is a data collection tool. In December 2011, the FBI approved an expansion of the UCR definition of rape to include: penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. Because the previous collection of UCR rape data included only penetration of a vagina by a penis, the FBI’s national snapshot of this crime did not reflect the reality of the types of perpetration. The new definition not only comports with research and evolving laws, but will lead to a more accurate collection of data on sexual assault crimes.
- 4 As discussed below, although statutes primarily use the term vagina, penetration is achieved when the vulva or labia majora is penetrated.
- 5 It is important to recognize that jurisdictions use different—and at times unfamiliar—terms to describe anatomy. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 3101 (2012), which uses the term “os” to address oral penetration.
- 6 *See, e.g.*, LA. REV. STAT. ANN. § 14:41-43; AMERICAN SAMOA CODE ANN. § 46.3604-10. *See* LA. REV. STAT. ANN. § 14:41-43; AMERICAN SAMOA CODE ANN. § 46.3604-10. In Louisiana, however, “sexual battery” is the intentional *touching* of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender, or the *touching* of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim [emphasis added]. LA. REV. STAT. ANN. §43.1. But *see* State v. Burt, 828 So. 2d 717 (La. Ct. App. 2002); State v. Hampton, 716 So.2d 417 (La. Ct. App. 1998); and State v. Ray, No. 12-1217, 2013 WL 1809908 (May 1, 2013) (where sexual battery statute includes digital penetration).
- 7 *See* ALA. CODE § 13A-6-65.1 (2012); N.H. REV. STAT. ANN. § 632 A:1(V)(a)(6)(2012). Most jurisdictions, however, do not criminalize this behavior. *See, e.g.*, N.J. STAT. ANN. § 2C: 14-1(c) (“‘Sexual penetration’ means vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the *anus* or vagina either by the actor or upon the actor’s instruction. The depth of the insertion shall not be relevant as to the question of commission of the crime.”) (emphasis added).
- 8 For an example of a statute addressing sexually motivated felonies, see N.Y. PENAL LAW § 130.91(McKinney 2011).
- 9 James L. Rigelhaupt, Jr., Annotation, *What Constitutes Penetration in Prosecution for Rape or Statutory Rape*, 76 A.L.R. 3d 163, § 3 (1977). *See* JENIFER MARKOWITZ, A PROSECUTORS’ REFERENCE, MEDICAL EVIDENCE AND THE ROLE OF SEXUAL NURSE EXAMINER IN CASES INVOLVING ADULT VICTIMS 23 (Dec. 2010), available at www.aequitasresource.org/library.cfm.
- 10 *See* Rigelhaupt, *supra* note 9. *See also, e.g.*, THE MERCK MANUAL OF MEDICAL INFORMATION 546 (Mark H. Beers et al. eds., Paw Prints 2d ed. 1997) (defining the anus as: “the opening at the end of the digestive tract where waste material (stool, feces) leaves the body.”); JENIFER MARKOWITZ, AEQUITAS, A PROSECUTOR’S REFERENCE: MEDICAL EVIDENCE AND THE ROLE OF SEXUAL ASSAULT NURSE EXAMINERS IN CASES INVOLVING ADULT VICTIMS 11 (2010) (defining the anus as the “opening of the rectum”). *See* Pelvis and Perineum in RICHARD L. DRAKE, A. WAYNE VOGL & ADAM W.M. MITCHELL, GRAY’S ANATOMY FOR STUDENTS, THIRD EDITION 11 (Churchill Livingstone 2010), available at http://www.hopkinsmedicine.org/mcp/Education/300.713%20Lectures/2014/Byung_Kang_Pelvis_09.15.2014.pdf.
- 11 *See, e.g.*, State v. A.M., 163 Wash. App. 414 (2011) (addressing child rape in the first degree but relying on definition of sexual intercourse in sex offenses part of statute which is applicable to adult victims as well).
- 12 *See, e.g.*, Commonwealth v. K.M., 452 Pa. Super. 7, 15 (1996) (a case involving the rape of a child, where female defendant’s use of her lips to penetrate her daughter’s vagina was sufficient to establish rape).
- 13 *Id.* (citing Commonwealth v. King, 445 Mass. 217, 834 N.E.2d 1175 (2005)).
- 14 *See, e.g.*, Rigelhaupt, *supra* note 9, § 6.5 (citing United States v. Norman T., 129 F.3d 1099 (10th Cir. 1997)); *see also* Aurringer v. State, 695 N.W. 2d 640, 644 (Minn. Ct. App. 2005).
- 15 In the following states the fact that no more than slight penetration is required is established in case law: Arizona, Florida, Georgia, Indiana, Maine, Massachusetts, Mississippi, Texas, and Virginia. AEQUITAS: THE PROSECUTORS’ RESOURCE ON VIOLENCE AGAINST WOMEN, RAPE AND SEXUAL ASSAULT ANALYSES AND LAWS (2014), available at www.aequitasresource.org. *See also*, N.J. STAT. ANN. § 2C: 14-1(c) (which doesn’t use the term however slight but clearly states that a specific depth of penetration is not required: “The depth of the insertion shall not be relevant as to the question of commission of the crime”).
- 16 *See, e.g.*, State v. Torres, 105 Ariz. 361 (1970); Richards v. State, 738 So.2d 415 (Fla. Dist. Ct. App. 2011); State v. Pratt, 309 A.2d 864 (Me. 1973).
- 17 *See, e.g.*, DEL. CODE ANN. tit. 11, § 761 (g)(1) (2011); 33 LAWS OF PUERTO RICO ANN. § 4771 (2011).

- 18 *But see* Davis v. State, 2011 Ark. App. 686, 386 S.W.3d 647 (2011) (a rape victim's uncorroborated testimony describing penetration may constitute substantial evidence to sustain a conviction of rape, even when the victim is a child). Please contact AEQuitas for additional information and guidance.
- 19 *See, e.g.* LOUIS ELLISON & VANNESSA MUNRO, UNIV. OF NOTTINGHAM, UNIV. OF LEEDS, COMPLAINANT CREDIBILITY & GENERAL EXPERT WITNESS TESTIMONY IN RAPE TRIALS: EXPLORING AND INFLUENCING MOCK JUROR PERCEPTIONS (2009), <http://www.rapecrisisScotland.org.uk/workspace/publications/Briefing-Report-Munro.pdf>.
- 20 SERGEANT JOANNE ARCHAMBAULT, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, TRAINING KEY 571: INVESTIGATING SEXUAL ASSAULTS PART I: ELEMENTS OF SEXUAL ASSAULT & INITIAL RESPONSE, 3 (2004), <http://www.theiacp.org/portals/0/pdfs/571InvestigatingSexualAssaultsPart1.pdf>.
- 21 *Victims of Sexual Abuse*, AMERICAN ACADEMY OF EXPERTS IN TRAUMATIC STRESS, <http://www.aeets.org/article123.htm> (last visited Dec. 11, 2014).
- 22 *See, e.g.*, OFFICE ON VIOLENCE AGAINST WOMEN, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS: ADULTS/ ADOLESCENTS, SECOND EDITION 98 (Apr. 2013), <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf> [*hereinafter* National Protocol].
- 23 It is a common misconception that rape causes severe genital injuries to victims. The research shows that injury occurs in a minority of cases and that injury findings in sexual assault forensic examination is often consistent with both forced penetration and consensual penetration.
- 24 *See* Crimesider Staff, *NYPD Officer Michael Pena Convicted of sex crimes, but jury deadlocks on rape*, CBS News (Mar. 29, 2012), <http://www.cbsnews.com/news/nypd-officer-michael-pena-convicted-of-sex-crimes-but-jury-deadlocks-on-rape/>.
- 25 *See* Sandra Bloom, *Understanding the Impact of Sexual Assault: The Nature of Traumatic Experience* in *SEXUAL ASSAULT: VICTIMIZATION ACROSS THE LIFESPAN* 405-32 (A. Giardino et al. eds., GW Medical Publishing 2003), http://www.sanctuaryweb.com/PDFs_new/Bloom%20Understanding%20impact%20sexual%20assault.pdf; *see also* Webinar Recording by Viktoria Kristiansson & Olga Trujillo, *Integrating a Trauma-Informed Response*, <http://www.aequitasresource.org/trainingDetail.cfm?id=112> (recorded Sept. 16, 2014).
- 26 KRISTIANSOON & TRUJILLO, *supra* note 25.
- 27 *See* CRIMESIDER STAFF, *supra* note 24.
- 28 In some cases thorough investigations may reveal perpetrators' additional intent to penetrate victim's vagina, mouth or anus with the intent of causing physical injury or death during their sexual assaults thereby implicating other serious assault statutes. *See, e.g.*, M. DeLisi, *Empirical Study of Rape in the Context of Multiple Murder*, 59(2) J. FORENSIC SCI. 420-24 (Mar. 2014).
- 29 *See* FED. R. EVID. 801; FED. R. EVID. 803.
- 30 Sharon: Clatsop County (Oregon Sexual Assault Task Force)(on file with AEQuitas).
- 31 *See, e.g.*, Rhoades v. State, 504 S.W. 2d 291 (Mo. Ct. App. 1973). The case law also discredits any link between penetration and the condition of the hymen, a theory also long since discredited by the medical community. *See, e.g.*, Green v. State, 200 A.2d 131, 134 (Md. 1966) (where the court reasoned that testimony of a physician that the prosecutrix's hymen was intact was immaterial because it was unnecessary to prove the element of penetration.)
- 32 Marilyn Sawyer Sommers, *Defining Patterns of Genital Injury from Sexual Assault: A Review*, 3(8) TRAUMA VIOLENCE ABUSE 270-80, 271 (July 2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3142744/>.
- 33 *See* People v. Strickland, 286 P. 2d 586 (Cal. Ct. App. 1955).
- 34 *See* Lee v. State, 28 S.E. 2d 465 (Ga. 1943).
- 35 *See* Long v. State, 66 S.E. 2d 837 (Ga. Ct. App. 1951) (relating to a child).
- 36 *See* Shorey v. State, 177 A. 2d 245 (Md. 1962) *cert denied*, 371 U.S. 928 (1962).
- 37 *See* Trimble v. Commonwealth, 447 S.W. 2d 348 (Ky. 1969).
- 38 The absence of physical evidence, alone, should rarely, if ever, be used as a reason not to file charges in a case. However, presence of semen is useful to prove the element of penetration. Semen found inside the victim's body, in the victim's vagina, in the wall of the vagina, in the cervix, and on the defendant's body, have all been held sufficient to establish the element of penetration. State v. Mason, 694 N.E. 2d 932 (Ohio 1998), *cert. denied*, 119 S. Ct. 624 (1998); GA. CODE ANN. § 16-6-1(a) (2011); Walker v. State, 603 S.E. 2d 533 (Ga. Ct. App. 2004). State v. Madore, 900 A. 2d 64 (Conn. App. Ct. 2006).
- 39 *See, e.g.*, DEL. CODE ANN. tit. 11, § 761 (g)(1) (2011); 33 LAWS OF PUERTO RICO ANN. § 4771 (2011).
- 40 For more information on timing considerations for collecting evidence, see THE NATIONAL PROTOCOL, *supra* note 22 at 7-8.
- 41 SOMMERS, *supra* note 32; *See* Hillary J. Larkin et al., *A pilot study to test the differential validity of a genital injury severity scale, in development for use in forensic sexual assault examinations*, 8(1) J. FORENSIC NURS. 30-38, 37 (2012)("[B]oth research and clinical experience underscore that the absence of trauma does not prove consent, nor does consent preclude physical trauma. No scale, regardless of how refined, will be able to answer the ultimate question of whether a sexual assault occurred").

42 SOMMERS, *supra* note 32.

43 Jenifer Markowitz, *Understanding Anogenital Injury in Adult Sexual Assault Cases*, 5 STRATEGIES IN BRIEF 1 (Oct. 2011), available at www.aequitasresource.org/library.cfm.

44 SOMMERS, *supra* note 32.

45 *See, e.g.*, Commonwealth v. Minerd, 562 Pa. 46, 753 A.2d 225 (2000).

46 "Rubbing of the penis between the labia of the female without entering the vagina." C.J. BROWN, GLOSSARY OF TERMS IN CHILD SEXUAL ABUSE (2006), <http://www.ncids.org/Defender%20Training/2006%20Fall%20Conference/Glossary%20Sexual%20Abuse%20Terminology.pdf> (Modified from American Professional Society for the Abuse of Children Descriptive Terminology in Trauma Abuse).

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