DOCTORAL DISSERTATION

Bridging the Gap:
Recommendations for Sex Crime Law Amendment in Japan Through a Comparative Study of Japan and United States

日本の性犯罪処罰規定のあり方に関する比較法的研究
―アメリカ州法の性犯罪規定を通して―

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A DISSERTATION PRESENTED TO
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FOR THE DEGREES OF
DOCTOR OF PHILOSOPHY IN SOCIAL SCIENCES

DEDICATION

This dissertation is dedicated to my family,
who have always supported me and encouraged me to pursue my dreams.
I would not have been able to complete this dissertation without your limitless affection,
encouragement, and support.

ABSTRACT

Globally, sex crimes are some of the most under-prosecuted crimes. Recently, there has been increasing awareness of the long-lasting and devastating consequences for their sex crimes to its victims and the need for proper punishment of such crimes in Japan and many countries around the world. Moreover, there is incessant public criticism in Japan that the existing law accurately captures neither the nature of sex crimes nor the gravity of the harms caused by such crimes. Therefore, this dissertation aims to bridge the gap between the realities of sex crimes experienced by victims and those of the sex crime criminal prosecution through a comparative analysis of the sex crime laws of Japan and the United States.

Recognizing the social significance of effective sex crime laws, every state in the United States engaged in sex crime law reform in the 1960s and 1970s. Many adopted rape shield laws that protect victims during investigations and trials and amended varying elements of sex crimes with the purpose of more effective sex crime prosecution. Even after the initial reforms, the state laws have gone through numerous amendments. Some were considered successful, while others were remembered as misguided attempts. The many successful and unsuccessful attempts that states have made to improve all aspects of their sex crime laws can serve as a meaningful reference when the legislature and the experts of Japan decide whether it is necessary to further reform their sex crimes following the amendment in 2017 and if so, how.

Therefore, this dissertation compares the sex crime laws of the United States and Japan with the purpose of utilizing the lessons learned from the U.S. state laws and their application in evaluating and improving the sex crime laws of Japan. A comparative analysis is made on the legal definitions, structure, and punishment of sex crimes of the two jurisdictions. By comparing legal texts, court decisions, and expert materials, this dissertation analyzes the legal elements of Japan's existing sex crime laws. The dissertation proposes ways to improve the existing laws of Japan by determining whether they render proper and just sex crime punishment, whether they adequately addresses a victim's perspective and protect a victim's rights, and whether they provides sufficient protection for the defendants accused of sex crimes, mainly, the constitutional rights in their criminal defense.

The dissertation evaluates five major aspects of the sex crime laws of the two jurisdictions. First and foremost, to address what is considered sex crimes in Japan and the United States, the dissertation identifies the punishable acts in the sex crimes laws of both countries. *Actus reus*, punishable acts, are compared and examined in two parts: the acts and the means constituting the legal elements of the crime. The composition and robustness of the extra layer of legal protection for vulnerable groups and newly emerging technology-facilitated crimes are also reviewed and compared with those offered under the United States laws to determine if any changes to the existing laws in Japan are necessary. Finally, the subjective element or *mens rea* for the United States sex crime laws are compared.

Based on the discussions, the dissertation recommends amendments to the sex crime laws in Japan by introducing model sex crime laws for Japan. The model sex crime laws serve as a

prototypes of the revised sex crime laws of Japan that reflects the proposed changes with respect to the five aspects analyzed in this dissertation. The dissertation also gauges the potential impact of the recommendations and addresses possible concerns related to them. Through a comparison that provides insights into the effectiveness of sex crime laws in two drastically different jurisdictions, this dissertation aims to assist the incredibly challenging assignment of shaping sex crime laws in Japan.

DECLARATION

I hereby declare the following:
This doctoral dissertation is the product of my original work. The sources used in the dissertation are accordingly cited. The dissertation and the research put towards building the dissertation have been conducted in compliance with the ethical standards and guidelines of Waseda University, Graduate School of Social Sciences.

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I. INTRODUCTION

The ceaseless struggle to close gaps between the realities and harms of sex crimes as experienced by victims and criminal law has brought about social changes around the world,[1] which may be finally opening its eyes to the frequency and seriousness of sex crimes, as well as the magnitude of harm to its victims. Unfortunately, despite substantial legal and policy changes that have been made in many jurisdictions, few have reached outcomes that could be evaluated as successful, with a "justice gap" persisting between the victims' perception or experience of the justice system and court decisions.[2]

In Japan, sex crime law went through a comprehensive reform in 2017,[3] the first major reform since 1907. While it brought about some meaningful changes, including the recognition of male victims and the enactment of a new statute that penalizes sex crimes based on a child–guardian relationship, there has been criticism that sex crime law in Japan needs many more changes to be able to effectively punish sex crimes in the country and provide redemption and restoration for victims. On the other hand, state sex crime laws in the United States have undergone numerous changes since the early 1970s, both in response to criticisms of rape laws and to growing concerns from the public about the increased reports of rape incidents,[4] taking on different elements and being amended yet again for their ineffectiveness or side-effects. Therefore, as the legislature of Japan determines whether it is necessary to further amend its sex crime laws and, if so, how, an analysis of state laws in the United States may provide different points of view.

1. Understanding Sex Crimes: Social Context and Statistics

Sexual violence does not discriminate against the gender of its victims, but it does disproportionally affect some groups. According to the National Intimate Partner and Sexual Violence Survey conducted in 2010 in the United States, nearly one in five women has been raped in their lifetime, reaching about 22 million female victims in the United States, compared to one in 71 male victims, still reaching about 1.6 million in number.[5] Approximately one in 10 women (9.4%) and one in 45 men (2.2%) have been raped by their intimate partner during their lifetime.[6] Another study found an especially high prevalence rate for women in college, finding

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[1] At 180, Clare McGlynn & Nicole Westmarland, Keleidoscopic Justice: Sexual Violence and Victim-Survivor's Perceptions of Justice, 28 Soc. & L. Studies. 2, 179, 201 (2009).

[2] *Id*.

[3]刑法の一部を改正する法律(平成 29 年法律第 72 号).

[4] At 121, Cassia C. Spohn, The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms, 39 Jurimetrics J. 119-130 (1999).

[5] At 18, Michele Black, Kathleen Basile, Matthew Breiding et al., The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report. (2011)(last accessed Nov. 10, 2021), Retrieved from the Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf

[6] At 1, Matthew Breiding, Jieru Chen & Michele Black Intimate Partner Violence in the United States — 2010 (2014)(last accessed Nov. 10, 2021), Retrieved from the Centers for Disease Control and Prevention, National Center for Injury Prevention and Control: http://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf

that one out of five undergraduate women experienced sexual assault or attempted sexual assault during their college years.[7]

The profound damage to victims has also been evidenced by psychological research. It has long been established that many sex crime victims suffer from chronic physical or psychological conditions, with the American Medical Association reporting a finding of such conditions in four out of five rape victims.[8] Another study, based on a sample of 393 female undergraduate students, found that the experience of both adult and child sexual victimization predicted suicidal behavior, finding that one in four victimized respondents, in contrast to approximately one in 20 non-victimized respondents, had engaged in a suicidal act.[9]

While victims' suffering and the degree of harm caused by a violation to their sense of safety and integrity cannot be quantified, the mere financial cost of rape can illustrate how it burdens society. According to a study led by the United States Department of Justice and National Institute of Justice, considering only tangible out-of-pocket costs, the average rape or attempted rape case (excluding child abuse) costs $5,100, finding losses worth $2,500 in mental health care, $2,200 in productivity, $430 in medical costs, $100 in property loss and damages, $37 in police and fire services, and $27 in social and victim services.[10] with most of the cost going to the medical and mental health care of the victims, in addition to the $15,000 to $20,000 annual cost of a prison cell.[11] The study additionally found that if losses per victimization of rape or attempted rape are to be quantified, the average rape costs about $87,000, finding losses worth $81,400 in quality of life,[12] based on the regression analysis of jury verdicts.[13] This number, which is admittedly lower than estimated in other studies,[14] captures only a small part of the whole picture, but it presents the injury that sex crime brings to society.

However, despite its high prevalence and apparent harm in the United States, rape is considered "the most under-reported crime."[15] According to an analysis conducted by the Bureau of Justice Statistics, the United States Department of Justice, on rape and sexual assault occurring from 1992 to 2000, more than half of rapes and sexual assaults against females (63%) were not reported to the police.[16] The rate of non-reporting was higher when the offender was a current or ex-husband or boyfriend, reaching three-fourths of victimization cases, 77% of completed rapes, 77% of attempted rapes, and 75% of sexual assaults.[17]

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[7] Christopher Krebs, Christine Lindquist, Tara Warner et al., The Campus Sexual Assault (CSA) study: Final report (2007)(last accessed Nov. 10, 2021), Retrieved from the National Criminal Justice Reference Service, http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf

[8] American Medical Association, Strategies for the Treatment and Prevention of Sexual Assault. (1995).

[9] Susan Stepakoff, Effects of Sexual Victimization on Suicidal Ideation and Behavior in U.S. College Women, 28 Suicide & Life-Threatening Beh. 1, 107, 126 (1998).

[10] At 9, Ted Miller, Mark Cohen & Brian Wiersema Victim costs and consequences: A New Look, NCJ 155282, (1996) (last accessed Nov. 10, 2021), Retrieved from the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice: https://www.ojp.gov/pdffiles/victcost.pdf

[11] *Id*. at 1.

[12] *Id*. at 9.

[13] *Id*. at 22.

[14] *Id*. at 23.

[15] At 2, National Sexual Violence Resource Center, Info & Statistics for Journalists: Statistics about Sexual Violence (2015).

[16] At 2, Callie Rennison, Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000, NCJ 194530, (2002)(last accessed Nov. 10, 2021), Retrieved from the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics: https://bjs.ojp.gov/content/pub/pdf/rsarp00.pdf

[17] *Id*. at 3.

The statistics on the rate of reporting do not present a very different picture in Japan. While the sample is limited compared to that of the United States, according to the report based on a survey of 3,500 respondents, while the reporting of sexual harm indicates much less prevalence (only 30 out of 1,812 female respondents and five out of 1,688 male respondents reporting sexual victimization[18]), only five responded that they reported to the police.[19]

2. Overview: Approach and Outline

This dissertation takes on the unique challenge of engaging in a comparative analysis of the sex crime laws of Japan and the United States. Specifically, the relevant sections of the Penal Code of Japan are compared with various state sex crime laws, with a special focus on the criminal elements of various sexual offenses and court decisions. The purpose of this comparison is to evaluate the effectiveness and problems of Japan's current legal elements of sex crime statutes and to consider proper ways of improving them. The reason for using the U.S. state penal laws is threefold. First, as state sex crime laws take on vastly different forms and elements, they provide diverse examples for Japan to consider. Second, as state sex crime law reforms have taken place since the early 1970s, the results could inform the legislature of Japan as it considers future directions for its sex crime laws. Finally, as many court decisions on sex crimes have been published in the United States, an analysis of state sex crime statutes, alongside court cases, can provide insightful information about how a statute with certain legal elements would operate judicially. This dissertation, therefore, reviews the text of the sex crime laws in Japan and the United States, analyzes court cases and expert opinions on the laws, and, finally, makes a recommendation for revising sex crime laws in Japan upon the evaluation of their effectiveness.

This dissertation consists of six chapters. Before going into a detailed comparative analysis of sex crime laws, the important question of why sex crime should be punished is first addressed in Chapter II, introducing a discussion about the protected interest in sex crimes in Japan and legislative intent in the United States. After establishing the purpose of enacting sex crime laws in Japan and U.S. states, the dissertation delves into a detailed analysis of criminal elements in Chapters III and IV.

Chapter III reviews the objective elements of the sex crime laws of Japan and U.S. states. The first section of Chapter III reviews punishable acts of sex crimes, going over various sexual acts that can fall under the object of penalization and their scope. The second section focuses on the criminal means employed to commit criminal acts. The discussion in this section includes the pivotal debate over whether the force or consent element currently employed in Japan should be amended. The third section of Chapter III discusses laws for sex crimes against victims with particular vulnerabilities, such as minors, or those committed by taking advantage of a special relationship between the perpetrator and the victim, such as that of a prison guard to a ward of the state. Finally, the fourth section introduces the new types of sex crimes that have emerged

[18] At 6, 法務省，性犯罪に関する施策検討に向けた 実態調査ワーキンググループ 「性犯罪に関する施策検討に向けた 実態調査ワーキンググループ 取りまとめ報告書」(Mar. 2020); *But see* at 5, 法務省，性犯罪に関する刑事法検討会第 5 回会議議事録 (Aug. 27, 2020) (Azusa Saito suggested that although many victims do not recognize their experience of sexual intercourse without consent as sexual violence or sex crime, even without the recognition, they nonetheless suffer from psychological damage, showing increase in suicide attempts, post-traumatic stress disorder, depression, alcohol dependency, drug dependency, severe impact on school or other social functioning, disturbance on interpersonal relationship).

[19] *Id*., *Also see at* FN2, Twenty eight respondents reported that they did not file report, and two did not respond to the question.

with technological development and evaluates whether the enactment of special statutes that address these modern sex crimes is necessary.

Chapter IV evaluates *mens rea*, or the subjective element required for sex crime laws, and discusses the properness of different standards. The question of whether a negligence-based offense should be introduced in Japan is also discussed. Finally, based on the discussion made in the previous chapters, Chapter V provides recommendations for sex crime law amendments in Japan and the reasons for such recommendations. Finally, Chapter VI, the conclusion, leaves the reader with some final thoughts.

Under each section, the elements of the laws of Japan and the United States are analyzed based on both court cases and expert opinions, as well as available administrative materials, to determine their perceived effectiveness and problems. For Japan, the discussions made by the Review Committee for Sex Crime Laws (「性犯罪に関する刑事法検討会」)(hereinafter "the committee"), commissioned by the Ministry of Justice, are introduced as an integral part of expert material in Japan. As the series of expert discussions in the committee also serves as an important reference for the legislature, the committee meetings present pertinent problems regarding current sex crime laws in Japan and the concerns surrounding possible changes.

Additionally, while the discussion of state laws is mostly based on existing laws, the United States' Model Penal Code, a model criminal provision drafted by the American Law Institute that serves as a reference for state legislatures, may be referenced when state laws diverge greatly. Nonetheless, as there are criticisms surrounding the Model Penal Code – that its provisions related to sex crimes are outdated – such a reference seldom takes place.[20] Based on a review of various materials, the laws of the jurisdictions are compared and discussed.

In order to make recommendations for meaningful and practical changes to sex crime laws that could reflect on the realities of criminal prosecution and sex crimes, this dissertation takes an interdisciplinary approach. This approach is integral to understanding the true nature of sex crimes as experienced by victims, as social science research provides pertinent information on the issue, such as various neurological and psychological reactions by victims of sexual violence and the nature and magnitude of harm from sexual violence. Understanding the pertinence of reflecting interdisciplinary knowledge in legislating sex crimes, the governments of both Japan and states of the United States have actively incorporated knowledge and arguments of different fields.

The Ministry of Justice in Japan has made this effort by diversifying the committee members to include not only a prosecutor, a member of the police force, lawyers, and criminal law experts but also a clinical psychologist, a psychiatrist, a victim's assistance counselor, and a nurse who is also a representative director of victims assistance organization[21] and hearing opinions from interdisciplinary experts during the committee discussions.[22] Similarly, states have amended its sex crime laws by reflecting the psychological and neurological understanding of sex crimes, as illustrated by Montana's 2017 sex crime amendment informed by neuroscience, psychology, and trauma research.[23] As illustrated by the examples, empirical and scientific

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[20] Deborah W. Denno, Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced, 1 Ohio St. J. Crim. L. 207 (2003).

[21] 法務省, 性犯罪に関する刑事法検討会委員名簿 (Apr. 12, 2021).

[22] For general discussions about the hearings, *see* at 22-24, 法務省, 性犯罪に関する刑事法検討会第 1 回会議議事録 (Jun. 4, 2020).

[23] At 63-5, Sou Hee Yang, When No Does Not Mean No: The Legislative Impetus Behind Montana Sex Crime Law Amendments & Its Implications for Japan, 27 Waseda Sociosc. J. 55 (2021).

knowledge about the gravity of sex crimes, the characteristics of sex crime perpetrators, and the offense patterns can inform a legislature in enacting more just and practical sex crime laws. Therefore, by referring to various statistical analyses and empirical studies conducted in the fields of neurology, psychiatry, psychology, criminology, and criminal statistics, *inter alia*, the dissertation makes recommendations for sex crime law amendments that are reflective of reality of sexual violence.

3. Definitions of the Terminologies and the Scope of the Analysis

Before introducing the scope of the dissertation, the first order of business is to clarify some terminologies that are used. Sex crime and sexual offense, as used in the dissertation, broadly refer to any attempted or completed criminal sexual act, committed against a victim using culpable means and generally prescribed under penal laws of the given jurisdiction that is the subject of the discussion. For the purpose of discussing varying punishable acts under criminal law, the dissertation utilizes its own broad definition of sex crime and sexual offense, referring to any number of acts that are to be discussed throughout this dissertation, including but not limited to sexual battery, conduct, contact, grooming, intercourse, penetration, touching, and the production or the distribution of sexual images. This definition is employed for a clear and comprehensive reference to a swath of criminal sexual acts discussed in the dissertation.

The terms, including sexual violence, sexual assault, sexual conduct, sexual acts and sex acts, can be defined in various ways with different scopes. To enable consistent and well-defined application of the closely related concepts, the dissertation utilizes the most commonly adopted and well accepted definitions of the European Commission and the National Sexual Violence Resource Center in the United States. The European Commission defines sexual form of gender-based violence as that "it includes sexual acts, attempts to obtain a sexual act, acts to traffic, or acts otherwise directed against a person's sexuality without the person's consent."[24] Additionally, National Sexual Violence Resource Center defines sexual violence as "… any type of unwanted sexual contact. This includes words and actions of a sexual nature against a person's will and without their consent."[25] The dissertation makes use of the two definitions to draw up terminologies that most accurately capture the nature of sexual acts in a way that enables a clear distinction between acts that warrant criminal sanction and those that do not.

Sexual violence in this dissertation refers to an attempted or completed act of a sexual nature committed against a person without his or her consent. While generally adopting the definition of sexual gender-based violence by the European Commission, the definition has been rephrased so that it would be easier to comprehend. Additionally, the scope of the definition has been slightly modified so that acts that are beyond the scope of the dissertation, such as acts of sex trafficking, are excluded. Additionally, while sexual assault is often used interchangeably with sexual violence, the National Sexual Violence Resource Center categorizes sexual assault as a form of sexual violence. Adopting the categorization, in this dissertation, sexual assault refers to the physical act of committing sexual violence. Additionally, to enable reference to acts of sexual nature that are not a form of violence, sexual conduct, sexual acts, or sex acts, as used in this dissertation, refer to any contact with another person that is of a sexual nature.

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[24] The European Commission, Gender-based violence (GBV) by definition, Policies: Justice and Fundamental Rights (last accessed Jan. 18, 2022), available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/what-gender-based-violence_en

[25] National Sexual Violence Resource Center, About Sexual Assault, NSVRC (last accessed Jan. 18, 2022), available at: https://www.nsvrc.org/about-sexual-assault

The European Commission, suggesting that violence against women, including sexual violence, should be understood as a violation of human rights and a form of discrimination, explains that acts of such violence can result in varying types of harm, including physical, sexual, psychological or economic harm, as well as suffering to women. [26] Accordingly, harms in this dissertation refer to any psychological, physical or any other forms of damage and suffering retained by the victims as a result of sexual violence. The dissertation, to effectively discuss the nature and severity of such harms, generally refers to any persons who have experienced the aforementioned sexual violence as sex crime victims. The dissertation loosely defines victims to recognize that there are individuals who have experienced varying forms of sexual violence. The broad definitions would also facilitate the unhindered discussion of which acts among varying acts of sexual violence should be considered a criminal offense.

At long last, before delving into the actual discussion, the scope of this paper should be clarified. There are various types of "sex" crimes. Some acts, such as bestiality, are deemed to harm social decency and forbidden whether or not the involved persons willingly participate in the act. Others, such as the distribution of vulgar or obscene materials, for example, are punished to different extents according to jurisdiction. Alternatively, some acts that have once been criminalized are now legally permissible if conducted between consenting adults. For one, while the laws criminalizing the acts have been held unconstitutional, many states in the past have penalized sodomy. Although all of these crimes warrant in-depth discussion, for the purpose of this dissertation, the discussion of sex crimes is limited to those involving sexual violence. More specifically, the criminal acts that this paper focuses on include various sexually violent acts committed by a perpetrator that cause substantial harm to the victim, including rape, sexual molestation, sexual abuse, and the production or distribution of private intimate or sexual images. With the recent development of technology, synthetic images that depict a victim in a sexual way are being made and distributed without the victim's consent, causing significant mental suffering for the victim.[27] While such crimes may not seem, at a glance, to fall under the object of this dissertation, they are in line with sex crimes, such as rape or sexual contact without consent, as the essence of the offense is a perpetrator's sexual exploitation of a victim without his or her consent. The discussion, therefore, includes technology-facilitated crimes, such as the creation and dissemination of synthetic sexual images.

It should also be acknowledged that sexual violence in a society cannot be reduced by criminal law alone. Indeed, in Japan, it has been noted that education on psychological and neurological changes sex crime victims can experience during and after the commission of the crime, such as freezing or tonic immobility, cognitive processing in regard to risk recognition and post-traumatic stress disorder, has been provided to experienced prosecutors with the purpose of utilizing the information in practice.[28] However, what goes beyond an acknowledgment of their significance, education for the public, as well as social support and treatment for the victims, is not discussed in this dissertation as it is beyond the scope of this dissertation. Consideration of sex education is limited to discussions pertaining to any impact it may have on the amendment of criminal law.

Finally, it is important to understand that social understanding of sex crimes, as well as the justice system, is very different in states and Japan. Social understanding of sex crimes also greatly varies among states, presenting the possibility that comparing different state laws may

[26] The European Commission, *supra* note 24.
[27] For detailed discussion on this topic, *see infra* Ch. III Sec. iv.
[28] 性犯罪に関する施策検討に向けた実態調査ワーキンググループ, *supra* note 18, at 10-11.

serve as a benefit by providing Japan with a varied perspective. However, the difference in the justice system and the characteristic of criminal court in the United States, in particular, that a criminal case is usually decided by a jury of one's peers, may make some aspects of state sex crime laws inappropriate for adoption in Japan. The recommendation, therefore, is made with the awareness of this difference in the system.

It is an understatement to say that amending sex crime law is not an easy task. There are a limitless number of considerations that need to be taken into account, from the protection of the victims to the rights of the accused. It is also one of the hardest crimes in terms of defining and proving elements. However, even with their numerous flaws, the laws of many states are products of contemplation and heartfelt discussions of many interest holders and professionals over decades to make them more just and effective. Whether it be as a model or as a cautionary tale, the laws of the states would serve as an insightful reference point for the legislature in Japan as it considers amendments for sex crime laws.

II. WHY PUNISH SEX CRIMES?

Before delving into detailed discussions about sex crime laws and a judicious evaluation of the current laws of Japan, it is pertinent to first address why it is necessary to penalize sex crimes. The most proper way to do this is to examine the protected interest or legislative intent of sex crime laws, which would explain why the two jurisdictions, Japan and the United States, punish sex crimes.

1. Japan

Article 31 of the Constitution of Japan states, " [n]o person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."[29] Accordingly, criminal law in Japan is founded upon the principle of 法益 (*Rechtsgut* or legal interest), making it "imperative to ascertain the legal interests that should be protected through penal statutes, and the scope of those safeguards; a determination of necessity should underlie the legislative process."[30] These interests, cumulatively called "protected interests," as a matter of course also exist for sex crime laws in Japan.

In the past, the interest served by punishing sex crimes in Japan has been the protection of the chastity of a woman who was thought to belong to her husband.[31] Therefore, sex crime laws in the past recognized women as only potential victims of sex crimes. [32] As understanding about gender equality, human rights, and sex has grown, the rights to sexual liberty or self-determination have been recognized as the main interest of protection in penalizing sex crimes.[33]

However, the interests have not yet been fully discussed and debated to provide a clear vision of what is to be protected by sex crime laws in Japan. Some argue for the need for a more nuanced elucidation of protected rights, such as those capturing willful ignorance by a perpetrator toward the wills of the victim and the violent nature of sexual crimes that force unwanted physical intimacy upon a victim.[34] Masaki Ueda has also pointed out that, given the long-term harm to the victims and the degree of invasion into the private area of sex that carries a special meaning for human beings, the discussion of sex crime law amendment should include amending the traditionally accepted notion of protected interests (as sexual liberty and the right to sexual self-determination) to reflect what the victims feel to have been violated. [35] Consequently, there has been an increase in opinions that sex crimes should be understood as those that violate human dignity rather than liberty.[36]

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[29] 憲法第三十一条「何人も、法律の定める手続によらなければ、その生命若しくは自由を奪はれ、又はその他の刑罰を科せられない。」.

[30] At 24-5, Shigemitsu Dando, THE CRIMINAL LAW OF JAPAN: THE GENERAL PART (B.J. George trans., 1997).

[31] 島岡まな「性犯罪の保護法益及び刑法改正骨子への批判的考察」慶應法学 37 号(2017 年)24 頁-36 頁.

[32] *Id.*

[33] *Id.*

[34] 嘉門優「強制わいせつ罪におけるわいせつ概念について」立命館法学 375=376 号（2017 年）116 頁-134 頁, citing 井田良「性犯罪の保護法益をめぐって」研修 806 号（2015 年）.

[35] At 92, 上田正基「性犯罪処罰規定の見直しに関する議論について」神奈川法学 53 巻 2 号（2021 年）81 頁.

[36] 和田俊憲、法務省, 性犯罪に関する刑事法検討会, 開催に当たって各委員から提出された自己紹介及び意見(令和２年７月修正).

Other scholars have also contributed to the discussion of protected interest in sex crimes. Mitsue Kimura suggests that protected interest is correctly understood as the dignity of the victim and harm as infringement to the person.[37] On the other hand, criminal law researcher Mana Shimaoka points out that there needs to be a more concrete and easy-to-grasp concept of what is to be protected by sex crime laws, rather than ambiguous concepts such as human dignity.[38] Keiichi Yamanaka, on the other hand, suggests that protected interest is more correctly captured with the concept of sexual inviolability, the interest imbedded in the right to maintain the sexual integrity of a person, which is sacrosanct and should not be violated by anyone.[39] Alternatively, Makoto Ida identifies the harm from sexual offenses as "coercing a victim to share the physical and sexual contact with the perpetrator."[40] Therefore, Ida suggests that an accurate understanding of the protected interest of sex crime is "the right to defend against infringement to one's physical intimate sphere."[41]

Being well aware of varied opinions, during the eighth committee meeting, the members revisited the topic of the protected interest of sex crimes. Some suggested that the concept of protected interest for sex crimes should be understood in a broader manner, with Taeko Kojima pointing out that it should be understood more broadly than sexual freedom to include concepts such as the victim's dignity, autonomy, and sexual integrity.[42]

The discussion went beyond how protected interests should be defined to include its implications for the proper prosecution of sex crimes.[43] One committee member, Toshinori Wada, suggested that defining protected interests for sex crime as sexual freedom may bear the undesirable effect of making sex crime seem as an act simply done without the victim's agreement.[44] Wada explained the concept of "(patriarchal) misogyny" (「家父長主義的ミソジニー」), the sense of certainty that it is natural and assured that others should willingly spare their sexual interests upon the acter's request, which serves as the basis of sex crimes and the fundamental aspect of violation of sexual liberty. [45] Therefore, Wada suggested that it is important to prevent the social spread of misogynic beliefs to prevent sex crimes.[46] What this implies is that to fully grasp the genuine nature of sex crimes, it is naturally imperative to modify the protected interest of sex crimes to address misogyny.[47]

Satoko Tatsui suggested that protected interest is more properly understood as dignity and integrity (「人格的統合性」).[48] The committee members entertained this concept, with Wada suggesting that integrity or dignity is a better protected interest for sex crimes.[49] Wada further explained that sexual acts should be a dignified exchange based on mutual agreement and

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[37] 木村光江「強姦罪の理解の変化」法曹時報 55 巻 9 号 1 頁(2003 年) 14 頁以下.
[38] 島岡まな, *supra* note 31.
[39] 山中敬一「強制わいせつの罪の保護法益について」研修 817 号（2016 年）.
[40] 井田良「性犯罪の保護法益をめぐって」研修 806 号（2015 年）3 頁.
[41] *Id*.
[42] At 3, 法務省, 性犯罪に関する刑事法検討会第８回会議議事録 (Nov. 10, 2020).
[43] *Id*.
[44] 和田俊憲, *supra* note 36.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] 辰井聡子「『自由に対する罪』の保護法益」町野朔先生古稀記念『刑事法・医事法の新たな展開(上)』（信山社、2014 年）425 頁.
[49] 性犯罪に関する刑事法検討会, *supra* note 42 at 4.

respect for the partner as an equal being, and sex crime is committed by using one's superiority to rob sexual interest. [50] Therefore, Wada suggested that understanding protected interests as respect for dignity and integrity would lead to an appropriate appreciation for the gravity of sex crimes.[51]

While there has not been one definitive answer that has been established to clearly propose what protected interest for sex crime in Japan is, a discussion of various values to clearly grasp the magnitude of harm to victims and the nature of sex crimes indicates that the awareness of sex crimes is undergoing changes, at least in some aspects in Japan. As the question of why what sex crime laws of Japan try to protect is integral to the question of what the sex crime laws should contain, this discussion is sometimes revisited in the evaluation of penal law provisions to reflect on their effectiveness in safeguarding proposed interests.

2. United States

A. Traditional understanding under common law

On the other hand, in the United States, legislative intent serves as a "'polestar' that guides … [the] Court's interpretation,…,"[52] and the courts "…endeavor to construe statutes to effectuate the intent of the Legislature."[53] When the language of the statute is clear, the courts do not refer to the intent of the legislature and give effect to the plain meaning of the words.[54] However, if the intent is not clearly demonstrated in the statute, the courts refer to legislative materials to gauge what the legislature intends to achieve by enacting the law.[55]

Until the 1950s, almost all states uniformly preserved Blackstone's definition of rape, which was "carnal knowledge of a woman forcibly and against her will."[56] Under common law, since a woman was considered the property of her husband, the law neither recognized any sexual crime against a lawful husband nor punished a man convicted of rape if he agreed with a victim's parents and a judge to marry the victim.[57] Therefore, as in Japan, in the past, the legislative intent of sex crime laws was not the protection of the female victims but rather the protection of the property rights of males who "owned" the women, whether it be their fathers or husbands.[58] Naturally, the law did not recognize male victims.

B. Legislative intent behind statutes

Since the mid-1970s, a series of rape law reforms spurred by the feminist movement has taken place in the U.S., resulting in the redrafting of rape statutes in every state and the District

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[50] *Id*.

[51] *Id*.; *see also* 和田俊憲, *supra* note 36.

[52] At *595, *Borden v. E.-Eur. Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006), citing *State v. J.M.*, 824 So.2d 105, 109 (Fla. 2002); *Reynolds v. State*, 842 So.2d 46, 49 (Fla. 2002).

[53] *Id*.

[54] At *91, *Tall Trees Const. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d 86, 91, 761 N.E.2d 565 (2001).

[55] *Southern California Gas Co. v. Public Utilities Com.*, 24 Cal.3d 653, 659, 156 Cal. Rptr. 733, 596 P.2d 1149 (1979).

[56] 4 William Blackstone, Commentaries * 210.

[57] At 721 & 726, Maria Pracher, The Marital Rape Exemption: A Violation of a Woman's Right of Privacy, 11 Golden Gate U. L. R., 3, 1, 717 (1981).

[58] At 437, *State in Int. of M.T.S.*, 129 N.J. 422, 609 A.2d 1266 (1992), citing Susan Brownmiller, Against Our Will: Men, Women, and Rape 377 (1975); Acquaintance Rape: The Hidden Crime 318 (Andrea Parrot & Laurie Bechhofer, eds. (1991).

of Columbia over the next 30 years.[59] The reforms, however, have not been identical,[60] resulting in various forms of sex crime laws in different state jurisdictions.

The legislative intent for sex crimes has also come to vary according to the state. Legislative intent plays a more prominent role in sex crimes in the context of laws related to sex offender registration and victim protection during criminal prosecution. Sex offender registration laws are enacted with the intent of protecting the public "by facilitating the monitoring of known sex offenders' movements and behaviors."[61] Its extent of application and potential infringement of the constitutional rights of those who have already served their sentences often become an issue, and in resolving such legal disputes, legislative intent plays an integral role.[62] As the laws on sex offender registration are beyond the scope of this paper, they are not discussed further here.

Legislatures of many states often make it clear that it is their intent for sex crime prosecution to take place without harming the dignity and rights of the victims. In fact, many states specifically include such intent in the texts of their criminal sexual offense statutes. For example, in Nebraska, legislative intent for sexual assault is codified as follows:

> It is the intent of the Legislature to enact laws dealing with sexual assault and related criminal sexual offenses which will protect the dignity of the victim at all stages of judicial process, which will insure that the alleged offender in a criminal sexual offense case have preserved the constitutionally guaranteed due process of law procedures…"

NE Code § 28-317 (2020).

Proclamation of legislative intent by writing it as a part of statutes not only clarifies the intent of the legislature in guiding criminal investigation and judicial processes; it also symbolizes the importance that the legislature places on intent. While these legal texts of intent related to the protection of victims during the sex crime investigation and trials are indispensable, they are beyond the scope of this paper, so the legislative intent in relation to victim protection is referred to here only when it is relevant.

More importantly, in the context of criminal statutes, which are the primary focus of this paper, legislative intent can be generally understood as the safety of an individual and the sexual autonomy of a person. For example, in New Mexico, the legislative intent for its criminal sexual conduct statutes[63] is bodily integrity and the personal safety of the individual.[64] In other cases, legislative intent is apparently written in the text of the law, serving as a more practical guiding tool for sex crime prosecution. For example, in California, CA Pen. Code § 263.1 (2019)(a) states "[T]he Legislature finds and declares that all forms of nonconsensual sexual assault may be considered rape for purposes of the gravity of the offense and the support of survivors." This section makes it clear that the legislature intends to recognize that *all forms* of nonconsensual

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[59] At 468, Ilene Seidman & Susan Vickers, The Second Wave: An Agenda for The Next Thirty Years of Rape Law Reform, 38 Suffolk U. Rev., 467 (2004); *see also* Carole Goldberg-Ambrose, Unfinished Business in Rape Law Reform, 48 J. Soc. Iss. 1, 173, 185 (1992).
[60] *Id*.
[61] At 344, 38 Samantha R. Millar, Offender Registration Act: The Problem of Continued Registration under SORA after Leaving the State, 38 Cardozo L. R. 1, 337 (2018).
[62] See, *e.g.*, *Doe v. O'Donnell*, 86 A.D.3d 238, 924 N.Y.S.2d 684 (2011).
[63] N.M. Stat. Ann. § 30-9-11 (criminal sexual penetration) & N.M. Stat. Ann. § 30-9-12 (criminal sexual contact).
[64] *See State v. Williams,* 105 N.M. 214, 730 P.2d 1196 (1986), citing *State v. Srader*, 103 N.M. 205, 704 P.2d 459 (Ct.App.), cert. denied, 103 N.M. 177, 704 P.2d 431 (1985).

sexual assault can be regarded as rape. In another example, Florida's law on Legislative Findings and Intent as to Basic Charge of Sexual Battery states the following:

> The Legislature finds that the least serious sexual battery offense, which is provided in s. 794.011(5)[65], was intended, and remains intended, to serve as the basic charge of sexual battery and to be necessarily included in the offenses charged under subsections (3)[66] and (4)[67], within the meaning of s. 924.34; and that it was never intended that the sexual battery offense described in s. 794.011(5) require any force or violence beyond the force and violence that is inherent in the accomplishment of "penetration" or "union.

FL Stat §794.005 (2019).

As is apparent from the text, the purpose of Section 794.005 is to clarify legislative intent in anticipation of potential confusion. In the above example, the legislature of Florida sought to

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[65] §794.011 Sexual battery.—

> … (5)(a) A person 18 years of age or older who commits sexual battery upon a person 12 years of age or older but younger than 18 years of age, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115.
> (b) A person 18 years of age or older who commits sexual battery upon a person 18 years of age or older, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115.
> (c) A person younger than 18 years of age who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115.
> (d) A person commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115 if the person commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury and the person was previously convicted of a violation…

FL Stat §794.011 (2019).

[66] §794.011 Sexual battery.—

> … (3) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury commits a life felony, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115.

Id.

[67] §794.011 Sexual battery.—

> … (4)(a) A person 18 years of age or older who commits sexual battery upon a person 12 years of age or older but younger than 18 years of age without that person's consent, under any of the circumstances listed in paragraph (e), commits a felony of the first degree, punishable by a term of years not exceeding life or as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115.
> (b) A person 18 years of age or older who commits sexual battery upon a person 18 years of age or older without that person's consent, under any of the circumstances listed in paragraph (e), commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115.
> (c) A person younger than 18 years of age who commits sexual battery upon a person 12 years of age or older without that person's consent, under any of the circumstances listed in paragraph (e), commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115.
> (d) A person commits a felony of the first degree, punishable by a term of years not exceeding life or as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115 if the person commits sexual battery upon a person 12 years of age or older without that person's consent, under any of the circumstances listed in paragraph (e), and such person was previously convicted of a violation…

Id.

clarify that it did not intend to require any force or violence beyond that is inherent in the penetration of §794.011(5).

C. Legislative intent in adjudication

With regard to other types of sex crime laws, legislative intent becomes more specific as to the particular type of sex crime the legislature attempts to penalize. For example, the Supreme Court of California has recognized that for the offense of lewd or lascivious conduct with a child under the age of 14 years, the legislature upheld that "persons under 14 years of age are in need of special protection."[68] However, again, when the text of the statute is clear, there is no need for courts to look into other materials or "…look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent."[69]

In a similar context, *State in Interest of M.T.S.* perhaps provides the most insightful and powerful evaluation of legislative intent by a court in the context of sex crime adjudication. The Supreme Court of New Jersey, in *State in Interest of M.T.S.*, decided whether the statutory language which "…defines 'sexual assault' as the commission 'of sexual penetration' 'with another person' with the use of 'physical force or coercion'"[70] required physical force or coercion as a separate and distinct element from sexual penetration. The court, discussing the history of sex crime laws, provided the context for the role of force, which served as a proxy measure for a victim's resistance.[71] The court also explained that the research informed legal reforms as it demonstrated that sexual assault is not about overcoming a victim's will or insult to her chastity but rather an assault on her person, promoting the understanding that rape is a crime of violence rather than one that is distinctly of a sexual nature.[72]

This understanding motivated reformers to emphasize that the focus should be on the perpetrator's conduct rather than the victims, particularly on its assaultive rather than sexual character.[73] In particular, the court recognized strong criticism for the traditional interpretation of force for its failure to recognize that force may be simply understood as "…the invasion of 'bodily integrity.'"[74] The legislature emphasized "… the assaultive nature of the crime, altering its constituent elements so that they focus exclusively on the forceful or assaultive conduct of the defendant,"[75] thus observing a close affinity between sexual assault and other forms of assault and battery. [76] Criminal sexual contact was also redefined to emphasize the involuntary and personally offensive nature of touching. Just as any unauthorized touching is a crime under the traditional law of battery, the court found that the legislature intended that so should be any unauthorized sexual contact under the reformed law. [77]

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[68] At *647, *People v. Olsen*, 36 Cal. 3d 638, 648, 685 P.2d 52, 58 (1984).
[69] At *595, *Borden v. E.-Eur. Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006), citing *Daniels v. Fla. Dep't of Health*, 898 So.2d 61, 64 (Fla. 2005).
[70] At 429, *State in Int. of M.T.S.*, 129 N.J. 422, 609 A.2d 1266 (1992), citing the statute (before amendment), "c. An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances: (1) The actor uses physical force or coercion, but the victim does not sustain severe personal injury;…"
[71] *Id*. at 435.
[72] *Id*. at 437.
[73] *Id*. at 438.
[74] *Id*. at 439, citing Susan Estrich, Rape, 95 Yale L.J. 1087, 1105, (1986).
[75] *Id*. at 442.
[76] *Id*. at 443.
[77] *Id*.

Moreover, from the legislature's decision to eliminate non-consent and resistance from the substantive definition of the offense, the court held that the legislature intended that a victim is not required to resist and therefore "need not have said or done anything in order for the sexual penetration to be unlawful."[78] Finding so, the court found that it would be inconsistent to hold that physical force, in addition to which entailed in unwanted sexual penetration itself, is required, as such holding is inconsistent with the legislative purpose to eliminate any consideration of whether the victim resisted.[79]

Thus, the court held the following:

> That the Legislature would have wanted to decriminalize unauthorized sexual intrusions on the bodily integrity of a victim by requiring a showing of force in addition to that entailed in the sexual contact itself is hardly possible… We conclude, therefore, that any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault. Therefore, physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful. The definition of "physical force" is satisfied under *N.J.S.A.* 2C:14–2c(1) if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration."[80]

At *444, State in Int. of M.T.S., 129 N.J. 422, 609 A.2d 1266 (1992).

The court's interpretation may be construed as somewhat liberal. However, many years later, the legislature of New Jersey amended the text of the law so that it reflects the court's understanding of the legislature's intention. The amended text is follows:

> (1) The actor ~~uses physical force or~~ (omitted) *commits the act using* (added)coercion *or without the victim's affirmative and freely-given permission*, (added) but the victim does not sustain severe personal injury;"

N.J. Stat. Ann. § 2C:14-2, 2018; N.J. Assem. Bill No. 2767, N.J. Two Hundred Eighteenth Legislature - First Ann. Sess.

This case demonstrates both the significance of legislative intent in construing sex crime laws when the text of the law is not clear and the challenges associated with the judicial interpretation of such intents in adjudicating cases on sex crimes. As the section has illustrated that legislative intent may play an integral role in sex crime prosecution, in further examinations of sex crime laws in the United States and relevant cases, legislative intent is referred to the extent that it aids the understanding of sex crime legislation and the interpretation of the respective laws.

3. Discussion

As discussed in the introduction, the gravity of the damage that sex crime brings to a victim is profound. For adult victims, sexual assault causes trauma, and research has found that

[78] *Id*.
[79] *Id*.
[80] *Id*.

sexual assault is one of the most frequent causes of PTSD in women.[81] Those who have experienced childhood sexual abuse report higher rates of depression, anxiety, and other psychiatric symptoms, as well as drug and alcohol abuse.[82] One study estimates that 10% of rape victims suffer from severe disabling psychological injury and 40% from emotional trauma requiring mental health treatment.[83] The varied grave damage and negative impact on victims suggest that harm from sex crimes is too multi-dimensional to capture it with one concept. Some protected interests go to a person's dignity and integrity, some go to the crimes' violent nature and a sense of safety, while others go to the respect that all persons deserve.

Therefore, all of the protected interests identified by scholars in Japan present a valid identification of the purposes of sex crime laws. A person should be entitled to bodily safety and have the right to be free from sexual violence. A person's dignity and integrity should be respected, and respect encompasses a person's inalienable right to determine who and when others may enter into the person's intimate sphere. While the purpose of a sex crime perpetrator is often merely to satisfy his own desires, victims suffer from extensive harm and a profound invasion into one's sense of security and intimacy.

Therefore, with harm encompassing various aspects of a victim's physical and psychological well-being as well as fundamental rights associated with maintaining one's dignity as a human being, the purpose of criminal law for sex crimes should be understood as being straightforward: it is to discourage and punish acts that cause long-lasting grave harm to a victim at the expense of the mere sexual gratification of the perpetrator. Thus, this dissertation engages in further evaluation and analysis that ultimately leads up to the recommendation proposal with this sense of purpose in mind.

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[81] National Center for Post-Traumatic Stress Disorder, Epidemiological Facts about PTSD - A National Center for PTSD Fact Sheet, Facts (2005); *see also*, Lori Haskell & Melaine Randall, The Impact of Trauma on Assault Sexual Assault Victims, Dept. J. Canada (2019).

[82] At 379, David Finkelhor, Gerald Hotaling & I.A. Lewis, Sexual Abuse and Its Relationship to Later Sexual Satisfaction, Marital Status, Religion, and Attitudes, 4 J. Interp. Violence, 4, 379, 399 (1989).

[83] *See* exhibit 1, Ted Miller, Mark Cohen & Shelli Rossman, Victim Costs of Violent Crime and Resulting Injuries, Datawatch, 186, 197, (1993) (conducting analysis with data based on Vanderbilt/ Urban Institute Cost of Crime Study (1993)).

III. OBJECTIVE ELEMENT

i. Acts

In this chapter, elements corresponding to acts in criminal laws on sex crimes in Japan are analyzed and compared with those of the United States. The analysis is carried out with the purpose of determining whether there is room for improvement for these elements in Japan, and, if so, what kind of changes should be made.

1. Japan

This section reviews acts that are to be punished as sex crimes in Japan. It also evaluates expert opinions associated with those acts to devise a proposal for a sex crime law amendment for Japan that can lead to a more effective penalization. There are mainly two kinds of acts that can be punished under Japan's penal code if committed through legally defined means: indecent acts and sexual intercourse, which includes anal, oral, or vaginal sexual intercourse. Three articles, Articles 176, 178(1), and 179(1) of Chapter XXII (Crimes of Obscenity, Rape, and Bigamy), punish indecent acts; Articles 177, 178(2), and 179(2) punish sexual intercourse. The two sections of Articles 178 and 179, therefore, punish different acts committed by the same means. Additionally, as Article 179 deals with specific groups of victims, a more detailed review on the relationship between the perpetrators and the victims as specified under Article 179, is to be discussed in Chapter iii. Vulnerable Groups. The scope of this section for Article 179 is limited to the evaluation of whether the punishable acts under Article 179 are properly defined. Before this paper delves into a detailed discussion related to the means or specific victim groups in the following sections, this section first provides a review of how the courts interpret the act elements, how the experts in Japan evaluate them, and what problems are associated with their definitions.

A. Indecent act

a. Statutes

First, this section discusses the general concept of indecent act as used in Articles 176, 178(1), and 179(1). The section then engages in the evaluation of the act as an element of a sex crime, including discussions related to inherent ambiguity in the word "indecent."

i-a. Statutes and judicial interpretation

Article 176 of the Penal Code of Japan reads as follows:

> A person who, through the use of force or intimidation, forcibly commits an indecent act upon a person of not less than thirteen years of age shall be punished by imprisonment with work for not less than 6 months but not more than 10 years. The same shall apply to a person who commits an indecent act upon a person under thirteen years of age.[84]

[84] 刑法第百七十六条「十三歳以上の者に対し、暴行又は脅迫を用いてわいせつな行為をした者は、六月以上十年以下の懲役に処する。十三歳未満の者に対し、わいせつな行為をした者も、同様とする。」.

強制わいせつ[Crime of Forcible Indecency], KEIHO [KEIHO] [Pen. C.] 第百七十六条 [Art. 176], 1907, Ch. 22, (Japan).

Article 178(1) of the Penal Code of Japan reads as follows:

> (1) A person who commits an indecent act by taking advantage of loss of consciousness or inability to resist, or by causing a loss of consciousness or inability to resist, shall be punished in the same manner as prescribed in Article 176.[85]
> 準強制わいせつ及び準強制性交等 [Quasi Forcible Indecency; Quasi Forcible Sexual Intercourse], KEIHO [KEIHO] [Pen. C.] 第百七十八条 [Art. 178], 1907, Ch. 22, (Japan).

Finally, Article 179 (1) of the Penal Code of Japan reads as follows:

> (1) A person who, by taking advantage of the person's influence as a guardian in fact for a person under 18 years of age, commits an indecent act against the person under the age of eighteen shall be punished in the same manner as prescribed in Article 176.[86]
> 監護者わいせつ及び監護者性交等[Crime of Indecency & Sexual Intercourse et al. by a Guardian], KEIHO [KEIHO] [Pen. C.] 第百七十九条 [Art. 179], 1907, Ch. 22, (Japan).

While the legal text may seem clear, when a police officer tries to investigate a report of an indecent act or when a court presiding over a case decides whether the acts committed by a perpetrator were, in fact, indecent, the ambiguity of the word "indecent" becomes rather apparent. Given the concerns for ambiguity, the question of what an indecent act is understood to be in the context of sex crimes needs to be answered to determine whether an indecent act functions properly as an element of a crime for successful sex crime prosecution. Therefore, the section first reviews how courts interpret indecent acts in the context of sex crimes.

First, to answer this question, how courts determine whether an act is considered indecent should be addressed. The courts in Japan follow the evaluation of the Supreme Court of Japan: They first sufficiently consider whether the act itself is sexual in nature, and, in some cases, take other factors into account, such as the specific circumstances under which the act has been committed to determine, if judged under the social standards, whether the act has a sexual meaning and the sexual connotation of sufficient strength based on the specific facts of the case.[87] However, sexual intention is not a necessary element for establishing an indecent act. The Supreme Court of Japan unanimously reversed its precedent made in 1970[88] to hold that the actor's sexual intention is not necessary for proving indecency.[89] The Court pointed out that there has been no requirement for establishing the actor's sexual intention other than the *koi*

[85] 刑法第百七十八条一項「人の心神喪失若しくは抗拒不能に乗じ、又は心神を喪失させ、若しくは抗拒不能にさせて、わいせつな行為をした者は、第百七十六条の例による。」.
[86] 刑法第百七十九条一項「十八歳未満の者に対し、その者を現に監護する者であることによる影響力があることに乗じてわいせつな行為をした者は、第百七十六条の例による。」.
[87] 最判平成 29 年 11 月 29 日刑集 71 巻 9 号 467 頁.
[88] 最判昭和 45 年 1 月 29 日刑集 24 巻 1 号 1 頁.
[89] 最判平成 29 年 11 月 29 日刑集 71 巻 9 号 467 頁.

generally required for proving the crime, a required subjective element that will be discussed in detail later in Chapter IV. Additionally, recognizing the continued argument since the enactment of the law on whether the act needs to sexually arouse or excite the actor, the Court clarified that sexual purpose should not serve as a determining factor for the establishment of forcible sexual indecency under Article 176.[90] While recognizing sexual purpose may serve as one of the factors to consider for a rounded determination of whether an act can be considered indecent, the decision should be primarily made by reflecting on the nature of the act, as judged by the social values and facts of each case. [91] While the consideration of whether an actor has acted with sexual purpose may play a rather weighty role in some cases, the Court held that the wholesale requirement for a sexual intention other than *koi* is not tenable. [92]

Applying the standard, the Fukuoka District Court considered whether an indecent act was committed in the following case. Two defendants held the victim up during a work-related party, one forcibly holding the victim up by her armpits and the other holding and spreading her legs and mimicking the missionary position.[93] The victim testified that as the defendant positioned himself between the victim's legs and shook his waist, there was a contact between an area between her vagina and her leg and what felt like the defendant's groin area at least twice or three times.[94]

The court deciding the case pointed out that the challenge with this case was that the act at issue involved only a "subtle physical contact"[95] that the victim made her testimony based on what she felt, as the victim was held up by one of the victims by the armpits and could not see what exactly was being done to her.[96] The court found that it would have been easy for the victim to sense what was being done to her, as the victim was wearing pants made out of thin material. The court held the testimony sounds clear as she seemed to be able to distinguish the sensation of that act from those associated with other acts, and others who were at the party testified that what they saw was similar to her account of the event.[97] The court dismissed the defendants' arguments, mainly that the defendant who was holding the victim by the armpits did not know the other defendant would engage in such acts and that the groin area of the defendant who mimicked the sex position never touched the victim's vaginal area.[98]

The court held that the defendant's actions, such as pulling up the victim's legs, positioning himself between her legs, shaking his waist, and collapsing onto the victim's body, all demonstrate that the defendants clearly mimicked a sexual act. [99] Moreover, the defense argued that the acts were merely a prank during a party and, as evidence, suggested that no other people in the party tried to stop them.[100] The court quickly dismissed this argument, holding that even if the defendants committed these acts thinking that it was a joke, their subjective

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[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] 福岡地判平成 30 年 10 月 31 日 LEX/DB 25561948.
[94] *Id*.
[95] *Id*.「微妙な身体的接触」.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *Id*.

perception does not affect whether their acts correspond to indecent acts as written in Article 176.[101] The court, therefore, found both defendants guilty.[102]

This case certainly poses some compelling questions about the concept of an indecent act. First, whether an act is sexual is determined by the nature of the act rather than by specific acts engaged by the defendants. Although there was a certain degree of uncertainty in terms of whether there was indeed contact between the victim's vaginal area and the defendant's groin area or even whether there had been an active imitation of a sexual act, the court ruled that the defendant had engaged in an indecent act. Moreover, the other defendant, who was merely holding the victim down by her armpits, was also found guilty because he was also participating in the act of mimicking a sexual position, albeit his relatively passive role in it.

Thus, it can be said the court clearly holds that if a certain act can be considered sexual in nature, it falls in the category of an indecent act. Second, the court also makes it clear that the defendant's motive in engaging in an indecent act does not matter. Therefore, generally speaking, an argument made by a defendant that he did not have a sexual motive in engaging in an allegedly indecent act but instead, say, that he only intended to harass or bully the victim, does not matter, as long as the act itself is considered to be sexual in nature.

b. Expert opinions

While the Fukuoka case demonstrates some challenges and considerations taken in by the courts in deciding whether an act is indecent, the continued discussions among legal experts regarding this issue more clearly highlight the ambiguity and characteristics of the indecent act as applied in sex crimes in Japan. In particular, the arguably equivocal nature of the word "indecency" has had experts continue their debate on the appropriateness of using indecency as an element of crime for Article 176.

Concerning this point, by evaluating about 500 cases and categorizing acts of indecency as judged by courts in Japan, Kamon found that acts that are deemed to carry a relatively lower degree of sexual harm are commonly considered to be perverted acts (「痴漢行為」), falling under the prefectural nuisance prevention ordinances (「迷惑行為防止条例」)[103] rather than satisfying forcible indecency. However, even the acts that are conventionally associated with a lower degree of culpability and sexual harm, such as touching someone's private areas through clothing, can be deemed a forcible indecent act if the act is persistent.[104]

Moreover, Kamon suggested that in the case of indecent acts on parts of the body that are not traditionally considered to be of a sexual nature, such as touching toes or fingers, sexual intention is usually required to prove that the act is forced.[105] What this implies is that as long as there are no other acts traditionally deemed to be sexual, attesting to the sexual nature of the act, acts on presumptively "non-sexual" parts of a body are not considered to lead to sexual gratification or satisfaction, and thus, cannot be construed as indecent acts under Article 176.[106]

In regards to the discussion on what makes an act sexual, during the review committee, Miho Okada, a representative of Rape Crisis Network and a member of an advocacy group

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[101] *Id*.
[102] *Id*.
[103] Sexual battery is punishable by anti-nuisance regulations (迷惑防止条例), such as 昭和 37 年東京都条例第 103 号.
[104] 嘉門優, *supra* note 34 at 124.
[105] *Id*. at 127.
[106] *Id*. at 128.

supporting lesbian, gay, bisexual, transgender, queer, intersex, asexual et al. (hereinafter "LGBTQIA+") sex crime victims called Broken Rainbow Japan, pointed out that the standard for determining what law should be applied for acts involving sexual body parts or objects should be the mental damage (or mental load, if translated literally from the original term (「精神的負荷」) the act causes upon the victim. [107]

Application of the concept of "indecency" is not limited to Article 176. For example, it is applied in Article 174, the crime of public indecency, which punishes those who engage in indecency in public. However, the protective interest in Article 176 is different from that in Article 174, which purports to protect order in regard to sexual morality and promote public welfare by maintaining the minimum degree of sexual morality. Because of the differences in their purposes, the indecent acts that are applied to Articles 174 and 176 are understood somewhat differently. In the spirit of promoting this interest, the Supreme Court of Japan has defined indecency in terms of public indecency as the acts that cause sexual excitement for which ordinary citizens may feel sexually ashamed, harming benign social standards in regard to sexual acts.[108] According to Kamon, because both the courts and the legal scholars deem the protected interest of Article 176 to be a violation of the sexual liberty of individuals, the concept of indecency is understood more broadly in terms of Article 176 compared to Article 174 to include acts such as kissing or briefly touching private parts.[109]

While evaluating a case under Article 176, some suggest that the approach of deciding if acts are indecent by assessing whether they sexually arouse or cause sexual shamefulness may result in unfair application, as it implies that similar acts directed at children or individuals who do not understand the sexual nature of such acts cannot be considered indecent.[110] However, Kamon suggests that such evaluation should be understood to be directed only toward the perpetrator's perspective, as well as the objective facts of the case.[111] Therefore, while a child who lacks understanding of the sexual nature associated with certain acts may not feel sexually aroused or ashamed, this does not prevent the prosecution of a perpetrator whose culpable acts are objectively of a sexual nature.

c. Evaluation of indecent act

Concerning the assessment of the sexual intention of the perpetrator, the Supreme Court of Japan has clearly held that sexual intention is not necessary, thereby reducing the possibility of a perpetrator arguing that he is not guilty because he had no sexual intention about the act. However, the clear holding only goes so far, as the concept of sexual indecency itself is somewhat equivocal, and sexual intention nevertheless often plays some part in deciding whether an act is indecent.

On the other hand, it is also quite an impossible mission to provide a concrete definition of indecent acts because it may signify that many acts that do not precisely fall under the definition will not be punishable even when it is clear that they have been committed with the same degree of culpability and blameworthiness. As indecency is a catch-all phrase for acts in sex crimes that do not fall into the category of sexual intercourse, its flexibility – or alternatively, ambiguity – may be necessary to make it possible to punish a variety of acts that should be

[107] At 13-14, 法務省, 性犯罪に関する刑事法検討会第２回会議議事録 (Jun. 22, 2020).
[108] 最判昭和 26 年 5 月 10 日刑集 5 巻 6 号 1026 頁.
[109] 嘉門優, *supra* note 34 at 118-9.
[110] *Id*. at 119.
[111] *Id*.

considered sexual crimes. To aid the evaluation, similar state laws in the United States are introduced in the latter part of this chapter to examine how indecent acts are used and applied in some state laws and whether there is any other better element that can be used alternatively to capture the same acts in a clear manner. This evaluation will assist in consideration of whether making more specific punishable acts would be better than having a general umbrella term "indecent act."

B. Sexual intercourse

a. Statutes

The punishable act of sexual intercourse, as applied in Articles 177, 178(2) and 179(2), includes anal, oral, and vaginal intercourse. This section reviews what kind of actions are punishable under the articles as sexual intercourse and what experts in Japan consider to be problems with the act.

Article 177 of the Penal Code of Japan reads as follows:

> A person who, through the use of force or intimidation, commits sexual intercourse, anal sexual intercourse, or oral sexual intercourse (hereinafter referred to as "sexual intercourse") with a person not less than thirteen years of age commits forced intercourse and shall be punished by imprisonment with work for a definite term of five years or more. The same shall apply to a person who commits an act of sexual intercourse with persons under the age of 13.

強制性交等[Crime of Forcible Sexual Intercourse *et al*.], KEIHO [KEIHO] [Pen. C.] 第百七十七条 [Art. 177], 1907, Ch. 12, (Japan).

Article 178(2) of the Penal Code of Japan reads as follows:

> (2) A person who commits acts such as sexual intercourse by taking advantage of a loss of consciousness or inability to resist, or by causing a loss of consciousness or inability to resist, shall be punished in the same matter as prescribed in the preceding Article. [112]
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> 準強制わいせつ及び準強制性交等 [Quasi Forcible Indecency; Quasi Forcible Sexual Intercourse], KEIHO [KEIHO] [Pen. C.] 第百七十八条 [Art. 178], 1907, Ch. 22, (Japan).

Article 179(2) of the Penal Code of Japan reads as follows:

> (2) A person who, by taking advantage of the person's influence as a guardian in fact for a person under 18 years of age, commits an indecent act against the person under the age of eighteen shall be punished in the same manner as prescribed in Article 177.[113]
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> 監護者わいせつ及び監護者性交等[Crime of Indecency & Sexual Intercourse *et al*. by a Guardian], KEIHO [KEIHO] [Pen. C.] 第百七十九条 [Art. 179], 1907, Ch. 22, (Japan).

[112] 刑法第百七十八条二項「人の心神喪失若しくは抗拒不能に乗じ、又は心神を喪失させ、若しくは抗拒不能にさせて、性交等をした者は、前条の例による。」.

[113] 刑法第百七十九条二項「十八歳未満の者に対し、その者を現に監護する者であることによる影響力があることに乗じて性交等をした者は、第百七十七条の例による。」.

b. The 2017 sex crime law reform as expansion of punishable act

The acts that fall under the term "sexual intercourse" in Articles 177, 178(2), and 179(2) have been expanded in the 2017 amendment. The definition of sexual intercourse was amended to include anal or oral sexual intercourse, significantly expanding the previous definition, which included only vaginal intercourse.[114] The impetus for the amendment was understanding that, as evidenced by the intimacy and strong invasion into another person's body accompanied by acts such as anal and oral intercourse, they carry the same degree of maliciousness and seriousness as vaginal sexual intercourse under the articles.[115] After the amendment, therefore, cases where a person commits anal or oral sexual intercourse with the required *mens rea* and means against a male victim became punishable pursuant to Articles 177, 178(2), and 179(2).[116]

c. Expert opinions

Legal professionals and experts in Japan have engaged in in-depth discussions on whether the crime of forcible sexual intercourse needs to be amended and, if so, how. The nature and content of discussions among experts and legal professionals pertaining to the appropriateness of the definition of sexual intercourse are introduced in this section. However, the discussion of whether the element of force or threat should be maintained follows in a separate section, as it warrants a detailed and dedicated analysis given that its intricacy and relevancy extends to not only the crime of forced sexual intercourse but also the crime of forced sexual indecency.

Experts point out that several aspects of Article 177 need to be examined to determine if it is necessary to amend the article. First, what actions need to be included in the definition of sexual intercourse has become an important discussion topic for Article 177. While the amendment to sex crimes in 2017 expanded the definition of sexual intercourse in Article 177, more discussion is necessary to evaluate whether they encompass all acts of a sex crime with equivalent culpability and harm as the current legal definition of sexual intercourse, especially in the LGBTQIA+ contexts, so that the victims of all groups are properly protected.

In regard to this point, Takeru Tanojiri points out that there has been discussion during the deliberation in the Diet about whether the artificial genitals that have been implanted during sex reassignment surgery qualify as "vagina or penis used in the act of sexual intercourse in Article 177."[117] Moreover, Okada suggested that it may not be proper to attempt to define which genitals are the right ones that fit the definition under the law of sex crimes, since sex crimes are not about different genders but violence using sex.[118] Okada added that there are sex crimes that involve chopsticks, pipes, vibrators, pens, lightbulbs, food, cutter knives, guns, fingers, hands, arms, and legs, among many others,[119] thereby suggesting that the legal definition for an act of a sex crime should be able to cover various forms of assaults. At the same time, there have been suggestions that the degree of harm associated with forcible vaginal sexual intercourse between males and females is higher than other acts of sex crime because of the risk for pregnancy

[114] At 113-4, 田野尻猛「性犯罪の罰則整備に関する刑法改正の概要」論究ジュリスト 23 号（2017 年）112-114 頁.
[115] *Id*.
[116] *Id*. at 114.
[117] *Id*.
[118] 性犯罪に関する刑事法検討会, *supra* note 107 at 9-12.
[119] *Id*. at 12.

involved in the former. However, Okada suggested that by adding anal and oral sexual intercourse, this argument has lost its validity for preventing other types of acts from being included.[120]

Additionally, during the same meeting, Koichi Miyazaki, whose doctoral research topic was sex crimes against males, suggests that the expansion of acts included in Article 177 is necessary for the protection of male victims.[121] Miyazaki indicates that while inserting objects or other parts of the body, such as the tongue, is not considered sexual intercourse under Article 177, it should be considered as such, given the severity of sexual violation the acts carry. [122]

In the same sense, Miyazaki argues, forcing erection and ejaculation should also be considered as satisfying sexual intercourse under Article 177. [123] As sex is a profoundly personal matter, and as anyone can become a victim of a sex crime, which inflicts serious harm, Miyazaki adds that it is important to understand sex crimes from a victim's perspective. [124]

Consequently, to ensure the protection of all victims regardless of their sexual identity, it seems necessary to further advance in-depth evaluation of whether the current definition of sexual intercourse is proper to provide equal protection for LGBTQIA+ victims. During the second committee meeting, Okada explained that, unlike the preconception that one may make in believing that LGBTQIA+ sex crimes would occur among LGBTQIA+ relationships, given the early ages of victimization for many LGBTQIA+ sex crime victims, it is likely that people close to them who are not in LGBTQIA+ groups, such as family members, have committed such crimes.[125] She proposed the following five changes that need to be made in order to properly address LGBTQIA+ sex crimes:[126] abolishment of an element that requires male genitals, [127] sex crime law based on digital penetration, [128] the addition of hate crime as an element that satisfies the force or threat requirement,[129] enactment of the rape shield law disallowing the court from asking questions about past relationships to the sex crime victims in order to prevent the formation of undue prejudice, which will create a disadvantage to the victims,[130] and finally, the addition of intimate partner violence as an element that satisfies the force or threat requirement.[131] In particular, the recommendations to abolish an element that requires male genitals and to enact laws based on digital penetration are particularly relevant, as they imply shortcomings and room for improvement for the current element of sexual intercourse.

C. Spousal relationship

The committee also discussed whether it is necessary to specify that sexual violence between spouses is punishable. During the sixth meeting, Kojima highlighted the significance of addressing this issue[132] by citing the 2017 Survey on Violence between Males and Females by

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[120] *Id*. at 9-12.
[121] *Id*. at 2-4.
[122] *Id.*
[123] *Id*. at 4.
[124] *Id*.
[125] *Id*. at 9-10.
[126] *Id*. at 9-12.
[127] *Id*.
[128] *Id*.
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] At 24, 法務省，性犯罪に関する刑事法検討会第 6 回会議議事録 (Sep. 24, 2020).

the Gender Equality Bureau Cabinet Office, which found that one-fourth of responses reported that forced sexual intercourse was committed by a spouse or ex-spouse.[133] Kojima, arguing that marriage does not form a relationship that forsakes one's protected interest in sexual liberty and integrity, and along with an increased understanding about domestic violence, said the provisions should specify that sexual violence between spouses is likewise the object of punishment.[134] Hashizume, while stressing that the academic and practical consensus is that spousal sexual violence is, of course, the object of sex crime provisions, acknowledged a judicial ruling on spousal sexual violence seems to suggest otherwise, one seemingly acknowledging that spouses have the right to demand sexual relationships and a duty to comply with such a demand as the grounds for justification. [135]

Based on this acknowledgment, Hashizume suggested it is possible to view that the criminal prosecution of spousal sexual violence is limited, and if so, specification of provision can be suggested as an alternative, but only after careful analysis of the current academic and practical consensus. [136] Hashizume also suggested that this specification does not need to include other intimate relationships, as including spousal relationships would play a sufficient role in delivering a clear message that an intimate relationship does not excuse commission of sex crimes.[137] He pointed out that including other relationships that cannot be clearly defined would increase ambiguity.[138] Wada similarly suggested that while the notion that marriage excludes the establishment of sex crimes is not considered valid, there may be those who believe that spousal relationships somewhat limit the application of sex crime prosecution. Wada suggested that specification in the law would send a strong message to society, although the way to go about it should be discussed further.[139] Yamamoto further suggested that it is difficult to prosecute spousal sexual violence by the element of force or threat, as there are many instances where domestic violence has been accompanied for a long time, and violations often take place under submission by power and dominance.[140]

The members also discussed how and where to include the specification, with members such as Azusa Saito suggesting, among other recommendations, the addition of "regardless of whether the person is in a marital relationship" under Articles 176 or 177.[141]

D. Evaluation of the acts

It is also important to consider that the two punishable acts, indecent acts and sexual intercourse, sufficiently cover all kinds of acts that should be punished under sex crimes. Because sexual intercourse specifically covers only anal, oral, and vaginal sexual intercourse, leaving all other acts to fall under indecent acts. However, the narrow definition of sexual intercourse may lead to unequal protection of victims, especially those in LGBTQIA+ groups. As discussed above, while an indecent act is broadly defined to enable the inclusion of various

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[133] 内閣府 男女共同参画局，男女間における暴力に関する調査 (2017), available at: https://www.gender.go.jp/policy/no_violence/e-vaw/chousa/h11_top.html
[134] 性犯罪に関する刑事法検討会, *supra* note 132 at 25.
[135] *Id*.
[136] *Id*.
[137] At 21, 法務省，性犯罪に関する刑事法検討会第 10 回会議議事録 (Dec. 25, 2020).
[138] *Id*.
[139] 性犯罪に関する刑事法検討会, *supra* note 132 at 26.
[140] *Id*. at 22-23.
[141] 性犯罪の罰則に関する検討会, *supra* note 137 at 21.

acts that are sexual in nature, there are nonetheless limitations stemming from its ambiguity. Finally, to make it clear that spousal relationship does not serve as an exemption for liability for sex crimes, specification of the fact in the statutes is worth consideration. While the 2017 amendment has broadened the scope of protection by including anal and oral sexual intercourse in the definition of sexual intercourse, there is remaining doubt on whether the two acts, indecent acts and sexual intercourse, provide just, equal, and sufficient protection for the sex crime victims of all groups. Therefore, the next section introduces acts in relevant U.S. state laws and court cases deciding on the acts to further examine whether there is an efficient way to improve the scope of the acts.

2. United States

Laws pertaining to sex crimes, mostly governed by state penal codes,[142] wholly differ by state. Accordingly, what kinds of acts are punished and how they are defined also vary depending on which state in which they have been committed. In terms of the act, many states generally punish sexual contact, penetration, battery, or intercourse. For example, under its sexual assault in the first to the fourth degrees, Alaska penalizes sexual contact and penetration. All four statutes punish the acts of sexual contact and penetration, but the severity of the offense differs in degrees according to the means employed by a perpetrator to commit the act, the characteristics of the victim, or the relationship between the victim and the perpetrator.[143] A few states use one general term, such as "sex act" or "sexual act," which is defined in more detail in the definition section. Other states have statutes punishing rape, anal sexual intercourse, and oral sexual intercourse separately instead of having one criminal act, such as sexual battery, that covers various acts.

However, what falls under such acts differ slightly for each state. The definitions, therefore, ultimately determine the boundaries of punishable acts. For example, a mere intentional sexual touching of any part of the body can be either punishable or not as sexual battery, depending on whether the state definition requires the touching of a sexual nature or of specific body parts, such as female breasts or genital areas.[144] However, even when punishable acts are defined, court cases demonstrate that there are still disputes concerning acts in real cases that fall under the definition.

Alternatively, some states include various other acts in their sex crime laws that are punishable only when victims fall under specified groups. As an example, in the case where a victim is a child, Georgia additionally punishes "...any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person."[145] In Alaska, the offense of unlawful exploitation of a minor includes an act where "...the person knowingly induces or employs a

[142] Federal sex crime laws govern acts where the federal government has jurisdiction, *e.g.*, 18 U.S.C.§ 2241 "Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency…"

[143] *See* AK Stat §11.41.410-430 (2012).

[144] *See, e.g.,* UT Code 76-9-702.1 (2020). "Sexual battery.(1) A person is guilty of sexual battery if the person, under circumstances not amounting to an offense under Subsection (2), intentionally touches, whether or not through clothing, the anus, buttocks, or any part of the genitals of another person, or the breast of a female person, and the actor's conduct is under circumstances the actor knows or should know will likely cause affront or alarm to the person touched."

[145] GA Code § 16-6-4 (2020).

child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct: (1) sexual penetration; (2) the lewd touching of another person's genitals, anus, or breast; (3) the lewd touching by another person of the child's genitals, anus, or breast; (4) masturbation; (5) bestiality; (6) the lewd exhibition of the child's genitals; or (7) sexual masochism or sadism."[146] However, because a section dedicated to special victims will follow, this section focuses on acts that are generally punishable as sex crimes.

Because it would be practically impossible to engage in a meaningful review of acts punished by sex crime laws in all states, this section introduces an example for different visions of punishable acts for sex crimes utilized in the U.S. states and discusses those that are most comparable to the punishable acts in Japan, as well as those that are noteworthy in terms of their characteristics.

A. Sex act

First, some states, such as Iowa, punish "sex acts" that broadly cover different kinds of acts of a sexual nature. Iowa's sexual abuse statute states:

> Any sex act between persons is sexual abuse by either of the persons when the act is performed with the other person in any of the following circumstances:
> 1. The act is done by force or against the will of the other. If the consent or acquiescence of the other is procured by threats of violence toward any person or if the act is done while the other is under the influence of a drug inducing sleep or is otherwise in a state of unconsciousness, the act is done against the will of the other.
> 2. Such other person is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters.
> 3. Such other person is a child.

IA Code § 709.1 (2019).

The three circumstances listed above describe means or the special group that a victim falls into, and the act that can be punished is defined simply as "any sex act." Sex act is subsequently defined under §702.17 as:

The term "sex act" or "sexual activity" means any sexual contact between two or more persons by any of the following:

> 1. Penetration of the penis into the vagina or anus.
> 2. Contact between the mouth and genitalia or mouth and anus or by contact between the genitalia of one person and the genitalia or anus of another person.
> 3. Contact between the finger, hand, or other body part of one person and the genitalia or anus of another person, except in the course of examination or treatment by a person licensed pursuant to chapter 148, 148C, 151, or 152.
> 4. Ejaculation onto the person of another.
> 5. By use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

[146] AK Stat §11.41.455 (2012).

6. The touching of a person's own genitals or anus with a finger, hand, artificial sexual organ or other similar device at the direction of another person.

IA Code § 702.17 (2021).

The somewhat limited list of acts has resulted in a not guilty verdict in some cases where sexual acts committed in the case did not align with the list of the prescribed acts. In *State v. Monk*, the Supreme Court of Iowa reversed the district court's judgment for a trial for sexual abuse arising from insertion of a broom handle into a victim's anus and held that it was an error to instruct the jury that a sex act meant any contact between specific body parts or substitutes. [147] Finding that the statutory definition requires sexual contact, the court found that the jury should instead have been instructed that a sex act requires sexual contact.[148] Alternatively, in *State v. Pearson*, the court dismissed the defendant's argument that his conduct of masturbation by moving his covered penis against the victim's clothed buttocks does not satisfy the sex act under Section 702.17 and affirmed his conviction. [149] In holding so, the court held that "[n]ot all contact is 'sexual act'. The contact must be between the specific body parts (or substitutes) and must be *sexual* in nature."[150] The court further held that "[t]he sexual nature of the contact can be determined from the type of contact and the circumstances surrounding it,"[151] including circumstances related to whether the act in question was made to sexually arouse or gratify the defendant or the victim.[152] The court further held that skin-to-skin contact is not required to find a sexual act, affirming the lower court's decision.

B. Sexual contact and sexual intercourse

Other states that similarly define two or three core punishable acts include a more expansive list of conduct that may fall under each core punishable act. For example, the state of Delaware, among others, punishes sexual contact and sexual intercourse. § 761 Definitions generally applicable to sexual offenses define them as the following:

(g) "Sexual contact" means:
(1) Any intentional touching by the defendant of the anus, breast, buttocks or genitalia of another person; or
(2) Any intentional touching of another person with the defendant's anus, breast, buttocks, semen, or genitalia; or
(3) Intentionally causing or allowing another person to touch the defendant's anus, breast, buttocks, or genitalia which touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature. "Sexual contact" shall also include touching when covered by clothing.

(h) "Sexual intercourse" means:
(1) Any act of physical union of the genitalia or anus of 1 person with the mouth, anus or genitalia of another person. It occurs upon any penetration, however slight. Ejaculation is

[147] At *451, *State v. Monk*, 514 N.W.2d 448, 451 (Iowa 1994).
[148] *Id*. at *450.
[149] At *455, *State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1994).
[150] *Id*.
[151] *Id*.
[152] *Id*.

not required. This offense encompasses the crimes commonly known as rape and sodomy; or

(2) Any act of cunnilingus or fellatio regardless of whether penetration occurs. Ejaculation is not required.

…

(j) "Sexual penetration" means:

(1) The unlawful placement of an object, as defined in subsection (d) of this section, inside the anus or vagina of another person; or

(2) The unlawful placement of the genitalia or any sexual device inside the mouth of another person.

11 DE Code § 761 (g), (h)&(j) (2019).

The terms used in the definitions are further defined as the following:

(b) "Cunnilingus" means any oral contact with the female genitalia.

(c) "Fellatio" means any oral contact with the male genitalia.

…

(d) "Object" means any item, device, instrument, substance or any part of the body. It does not mean a medical instrument used by a licensed medical doctor or nurse for the purpose of diagnosis or treatment.

11 DE Code § 761 (b),(c)&(d) (2019).

In Delaware, the terms "unlawful sexual intercourse," "unlawful sexual touching," and "unlawful sexual penetration," which have been used for sex offenses until the 1990s, have been replaced, as the law on sex crime was largely amended, categorizing rape statutes[153] into four different degrees and sexual contact into first, second, and third degrees. The reform, carried on over the 1990s with increased recognition of "the long-term devastating impact sex offenses have upon the victim, the perpetrator, and society,"[154] *inter alia*, eliminates misguiding concepts such as "voluntary social companion," which has created situations where date and acquaintance rape of a child was considered a lesser crime than stranger rape. However, the fundamental definitions remain largely unchanged.[155] In a case where a defendant appealed his conviction based on, *inter alia*, the fact that he was entitled to a jury instruction on unlawful sexual contact in the second degree, as a lesser included offense of rape in the second degree, the Supreme Court of Delaware found that his act of pressuring the victim with continued threats to put the victim's mouth around the defendant's penis, under statutory definitions, constituted fellatio, and hence, sexual intercourse, adding that it is irrelevant whether there was penetration or ejaculation.[156]

C. Sexual penetration

Alternatively, some states punish acts of sexual battery and sexual penetration. As an illustration, Mississippi's offense of sexual battery under § 97-3-95 is defined as follows:

(1) A person is guilty of sexual battery if he or she engages in sexual penetration with:

[153] Susan Purcell, The Evolution of Delaware Sex Crimes Legislation in the 1990s, 19-Sum Del. Law. 8, 12 (2001).
[154] 154. Id. at 12*.
[155] *Id*. at 9*.
[156] At *3, *Lopez v. State*, 918 A.2d 338 (Del. 2006).

(a) Another person without his or her consent;
(b) A mentally defective, mentally incapacitated or physically helpless person;
(c) A child at least fourteen (14) but under sixteen (16) years of age, if the person is thirty-six (36) or more months older than the child; or
(d) A child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child…

MS Code § 97-3-95 (2019).

In defining sexual penetration,

For purposes of Sections 97-3-95 through 97-3-103 the following words shall have the meaning ascribed herein unless the context otherwise requires:
(a) "Sexual penetration" includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body.

MS Code § 97-3-97 (2019).

Despite the specific definitions, for courts, some confusion as to whether an act in a given case falls under the legal definition of sexual penetration remains. In *Pittman v. State*, the victim testified that Pittman "…began to finger me and then he took my clothes off and he put his mouth down on my private parts."[157] The court dismissed Pittman's claim that the evidence of the victim, his 13-year-old daughter, was insufficient to support his conviction of a sexual battery. The court cited the Supreme Court decision as a controlling definition, which found that "'[P]roof of contact, skin to skin, between a person's mouth, lips, or tongue and the genital opening of a woman's body, whether by kissing, licking, or sucking, is sufficient proof of 'sexual penetration' through the act of 'cunnilingus.'"[158] Based on that definition, the court found that Count VI of sexual battery, charged through the act of cunnilingus oral sex, satisfied the element of the act of sexual battery. [159]

D. Sexual intercourse

a. Definition under Connecticut Law

Moreover, the definition of sexual intercourse that includes anal, oral, and vaginal intercourse, like that of Japan, often becomes a subject of dispute even when the definition is provided by the code in more detail. For example, in Connecticut, sexual assault to the first degree, under Section 53a-70, states:

(a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in *sexual intercourse* (emphasis added) by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person, or (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person, or (3) commits sexual assault in the second degree

[157] *Pittman v. State*, 836 So. 2d 779, 784 (Miss. Ct. App. 2002).
[158] *Johnson v. State*, 626 So.2d 631, 633–34 (Miss.1993) as cited in *Pittman v. State*, 836 So. 2d 779, 784 (Miss. Ct. App. 2002) at *783.
[159] *Id*. at *784.

> as provided in section 53a-71 and in the commission of such offense is aided by two or more other persons actually present, or (4) engages in sexual intercourse with another person and such other person is mentally incapacitated to the extent that such other person is unable to consent to such sexual intercourse.

CT Gen Stat § 53a-70 (2019).

Section 53a-65 – Definitions defines "sexual intercourse" as follows:

> …vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Its meaning is limited to persons not married to each other. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body."

At (2), CT Gen Stat § 53a-65(2019).

b. Disputes in application

In the past, courts in Connecticut have faced a few challenges regarding which actions fall under the state's sex crimes, which compelled the legislature to define what sexual intercourse entails.

In *State v. Scott*,[160] the defendant was charged and convicted of aggravated sexual assault in the first degree and attempted sexual assault.[161] On the evening of December 31, 1995, after the victim, the defendant, the victim's friend and her fiancé had a few drinks at a social club, the victim asked her boyfriend to meet her at her apartment.[162] When the victim left the club with her friend's fiancé and the defendant, the defendant fired his gun a few times into the air. [163] When they arrived at the victim's apartment, the defendant asked her if he could use the bathroom, to which she reluctantly agreed. [164] They went upstairs while the fiancé waited downstairs. After using the bathroom, he kissed her.[165] She initially returned the kiss but told him to stop as he continued to hug and grab her.[166] He continued to touch her and pushed her to the bed in her room.[167] There, she undressed her pants and underwear, and the defendant told her to put a condom that he had produced on his penis, and when she refused, he inserted his penis into her vagina anyway.[168] After a while, he forced her head toward his crotch and told her to lick him, and when she refused, screaming and crying, he recommenced vaginal intercourse. [169] A jury found the defendant guilty of aggravated sexual assault in the first degree and attempted sexual assault in the first degree.[170] Jury instruction, as in many other cases, has served as an important standard for the jury to determine whether the defendant is guilty or not of the charged crime, based on the guidance provided in the court instruction.

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[160] 55 Conn. App. 660, 740 A.2d 441, 445 (1999), *rev'd in part*, 256 Conn. 517, 779 A.2d 702 (2001).
[161] *State v. Scott*, 256 Conn. 517, 779 A.2d 702 (2001).
[162] *Id*. at * 521.
[163] *Id*.
[164] *Id*.
[165] *Id*.
[166] *Id*.
[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *Id*. at * 519.

The trial court instructed the jury on aggravated sexual assault in the first-degree charge as the following:

> Sexual intercourse is defined in several ways in our statute. As it pertains to this count, it means vaginal intercourse. Penetration, however slight, is sufficient to complete vaginal intercourse, and it does not require the emission of semen…
>
> Now, as to the underlying crime of sexual assault in the first degree, I just finished charging you on that particular crime as part of the first count. I don't think I need to repeat it at this point. I can tell you that my instruction to you on that is the same as I would instruct you on this, the second count, with two exceptions... [T]he second distinction between count two and the first is that the sexual intercourse claimed in this count to have been attempted is fellatio rather than vaginal intercourse. And I would instruct you that fellatio is, of course, the act of obtaining sexual gratification by oral stimulation of the penis. Otherwise, the instructions that I have given you regarding sexual assault in the first degree apply equally to this, the second count.

At 667-68, State v. Scott, 55 Conn. App. 660, 740 A.2d 441 (1999), *rev'd in part*, 256 Conn. 517, 779 A.2d 702 (2001).

The defendant claimed that the trial court improperly failed to instruct the jury that penetration was an essential element of attempted sexual assault in the first degree. The appellate court ruled that the instruction was proper, as the "court adequately instructed the jury on the element of penetration by incorporating by reference its instruction on the first count."[171] The court further held the instruction properly informed the jury that penetration is necessary to establish vaginal intercourse during its instruction on aggravated sexual assault in the first degree, allowing the jury to apply the correct standard as it reached its verdict on the attempted first-degree sexual assault by fellatio.[172] One judge, Judge Sullivan, dissented, finding that the instruction was insufficient, as the defendant telling the victim to lick him would not subject him to liability for attempted sexual assault in the first degree by forcible sexual intercourse but rather for the lesser offense of attempted sexual assault in the third degree by forcible sexual contact.[173]

After reviewing the matter, the Supreme Court of Connecticut agreed with the holding that the instruction was improper, as it did not provide sufficient instruction for the jury to understand that proof of penetration was "necessary to find the defendant guilty of attempted first-degree sexual assault by fellatio as well as of aggravated first-degree sexual assault by vaginal intercourse."[174] The Supreme Court of Connecticut therefore reversed the judgment of the appellate court with respect to the defendant's conviction for attempted sexual assault in the first degree and remanded the case in part for a new trial on the charge.[175] The court held that compelling the victim to "lick" did not satisfy the penetration requirement of sexual assault in the first degree unless the victim was forced to insert the perpetrator's penis into her mouth.

To this point, Judge Katz dissented, making a noteworthy argument. As an essential element of analysis to decide if the case satisfies the penetration requirement of forcible sexual

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[171] At 668, *State v. Scott*, 55 Conn. App. 660, 740 A.2d 441 (1999), *rev'd in part*, 256 Conn. 517, 779 A.2d 702 (2001).
[172] *Id*.
[173] *Id*. at 668-671.
[174] At *529, *State v. Scott*, 256 Conn. 517, 779 A.2d 702 (2001).
[175] *Id*. at *536.

intercourse by fellatio, the court first had to determine if the victim was compelled to lick the defendant's penis without necessarily also being compelled to insert the penis into her mouth. In regard to this issue, Judge Katz found that he does not "…distinguish between a penis that is stimulated orally inside the mouth and one that is stimulated orally by the tongue protruding beyond the lips."[176] He subsequently argued that as the tongue is an integral part of the mouth, an act of fellatio inherently involves the use of the tongue, and when the victim's tongue is forcibly extended beyond the usual place of her oral cavity, it should be viewed as "a violation, or penetration, of the boundary of the mouth as so extended."[177] Citing the common law's least penetration doctrine and the legislature's use of the phrase "however slight " in §53(a)-65(2) in support of his position, Judge Katz argued that the public policy underlying the least penetration doctrine of §53(a)-65(2) to punish the fact, not the degree of penetration, would be strengthened by a judicial finding that sexual intercourse as used in §53(a)-70 includes the act of fellatio in the case at hand, satisfying the act of penetration by forcible extension of the tongue out of its usual oral cavity.[178]

The above case demonstrates the potential confusion that exists even for a seemingly clear definition of sexual intercourse, including oral, anal, and vaginal intercourse.[179] If an act of fellatio can be construed as penetration and "when the defendant forcibly touches the victim's tongue with his penis, whether the victim's tongue happens to be inside or outside the mouth when the unwanted touching occurs, the penetration requirement is satisfied,"[180] the kinds of acts punishable change drastically because the same kind of analogy may be applied elsewhere.

The courts in Connecticut have also grappled with the definition of cunnilingus, as it is used to define sexual intercourse. The Supreme Court of Connecticut, in deciding *State v. Kish*,[181] held that the lower court's instruction to the jury that "[c]unnilingus is sexual stimulation of the clitoris or vulva by the lips or tongue. The vulva consists of the external parts of the sexual organs" was proper, as it applies the commonly understood meaning of the word, and penetration is not an essential element when cunnilingus is charged. In another case, the court held that touching the labia majora, the genital opening, of a three-year-old child is sufficient to constitute vaginal intercourse,[182] finding that "the common-law construction of rape was designed to punish the fact, not the degree, of penetration."[183] Recognizing the common-law least penetration doctrine and the jury charge of "penetration of the body" upheld in *State v. Shields*,[184] the court held that the digital penetration of the labia majora is sufficient to satisfy the sexual intercourse element of his sexual assault in the first-degree charge.[185]

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[176] *Id*. at *714-5.
[177] *Id*. at *540.
[178] *Id*. at *541-2.
[179] Additionally, it brings up the interesting issue unique in the U.S. court system that the court needs to be able to properly instruct the jury concerning what falls under the acts under each sex crime offense. Nonetheless, in any judicial proceedings of foreign countries, whether an act falls within the boundaries of punishable act in the first place, before delving into the issue of jury instruction, is often the center of legal dispute.
[180] At 542, *State v. Scott*, 256 Conn. 517, 779 A.2d 702 (2001).
[181] At *764, *State v. Kish*, 186 Conn. 757, 443 A.2d 1274 (1982).
[182] At *807, *State v. Albert*, 252 Conn. 795, 807, 750 A.2d 1037, 1045 (2000).
[183] *Id*. at *724. Similarly, the New York Court of Appeals concluded that the phrase 'penetration, however slight' "…means nothing more than penetration of the private parts of the man into the person of the woman, and no discussion is necessary or proper as to how far they entered." At *237, *People v. Crowley*, 102 N.Y. 234, 6 N.E. 384 (1886), citing *Rex v. Allen*, 9 Car. & P. 31; *Rex v. Hughes*, 9 Car. & P. 752.
[184] At 259, *State v. Shields*, 45 Conn. 256 (1877).
[185] At *812, *State v. Albert*, 252 Conn. 795, 807, 750 A.2d 1037, 1045 (2000).

E. Digital penetration

Additionally, in some states, there have been legal disputes as to whether digital penetration and penetration by objects may satisfy penetration under their sex crime laws. In Pennsylvania, the sexual assault statute states:

> Except as provided in section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent.
> 18 Pa. Stat. and Cons. Stat. Ann. § 3124.1 (West)

> Deviant sexual intercourse and sexual intercourse are defined as follows:
> "Deviate sexual intercourse." Sexual intercourse per os or per anus between human beings and any form of sexual intercourse with an animal. The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.
> …
> "Sexual intercourse." In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required.

18 Pa. Stat. and Cons. Stat. Ann. § 3101 (2018).

In deciding whether digital penetration can be the basis of either sexual intercourse or deviate sexual intercourse, the Supreme Court of Pennsylvania held that "[t]he definitions of sexual intercourse and deviate sexual intercourse include vaginal intercourse, anal intercourse, oral intercourse, and penetration by a foreign object, but not digital penetration of the vagina."[186] The Commonwealth argued that the legislature intended to include all forms of penetration, including digital penetration.[187] The Commonwealth reasoned that if the acts do not include digital penetration, sexual intercourse and deviant sexual intercourse would consist of all types of penetration except the finger, "which would be absurd."[188] The court did not agree. The court held that an examination of the plain wording of the statute does not support that sexual intercourse includes digital penetration. The court further held that the legislature did not intend to include digital penetration, as demonstrated by the fact that the legislature enacted the crime of aggravated indecent assault, another crime of the same degree, which the act would fall into. Aggravated indecent assault states:

> (a) Offenses defined. – Except as provided in sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse) and 3124.1 (relating to sexual assault), a person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault …

18 Pa. Stat. and Cons. Stat. Ann. § 3125 (2018).

[186] At 188, *Com. v. Kelley*, 569 Pa. 179, 801 A.2d 551 (2002).
[187] *Id*. at *189.
[188] *Id*.

Additionally, indecent assault is defined as follows:

> A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:
> (1) the person does so without the complainant's consent;
> (2) the person does so by forcible compulsion;
> (3) the person does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
> …
> (b) Grading.--Indecent assault shall be graded as follows:
> …
> (iii) The indecent assault was committed by touching the complainant's sexual or intimate parts with sexual or intimate parts of the person.
> (iv) The indecent assault is committed by touching the person's sexual or intimate parts with the complainant's sexual or intimate parts.

18 Pa. Stat. and Cons. Stat. Ann. § 3126 (2018)

The examination into the cases demonstrates that while many states provide a detailed explanation of the acts, there are still many legal disputes regarding whether an alleged act would fall under the definition of sexual intercourse, despite attempts to fairly clearly define it by listing what kind of penetration is included in the act and clarifying that neither emission nor nothing more than a slight penetration is needed.

F. Sexual battery

Another act that several states punish, which can be compared to Japan's sexual intercourse or indecent act depending on how a state defines it, is sexual battery. For example, Florida punishes sexual battery, as an act more equivalent to sexual intercourse in Japan, by defining the act as:

> (h) "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose."

FL. Stat § 794.011 (2019).

On the other hand, other states provide a definition of sexual battery that is much broader in scope, and thus, more properly compared to the indecent act in Japan. In California, the statute of sexual battery states:

> (a) Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery…
> (b) Any person who touches an intimate part of another person who is institutionalized for medical treatment and who is seriously disabled or medically incapacitated, if the touching is against the will of the person touched, and if the touching is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery…

…
(d) Any person who, for the purpose of sexual arousal, sexual gratification, or sexual abuse, causes another, against that person's will while that person is unlawfully restrained either by the accused or an accomplice, or is institutionalized for medical treatment and is seriously disabled or medically incapacitated, to masturbate or touch an intimate part of either of those persons or a third person, is guilty of sexual battery…
(2) As used in this subdivision, *"touches" means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim* (emphasis added).
(f) As used in subdivisions (a), (b), (c), and (d), *"touches" means physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense* (emphasis added).
(g) As used in this section, the following terms have the following meanings:
(1) "Intimate part" means *the sexual organ, anus, groin, or buttocks of any person, and the breast of a female* (emphasis added).
…

Cal. Penal Code § 243.4 (2020).

Based on the text of the statute, the Court of Appeal, Sixth District in California, held that acts such as brushing one's arm against another person's breasts satisfy touching under Section 243.4, Subdivision (d), finding that direct contact is not required.[189] In another case, dismissing the state's argument that the defendant's actions forcing the victim's hand to touch his genitals were sufficient to satisfy battery, a court held that a hand cannot be considered to be an intimate part.[190]

G. Spousal rape

Not all, but some state laws specify that sexual rape or other rape occurring between cohabitants is punishable. For example, in California:

(a) Rape of a person who is *the spouse of the perpetrator* (emphasis added) is an act of sexual intercourse accomplished under any of the following circumstances:

(1) Where it is accomplished against a person's will by *means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury* (emphasis added) on the person or another.

(2) Where a person is *prevented from resisting* (emphasis added) by any intoxicating or anesthetic substance, or any controlled substance, and this condition was *known, or reasonably should have been known* (emphasis added), by the accused.

(3) Where a person is at the time *unconscious of the nature of the act* (emphasis added), and this is known to the accused. As used in this paragraph, "unconscious of the nature of

[189] At *716, *People v. Dayan*, 34 Cal. App. 4th 707, 716, 40 Cal. Rptr. 2d 391, 396 (1995).
[190] At *309, *People v. Elam*, 91 Cal. App. 4th 298, 309, 110 Cal. Rptr. 2d 185, 193 (2001), as modified (Aug. 22, 2001).

the act" means incapable of resisting because the victim meets one of the following conditions:
(A) Was unconscious or asleep.
(B) Was not aware, knowing, perceiving, or cognizant that the act occurred.
(C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

(4) Where the act is accomplished against the victim's will by *threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat* (emphasis added). As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(5) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(b) As used in this section, "*duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted* (emphasis added). The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in apprising the existence of duress.

(c) As used in this section, *"menace" means any threat, declaration, or act that shows an intention to inflict an injury upon another* (emphasis added).

(d) If probation is granted upon conviction of a violation of this section, the conditions of probation may include, in lieu of a fine, one or both of the following requirements:

(1) That the defendant make payments to a battered women's shelter, up to a maximum of one thousand dollars ($1,000).

(2) That the defendant reimburse the victim for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's offense.

For any order to pay a fine, make payments to a battered women's shelter, or pay restitution as a condition of probation under this subdivision, the court shall make a determination of the defendant's ability to pay. In no event shall any order to make payments to a battered women's shelter be made if it would impair the ability of the defendant to pay direct restitution to the victim or court-ordered child support. Where the injury to a married person is caused in whole or in part by the criminal acts of his or her spouse in violation of this section, the community property may not be used to discharge

> the liability of the offending spouse for restitution to the injured spouse, required by Section 1203.04, as operative on or before August 2, 1995, or Section 1202.4, or to a shelter for costs with regard to the injured spouse and dependents, required by this section, until all separate property of the offending spouse is exhausted.

CA Pen. Code § 262 (2019).

Alternatively, providing a broader scope, Section 53a-70b (Sexual Assault in Spousal or Cohabiting Relationship: Class B felony) states:

> (a) For the purposes of this section:
>
> (1) "Sexual intercourse" means vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body; and
>
> (2) "Use of force" means: (A) Use of a dangerous instrument; or (B) use of actual physical force or violence or superior physical strength against the victim.
>
> (b) No spouse or cohabitor shall compel the other spouse or cohabitor to engage in sexual intercourse by the use of force against such other spouse or cohabitor, or by the threat of the use of force against such other spouse or cohabitor which reasonably causes such other spouse or cohabitor to fear physical injury.
>
> (c) Any person who violates any provision of this section shall be guilty of a class B felony for which two years of the sentence imposed may not be suspended or reduced by the court.

CT Gen Stat § 53a-70b (2019).

In other states, while silent on law, courts have clearly established that spousal relationships serve as no exception for sex crime laws. For example, in *People v. Liberta*, the court held, "Certainly, then, a marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity. A married woman has the same right to control her own body as an unmarried woman."[191] On the other hand, many other states still allow spousal defense or specifically prescribe lower sentences for spousal rape. For example, Maryland's Section 3-318 (Rape and spousal offense – Spousal defense) states:

> (a) Except as provided in subsections (b) and (c) of this section, *a person may not be prosecuted under § 3-303, § 3-304, § 3-307, or § 3-308 of this subtitle for a crime against a victim who was the person's legal spouse at the time of the alleged rape or sexual offense* (emphasis added).

[191] At 164, *People v. Liberta* ,64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207(1984),citing Thomas Clancy, Equal Protection Considerations of the Spousal Sexual Assault Exclusion, 16 N. Eng. L. Rev. 1, 2-3, 4, 8 (1980); *cf. Planned Parenthood v Danforth*, 428 U.S. 52 (1976).

(b) A person may be prosecuted under § 3-303(a), § 3-304(a)(1), or § 3-307(a)(1) of this subtitle for a crime against the person's legal spouse if:
(1) at the time of the alleged crime the person and the person's legal spouse have lived apart, without cohabitation and without interruption:
(i) under a written separation agreement executed by the person and the spouse; or
(ii) for at least 3 months immediately before the alleged rape or sexual offense; or

(2) the person in committing the crime uses force or threat of force and the act is without the consent of the spouse.

(c) A person may be prosecuted under § 3-303, § 3-304, § 3-307, or § 3-308 of this subtitle for a crime against the person's legal spouse if at the time of the alleged crime the person and the spouse live apart, without cohabitation and without interruption, under a decree of limited divorce.

MD Crim Law Code § 3-318 (2019).

H. Evaluation

The cases likely demonstrate that, despite the attempts by the legislature to provide a clear definition, courts end up drawing the lines of acts in actual cases. Nonetheless, the more unambiguous the definition provided in the statute, the more the courts can rely on the text of the statute without playing a guessing game of what the legislature might have intended. Therefore, the legislature's efforts to clearly define sex crime acts serve all parties involved in the justice system by providing the public better notice, by providing legal professionals with a better understanding of the law, by offering involved parties a better sense of what is punished under an act, and finally, by providing the courts with a clear guidance tool, which they can use to render fair and uniform sentencing for sex crimes.

3. Discussion

The earlier discussion about legal challenges in Japan and the United States demonstrates the demanding task of defining acts that may be punishable as sex crimes in a way that is clear but also general enough to capture various acts. Based on the earlier evaluation, there are seven points to consider when the acts that are punishable as sex crimes in Japan are evaluated with possible consideration for amendment.

A. Expanding the definition of sexual intercourse

First, the discussion of whether the definition of sexual intercourse should be expanded to include other body parts or objects to ensure the protection of sexual minority victims needs to be explored. Miyazaki suggested that while the insertion of objects or other parts of the body, such as the tongue, is not considered sexual intercourse under Article 177, it should be considered as such, given the severity of sexual violation the acts carry.[192] Jun Yamamoto also explained to the committee that even when sexual assault is committed using a finger or an object, the magnitude of damage to the victim remains the same, arguing that the definition of sexual intercourse should be amended to include other kinds of assaults.[193] The committee,

[192] 性犯罪に関する刑事法検討会, *supra* note 107 at 3.
[193] 山本潤, *supra* note 36.

referring to the laws of New York, Michigan, and California, as well as those of South Korea, the United Kingdom, and France, discussed the possibility of including insertion of a part of one's body or an object in the definition of sexual intercourse.[194] Azusa Saito, evincing her argument with her survey of 3,000 subjects, with 7.7% of women and 2.9% of males among those reported as having experienced sexual assault, suggested that whether the sexual assault was committed by male genitalia, the finger, or other objects, the mental damage suffered by the victims did not differ.[195]

On the other hand, Takashi Hashizume pointed out that all acts to be included in the definition of forcible sexual intercourse should have the same degree of seriousness and wrongfulness as those of forced vaginal, anal, and oral penetration by male genitals, expressing doubt that every kind of insertion committed by finger or object carries an equivalent degree of culpability.[196] Another point was raised as to whether different kinds of insertion or penetration are sexual in nature enough to qualify as acts of sexual intercourse, as Hashizume suggested that acts included in the definition of sexual intercourse should be those that carry clear sexual intention and thus can be regarded as a sexual invasion. [197]

Amending the definition of sexual intercourse involves drawing some kind of line around what acts can be regarded as sexual intercourse. Two pertinent issues in deciding where the line lies would be (1) whether including such acts in the definition of sexual intercourse indeed promotes justice for victims and (2) whether acts of insertion by objects or body parts, when such acts do not appear to be sexual in nature, can be considered as sexual intercourse.

B. Implications of the potential expansion

The discussion about the two above points cannot be made without a review of literature on how victims perceive different types of sexual assault. Research, including the aforementioned study by committee member Saito, suggests that mental suffering for victims does not differ based on the types of assault.[198] On the other hand, some research suggests that women who have experienced non-vaginal type of assault, including oral or digital sex, are less likely to construe their experience as rape, thereby reporting less mental harm.[199] Kahn and others, in the analysis of the result of the experiment, raise the following difficult questions:

> Should efforts be made to get all women who have had an experience that would legally qualify as rape to label their experience as such? Women as a group, and likely women in the future, might be better off if all women who experienced rape labeled it as such. Such widespread acknowledgment of rape might highlight the tremendous problem of rape in our society, lead to greater enforcement of rape statutes, greater prosecution for rape, and ultimately reduce the frequency of rape. But at what cost to individual women who can better cope with what happened to them by not calling their experience rape?

At 241, Kahn et al., supra note 193.

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[194] 性犯罪に関する刑事法検討会, *supra* note 132 at 2.
[195] *Id.* at 4.
[196] *Id.* at 6.
[197] *Id*.
[198] *Id*. at 4-5.
[199] Arnold S. Kahn, Jennifer Jackson, Christine Kully, Kelly Badger & Jessica Halvorsen, Calling It Rape: Differences in Experiences of Women Who Do or Do Not Label Their Sexual Assault as Rape, 27, Psych. Women Quarterly, 233, 242 (2003).

On the one hand, many victims who have experienced other types of sexual assault, such as object or digital penetration, should not be denied an opportunity to seek justice because they are unfamiliar forms of sexual assault that have not been traditionally recognized as such. Therefore, it is possible to argue that exclusion of some types of penetration, such as those using other body parts like fingers or objects, would deter a fair and consistent punishment of sex crime. In regard to this point, while the court in Pennsylvania has denied the argument, the argument made by the prosecution in forementioned *Com. v. Kelley* that it would be absurd to construe that sexual intercourse would include all types of penetration except for, in the case at hand, fingers,[200] still holds.

On the other hand, hastily broadening the legal definition may harm rather than help some victims by causing them to recognize their experiences as rape and thereby increase their mental suffering from the experience, as the authors point out. Moreover, it would make prosecution difficult, creating situations in which victims do not identify themselves as such.

Before concluding that expanding the definition of sexual intercourse may increase suffering for some victims who have not identified their experience as sexual violence, two points should first be addressed first to determine whether the assumption underlying the argument is reasonable. First, it should be evaluated whether victims are indeed better off not labeling their experiences as sexual violence or rape. At the outset, including the research by Kahn et al.,[201] literature has consistently found that rape myths that distort the conception of victims' experiences, as well as the prejudice that is encrusted once one is labeled a rape victim, are the major causes of many victims' unwillingness to label their experiences as rape.[202] Moreover, those with "more benevolent sexist attitudes, greater rape myth acceptance, and more tolerant attitudes of sexual harassment were less likely to label their past sexual assault experience as rape."[203]

Others further point out that when women cannot label their prior experience of sexual assault or abuse for what it is, they do not understand their psychological distress, and therefore, they do not seek treatment.[204] Moreover, on the contrary, some research suggests that the harm suffered by victims do not label their past experiences of sexual assault as sexual violence is more severe than the harm suffered by victims who do. In fact, one study has found that when compared to acknowledged victims, unacknowledged victims tend to experience more emotional problems and poorer psychosocial adjustment, demonstrating problems including emotional problems interfering with work or social activities, lack of support, frequent experience of negative emotions, and increased alcohol consumption.[205]

During the committee meeting, Saito also suggested that, by pointing out that while there are victims who do not identify their experience as sexual violence or a sex crime, they

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[200] At 189, *Com. v. Kelley*, 569 Pa. 179, 801 A.2d 551, (2002).
[201] Kahn et al., *supra* note 199.
[202] At 130, Kimberly Lonsway & Joanne Archambault, The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform, 18 Violence against Women 2, 145, 182 (2012).
[203] Kelly LeMaire, Debra Oswald & Brenda Russell, Labeling Sexual Victimization Experiences: The Role of Sexism, Rape Myth Acceptance and Tolerance for Sexual Harassment, 31 Violence & Vic., 2, 322, 346 (2016).
[204] At 410, Melanie Harned, Understanding Women's Labeling of Unwanted Sexual Experiences with Dating Partners: A Qualitative Analysis, 11 Violence against Women 374, 413 (2005), *citing* Melissa Layman, Christine Gidycz & Steven Lynn, Unacknowledged Versus Acknowledged Rape Victims: Situational Factors And Posttraumatic Stress. 105 J. Abnormal Psych., 124, 131 (1996); Victoria Pitts & Martin Schwartz (1993). Promoting Self-Blame in Hidden Rape Cases. 17 Hum. & Soc., 383, 398 (1993).
[205] Renee Botta & Suzanne Pingree, Interpersonal Communication and Rape: Women Acknowledge Their Assaults. 2 J. Health Comm., 3, 197, 212 (1997).

nonetheless may suffer from severe psychological damage or suicidal ideation, substance abuse, severe impact on the social functioning, including the poor adjustment at the school in case a victim is a student, and disturbance on interpersonal relationships.[206] Therefore, it seems untenable to conclude that victims are better off in terms of their psychological well-being and social functioning when they do not recognize their experiences as rape or sexual abuse.

Moreover, the results of the research by Kahn *et al*.[207] may not reflect how male and LGBTQIA+ victims account for their experiences. It should also be noted that understanding sexual assault grows and changes, and since 2003, when the research was developed, it is possible that the difficulties associated with acknowledging one's own experiences of sexual assault as sexual violence may have seen a scintilla of improvement[208] with improved social understanding about sexual violence.[209] More importantly, it should be explained that a victim's labeling of his or her experience of sexual violence is not a plain, one-time process but a continuum that is affected by the reactions of those who have received the information.[210] Many victims initially disclose their experience as sexual assault but later stop when they receive negative reactions from professionals, family, or friends, which increases their feelings of self-blame and self-doubt.[211] What this implies is that even if victims initially recognize their experience as rape or sexual assault, they may refuse to continue to do so if such disclosure is met with negative reactions, thus making it difficult to determine if lack of acknowledgement by victims is a product of negative conditioning or that of their genuine beliefs. Therefore, taken as a whole, it seems far-fetched to conclude that expanding the penal law's scope of sexual intercourse would harm rather than help the victims. Rather, legislative reform may bring about positive changes that can, in turn, improve the social conception of sexual violence for the better,[212] promoting an environment where victims can more comfortably identify their experiences for what they are.

C. Penetration by a body part or object

In response to the second point, Saito pointed out that, in the case of a bullying victim who has experienced the insertion of a body part or an object by multiple people into one's genitalia, the purpose of the act is to insult the person sexually, and the victim has been treated as a sexual object in a forcible way.[213] Therefore, if in the same situation, one victim is forced

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[206] At 5-6, 法務省，性犯罪に関する刑事法検討会第 5 回会議議事録 (Aug. 27, 2020).
[207] Kahn et al., *supra* note 199.
[208] The programs often include components challenging rape myths and various types of sexual violence. *See* Shannon Morrison, Jennifer Hardison, Anita Mathew & Joyce O-Neil, An Evidence-based Review of Sexual Assault Preventative Intervention Programs, National Inst. of J. Tech. Rep. (2004).
[209] *See* at 40, Brittney Herman, Sex Education as a Form of Sexual Assault Prevention: A Survey of Sexual Education Among States with the Highest and Lowest Rates of Rape, 1 BYU Edu. L. J. 5 (2020)(showing that lowest rates of rape commonalities include teaching of consent, coercion, dating violence and that in states with lower rates of rape students learn about how to respond to an assault, including the methods of reporting available remedies of assault).
[210] Zoe Peterson & Charlene Muehlenhard, Was it Rape? The Function of Women's Rape Myth Acceptance and Definitions of Sex in Labeling Their Own Experiences, 51 Sex Roles 3/4, 129, 144 (2004)(suggesting that rape acknowledgement may be dichotomous variable).
[211] Courtney Ahrens, Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape, 38 Am. J. Comm. Psychol. 263, 274 (2006).
[212] At 159, Kimberly Lonsway & Joanne Archambault, The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform, 18 Violence against Women 2, 145, 182 (2012).
[213] 性犯罪に関する刑事法検討会, *supra* note 132 at 4-5.

insertion by male genitalia and the other by a beer bottle, Saito suggested that it is unreasonable to punish the former as sexual intercourse and the latter as sexual indecency.[214] Indeed, while it is too simplistic and unrealistic to regard sexual assault simply as a crime of violence,[215] the essence is that sex is the only means of achieving the violence and dehumanization of victims.[216]

Ultimately, in affording the protection of all victims, including LGBTQIA+ victims, the inclusion of these other forms of penetration to the current definition of sexual intercourse can only be fairer and more consistent. Some may view that, in comparison with oral, anal or vaginal sexual intercourse, acts of penetration using body parts or objects committed with the required means may be viewed as less sexual in nature for they has been committed with other purposes like bullying, harassment, or humiliation. However, as the courts in Japan have already found, sexual intention should not be the focus on determining the culpability of the acts. Instead, the focus should be on harmful violence and disrespect for the victims associated with the acts. The need to include the acts is obvious if sufficient consideration is given to the graveness of harm to the victims caused by penetration using objects or fingers.

D. Separate offense

Subsequently, discussion needs to be made on whether creating a separate offense for the other types of penetration, rather than adding them to the definition of sexual intercourse in Japan, would be more feasible, considering their nature and degree of culpability. In fact, during the committee meeting, some members, such as Wada, suggested that enacting a separate crime that includes other acts of insertion may resolve the disputed issue of how to address acts of insertion that are not of a sexual nature in the traditional sense, while acknowledging that this does not resolve objections by those who believe that the acts do carry the same degree of culpability and blameworthiness and thus should be punished as sexual intercourse.[217] However, again, the mental damage to those who have been victims of sexual assault using objects or other bodily penetrations may be as serious as those who have been victims of sexual assault by genital, oral, or anal penetration.[218] Additionally, digital or object penetration also carries bodily harm, sometimes distinct enough that medical experts can identify certain kinds of scars to genitalia due to damage from violence committed using other body parts or certain objects.[219] Therefore, in terms of the gravity of bodily or mental harm, it may not matter what kind of sexual penetration against one's will has been committed, suggesting that sexual penetration of all kinds carries the same degree of culpability and blameworthiness, and the line-drawing should be done while considering the magnitude of harm to the victims. In this regard, Rikizou

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[214] *Id*.

[215] Ann Cahill, Foucault, Rape, and the Construction of the Feminine Body, 15 Hypatia 1, 43, 63 (2000).

[216] Winifred Woodhull, Sexuality, power, and the question of rape, Feminism and Foucault: Reflections on Resistance, ed. Irene Diamond &Lee Quinby (1988).

[217] 性犯罪に関する刑事法検討会, *supra* note 132, generally & at 7.

[218] At 29, Sophie Khadr, Venetia Clarke, Kaye Wellings, Laia Villalta, Andrea Goddard, Jan Welch, Susan Bewley, Tami Kramer & Russell Viner, Mental and Sexual Health Outcomes Following Sexual Assault in Adolescents: A Prospective Cohort Study, 2 The Lancet Child & Adolescent Health 9, 654, 665 (2018)(finding that assault characteristic, including digital or object penetration, does not make a difference in terms of risk for psychiatric disorder among adolescent victims); *See also* Azusa Saito's comments. *Id*. at 4.

[219] At 874, Troy Andrew Eid, A Fourth Amendment Approach to Compulsory Physical Examinations of Sex Offense Victims, Univ. Chic. L. Rev. 873, 901 (1990). Also *see* FN 10 at *Id*., explaining that medical experts may attribute certain types of rectal scar tissues or hymenal scars as a result of certain types of penetration.

Kuzuhara suggests that a straight-forward sexual penetration element may be more suitable for Japan.[220]

Another point that needs to be discussed is whether other forms of penetration should be included in the legal definition of sexual intercourse and how to phrase different acts to be included in sexual intercourse. On this point, the wording "…any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body" in the Miss. Code. Ann. § 97-3-97 we have reviewed above may serve as a reference in determining how to properly word a broader definition of sexual intercourse.

E. Indecent act

Next, whether an indecent act serves as an effective element of a crime should be evaluated. The evaluation is founded upon the understanding, per the earlier review about the concept of the indecent act in Japan, that the current judicial determination of whether an act qualifies as an indecent act is made based on the evaluation of whether it can be an element of a sex crime, given the social understanding of such an act and the circumstances under which it is committed.[221] Proponents may offer two reasons for amending the wording of the "indecent act." The evaluation of the third consideration is made while bearing the two following motives in mind.

First, it may be beneficial to modify the "indecent act" to a better-defined term with clear-cut boundaries, providing a more sensible notice to the public as to what kinds of actions are prohibited under the penal law. However, the definition must not become too rigid to limit the kinds of acts that can be punished under the law. This is a particularly pertinent task, as this definition serves as a catch-all phrase that describes all sex crime acts other than those qualifying as sexual intercourse. If the definition is amended to be clearer, the amendment should be conducted carefully so that it does not lose the flexibility to include acts under different circumstances.

An alternative reason may be to expand the list of acts that could fall under the acts of a sex crime. To address this concern, it is essential to first gauge room for improvement for the breadth of an indecent act by mapping out what kind of acts are included or, alternatively, excluded in the definition of an indecent act. Based on Kamon's analysis of cases mentioned in the earlier part of this section, the indecent act largely covers (1) contact with sexual parts of the body,[222] including those covered with clothes if the act is persistent[223] (2) contact with non-sexual parts of the body, but only if the act is grave sexual invasion committed against the victim's will;[224] (3) limited non-contact cases where victims are made to see a sexual act of the perpetrator, such as masturbation, and only if committed in a rather forcible way[225] (4) limited non-contact cases where the victim's sexual act or naked body is made to be shown to the perpetrator and is necessarily accompanied with the use of force or other forcible means that

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[220] At 398-9, 葛原力三「性刑法の改正について」関西大学法学論集 70 巻 2=3 号（2020 年）359 頁-399 頁.
[221] At 80, 谷脇真渡「強制わいせつ罪の成立に性的意図は必要か―平成 29 年 11 月 29 日最高裁大法廷判決を契機として―」桐蔭法学 25 巻 1 号（2018 年）75 頁-109 頁.
[222] 嘉門優, *supra* note 34 at 126-7.
[223] *Id*. at 124.
[224] *Id*. at 127-8.
[225] *Id*. at 130.

makes it impossible for the victim to refuse it, unless the victim is a child.[226] Indecent acts, as prior court decisions have demonstrated, do not cover stealth photograph by the perpetrator of the victim because this lacks the victim's concurrent awareness of the sexual invasion.[227] It also does not cover contact with non-sexual parts of the body, such as touching toes, if the act does not accompany touching of sexual parts of the body, such as genitalia, as the act cannot be considered to be, objectively and reflecting on social standards, "acts with the purpose of straightforwardly satisfying the perpetrator's sexual satisfaction."[228]

On the other hand, while some acts, such as stealth photography, are not covered by indecent acts, they nonetheless should be included in the punishable acts to afford protection for victims of all types of sex crimes. This is especially important given that stealth photography and the distribution of sexual media featuring victims are increasing in many forms, but as this discussion also involves an examination of sex crimes facilitated by technology, such acts are discussed in more detail in Chapter iv. Online and Technology-Facilitated Sex Crimes. Some of these acts fall under the definition of a perverted act (「痴漢行為」) under the prefectural nuisance prevention ordinances (「迷惑防止条例」),[229] but the acts falling under the ordinances differ from the criminal sex crime law for its lesser degree of culpability and punishment. Moreover, as a public display of the acts is often required to be punishable under the prefectural ordinances, it should be contemplated whether criminal intervention should be expanded to cover persistent and severe sexual harassment in private settings and other sexual acts that nonetheless threaten victims' sense of safety, acts that do not get properly punished under current sex crime law.

For an informed analysis with points of comparison, three alternative elements of sex crime acts used in state laws may be worth exploring at this point. First, lewdness is sometimes used to define acts of indecency in the context of punishing public lewdness, such as in Section 21.07 of the Texas Penal Code,[230] but it is also a concept, along with the lascivious act, that is used by the U.S. states as an equivalent of an indecent act of sex crime laws in Japan. In Vermont, for example, §2602 states that:

> (a)(1) No person shall willfully and lewdly commit any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of 16 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of such person or of such child."

13 V.S.A. § 2602.

Not to mention that the term "lewdness" also carry the same degree of ambiguity as the term "indecent act", if considered a potential alternative to indecent act for Japan, there is also a

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[226] *Id*. at 131.

[227] *Id*. at 132.

[228] *Id*. at 128. (clarifying, in FN34, that while sexual intention may not be a necessary element, it can serve as an important point of consideration.)

[229] Sexual battery is punishable by anti-nuisance regulations (迷惑防止条例), such as 昭和 37 年東京都条例第 103 号 of Tokyo.

[230] §21.07 Public Lewdness

> A person commits an offense if the person knowingly engages in any of the following acts in a public place or, if not in a public place, the person is reckless about whether another is present who will be offended or alarmed by the person's: (1) act of sexual intercourse;(2) act of deviate sexual intercourse; or (3) act of sexual contact. (b) An offense under this section is a Class A misdemeanor.

TX Penal Code § 21.07 (2019).

problem of translating the word correctly into Japanese. Overall, there would be no great value in replacing "indecent act" with "lewdness."

Another option may be the employment of the term "sexual battery." As the example of the statute of California Penal Code § 243.4 explained above, when broadly defined, "sexual battery" may serve as an alternate element with a higher degree of specificity. However, as with "lewdness," there are many unresolved issues that make it unsuitable as a potential alternative to an indecent act. First, it is highly arguable that most, if not all, acts pertaining to the definition of sexual battery are already included in the concept of the indecent act as used in Japan. Second, given the comparative conciseness of the Penal Code of Japan, it is not feasible to first employ the concept of sexual battery and provide a list of extensive definitions, as in the case of California. However, without a list of further definitions, the concept of sexual battery is just as equally inherently ambiguous to the degree that its application is vastly different depending on a state's definition. Furthermore, as in the earlier contender of "lewdness," there remains the same issue of interpreting the term accurately in Japanese so that its original meaning is well-maintained. Lastly, the potential effect of using the term "sexual" should be considered, which is to be dealt with in more detail after providing the last potential candidate used by states.

Alternatively, other states use the concept of sexual contact. For example, in Delaware, the offense of unlawful sexual contact in the third-degree is stated as follows:

> A person is guilty of unlawful sexual contact in the third degree when the person has sexual contact with another person or causes the victim to have sexual contact with the person or a third person and the person knows that the contact is either offensive to the victim or occurs without the victim's consent.

11 DE Code § 767 (2019).

The concept of sexual contact seems clear and general enough to capture different types of bodily contact of a sexual nature. However, the term "sexual" that is included in the concepts of both sexual battery and sexual act may be an issue. That is, there is a possibility that, if misconstrued, courts may understand that only acts committed with apparent sexual intent can satisfy as sexual battery or sexual contact by, for example, making it difficult to punish acts of sex crimes committed with the purpose of harassment or bullying. The problem here, then, is how the courts would interpret the word "sexual," which serves to name an attribute to acts such as battery or contact. While it can be clarified that "sexual" goes only to the generally perceived nature and not the purpose of the acts, adding such an explanation may complicate the legal text and make it more ambiguous, and thus, counter-effective.

The word "indecent" may also carry confusion and ambiguity in the same way that "sexual" does, as Kamon pointed out that some mistakenly argues that "the indecent act" does not offer protection for groups such as children, when in fact, the sexual purpose is supposed to be only analyzed in relation to the perpetrator.[231] However, as alternative options using sexual contact or touching are neither clearer in their definitions nor more inclusive than "indecent act," and if it is ultimately up to the courts to set the boundaries of the concept "sexual," adopting any of the alternative options provided as examples above, in place of the element "indecent act," seems futile, and rather, counter-productive.

Regardless, serious consideration should still be given to the possibility of penalizing verbal sexual harassment and other acts, such as non-contact sex crimes. These different acts would include those that may not be understood as sexual by the objective social standard but are

[231] 嘉門優, *supra* note 34 at 127-8.

nonetheless sexual for a perpetrator, and accordingly perceived as such by a victim. Therefore, creating a lesser offense, including verbal and other acts of sex crimes, should be considered to supplement indecent acts and prevent loopholes in punishment.

F. Spousal rape

As introduced earlier in the discussion of Japan, many committee members suggested that specifying in the laws that sex crimes against spouses are also punishable would help clarify the persisted outdated notions that some sexual coercion between spouses is permissible, and it would guide courts in recognizing spousal sexual assault.[232] While a dedicated statute like the ones introduced in the review of U.S. laws may not be necessary, as Saito, Hashizume and Yamamoto have suggested, [233] the inclusion of a clause that states "regardless of whether one is married the victim" or "regardless of marital status" can be a feasible and practical solution.

G. Protection of children

Finally, for children, expansion of the punishable act may be desirable, considering the special characteristics of the child victims. Child victims often do not understand the sexual nature of certain acts, and pedophiles often engage in different types of acts, such as grooming or other acts that may not project obvious sexual intent, to get sexual gratification from children. Some of these acts, if done among adults, may not be suitable for criminal sanctions. However, in the context of children, the same seemingly relatively harmless act may lead to greater harm. That is, acts of building relationships with children online or asking for their pictures, even if the pictures are not sexual, may eventually lead to significant harm for children, the former by allowing perpetrators to groom the children for sexual purposes, and the latter by potentially making their pictures available for sexual purposes among pedophiles and increasing the susceptibility of children to provide pictures of an increasingly greater sexual nature. As an illustration, during the introduction for the committee, Yamamoto explained that with the development of the internet, there is an increase in cases where perpetrators use the internet to contact child victims and groom them for the purpose of sexual acts, sexual abuse, or human trafficking.[234] In her research, Kamon suggests that, for children with immature abilities to make decisions, the protected interest should be protected from sexual inviolability (「性的不可侵性」[235]), as indicated by Keiichi Yamanaka,[236] meaning that they are entitled to be free from any sexual stimulus.

Furthermore, as any sexual act committed against children may deter to their development, defining acts of sex crimes when the victims are minors warrants special consideration.[237] A more nuanced development of the act, however, should be done in conjunction with the discussion about the characteristics of sex crime against children and the increasing modern sex crimes against children. Therefore, a more in-depth discussion about how the act should be defined follows in later chapters. Additionally, further discussion of how the act elements interact with other elements of sex crimes is to be made in Chapter V. Recommendations .

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[232] 性犯罪に関する刑事法検討会, supra note 137 at 19-22.
[233] *Id*. at 21-22.
[234] 山本潤, *supra* note 36.
[235] 嘉門優, *supra* note 34 at 134.
[236] 山中敬一, *supra* note 39.
[237] 嘉門優, *supra* note 34 at 134.

ii. MEANS

This chapter reviews means elements, namely the elements concerning how or under which circumstances culpable acts are committed. In Japan, three means elements are used for sex crime laws: force or threat, *non compos mentis* or inability to resist, and finally, under Article 179, using influence as a guardian in fact. As Article 179 is discussed in detail under the chapter on vulnerable groups, this chapter dedicates itself only to the means of force or threat and *non compos mentis* or inability to resist, with a more specialized focus on force or threat. More specifically, along with judicial interpretation of the elements, various expert opinions about the elements are introduced to analyze their appropriateness. Following the review, various means elements in the U.S. states are introduced to enable a comparison with those of Japan. Finally, based on the comparison, this chapter engages in a discussion on whether the means elements of Japan effectively serve their roles as legal elements for sex crimes.

1. Japan

A. Force or threat

In Japan, force or threat is required for both the crime of forcible indecency, Article 176[238], and the crime of forcible sexual intercourse *et al*. Article 177.[239] As clarified in my previous article comparing the sex crime amendments of Japan and the state of Montana, "'[a]ssault' corresponds to 'force,' and 'intimidation' to 'threat' in the Anglo-American legal language."[240] Force or threat is perhaps the most disputed element in Japan's sex crime law. Some criticize the element of force or threat as a cause for passive and insufficient sex crime prosecution in Japan, while others suggest that it is a necessary evil and, at the same time, a scapegoat for everything that is wrong with sex crime prosecution in Japan, when it is merely serving its role in providing clarification for what is being punished under the articles. This section examines how the element is being applied in Japan through a review of relevant court cases, and it explores arguments for both proponents and opponents of the elements to evaluate whether the force or threat element should be maintained.

When considering the element of force or threat, courts in Japan need to evaluate whether the victim's resistance is rendered conspicuously difficult by the perpetrator's behavior, as the Supreme Court of Japan has held that "…the [force or threat] requirement should be deemed satisfied if the act, under the conditions at the specific time and place, is considered to have made it impossible or conspicuously difficult for a person of the age, sex, background and behavior to [resist]."[241] Therefore, the court should consider specific facts and circumstances of each case in determining if the force or threat used in each case is of a degree that made a victim's resistance conspicuously difficult, and when the court can find that it is so, the force and threat element can be deemed satisfied.

a. Court cases

(1) The Kobe case (2004)

In order to properly evaluate how courts in Japan apply this standard and interpret force and threat, a few cases will be presented. First, a case decided in 2004 by the Kobe district

[238] At 第百七十六条 [Art. 176], *infra* at 16-17.
[239] At 第百七十七条 [Art. 177], *infra* at 21.
[240] Sou Hee Yang, *supra* note 23 at 66.
[241] 最判昭和 33 年 6 月 6 日集刑 126 号 171 頁.

court[242] is worth noting. The defendant, as an employee of a company that sells desserts, managed and directed bakeries operating under the company, and the victim worked as a clerk at one of the bakeries. [243] The decision found that, other than one being in the position of a superior and the other being a subordinate in the company, there was no other personal relationship between the two.[244] On the day of the crime, the defendant offered the victim a ride. [245] The defendant suggested that they should go see the night view, and when the victim agreed, he parked his car at a secluded dark spot where there was little pedestrian or car traffic. [246] The defendant was talking to the victim about the victim's boyfriend and started touching the victim on the head and earlobes. [247] When the victim did not clearly refuse it, the defendant kissed the victim and fondled her breasts. [248] As the victim did not make it clear by her action or words that she did not want this,[249] the defendant put his hand under the victim's skirt and touched her thigh, at which point the victim said, "Please stop." [250] The victim did not flee, and the defendant dropped her off at her home while telling the victim that he intended to make a change to her position in the factory soon, as she had wished. [251] In deciding on the case, the court noted that it was doubtful that the victim's memory was accurate, as the victim did not report the incident until more than a year and seven months had passed.[252]

The court found the defendant's arguments that he was not aware that the victim did not want his advances, as she did not make her refusal clear, and that he stopped as soon as she expressed her lack of consent, cannot be plainly dismissed.[253] Nonetheless, the court considered the following facts. The defendant was a 39-year-old married man with children, and the victim was a 19-year-old living with a boyfriend. [254] The defendant took her to a secluded area with little traffic. [255] During the offense, the defendant stopped when the victim desperately asked the defendant to stop, and while the victim continued working at the bakery for a while, she eventually quit her job, which was intended to be a stepping stone for her dream to become a pâtissier, because she could not stand working with the defendant.[256] From these facts, the court held that the defendant, being fully knowledgeable about the victim's age, relationship, and circumstances, could have easily understood that the victim did not consent to his acts of kissing her and fondling her breasts and that, rather, she, surprised and startled, was in a position where it was not easy for her to strongly express her rejection. [257] The court, finding that the defendant used the victim's difficult position, in which she could not clearly refuse his advances, held that

[242] 神戸地判平成 16 年 6 月 28 日 LEX/DB 25410588.
[243] *Id*.
[244] *Id*.
[245] *Id*.
[246] *Id*.
[247] *Id*.
[248] *Id*.
[249] *Id*.
[250] *Id*.
[251] *Id*.
[252] *Id*.
[253] *Id*.
[254] *Id*.
[255] *Id*.
[256] *Id*.
[257] *Id*.

the defendant clearly had the understanding that the acts were committed against the victim and that there was *koi* to commit indecent acts against her will. [258]

Moreover, the court held that even from the defendant's testimony, no reasonable explanation supports that the victim has consented to the defendant's acts.[259] The court also held that the defendant talking about how he intended to transfer the victim to the work position she had wished for after the commission of his offense demonstrates that the defendant knew that his actions were committed against the victim's will.[260] Finding the defendant guilty, the court further held that there was no reason for leniency for the defendant's selfish motive to satisfy his sexual needs by taking advantage of his position as a superior and the victim's position where rejection was difficult.[261] The court also noted that his advances ultimately caused the victim to lose her job, which was a gateway to making her dream come true.[262] The court additionally found that the defendant could not reach a settlement with the victim and that he had been investigated for committing other similar offenses after this event. [263] Nonetheless, the court found several reasons to reduce his penalty. First, because the victim did not express clear refusal (even if the court held that she was in a state in which saying no was difficult), "the level of forcibleness employed in the case is weak, and the indecent acts committed are also not of serious degree."[264] Second, the defendant acknowledged that his actions were wrong and showed remorse, and he proposed to pay 100,000 yen to the victim, even though the victim refused to accept it. Finally, the defendant needed to support his children.[265] For these reasons, the court sentenced him to a year of imprisonment, suspended for three years.[266]

This case brings up two points of discussion. First, notwithstanding that the court's dictum that the victim's resistance is not required to find the defendant guilty, it nonetheless became a factor for providing a lesser penalty. The court held, as one of the reasons for reducing the sentence, that she did not actively refuse: "the level of force in the case is weak that it does not amount to finding that the acts were indecent acts."[267] Therefore, even when a court does not require a victim's resistance, such resistance may nonetheless play an important role in the court decision, as it determines the penalty for the defendant.

Second, it is worthwhile to take a closer look into the reasons the court provided in deciding on the defendant's sentence. While holding that the defendant had deliberately engaged in sexual acts against the victim's will by taking advantage of her position, it is interesting that the court decided to lower his penalty based on his use of a low degree of force. Therefore, the force or threat element, more than merely serving as a "yes or no" standard to assist the court to find whether a circumstance has made the sexual act criminal, serves a more active role, as its degree also goes to the determination of sentence. Additionally, it is curious that the court held that the defendant deserved no leniency as he repeated similar acts and was again under police

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[258] *Id*.
[259] *Id*.
[260] *Id*.
[261] *Id*.
[262] *Id*.
[263] *Id*.
[264] *Id*.「被告人が被害者に加えた強制の程度は弱く，わいせつな行為の内容も強度とまではいえないこと」.
[265] *Id*.
[266] *Id*.
[267] *Id*.「被告人が被害者に加えた強制の程度は弱く，わいせつな行為の内容も強度とまではいえないこと」.

investigation for committing such acts, while at the same time finding that he deserved some leniency because he was showing remorse.

This case well demonstrates how courts in Japan often seem to provide reasons for leniency, sometimes even by offering far-fetched reasons. This kind of leniency, or the tendency to find a reason to reduce the sentence, may not be limited to sex crime sentencing in Japan. In other words, the general tendency to show leniency when rendering sentences may be a characteristic of the criminal justice system in Japan, rather than a problem specific to sex crime laws. Indeed, generally speaking, prosecutors in Japan routinely suspend prosecution in about one-third of all offenses, and judges also routinely suspend sentences for nearly 60% of convicted offenses.[268]

Moreover, whether the force or threat element is the right criminal element has been debated mainly in the context of sexual intercourse, but this case addresses the implications of the element as it interacts with the element of indecent act. One problem particular to the application of force or threat in Article 176 is that there seems to be some confusion about whether certain persistent and unwanted sexual contacts should be understood as satisfying the force or threat element or the indecent act element.[269] If there is no clear way to address this confusion, the element's independence and ability to stand as a whole and separate criminal element may be called into question. In the case at hand, the defendant escalated his unwanted sexual contact with the victim. However, while the court acknowledged that the escalating nature of the act may have contributed to the difficulty for the victim to resist, the court did not directly hold that persistency of acts can be grounds for finding the force or threat element.

(2) The Miyazaki case (2020)

Next, the case decided by Miyazaki District Court in 2020 serves as an illustration of what a court would consider as force. According to the facts of the case, the defendant was the victim's high school teacher.[270] The defendant and the victim frequently met even after the victim's graduation, as the victim's sister worked out at the judo gym, at which the defendant was also working.[271] On the night of the event, the defendant, the victim, and the former manager at the gym went out for a drink together.[272]

The victim and defendant's accounts of what happened are provided in detail to aid the examination of what the court takes into account when it evaluates the element of force. The victim's account is as follows. After drinking, the defendant was walking the victim home, the defendant bumped into the victim, and the victim pushed back.[273] When the victim and the defendant were walking in a park, he suddenly placed his hand on the victim's waist.[274] The victim said, "What are you doing?" as she pushed his arm away, thinking that maybe it was a prank.[275] After that, the defendant did not do anything, and the victim walked ahead of him.[276]

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[268] At 406, John O. Haley, THE HANDBOOK OF COMPARATIVE CRIMINAL ELEMENT (Kevin Heller & Markus Dubber ed., 2010).
[269] 嘉門優, *supra* note 34 at 121.
[270] 宮崎地判令和２年２月３日 LEX/DB 25565043.
[271] *Id*.
[272] *Id*.
[273] *Id*.
[274] *Id*.
[275] *Id*.
[276] *Id*.

The defendant seemed to be in a somber mood because he did not say anything.[277] The victim felt somewhat intimidated, so she said twice that she could go home by herself. Each time, the defendant said that he would walk with her a while more.[278]

When he walked her by the stairs, the victim thanked him for accompanying her, turned around, and tried to climb up the stairs.[279] At that point, the defendant pulled her by the arm to face him, and he kissed her.[280] The victim took a step back, but the defendant kissed her again and put his hand under her clothes to touch her breasts, genitals, and buttocks.[281] When she came to, the victim's pants and underwear had been pulled down, and the defendant was licking her genitalia. [282] After that, the defendant said with a strong tone that he would go over to a bench. [283] At this point, the victim was lowering herself to pull up her pants and underwear, but the defendant strongly grabbed the victim by the left arm, pressed his body against her, and took the victim to the bench. There, he forced sexual intercourse against the victim.[284] After that, the defendant told her to put his genitals in her mouth, and while she felt bad and did not want to, her mind had gone completely blank since the first time that the defendant had kissed her. She could not speak or move her body as she intended, nor could she resist with strong force.[285]

The court acknowledged a list of facts as relevant, including that the defendant had been the victim's teacher and that he was older than the victim's father, that they never engaged in any conversation or action that conveyed sexual interest until they came out of the dormitory where they had been drinking, that the victim made her report promptly, and that there was no plausible reason on the part of the victim that would motivate her to make a false report.[286] The court, dismissing the defendant's argument that the victim reported the case because she regretted the intercourse and wanted it to serve as an explanation in case she was pregnant, found that there was no evidence that the victim was pregnant and that the victim was never put in a situation where she could not hide the facts about the case from her parents.[287]

The defendant's account of the event is as follows. When the defendant was walking the victim home, he never bumped into the victim, nor did the victim tell the defendant that she could walk by herself.[288] In the park, they were talking and holding hands so that the victim would not bump into him, with the victim giving no indication that she did not want to engage in such acts.[289] Moreover, he walked ahead of her when he was moving over to the bench, and she followed him voluntarily.[290] When he asked her if they could engage in sexual intercourse again, she answered that she wanted to do it at a hotel the next time.[291]

The court found the defendant's account implausible for several reasons. First, the court found it hard to comprehend that the defendant would hold the victim's hand in order to prevent

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[277] *Id*.
[278] *Id*.
[279] *Id*.
[280] *Id*.
[281] *Id*.
[282] *Id*.
[283] *Id*.
[284] *Id*.
[285] *Id*.
[286] *Id*.
[287] *Id*.
[288] *Id*.
[289] *Id*.
[290] *Id*.
[291] *Id*.

her hand from bumping into him.[292] Moreover, it was unconvincing for the court that the defendant believed the victim's utterance of "Ungh" (「ううん」 in Japanese) as a sign of agreement to his kiss.[293] Moreover, the court found that it would have been difficult for the sexually immature 19-year-old-victim to walk to the bench with her pants and underwear pulled down, and it is difficult to believe that the victim would have walked 17 meters in the dark park in a state in which typical women would feel a sense of shame.[294] Notwithstanding the court's questionable attempts to determine the situation by judging the state in which "typical women would feel a sense of shame" and what a "nineteen-year-old with sexual immaturity" would do, in all fairness, the court gave sufficient consideration to whether the situation was of the nature that the victim had a meaningful opportunity to get away or refuse the sexual advances.[295]

Additionally, in determining whether there was enough force or threat sufficient to make the victim's resistance conspicuously difficult, the court found that while the force that the defendant exercised did not reach the degree of hitting or kicking, it was nonetheless of a sufficient degree, such as pushing or shoving the victim for a good deal of distance while the victim had her pants and underpants pulled down. [296] Moreover, as the defendant was 179 cm and 90 kg, and the victim was 165 cm and 57 kg, the court recognized that physical resistance would have been difficult, given the difference in physique. As it was late at night with no one around, the court also observed that asking for help was impossible. [297] Moreover, the court rightfully considered that, given that the defendant had suddenly sexually assaulted the victim, who had been respecting the defendant, the victim had been in a state of extreme surprise and agitation. [298] Given everything, the court found enough force or threat to make the victim's resistance conspicuously difficult, and subsequently found the defendant guilty of a violation of Article 177. One may read the case and suggest that courts in Japan seem to interpret force or threat in a liberal way, as it is supposed to be done. The court also flexibly considered the circumstances of the case, the characteristics of the victim (although some parts involved an undesirable process of reflecting on how victims of certain characteristics should behave), and the relationship between the victim and the perpetrator, with the recognition of the inherent disparity of power that arose out of the relationship. In fact, while this will be discussed in more detail later, this case seems to serve as a respectably good case to demonstrate Hashizume's theoretical account of how the force or threat element is supposed to be interpreted in theory. [299] However, it seems imprecise to say that courts have consistently followed this approach in interpreting force or threat. Comparing this case with the 1992 case decided by the Tokyo district court[300] provides a more comprehensive perspective.

(3) The Tokyo case (1992)

In 1992, the Tokyo District Court found a defendant not guilty of forcible indecency in a case where the defendant was alleged to have engaged in sexual contact and taken pictures of the

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[292] *Id*.
[293] *Id*.
[294] *Id*.
[295] *Id*.
[296] *Id*.
[297] *Id*.
[298] *Id*.
[299] 性犯罪に関する刑事法検討会, *supra* note 18 at 8-9.
[300] 東京地判平成４年２月１７日 LEX/DB 27921244.

24-year-old complainant's private areas by brandishing a knife and threatening her. [301] The court rendered the verdict of not guilty because it found that the complainant's testimony was untrustworthy and that the act between the defendant and the complainant was consensual, without the alleged use of force or threat. [302] While admitting that he had committed most of the alleged sexual acts, the defendant claimed that they have been consensual.[303] He also claimed that he strangled the complainant not to submit her to unwanted sexual acts, but because they had discussed committing suicide together.[304] Just as for many sex crime cases, as there was not much other evidence available except for the parties' testimonies, the court focused on evaluating the credibility of the complainant and the defendant's testimony. [305]

According to the decision, the complainant and the defendant first met the complainant as her customer as he had bought a water purifier from the complainant.[306] Since then, the defendant had become a frequent customer to the complainant, as he bought several more items from her and introduced other customers to her.[307] Their transactions often took place at the defendant's residence, where the alleged crime of forcible indecency took place.[308] At around 6:30 in the afternoon on the day of the events, the defendant was angry at the complainant for being late and told her to refund all the goods he had bought from her.[309] The complainant told the defendant that she did not have any money at the moment and that she would repay the money later, and the defendant did not accept that and yelled at her.[310] The alleged forcible indecency took place following this dispute, around seven in the afternoon.[311]

The decision states that the defendant engaged in sexual acts with the complainant, took pictures of the complainant's body parts and cut the complainant's pubic hair with a scissor.[312] The last picture of the complainant's body shows a digital clock reading 10 p.m.[313] At around 10:45 p.m., the complainant yelled for help from the defendant's window, and a neighbor at the same residence who heard the cry for help reported it to the police.[314] The police came to the defendant's place of residence and asked if anything was going on, but no one responded.[315] As the police officers continued to knock on the door and ask what was wrong, the complainant suddenly burst out of the house and squatted down, crying.[316] The complainant told the officers that a person claiming to be a gang member forced her to become naked and took her pictures with a polaroid camera.[317]

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[301] *Id*.
[302] *Id*.
[303] *Id*.
[304] *Id*.
[305] *Id*.
[306] *Id*.
[307] *Id*.
[308] *Id*.
[309] *Id*.
[310] *Id*.
[311] *Id*.
[312] *Id*.
[313] *Id*.
[314] *Id*.
[315] *Id*.
[316] *Id*.
[317] *Id*.

The complainant's and defendant's testimonies vary a great deal as to how the events have taken place. [318] In order to properly appraise the court's evaluation of the testimonies, it is essential to review their testimonies in detail, in order to evaluate how their testimonies diverge and whose testimony is more credible.

First, the complainant testified at the trial that, after a dispute that began at 6:30 p.m., the defendant took a knife out of the kitchen sink, threatened to cut his own finger with it, and had the defendant sit down.[319] The defendant then said, "'Do you understand what I am thinking? It is enough for me if you would let me touch your breasts just a little bit. Which do you like better, to die or to let me touch your breasts a little bit?"[320] and pulled the complainant by her wrist onto his lap.[321] The defendant took off the complainant's top.[322] The defendant then fondled the complainant's breasts and put his hand down her pants. When the complainant resisted, the defendant strangled her.[323] The defendant had her become naked, and the complainant testified that she had no choice but to become naked.[324] The defendant then touched the complainant's genitals, used the defendant's fingers to spread them apart, and took pictures.[325]

The defendant then told the complainant that he would engage in sexual intercourse with her, but the complainant said that she had a fiancé.[326] The defendant then said he would "excuse"[327] her if she let him insert his genitals into her anus, and she agreed. When he was not able to insert his genitals into the complainant's anus, he rubbed a lotion on the complainant's anus and ordered her to put his genitals in herself.[328] While the complainant made it seem as if she was trying, the complainant repeatedly gave up saying that it hurt.[329] The defendant then pressured her to perform oral sex on him.[330] The complainant testified that she complied out of fear, as the defendant tried to hold the knife that had been placed on top of the *kotatsu* table again.

At this point, the complainant testified, she lost her composure and thought she was going to die. She felt that "…it would be okay to be murdered and had her mouth covered by the defendant's hands, as she said things like, 'It is painful to be murdered, so please kill me when I am asleep.'" [331] After that, the complainant testified that the defendant cut the complainant's pubic hair with a pair of scissors.[332] The complainant testified that at the time, thoughts such as if the defendant would send the pictures to her fiancé or her parents and if she would be dead by

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[318] *Id*.
[319] *Id*.
[320] *Id*.「おれの気持ちをわかってくれるか。ちょっとだけオッパイ触らせてくれればいいんだよ。オッパイ触るのと死ぬのとどっちがいいんだ。」.
[321] *Id*.
[322] *Id*.
[323] *Id*.
[324] *Id*.
[325] *Id*.
[326] *Id*.
[327] *Id*.「「じゃあ、そこは勘弁してやるから後ろに入れろ。」と迫られ、「許してもらえるんであれば入れます。」と言って、四つんばいになった。」.
[328] *Id*.
[329] *Id*.
[330] *Id*.
[331] *Id*.「殺されてもいいと思うようになり、「殺されるのは苦しいから、寝てるときに殺してください。」などと被告人に言い、実際に口をふさがれだりした。」.
[332] *Id*.

tomorrow were passing through her mind.[333] She then noticed that the windows were ajar and thought that she could escape if she screamed out the windows. At that point, the defendant told her that he wanted to shave her pubic hair with a razor.[334] The complainant volunteered to do it, stood up while pushing him down, and yelled out the windows. [335] While the defendant closed the windows right away, the complainant hit the defendant's head with a coffee bottle and a cooking pot. The complainant screamed again, and a person who heard her from outside hurried up and went to notify the police. [336] After that, she continued to cause a commotion by engaging in acts such as pushing the *kotatsu* table, and the defendant told her, "You should get dressed and leave."[337] The complainant put on a coat and ran out into the hallway as the police approached the exit near the end of the hallway.

On the other hand, the defendant testified to a completely different version of how the events unfolded. According to the defendant's testimony at the trial, after the two had a dispute, the complainant made coffee, sat down at the defendant's *kotatsu* table and drank the coffee while repeatedly making comments such as, "Father, I was bad. Please let us make up once again."[338] The defendant did not react at first, but because he started feeling sorry for her, they started talking. After that conversation, they went on to talk about a visit to karaoke the night before, and he asked if she would let him take nude pictures of her since he had an unfinished roll of a film.[339] The complainant accepted, saying, "You are helpless."[340]

The defendant then had the complainant sit on his lap.[341] The defendant touched the complainant's breasts over her clothing, and they conversed some more.[342] He then took both of her tops and bottoms off and took a picture of her as she was standing naked.[343] He had her lie down, used both of his hands to spread her genitalia apart and took pictures.[344] It became cold, so they went under the table and caressed each other.[345] The defendant had a semi-erection, so he tried anal sex, and while he could get semi-erection several times by acts like oral sex from the complainant, he could not get an erection while trying to insert his genitals.[346] Because of that, the defendant said, "I am getting old, and my body is getting weak. Here is a knife. Shall we die together?"[347]

The defendant put the knife before the complainant, saying, "Stab me with this."[348] The defendant testified that he touched the complainant's neck around the Adam's apple area while jokingly saying, "If you get strangled here, you can die easily."[349] Eventually, the defendant gave

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[333] *Id*.
[334] *Id*.
[335] *Id*.
[336] *Id*.
[337] *Id*.「もう服を着て帰れ。」.
[338] *Id*.「お父さん、私が悪かったから、もう一回仲直りして下さい。」.
[339] *Id*.
[340] *Id*.「しょうがないお父さんなんだから。」.
[341] *Id*.
[342] *Id*.
[343] *Id*.
[344] *Id*.
[345] *Id*.
[346] *Id*.
[347] *Id*.「おれも年を取ったし、身体も弱っている。ここに包丁があるから、おれといっしょに死のうか。」.
[348] *Id*.「これでおれを刺せ。」.
[349] *Id*.「ここを締めれば簡単に死ねる。」.

up on his intention to engage in any form of sexual penetration, and while he was making comments that would trouble her, such as "Shall I send the pictures to your parents?",[350] he became sleepy from being tired and intoxicated. [351] He said, "I will sleep,"[352] and he slept. The complainant lay down next to the defendant.[353] Suddenly, the defendant got hit in the head, so he asked her what she was doing, but the complainant caused a commotion, throwing objects on the table.[354] Because the defendant kept ignoring her, she said, "I feel angry now. I am going to call the cops."[355] The defendant responded, "If you want to call [the police], you should."[356] The defendant testified that, although he was not doing anything, the complainant opened the window and yelled, "I am going to get murdered."[357] The defendant told the complainant to stop and close the windows, but because the complainant opened the window again, he told her to suit herself and left her alone.[358] Meanwhile, the police came, and he was arrested.[359]

In evaluating the credibility of the testimonies, the court found the complainant's testimony inconsistent. First, the court found inconsistency in the complainant's testimony regarding the knife's whereabouts. The complainant testified that the knife had been placed on the front right side of the table during the two counts of forcible indecency, but she tried to move it away from the defendant before yelling out of the windows by lifting the top part of the table a little bit, dropping the knife on the other side, and pushing it by her hands little by little.[360] However, the court found that there was no mention of this in the complainant's report made to the police.[361]

Moreover, the complainant's story had significantly changed twice in the same police report when a police officer pointed out inconsistencies in her story.[362] The court also found that different versions of testimony about the location of the knife and the way it fell down the table were offered during all nine court sessions.[363] The complainant's final version of the testimony was that she dropped the knife by pushing the stove that had a pot on top, which was in front of the knife. [364] While the complainant did not testify that she dropped the knife during the second court session of the trial, she testified that the knife bothered her in any event.[365] The court also found that the answers she gave when asked detailed questions about why she used the stove to drop the knife, mainly that she was trying to hide the knife after it had dropped, were unnatural.[366] The court found that even when considering the testimony made during the trial, if she was so afraid of the knife, it was more natural for her to take the knife herself or turn over the top of the table as a whole, and to act as she suggested would be unnatural for her mental state at

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[350] *Id*.「写真を親に送ろうか。」.
[351] *Id*.
[352] *Id*.「寝るぞ。」.
[353] *Id*.
[354] *Id*.
[355] *Id*.「もう頭に来たから。警察呼ぶよ。」.
[356] *Id*.「呼びたければ、呼べばいい。」.
[357] *Id*.「殺される。」.
[358] *Id*.
[359] *Id*.
[360] *Id*.
[361] *Id*.
[362] *Id*.
[363] *Id*.
[364] *Id*.
[365] *Id*.
[366] *Id*.

the time.[367] Moreover, the court found it reasonable that the complainant was not conscious of the knife, at least at the point when she asked for help by yelling out the windows.[368] Thus, the court concluded that it "cannot help but hold that the complainant's testimony on this point is false testimony made to argue that she did not have any other choice but to comply with the forcible indecency because of the threat made with the knife."[369]

(3.1) Problems included in the Tokyo case (1992)

Giving full credit and deference to the court in regard to the other aspects of its decision, including the inconsistency in the complainant's testimony, warranted a not-guilty verdict for the defendant, the discussion here will focus only on the court's evaluation of the case concerning force or threat. The first force–threat evaluation involves the disparity in power between the defendant and the complainant, as he was her important customer who would also refer other customers to her. Moreover, the complainant, 24-year-old, was making a home-visit sale at the 52-year-old defendant's house, a place of the defendant's dominion. He had a disability associated with breathing, but there was no indication that this made it difficult for him to engage in any physical movement.

By both of their accounts, because he was angry at her for being late, he threatened that he would not purchase from her anymore, and when she conceded, he asked for a full refund. She complied and said she would bring the money later. However, the defendant yelled at her and told her not to kid around. In addition to the hostility of the environment, the situation where the defendant yells at the victim not to kid around, even when she agrees to offer a full refund, indicates some degree of disparity of power in their relationship.

The court found that the defendant's account of the story was not too inconsistent while quickly dismissing the complainant's account. First, the court made inconsistent criticisms of the appropriateness of the complainant's behavior during the alleged events. Much of this is due to the plausibility of the complainant's conduct, which, in the court's opinion, seemed unnatural. For example, the court considered when it would be natural or unnatural for the victim to try to escape, for instance, by suggesting that the complainant's thoughts that she could run away through the window were not reasonable, considering the weather and the circumstances.[370] The problem is that the court, instead of understanding that a victim under such circumstances may consider seemingly unreasonable escape routes out of desperation, used such information as evidence that the complainant's testimony was not trustworthy. Moreover, as mentioned above, the court considered the fact that the complainant was able to yell out the window as evidence that she was not bothered by the defendant's threat with a knife without entertaining consideration that for her, it was a desperate and courageous cry for help risking her safety.

Notwithstanding the court's finding that her consideration of the escape route was unconvincing, concerning the part of the complainant's testimony that she had subsequently caused a commotion, the court quickly turned around and found her testimony untrustworthy, suggesting that, this time, it seemed implausible that she did not attempt to escape. However, the victim was naked until she was able to put on a coat after the fact and, according to her account of the incident, was under the threat by a knife and her naked pictures. It is not too difficult to

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[367] *Id*.
[368] *Id*.
[369] *Id*.「……この点に関するＡ子の供述は、包丁による脅迫に恐怖し、本件わいせつ行為に応ぜざるを得なかった旨訴えるための、虚偽の供述であると断ぜざるを得ない。」.
[370] *Id*.

imagine that making any attempt to escape would have been extremely difficult, even if the defendant was not actively brandishing the knife at the point of time. The court, by using its own arbitrary standard for determining the natural timing under which a victim should and should not try to escape, dismissed the complainant's trustworthiness for inappropriate reasons.

In the same sense, it may have been inappropriate for the court to determine what was a "more natural"[371] way for the complainant to handle her fear of the knife. This is not to say that this court's evaluation as a whole was misguided, but the focus on the "unnatural" nature of her act of pushing the stove to drop the knife off the table, out of fear of the knife, may have been misplaced. Another important factor to consider is whether there are more doubts and stricter standards that are at play in evaluating of a victim's credibility because the case is about sex crimes. It is worth asking whether a court would find a victim of a robbery case during which the victim has alleged to engage in the same kind of method of dropping the knife off the table, incredible for his or her unnatural behavior. Finally, it is important to be mindful that evaluating how a victim should have acted can easily lead to victim-blaming.

The court also quickly dismissed the complainant's behavior after the police arrived as irrational and unfit for how a victim would have acted, without due consideration of the fact that her actions may be scattered if she has just been a victim of a sex crime, especially if the perpetrator has been her long-term customer and has her private pictures, which he has threatened to send to her parents and fiancé. Moreover, the court dismissed the victim's testimony that she felt like she wanted to be killed as abrupt and incredible without considering that she may have been in such extreme agony that she just wanted things to end.

In fact, there are many factors that warrant consideration that serves to demonstrate the hostile circumstances under which the events unfolded, including that there are no factual disputes between the two parties, at least with respect to how such events took place. The defendant engaged in various violent behaviors, such as cutting the complainant's pubic hair and threatening to send a picture of her private area to her parents. While the defendant suggested that the threat was a joke, it is highly doubtful that it would have been accepted as a joke by the complainant. The plain facts of the case also demonstrate that the complainant acted with urgency in an effort to end the situation by yelling out the window, even risking her safety and causing a commotion until the police had arrived. The court failed to give due consideration to such facts in considering whether there was the use of force or threat under the circumstances under which the alleged events had unfolded. In the end, by both of their accounts, notwithstanding any inconsistencies, there was at least his brandishing of a knife, and a threat of, or at least mention of, death by the defendant.

Moreover, he did, by both his and her account, touch her neck and say that she could die easily if she got strangled there. By his account, the "joking" death threat was followed by his threat of sending pictures of her private area to her parents. Time after time, while deliberating through many reasons to find the complainant's account incredible, the court too easily accepted the defendant's account that the violent act of touching her neck, accompanied by a death threat and the threat of sending her private pictures to her parents, was a joke, rather than facts that could satisfy the threat element. While the inconsistent nature of the victim's testimony, demonstrated by changes after changes in the testimony upon questioning by the police and court appearances without any additional evidence to support her account, certainly warrants a not-guilty verdict. The problem is that, in rendering its decision, the court dismissed the complainant's account too quickly and for wrong reasons.

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[371] *Id*.

Additionally, while psychological phenomena that can occur to a sex crime victim are not typically understood and introduced by the courts in Japan, it is worthwhile to note that a victim may have difficulty recalling details of traumatic events because of neurological phenomena that occur at the time of extreme fear and anxiety. According to Rebeca Campbell, a psychology researcher who studies the neurological phenomenon of sexual violence victims, the brain of a person who is experiencing sexual violence can produce a high level of catecholamines, which can hinder the hippocampus, the part of the brain that processes information into memory.[372] Therefore, a victim may have a hard time recalling the memories of the events or consolidating the memory in the first instance of providing testimony accurately. While this does not, by any account, mean that any inconsistency of a sex crime victim's testimony should be regarded as proof of the neurological phenomenon suffered by a sex crime victim, it may provide some explanation as to why some victims have trouble accurately recalling such traumatic events.

The problem presented with this case is not the decision itself but how the court reached its conclusion by repeatedly conjecturing what a reasonable victim would have done under the circumstances and refusing to consider facts that have been admitted by both the defendant and the complainant that suggest circumstances under which a person would feel that her safety has been compromised. Additionally, unlike the Miyazaki court, this court failed to give due consideration to the nature of the relationship between the victim and the perpetrator or to the circumstances under which the incident took place.

b. Expert opinions

Having reviewed cases such as the ones evaluated here, experts in Japan diverge in their opinions on whether force or threat stands as an effective legal element. The divergence continued during committee meetings, during which some members argued that force or threat elements should be replaced or alleviated, while others expressed concerns over drastic changes. During the fifth meeting, Kojima, maintaining her resolute stance that sexual intercourse without consent needs to be punished, criticized the reality, under which sexual intercourse without consent goes unpunished if the element of force or threat or the element of *non compos mentis* or inability to resist cannot be satisfied, an incompatible situation if protected interest for a sex crime is sexual liberty and integrity.[373]

Saito, providing her insights gained from assisting sex crime victims, explained that even victims often do not identify their experience of sexual intercourse without consent as sexual violence or a sex crime, just as most sexual intercourse without consent does not satisfy the legal elements of sex crimes under the Penal Code of Japan.[374] However, Saito suggested that such a fact does not reflect the severe harm that sex crime causes to the victims, as even the victims who do not identify their experience as sexual violence or a sex crime may suffer from psychological damage, showing an increase in suicide attempts, post-traumatic stress disorder, depression, alcohol dependency, drug dependency, severe impact on school or other social functioning, and disturbance of interpersonal relationships.[375] Saito added that given that sex

[372] Rebecca Campbell, The Neurobiology of Sexual Assault: Implications for Law Enforcement, Prosecution, and Victim Advocacy, National Institute of Justice (Dec 1, 2012).
[373] 性犯罪に関する刑事法検討会, *supra* note 18 at 4-5.
[374] *Id*. at 5-6.
[375] *Id*.

crime is violence that assaults both the body and mind of a victim, intercourse without consent should be properly punished as a sex crime.[376]

Konishi shared that about 80% of those who are sex crime or sexual violence victims suffer from post-traumatic stress disorder.[377] From her clinical experience, Konishi reported that there is a need for change, as there is no major disparity between victims who get some sense of justice by getting their cases prosecuted and those who do not, and it is a reality in the clinical sense that criminal law does not procure justice for victims who reasonably deserve it.[378]

Konishi also argued that criminal law needs to reflect a psychological reality that it is impossible to resist when someone is under extreme fear.[379] Existing literature supports that victims going through a sex crime may experience various neurological responses. A physical inability to react or resist, freezing due to release of high levels of corticosteroid or feeling emotionally flat due to the release of high levels of opioids may occur to some victims.[380] While these two reactions are relatively common reactions that can occur to a victim, a disruption of brain functions caused by fear may also cause other irrational behaviors by victims, making their behavior seem unreasonable in the eyes of those who do not understand the chemical reaction that is occurring in the victims' brains.[381]

For the most part, sets of behaviors resulting from a complex interaction of a victim's autonomic, hormonal, and cognitive processing greatly vary, and a judicial decision on what a victim's natural response is without an understanding of these factors may lead to misguided decisions.[382] A court will always be required to handle the challenging task of determining the true version of how an event has unfolded. Therefore, deciding whether a person's behavior is reasonable, given the situation, may be inevitable. However, if a court engages in such evaluations while lacking the understanding that victims' behavior in fearful situations may be varied and can also be unreasonable, the court is at risk of unfairly discounting a victim's claims.

Konishi also explained that when one is under a state of governance for a long time, such as abuse, the person concedes to acts by the abuser, seemingly like consenting to the act, but not in actuality.[383] Konishi, therefore, suggested that the reality of abuse and psychology should be reflected in criminal law.[384] Additionally, during the second committee meeting, Mayumi Nishioka suggested that the current requirement of force or threat does not render the proper protection of male victims.[385] Nishioka provided three examples of sex crime cases against male victims that she has witnessed as a supporting member of a one-stop assistance center for sex crime victims.[386] She pointed out that, while there was no use of force or threat as legally required, the perpetrators committed sex crimes by using undue pressure from their superior positions over a victim or by taking advantage of a victim's state of intoxication.[387] Therefore, Nishioka suggested that it is desirable for a society to punish forced sexual intercourse that has

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[376] *Id*.
[377] *Id*. at 7-8.
[378] *Id*.
[379] *Id*.
[380] Rebecca Campbell, *supra* note 372.
[381] *Id*.
[382] Ralph Adolphs, The biology of fear, 23 Current biology 2, R79, R93 (2013).
[383] 性犯罪に関する刑事法検討会, *supra* note 18 at 8.
[384] *Id*.
[385] 性犯罪に関する刑事法検討会, *supra* note 107 at 4-6.
[386] *Id*.
[387] *Id*.

been committed without the use of force or threat if such an act has been committed without voluntary consent or while a victim was in a state of intoxication or sleep.[388]

Alternative ways of supplementing force or threat element were also discussed. For example, as mentioned in the previous section, in order to more effectively address sex crimes against LGBTQIA+ individuals, Okada suggested that hate crimes and intimate partner violence should be incorporated as elements that can be deemed to satisfy force or threat requirement.[389] That is, where there is evidence of intimate partner violence or hate crime, such as evidence that the perpetrator has made a degrading remark against the victim for being a lesbian, it should be deemed as evidence for finding the force or threat element . These suggestions are deeply insightful, ensuring a broader protection for LGBTQIA+ individuals as well as other minority and domestic violence victims.

On the other hand, there have been heightened concerns about the negative consequences of making modifications to force or threat element, especially in regard to creating an element based on consent. Miwa Kanasugi, during a self-introduction and presentation of expert opinions to the committee, suggested that sex crimes based on consent will wither the public's desire to engage in healthy relationships.[390] Moreover, Kanasugi presented the possibility where the male would get sued for sex crime offenses by a victim out of vindictiveness or regret,[391] for reasons such as the following example quotes: "I liked [him] but not anymore" (「今まで好きだったつもりが嫌になった」), "Sweet words deceived me into engaging in the relationship (sexual intercourse *et al*.), but it (the fit or the partner's qualities) was not good as I thought" (「甘い言葉に騙されて交際（性交等）してみたら，思ったより（相手の条件や相性が）良くなかった。」), and "I did not mean to, but I was deceived"「そんなつもりじゃなかった，だまされた。」).[392]

This apprehension that women will lie about rape charges, which serves as deterrence against active sex crime law reforms, is, in fact, a centuries-old one arising from the typical rape myth that the majority of rape charges are a result of women trying to get back at a man or to cover up a pregnancy.[393] For one, it is a very curious train of thought to suggest that one who regrets sexual engagement would want to make it more official and public by filing a police report and going to court, especially in Japan, where there are still unchecked concerns about secondary victimization to victims.[394] Given the seriousness of the consequences of a false conviction and the social harm that can be brought about by it, any legal vulnerability to false accusation is a concern that needs to be seriously addressed for *any* crime amendment.

However, in this specific context, it is worth deliberating whether this very particular concern about the possibility of women making false accusations about sexual assault out of vindictiveness or regret is a concern valid enough to deter active sex crime law reforms or inflated prejudice based on the rape myth that prevents victims from being afforded with better redemption from criminal law. In fact, during the fifth meeting, Konishi gave a testimony based on her clinical practice, reporting, as Yamamoto had pointed out, that there are many victims who feel afraid of how they will be treated if they report to the police, and even if they do, many

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[388] *Id*.
[389] *Id*. at 9-12.
[390] 金杉美和, *supra* note 36.
[391] Needless to say, these acts can be punishable as false complaints under Article 172 of the Penal Code.
[392] 金杉美和, *supra* note 36.
[393] Martha R. Burt, Cultural Myths and Supports for Rape, 38 J. Personality & Soc. Psychol. 217, 230 (1980).
[394] *See e.g.*, 島岡まな, *supra* note 31 at 30.

do not get acknowledged, leaving less than one percent of cases that end up in the hands of the prosecutors.[395] Despite the never-ceasing suspicion that women will falsely cry rape, a substantial amount of literature has found that women are much more likely to suffer from rape and not report it, making rape often the most underreported crime in many countries.[396]

To add a brief discussion of the United States here to facilitate comparison, according to the 2020 survey, while 40% of violent victimizations were reported to the police, only 22.9% of rapes or sexual assaults have been reported, keeping their places as the most underreported crimes.[397] The situation is not very different in Japan. Yamamoto cited statistics that sex crimes are highly underreported in Japan, with a report by the Ministry of Internal Affairs and Communications indicating that only 3.7% of those who have been subject to forcible sexual intercourse have consulted the police.[398]

The importance of expecting and managing the consequences of sex crime amendments cannot be understated, especially when it comes to the negative ones. However, careful reflection is necessary to examine if the misguided preconceptions and prejudices about sex crime victims are not the cause of the extra caution. Having said that, because of the special nature of sex crimes, where there is often no additional evidence other than the involved parties' words, the legitimate kinds of concerns about the role of the legal element in effectively preventing false convictions and assurance that those wrongly accused will be able to prove their innocence are pivotal.

Kanasugi's other points are worth more consideration. She suggested that some redemption may be made more properly in the sector of civil lawsuits.[399] Additionally, Kanasugi expressed concern that sex crimes based on consent will increase scrutiny into the victim's testimony.[400] All in all, Kanasugi raises a very pertinent question that cannot be dismissed: given the current state of understanding about sex and gender in Japan, would implanting an element based on consent be effective?

Miyata raised similar careful concerns to Kanasugi's opinion, making valid points with respect to the practical implications of adopting a consent-based element. First, by pointing out that several elements serve as a definition of a lack of consent in many jurisdictions, essentially making something as a condition of showing lack of consent, Miyata expressed doubt that amending the law to adopt a lack of consent standard would really meaningfully expand the boundary of punishment.[401] Moreover, Miyata suggested that when a case does not result in a conviction, the issue may not lie in the legal elements, but in that there is often no evidence in sex offense cases, citing examples such as when evidence remained on clothes is eliminated by it, or when a victim with intellectual disability cannot remember the place of assault. Citing these

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[395] 性犯罪に関する刑事法検討会, *supra* note 18 at 7-8.

[396] At 136, Kimberly Lonsway & Louise Fitzgerald, Rape Myths, 18 Psych. W. Quarter. 133, 164 (1994) (citing reporting of 8 percent, *as reported in* Mary Koss, Hidden Rape: Sexual Aggression and Victimization in A National Sample of Students in Higher Education, *in* RAPE AND SEXUAL ASSAULT I1,3, 25 (A. W. Burgess ed., 1988) and 16 percent, *as reported in* Med. Univ. S.C. & National Victim Center, Rape in America: A Report to the Nation (1992).

[397] At 7, The U.S. Dept. Just. Off. Just. Program, Bureau Just. Stat. Crim. Victimization, 2020, NCH 201775 (Oct., 2021).

[398] 男女間における暴力に関する調査, *supra* note at 133.

[399] 金杉美和, *supra* note 36.

[400] *Id*.

[401] 性犯罪に関する刑事法検討会, supra note 18 at 7.

examples, Miyata argued that it should first be decided whether the problem lies in lack of proper evidence or inadequate legal elements.[402]

As a legal scholar, Hashizume provided a more academic perspective for the evaluation of the force or threat element. While the standard of force or threat "making the victim's resistance conspicuously difficult," as suggested by precedent, seems to require a significant degree of force or threat, he explained that it is not supposed to.[403] Hashizume emphasized that the evaluation is not made solely on the force or threat itself but on the total evaluation of specific circumstances of a case, such as the relationship between the perpetrator and the victim prior to the assault and other pertinent circumstantial factors.[404] Here, Hashizume has provided a theoretical perspective as a criminal law scholar. This implies that psychological factors play an important role in determining whether there was a circumstance that made it difficult for the victim to resist.[405] Therefore, Hashizume suggested that he believes force or threat functions only as an external symbol to clearly make sure sexual intercourse is against a victim's consent, and it does not excessively limit the boundaries of the punishment of sex crimes. Accordingly, in theory, if the legal practice is conducted according to the correct understanding of force or threat, special problems should not arise.[406] However, if, by practice, there is disparity observed in practice and limitation observed by the public, Hashizume believed the fundamental direction should be discussed given that the current law can bear misunderstanding.[407]

Naturally, the voice against abolishing force or threat elements or establishing consent-based sex crime law has not been limited to those on the committee. Kamon suggests, as explained by Hashizume, that there are already means in place to evaluate the difficulty of resistance by a victim, consisting of objective factors besides force or threat, such as the circumstances under which the offense has unfolded, circumstances during the offense, and the characteristics of the victim, rendering the adoption of the consent-based element unnecessary for being redundant.[408] Furthermore, given the concern that rape myths persist in Japan, the introduction of the no-means-no model may lead to situations where victims are questioned why they did not resist harder during the police investigation and trial, making them suffer more rather than leading to their protection.[409] Additionally, Kamon, while evaluating the yes-means-yes model and the possible enactment of negligence-based offenses based on the model, suggests that their adoption is not feasible because there is a "social tendency" (「社会的風潮」) not to explicitly talk about sexual acts in Japan.[410] Given this tendency, if criminal law requiring affirmative consent for a sexual act is introduced, it would significantly impact society and its persons' right to sexual activity in Japan.[411] Kamon warns that if there is no shared awareness of a certain degree among society and its people about the rule that serves as the premise of a criminal act, the public will not understand why the criminal act should be considered

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[402] *Id*.
[403] *Id*. at 8-9.
[404] *Id*.
[405] *Id*.
[406] *Id*.
[407] *Id*.
[408] At 67, 嘉門優「性犯罪規定の見直しに向けて:不同意性交等罪の導入に対する疑問」立命館法学 387＝388 号（2019 年）52 頁-72 頁.
[409] *Id*. at 68.
[410] *Id*. at 70.
[411] *Id*.

culpable.[412] Thus, Kamon expresses her opposition to the adoption of both the no-means-no model and the yes-means-yes model, as well as the enactment of the negligence-based offense.[413]

There seems to be a disparity between the nature of arguments between those who argue for a change in force or threat elements and those who do not, with the former focusing on the reality of victims who have to witness perpetrators escape punishment or live in fear while the latter focus on the reality of legal practice, by expressing concern about whether relaxation or abolishment of the elements could be feasible under the justice system of Japan, and also whether it would be able to bring meaningful change. Before deciding on the future direction for the amendment, whether the two perspectives can be integrated to come up with a practical solution that can make meaningful changes to sex crime prosecution needs to be reviewed. It is especially important to address the potential negative consequences of adopting a consent-based element to sex crimes because, as Kanasugi pointed out during the review committee,[414] there still remains strong doubts about whether consent-based sex crimes can be properly effectuated. Before delving into such discussions, reviewing the laws of the U.S. states where sex crimes are defined by various mean requirements and examining cases on the laws may address some concerns by experts in Japan and facilitate the evaluation.

B. Non compos mentis or inability to resist

Additionally, indecent acts under Article 178(1)[415] or sexual intercourse under Article 178(2)[416] committed using the means of "taking advantage of loss of consciousness or inability to resist, or by causing a loss of consciousness or inability to resist of a person."[417] Loss of consciousness, or *non compos mentis*, to interpret it more precisely, and the inability to resist, are generally understood to be broad terms. However, a narrow judicial interpretation and subsequent guilty verdict[418] have stirred public outrage and led to criticisms about the properness of the sex crime laws,[419] despite a subsequent reversal for some of these cases by higher courts.

Among the controversial cases was a decision made in Nagoya, Aichi, involving a defendant, the victim's father, who had long abused the victim both sexually and physically.[420] The Nagoya District Court presiding over the case decided whether the victim, who was 19 years old during the offense, was in a state where she was not able to resist.[421] The court found that reasonable doubt remains in reaching the conclusion that the victim was in extreme fear of grave

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[412] *Id*.
[413] *Id*.
[414] 金杉美和, *supra* note 36.
[415] 第百七十八条 [Art. 178], *infra* at 17.
[416] 第百七十八条 [Art. 178], *infra* at 21.
[417] 刑法第百七十八条「人の心神喪失若しくは抗拒不能に乗じ、又は心神を喪失させ、若しくは抗拒不能にさせて…」.
[418] *See e.g.*, 福岡地久留米支判平成 31 年 3 月 12 日（公刊物未登載）(finding the defendant not guilty for lack of necessary *koi* in knowing that the victim was in the state of *non compos mentis* from intoxication), rev'd, 二審（福岡高判令和２年２月５日 LEX/DB25565044). The subject of koi will be discussed in more detail a following chapter dedicated to subjective element.
[419] 上田正基, *supra* note 35 at 82, citing Flower Demo (last accessed Nov. 12, 2021), available at: https://www.flowerdemo.org/
[420] 名古屋地判平成 31 年 3 月 26 日判時 2437 号 100 頁 (rev'd by 名古屋高判令和 2 年 3 月 12 日判時 2467 号 137 頁).
[421] *Id*.

harm to her safety or life that she was not able to resist.[422] The court also concluded that it is difficult to hold that the victim was in a state of blind obedience toward her father in a way that she believed whatever her father said and engaged in sexual acts, believing that she had no other choice.[423] The court cited desperate attempts by a minor victim to get away from the abuse of her father by seeking help and asking younger siblings to sleep together so that the father could not sexually abuse her at night as evidence that she was not in a state where she had no choices but to submit to her father's sexual abuse.[424]

Rightfully, experts have criticized the decision as an inaccurate application of the means of Article 178. Takuto Yasuda, for one, criticizes this decision for (1) unnecessarily limiting the boundaries of application to require complete control over the victim's personality beyond her ability to make choices about sexual acts without clear grounds and (2) lacking the fundamental understanding of sex crime cases that are based on a disparity of power, especially given that the defendant, being her guardian, had sexually assaulted her despite her resistance since she was in the second year of middle school and had physically assaulted her if she refused.[425]

Reflecting the broader interpretation and better understanding about cases based on perpetrators with power, other courts, such as one deciding a case in Akita involving a guidance counselor of an extracurricular club, held that an assumption could be made that student victims were in a state where they could not resist if they were not in a romantic relationship with the defendant counselor and if there was no other reason for the victims to accept the sexual advances from him.[426]

However, court decisions that narrowly defined and interpreted *non compos mentis* or inability to resist,[427] such as the aforementioned Nagoya case, nonetheless left questions about whether *non compos mentis* and the inability to resist function effectively as a legal element to broadly include different states of a victim where she cannot provide meaningful consent to a sexual act. The shortcoming may stem from the fact that the wording of the element involves some degree of ambiguity as to what is included in their definitions, ultimately allowing judges to apply stricter or milder standards. However, before examining how it can be improved, one caveat needs to be noted. The means of *non compos mentis* or inability to resist, as it interacts with the means of force or threat as the two means that need to be proven in order to penalize sex crimes where a victim is an adult, is necessarily influenced by the precedented discussion of whether the force or threat element should be relaxed or abolished.

Therefore, how the force or threat element should be amended will also influence how the means of *non compos mentis* or inability to resist needs to be accordingly amended. Likewise, during the committee meetings*, non compos mentis* and the inability to resist have been discussed, but with more focus on the element of force or threat and vulnerable groups, as the specification of the latter groups may eliminate or change the necessity of the element of *non compos mentis* and the inability to resist as a whole. Additionally, how to complement Article 178 to afford more protection for those with special vulnerabilities has been discussed by the committee members, but this is to be discussed in the Chapter iii. Vulnerable Groups.

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[422] *Id*.
[423] *Id*.
[424] *Id*.
[425] 安田拓人「準強制性交等罪における抗拒不能の判断」法学教室 469 号（2019 年）138 頁以下.
[426] 秋田地判平成 25 年 2 月 20 日 LEX/DB 25500971.
[427] *See*, i.e., 鹿児島地判平成 26 年 3 月 27 日 LEX/DB 25446357.

Nonetheless, the evaluation of the element of *non compos mentis* or inability to resist, especially through examination of court decisions such as the Nagoya case, demonstrate how a legal element can be just a tad too general in that its purpose of providing flexibility may, on the contrary, be misused to allow some courts to apply an overly narrow standard. While courts may refrain from making decisions based on strict standards going forward, the disarray of standards alone may indicate shortcomings of the means of *non compos mentis* or inability to resist.

2. United States

The means adopted by state criminal laws that are required for sex crimes vary greatly. They can be crudely divided into three different groups according to the nature of required means: those that require force or threat or forcible compulsion, whether in the strict sense or with more relaxed interpretation, those that require consent, which is defined with force, threat, forcible compulsion or the equivalent, those that have eliminated force element in effect by judicial interpretation, and finally those with genuine consent requirement. According to the commentaries for the 2015 Discussion Draft for Model Penal Code drafted by the American Law Institute, a few states still maintain strict force elements, [428] and three states, New Jersey, Florida, and Virginia, have eliminated force requirements through judicial interpretation.[429] The remainder has either eliminated force[430] or defined it broadly to include various circumstances.[431] What this implies is that, while reforms are ongoing in many states, many jurisdictions still require some form of force or threat of force, while the actual degree is subject to "considerable dispute and variation."[432] In order to promote effective discussion, rather than listing every kind of the U.S. state laws, this section demonstrates examples of state laws that are conducive to the discussion in Japan, reviews definitions of consent in example states, and, finally, evaluates how problems that have concerned experts in Japan are handled in those states.

A. Consent in state laws

As in Japan, the force element has been one of the most highly debated topics in sex crime reforms in many jurisdictions. Among the sex crime laws of states that use the concept of "consent" as a means requirement in their laws, many define consent by listing other elements, including forcible compulsion, force or threat, inability to resist, and mental or physical incapacitation. Keeping out those engaging in circular defining of the means, whereby means of

[428] "The states include Maine, Montana, North Carolina, Iowa, South Carolina, Texas, Indiana & Louisiana." At n. 86, Model Penal Code § 213.1(2) statutory commentary 37 (Am. Law Inst., Discussion Draft No. 2, 2015). But laws of the states have then been amended since then with substantial changes. *See* the example of Montana in the following section.

[429] *Id*. at n. 87. (citing *In the Interest of M.T.S.*, 609 A. 2d 1266 (N.J. 1992); *State v. Sedia*, So. 2d 533, 535 (Fla. Dist. Ct. App. 1993); *Gonzalez v. Commonwealth*, 45 Va. App. 375 (2005), citing *Minor v. Commonwealth*, 591 S.E.2d 61, 67 (Va. 2004).

[430] The commentary identifies that the following 15 states have no statutory force requirement, but notes that force element may be reintroduced through some of the definitions of non-consent for the state laws: Arizona, Hawaii, Mississippi, Missouri, Nebraska, New Hampshire, New York, Nevada, Oregon, Pennsylvania, Tennessee, Utah, Vermont, Washington, and Wisconsin. *Id*. at n. 87.

[431] *Id*. at 37-9; *see also Id*. at n. 94-100.

[432] At 4, Joshua Mark Gried, Forcing the Issue: An Analysis of the Various Standards of Forcible Compulsion in Rape, 23 Pepp. L. Rev. 1277 (1996).

consent is defined by force or threat and evaluated with consent by judicial examination,[433] this dissertation focuses on state laws that serve as references for Japan and the example legal definitions of consent that provide a meaningful illustration of how other jurisdictions define and apply the concept of consent in sex crimes.

a. California

The laws in California are as follows:

(a) In prosecutions under Section 261, 286, 287, or 289, or former Section 262 or 288a, in which consent is at issue, "consent" means positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

(b) A current or previous dating or marital relationship is not sufficient to constitute consent if consent is at issue in a prosecution under Section 261, 286, 287, or 289, or former Section 262 or 288a.

(c) This section shall not affect the admissibility of evidence or the burden of proof on the issue of consent.

CA Pen. Code § 261.6 (Amended by 2021 Cal. Legis. Serv. Ch. 626 (A.B. 1171)).

§261. (a) Rape is an act of sexual intercourse accomplished under any of the following circumstances:
(1) If a person who is not the spouse of *the person committing the act is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act* (emphasis added)…(omitted)…the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent. This paragraph does not preclude the prosecution of a spouse committing the act from being prosecuted under any other paragraph of this subdivision or any other law.
(2) If it is accomplished against a person's will by means of *force, violence, duress, menace, or fear of immediate and unlawful bodily injury*(emphasis added) on the person or another.
(3) If a person is *prevented from resisting by an intoxicating or anesthetic substance, or a controlled substance, and this condition was known, or reasonably should have been known by the accused*(emphasis added).
(4) If a person is at the time *unconscious of the nature of the act, and this is known to the accused*(emphasis added). As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets any one of the following conditions:
(A) Was unconscious or asleep.
(B) Was not aware, knowing, perceiving, or cognizant that the act occurred.

[433] *See* at 761, Kin Kinports, Rape and Force: The Forgotten Mens Rea, 4 Buff. Crim. L. Rev. 755 (2001)("…this almost universal disregard of mens rea issues as applied to the element of force confirms the redundancy of the force requirement, once absence of consent and its accompanying mens rea have been established").

(C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.
(D) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.
(5) If *a person submits under the belief that the person committing the act is someone known to the victim other than the accused, and this belief is induced by artifice, pretense, or concealment practiced by the accused*, (emphasis added)with intent to induce the belief.
(6) If the act is accomplished against the victim's will *by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat* (emphasis added). As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.
(7) If the act is accomplished against the victim's will *by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official* (emphasis added). As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(b) For purposes of this section, the following definitions apply:
(1) *"Duress"* (emphasis added) means *a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted* (emphasis added). The total circumstances, including the age of the victim, and the victim's relationship to the defendant, are factors to consider in appraising the existence of duress.
(2) *"Menace"* (emphasis added) means *any threat, declaration, or act that shows an intention to inflict an injury upon another* (emphasis added).

Penal Code § 261 (2019). (Amended by 2021 Cal. Legis. Serv. Ch. 626 (A.B. 1171)).

§261.6
(a) In prosecutions under Section 261, 286, 287, or 289, or former Section 262 or 288a, in which consent is at issue, "consent" means *positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved*(emphasis added).
(b) *A current or previous dating or marital relationship is not sufficient to constitute consent* (emphasis added) if consent is at issue in a prosecution under Section 261, 286, 287, or 289, or former Section 262 or 288a.
(c) This section shall not affect the admissibility of evidence or the burden of proof on the issue of consent.

CA Pen. Code § 261.6 (Amended by 2021 Cal. Legis. Serv. Ch. 626 (A.B. 1171)).

§261.7

> In prosecutions under Section 261, 286, 287, or 289, or former Section 262 or 288a, in which consent is at issue*, evidence that the victim suggested, requested, or otherwise communicated to the defendant that the defendant use a condom or other birth control device, without additional evidence of consent, is not sufficient to constitute consent* (emphasis added).

CA Pen. Code §261.7 (Amended by 2021 Cal. Legis. Serv. Ch. 626 (A.B. 1171)).

§263.1 reads:

> (a) The Legislature finds and declares that *all forms of nonconsensual sexual assault may be considered rape for purposes of the gravity of the offense and the support of survivors* (emphasis added).
>
> (b) This section is declarative of existing law.

CA Pen. Code § 263.1 (2019).

Finally, §266c states:

> Every person who induces any other person to engage in sexual intercourse, sexual penetration, oral copulation, or sodomy *when his or her consent is procured by false or fraudulent representation or pretense that is made with the intent to create fear, and which does induce fear, and that would cause a reasonable person in like circumstances to act contrary to the person's free will* (emphasis added), and does cause the victim to so act, is punishable by imprisonment in a county jail for not more than one year or in the state prison for two, three, or four years.
>
> As used in this section, "fear" means the *fear of physical injury or death to the person or to any relative of the person or member of the person's family*(emphasis added).

CA Pen. Code §263.1 (2017).

The discussion with regard to laws in California is limited to those that pertain to the discussion of force and consent element that is relevant to this section. First, according to §261(2), sexual intercourse against one's will should accompany means such as force, violence, duress, menace, or fear of immediate and unlawful bodily injury. Therefore, while consent is defined without reference to threat or force under §261.6 and §263.1 declare that nonconsensual sexual intercourse of all kinds may be considered rape, such declaration goes to the gravity of the offense and victim support, not to the determination of guilt.

In spite of its criminal law, especially 261(a)(2), which still requires force, violence, duress, menace, or fear of immediate and unlawful bodily injury, one cannot be quick to judge that California is conservative in legislating sex crimes. Some may suggest that it may be so in respect to penal law, but California is radically enacting other laws to manage sex crimes within the state, being the first state to adopt affirmative consent, by requiring universities in California to adopt policies concerning sexual assault, domestic violence, dating violence and stalking, which includes the affirmative consent standard[434] as a part of its education code. Moreover, in

[434] Cal. Educ. Code § 67386 Student Safety

> (1) An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. "Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that the person has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between

2021, it became the first state to ban non-consensual condom removal under its civil act.[435] It can be suggested that all the progressive acts and provisions that acknowledge that all forms of non-consensual sexual intercourse can be rape do not do any good in perpetuating the true consent standard in society until California actually talks the talk by penalizing all forms of non-consensual sexual intercourse. However, some may view California's approach as a good example of a jurisdiction that attempts to effectively reduce its sex crimes and protect victims by using tools that may be more appropriate than criminal law.

Nonetheless, there are criticisms over the lack of consistency in court decisions on §261(a)(2), which demonstrate the need to amend the law to reflect "the true harm of rape: [t]he lack of choice."[436] While criticizing the reasoning made by the Supreme Court of California in deciding *In re John Z,*[437] Nicole Walsh suggests that the court confused the concept of persistence and force and therefore failed to find the element of force or others as required in §261(a)(2) in the context of withdrawal of consent.[438] The court's failure is apparent, especially given that the court held that force should be something greater or substantially different from the sexual acts themselves,[439] departing from the judicial interpretation approach taken by states such as New Jersey. The courts' struggle, including the confusion demonstrated in *In re John Z*, to squeeze force into the framework of adjudication of rape cases leads to the pertinent question of how force may fit into the state's sex crime laws.[440] Walsh, explaining that while force was traditionally required to demonstrate a lack of consent by the victim, it now merely serves a redundant role in the law, as it causes courts to analyze non-consent twice.[441]

Finally, in addressing why the force element needs to be abolished, Walsh answers as follows:

> Perhaps because force in and of itself is not the harm that rape law addresses, but instead, rape law seeks to address the fundamental harm caused by the fact that victims are deprived of choice. Requiring force does not address the harm in depriving victims of the power to choose, requiring non-consent as an element addresses this harm.
>
> Having or continuing intercourse after a woman withdraws consent deprives her of choice, and, as a result, causes harm. Under an alternative analysis that eliminates force

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> the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.
> (2) A policy that, in the evaluation of complaints in any disciplinary process, it shall not be a valid excuse to alleged lack of affirmative consent that the accused believed that the complainant consented to the sexual activity under either of the following circumstances:
> (A) The accused's belief in affirmative consent arose from the intoxication or recklessness of the accused.
> (B) The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented.

Cal. Educ. Code § 67386(1)&(2) (2020).

[435] Sexual Battery: Nonconsensual Condom Removal, A.B. 453, C.A. 2021-22 Leg. Sess. Ch. 613 (2021)(An act to amend the Civil Code)(Passed on Oct. 7, 2021).

[436] At 226, Nicole Walsh, The Collusion of Consent, Force, and Mens Rea in Withdrawal of Consent Rape Cases: The Failure of in re John Z., 26 Whittier L. Rev. 225, 262 (2004).

[437] 29 Cal.4th. 756, 128 Ca.Rptr.2d 783, 60 P.3d 183 (Cal. 2003).

[438] Nicole Walsh, *supra* note 436 at 253.

[439] *Id*. at 233; *see In re John*, 29 Cal.4th at 764, citing *People v. Mom*, 80 Cal.App.4th 1217, 1224, 96 Cal.Rptr.2d 172 (2000).

[440] Nicole Walsh, *supra* note 436 at 257.

[441] *Id*. at 258.

> as an element, nonconsensual intercourse is the primary consideration, and force is subjugated to a role as an evidentiary and aggravating consideration.

Nicole Walsh, *supra* note 436 at 260.[442]

The legal development with respect to sexual violence in California has not been stagnant, legislating different types of laws to reflect the developing understanding of sexual violence, often as a pioneer state. However, because of its requirement for force, it has not been able to escape criticism that its laws fail to protect victims and that the courts fail to render constant decisions or establish precedents with clear rules. This may be worth noting, as in Japan, some experts are advocating for the enactment of laws in different sectors as a better way of addressing sex crimes than an amendment to its penal law.[443] While building robust protection for sex crime victims and vulnerable groups outside the scope of penal law is valuable, and in some cases may result in a much stronger positive impact with respect to victim recovery if it is not accompanied by corresponding changes to the penal law, the criminal justice system under the jurisdiction may continue to be subject to criticism for the improper prosecution of sex crime laws.

Additionally, although *mens rea* will be separately covered in a chapter to be followed, it is also worthwhile to briefly review how courts in California deal with situations where a defendant claims that he has mistakenly believed that the victim has consented. A defendant who is being prosecuted for sex crimes in California may claim that he honestly believed that he had the victim's consent ("the *Mayberry* defense"[444]). However, to claim such a defense, the defendant needs to prove both the subjective and objective components of the defense. The defendant needs to prove the subjective component of whether he honestly and, in good faith, albeit mistakenly, believed the victim's consent, by adducing evidence of the victim's equivocal conduct that made him erroneously believe the existence of consent.[445]

In *People v. Williams*, the defendant's and victim's accounts of what happened diverged a great deal: the defendant's account involved that the victim initiated sexual contact, and the victim's account suggested that the defendant punched her, pushed her to bed, and threatened her before the sexual encounter occurred. [446] The Supreme Court of California, in Bank, reversed the judgment of the Court of Appeal to find that the jury instruction on the *Mayberry* defense was not warranted in this case, while holding that "[t]hese wholly divergent accounts create no middle ground from which Williams could argue he reasonably misinterpreted Deborah's[the victim's][explanation added] conduct."[447] The court's decision demonstrates that, while a

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[442] Citing at 355, David P. Bryden, Redefining Rape, 3 Buff. Crim. L. Rev. 317 (2000); At 285-6, Craig Byrnes, Putting the Focus Where it Belongs: Mens Rea, Consent, Force, and the Crime of Rape, 10 Yale J.L. & Feminism 277, 300 (1998) at FN 243-5.

[443] 法務省, 性犯罪に関する刑事法検討会第 12 回会議議事録(Feb. 16, 2021) (*see e.g.* at 15, Sato's comments that suggest other legal safeguards such as Youth Protection and Development Ordinance may be more suitable for protecting children from sex crimes).

[444] *See* at *155, *People v. Mayberry*, 15 Cal. 3d 143, 155, 542 P.2d 1337, 1345 (1975)("If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite under Penal Code section 20 to a conviction of either kidnaping (s 207) or rape by means of force or threat (s 261, subds. 2 & 3).

[445] At *361, *People v. Williams*, 4 Cal. 4th 354, 361, 841 P.2d 961, 965 (1992).

[446] *Id*. at *362, citing *People v. Burnett*, 9 Cal.App.4th 685, 690, 11 Cal.Rptr.2d 841 (1992) & *People v. Rhoades*, 193 Cal.App.3d 1362, 1369, 238 Cal. Rptr. 909 (1987).

[447] *Id*. at *362.

defendant may claim the mistake of consent as his defense, in order to do so, the mistake needs to be truly reasonable, both by the subjective and objective standard.

b. Colorado

Alternatively, Colorado's statutes serve as a practical reference for the evaluation of the means element. In Colorado, sexual assault is defined as follows:

> §18-3-402. Sexual assault
> (1) Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if:
> (a) The actor *causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will*; (emphasis added) or
> (b) The actor *knows that the victim is incapable of appraising the nature of the victim's conduct*; (emphasis added) or
> (c) The actor knows that the victim submits erroneously, believing the actor to be the victim's spouse; or
> (d) At the time of the commission of the act, the victim is less than fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim; or
> (e) At the time of the commission of the act, the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and is not the spouse of the victim; or
> (f) The victim *is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority to coerce the victim to submit*, (emphasis added) unless the act is incident to a lawful search; or
> (g) The actor, while purporting to offer a medical service, engages in treatment or examination of a victim for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices; or
> (h) The victim is *physically helpless and the actor knows the victim is physically helpless and the victim has not consented* (emphasis added).
> …

CO Rev. Stat. §18-3-402 (2013).

> §18-3-404. Unlawful sexual contact
> (1) Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if:
> (a) The actor *knows that the victim does not consent*; (emphasis added)or
> (b) The actor *knows that the victim is incapable of appraising the nature of the victim's conduct*; (emphasis added) or
> (c) The victim is *physically helpless and the actor knows that the victim is physically helpless and the victim has not consented*; (emphasis added)or
> (d) The actor has *substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission*; (emphasis added) or
> (e) Repealed by Laws 1990, H.B.90-1133, § 25, eff. July 1, 1990.

(f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority, unless incident to a lawful search, to coerce the victim to submit; or
(g) The actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices.
(1.5) Any person who knowingly, with or without sexual contact, induces or coerces a child by any of the means set forth in section 18-3-402 to expose intimate parts or to engage in any sexual contact, intrusion, or penetration with another person, for the purpose of the actor's own sexual gratification, commits unlawful sexual contact. For the purposes of this subsection (1.5), the term "child" means any person under the age of eighteen years.
…

CO Rev. Stat. §18-3-404 (2013).

Finally, consent is defined as follows:

(1.5) "Consent" means *cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act* (emphasis added). A current or previous relationship shall not be sufficient to constitute consent under the provisions of this part 4. Submission under the influence of fear shall not constitute consent. Nothing in this definition shall be construed to affect the admissibility of evidence or the burden of proof in regard to the issue of consent under this part 4.

CO Rev. Stat. § 18-3-401(1.5) (2019).

Colorado's §18-3-402(1)(a) focuses on the perpetrator's action that he undertakes to cause submission of the victim. By the wording of the statute, the element does not require any degree of physical threat or force, only that it is of sufficient consequence that is reasonably calculated to cause submission of the victim. Colorado's statutes allow various acts to be penalized by listing several specific elements, such as the relationship between the perpetrator and the victim or the conditions of a victim, but at the same time, they open the door for judicial interpretation to define and shape which acts would be considered to have been reasonably calculated to cause submission of a victim. The Supreme Court of Colorado has upheld the law against the challenges that the laws are unconstitutionally indefinite, as the statutes are framed so that a jury can deliver determination for the question of whether the means employed by the defendant was reasonably calculated to cause submission, thus finding it that it "does not make it too vague to afford a practical guide to acceptable behavior."[448]

In *People v. Smith*, a defendant argued that the language "causes submission" and "against the victim's will" are purely subjective standards that empower the victim to decide whether or not the act was done with consent.[449] However, the court dismissed the argument by finding that "[T]his is simply a problem of proof. Whether consent existed at the relevant time is an objective fact, not something which can be varied by a later decision of the victim."[450] The

[448] At 556, *People v. Beaver*, 549 P.2d 1315 (Colo. 1976); *see also People v. Barger*, 550 P.2d 1281 (Colo. 1976); *People v. Smith*, 638 P.2d 1, 5 (Colo. 1981).
[449] At *7, *People v. Smith*, 638 P.2d 1, 5 (Colo. 1981), citing *People v. Edmonds*, 195 Colo. 358, 578 P.2d 655 (1978).
[450] *Id*.

court also pointed out that many crimes include a victim's lack of consent to the proscribed activity as an essential element of a crime, such as theft, false imprisonment, and criminal trespass.[451] Colorado's early rape reform has brought about a consent-based sexual assault statute that is flexible and unrestricted by narrowly defined force or coercion. However, its flexibility requires the judiciary to play a significant part in ensuring that legislative intent is preserved. To put it another way, if sex crime reform in Japan has as one of its goals limiting the prospective impact of a judge's bias and prejudice on sex crime prosecution, a widely defined statute like in Colorado may not be a feasible solution.

c. Montana

Finally, Montana's sex crime laws, which have been amended to adopt the consent-based element in 2017 are worthy of examination:

> 45-5-502. Sexual assault
> (1) A person who knowingly subjects another person to any sexual contact *without consent* (emphasis added) commits the offense of sexual assault.
>
> (2)(a) On a first conviction for sexual assault, the offender shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.
> (b) On a second conviction for sexual assault, the offender shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both.
> (c) On a third and subsequent conviction for sexual assault, the offender shall be fined an amount not to exceed $10,000 or be imprisoned for a term not to exceed 5 years, or both.
>
> (3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years, unless the judge makes a written finding that there is good cause to impose a term of less than 4 years and imposes a term of less than 4 years, or more than 100 years and may be fined not more than $50,000.
>
> (4) An act "in the course of committing sexual assault" includes an attempt to commit the offense or flight after the attempt or commission.
>
> (5)(a) Subject to subsections (5)(b) through (5)(f), consent is ineffective under this section if the victim is:
> (i) *incarcerated in an adult or juvenile correctional, detention, or treatment facility or is on probation, conditional release, or parole and the perpetrator is an employee,*

[451] At *6, *People v. Smith*, 638 P.2d 1, 5 (Colo. 1981)(" For example, the criminality of acts which would otherwise constitute theft, section 18-4-401, C.R.S.1973 (1978 Repl. Vol. 8), false imprisonment, section 18-3-303, C.R.S.1973 (1978 Repl. Vol. 8), and second-degree criminal trespass, section 18-4-503, C.R.S.1973 (1978 Repl. Vol. 8), is vitiated if the intended victim authorizes or consents to the actor's conduct").

contractor, or volunteer of the supervising authority and has supervisory or disciplinary authority over the victim, (emphasis added) unless the act is part of a lawful search;
(ii) less than 14 years old and the offender is 3 or more years older than the victim;
(iii) receiving services from a youth care facility, as defined in 52-2-602, and the perpetrator:
(A) has *supervisory or disciplinary authority over the victim or is providing treatment to the victim*; (emphasis added) and
(B) is an employee, contractor, or volunteer of the youth care facility;
(iv) admitted to a mental health facility, as defined in 53-21-102, is admitted to a community-based facility or a residential facility, as those terms are defined in 53-20-102, or is receiving community-based services, as defined in 53-20-102, and the perpetrator:
(A) has supervisory or disciplinary authority over the victim or is providing treatment to the victim; and
(B) is an employee, contractor, or volunteer of the facility or community-based service;
(v) a program participant, as defined in 52-2-802, in a private alternative adolescent residential or outdoor program, pursuant to Title 52, chapter 2, part 8, and the perpetrator is a person associated with the program, as defined in 52-2-802;
(vi) the victim is a client receiving psychotherapy services and the perpetrator:
(A) is providing or purporting to provide psychotherapy services to the victim; or
(B) is an employee, contractor, or volunteer of a facility that provides or purports to provide psychotherapy services to the victim and the perpetrator has supervisory or disciplinary authority over the victim; or
(vii) a student of an elementary, middle, junior high, or high school, whether public or nonpublic, and the perpetrator is not a student of an elementary, middle, junior high, or high school and is an employee, contractor, or volunteer of any school who has ever had instructional, supervisory, disciplinary, or other authority over the student in a school setting.
(b) Subsection (5)(a)(i) does not apply if one of the parties is on probation, conditional release, or parole and the other party is a probation or parole officer of the supervising authority and the parties are married to each other.
(c) Subsections (5)(a)(iii) and (5)(a)(iv) do not apply if the individuals are married to each other and one of the individuals involved is a patient in or resident of a facility, is a recipient of community-based services, or is receiving services from a youth care facility and the other individual is an employee, contractor, or volunteer of the facility or community-based service.
(d) Subsection (5)(a)(v) does not apply if the individuals are married to each other and one of the individuals involved is a program participant and the other individual is a person associated with the program.
(e) Subsection (5)(a)(vi) does not apply if the individuals are married to each other and one of the individuals involved is a psychotherapy client and the other individual is a psychotherapist or an employee, contractor, or volunteer of a facility that provides or purports to provide psychotherapy services to the client.
(f) Subsection (5)(a)(vii) does not apply if the individuals are married to each other.
MT Code § 45-5-502 (2020).

45-5-503. Sexual intercourse without consent
(1) A person who knowingly has sexual intercourse with another person *without consent or with another person who is incapable of consent* (emphasis added) commits the offense of sexual intercourse without consent. A person may not be convicted under this section based on the age of the person's spouse, as provided in 45-5-501(1)(b)(iv).

(2) A person convicted of sexual intercourse without consent shall be punished by life imprisonment or by imprisonment in the state prison for a term of not more than 20 years and may be fined not more than $50,000, except as provided in 46-18-219, 46-18-222, and subsections (3), (4), and (5) of this section.

(3)(a) If the victim is less than 16 years old and the offender is 4 or more years older than the victim or if the offender inflicts bodily injury on anyone in the course of committing sexual intercourse without consent, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than $50,000, except as provided in 46-18-219 and 46-18-222.
(b) If two or more persons are convicted of sexual intercourse without consent with the same victim in an incident in which each offender was present at the location where another offender's offense occurred during a time period in which each offender could have reasonably known of the other's offense, each offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 5 years or more than 100 years and may be fined not more than $50,000, except as provided in 46-18-219 and 46-18-222.
…
MT Code § 45-5-503 (2020).

45-5-508. Aggravated sexual intercourse without consent
(1) A person *who uses force while knowingly having sexual intercourse with another person without consent or with another person who is incapable of consent* (emphasis added) commits the offense of aggravated sexual intercourse without consent.

(2) A person convicted of aggravated sexual intercourse without consent shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 10 years or more than 100 years and may be fined not more than $50,000, except as provided in 46-18-219 and 46-18-222.
MT Code § 45-5-508 (2020).

Consent in the sections is defined as follows:

(1)(a) As used in 45-5-502, 45-5-503, and 45-5-508, the term “consent” means *words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact* (emphasis added) and is further defined but not limited by the following:
(i) an expression of lack of consent through *words or conduct* (emphasis added) means there is no consent or that consent has been withdrawn;

(ii) *a current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent* (emphasis added); and
(iii) lack of consent may be inferred based on all of the surrounding circumstances and must be considered in determining whether a person gave consent.

(b) Subject to subsections (1)(c) through (1)(g), the victim is *incapable of consent* (emphasis added) because the victim is:
(i) mentally disordered or incapacitated;
(ii) physically helpless;
(iii) overcome by deception, coercion, or surprise;
(iv) less than 16 years old;
(v) incarcerated in an adult or juvenile correctional, detention, or treatment facility or is on probation, conditional release, or parole and the perpetrator is an employee, contractor, or volunteer of the supervising authority and has supervisory or disciplinary authority over the victim, unless the act is part of a lawful search;
(vi) receiving services from a youth care facility, as defined in 52-2-602, and the perpetrator:
(A) has supervisory or disciplinary authority over the victim or is providing treatment to the victim; and
(B) is an employee, contractor, or volunteer of the youth care facility;
(vii) admitted to a mental health facility, as defined in 53-21-102, is admitted to a community-based facility or a residential facility, as those terms are defined in 53-20-102, or is receiving community-based services, as defined in 53-20-102, and the perpetrator:
(A) has supervisory or disciplinary authority over the victim or is providing treatment to the victim; and
(B) is an employee, contractor, or volunteer of the facility or community-based service;
(viii) a program participant, as defined in 52-2-802, in a private alternative adolescent residential or outdoor program, pursuant to Title 52, chapter 2, part 8, and the perpetrator is a person associated with the program, as defined in 52-2-802;
(ix) the victim is a client receiving psychotherapy services and the perpetrator:
(A) is providing or purporting to provide psychotherapy services to the victim; or
(B) is an employee, contractor, or volunteer of a facility that provides or purports to provide psychotherapy services to the victim and the perpetrator has supervisory or disciplinary authority over the victim;
(x) a student of an elementary, middle, junior high, or high school, whether public or nonpublic, and the perpetrator is not a student of an elementary, middle, junior high, or high school and is an employee, contractor, or volunteer of any school who has ever had instructional, supervisory, disciplinary, or other authority over the student in a school setting;
(xi) a witness in a criminal investigation or a person who is under investigation in a criminal matter and the perpetrator is a law enforcement officer who is involved with the case in which the victim is a witness or is being investigated; or
(xii) a parent or guardian involved in a child abuse or neglect proceeding under Title 41, chapter 3, and the perpetrator is:

(A) employed by the department of public health and human services for the purposes of carrying out the department's duties under Title 41, chapter 3; and
(B) directly involved in the parent or guardian's case or involved in the supervision of the case.

(c) Subsection (1)(b)(v) does not apply if the individuals are married to each other and one of the individuals involved is on probation, conditional release, or parole and the other individual is a probation or parole officer of a supervising authority.

(d) Subsections (1)(b)(vi) and (1)(b)(vii) do not apply if the individuals are married to each other and one of the individuals involved is a patient in or resident of a facility, is a recipient of community-based services, or is receiving services from a youth care facility and the other individual is an employee, contractor, or volunteer of the facility or community-based service.

(e) Subsection (1)(b)(viii) does not apply if the individuals are married to each other and one of the individuals involved is a program participant and the other individual is a person associated with the program.

(f) Subsection (1)(b)(ix) does not apply if the individuals are married to each other and one of the individuals involved is a psychotherapy client and the other individual is a psychotherapist or an employee, contractor, or volunteer of a facility that provides or purports to provide psychotherapy services to the client.

(g) Subsection (1)(b)(x) does not apply if the individuals are married to each other.
MT Code § 45-5-501 (2020).

For aggravated sexual intercourse without consent, force is defined as follows:
(2) As used in 45-5-508, the term "force" means:
(a) the infliction, attempted infliction, or threatened infliction of bodily injury or the commission of a forcible felony by the offender; or

(b) the threat of substantial retaliatory action that causes the victim to reasonably believe that the offender has the ability to execute the threat.
MT Code § 45-5-501 (2020).

The Montana laws bespeak ongoing efforts by states to improve their sex crime laws through reforms. Indeed, as mentioned earlier, amendments to sex crime laws are still continuously being made in many state jurisdictions by updating their laws according to an evolving understanding of sexual violence and making improvements to their laws.[452] In the past, the college town of Missoula in Montana has earned its disgraceful nickname, "America's rape capital" for its high number of reported rapes (although the number in fact had been aligned with

[452] *See e.g.*, An Act to Amend the Penal Law, in relation to the definition of consent A.B.A6540A, N.Y. 2021-22 Leg. Sess. (2021); An Act to Amend the Penal Law, in relation to prohibiting the use of the intoxication of a victim as a defense to a criminal charge for sex crimes and creating an affirmative defense for such criminal charges, S.B.S452A, N.Y. 2021-22 Leg. Sess. No. 100 (2021).

national averages for college sexual assaults),[453] when the U.S. Assistant Attorney General for Civil Rights, Thomas Perez, came to Missoula on May 1, 2012, and announced a federal investigation into the university, city police, and county attorney by reporting that there had been at least 80 reported rapes in the past three years.[454] The amended laws in Montana, for which adoption of consent element *inter alia* has been the most significant change, demonstrate its determination in improving its justice system for sex crime victims, as suggested by recent scholarship,[455] thereby setting an example for other states in the midst of the legislative trend toward defining sex crime based on consent.

B. Addressing points of concerns among experts in Japan

This section provides relevant information about state sex crime laws and expert materials pertaining to concerns expressed by experts in Japan about alleviating or abolishing force or threat requirements.

a. Addressing concerns about the consent element

First, preference for force element seems to be centered on its "concreteness," at least to some extent, in providing *something* to look for other than the victim's claim of her lack of consent, especially in cases where a perpetrator claims that he did not "understand" a victim's lack of consent absent her active expression of refusal as he proceeded with the sexual assault. As Kawaide explains during committee meetings, it is difficult to prove that a victim's mind during the assault was as the victim claims, and it should be proven from external facts or objective facts.[456] Committee members talked about the problems associated with so-called gray zone cases in which a victim's consent or lack thereof is not clear during their discussion of the yes-means-yes model. Hashizume, showing opposition to the adoption of the yes-means-yes model, suggested that an element based on affirmative consent is not feasible for Japan[457] because in addition to his personal belief that penalizing all acts in a "gray zone" where the existence of consent is unclear is not proper, the social understanding does not reach the level of "yes means yes."[458] Hashizume further suggested that penalization of such acts may bring about undesirable consequences, as it may lead to penalization of "even cases where victims were consenting deep down (「内心」)."[459] As one example of a case in the gray zone, Hashizume also gives a case, in which the victim has "accepted" the sexual act while being put in a state of conflict and unease (「被害者が一定の葛藤や躊躇の上に性行為を受け入れた場合のように，自発性が乏しくグレーゾーンの場合」).[460]

Richard Klein, while cynically opposing the unwarranted expansion of the doctrine of affirmative consent, makes the following observation:

> Rape reformers often use the phrase, "men just don't get it," and hope that changes in rape laws can lead to societal and cultural changes in the interactions between the sexes.

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[453] At 175, Alison Hatch, CAMPUS SEXUAL ASSAULT: A REFERENCE HANDBOOK (2017).
[454] Eliza Gray, The Sexual Assault Crisis on American Campuses, Time (May 15, 2014)(last accessed Nov 6. 2021), available at: https://time.com/100542/the-sexual-assault-crisis-on-american-campuses/
[455] At *124, Donald Dripps, Due Process Overbreadth, The Void for Vagueness Doctrine, Fundamental Rights, and the Brewing Storm over Undefined Consent in Sexual Assault Statutes, 73 Okla. L. Rev. 121, 124 (2020).
[456] 性犯罪に関する刑事法検討会, supra note 42 at 21-22.
[457] *Id*.
[458] *Id*.
[459] *Id*.
[460] *Id*.

> Men must understand, it is maintained, that a woman may freeze immediately prior to intercourse and not be able to communicate any negativity, and men must not take that silence as indicating consent. That's why an affirmative indication of consent is required; no assumptions ought be made. If the law makes this clear to men, then men will act far more cautiously, respectfully, and judiciously. The law must compensate for the failings of men.

At 1013, Richard Klein, An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness, 41 Akron L. R. 4, 7, 981, 1057(2018).

If a victim, as in Hashizume's example of a gray zone case, has acquiesced in the sexual act while being put in a state of conflict and unease, is the lack of consent truly unclear? In fact, was it not the purpose of the force or threat element in Japan, at least theoretically, to broadly include circumstances and conditions of such conflict and unease if they are sufficient to make the victim conspicuously difficult to express her refusal? Even without the requirement for affirmative consent, would it not satisfy Colorado's sexual assault statute if the perpetrator causes such a state of conflict and unease upon the victim to commit the act against the victim's will pursuant to § 18-3-402(1)(a)?

Klein's illustration of the case in which a woman freezes prior to sexual intercourse, with her body stiff and her reactions unresponsive, also raises similar questions. Is it not natural and reasonable for a person to assume that he should not proceed with sexual intercourse with a person in such a state or at least to ask if she is okay? Consent, as used as an element in criminal law, does not refer to the immeasurable, deep-down feelings of a victim. It goes to an objective evaluation of the victim's willingness to participate in sexual activity, and when the willingness is unclear via outward expression, upon the circumstances where a perpetrator could have reasonably known and understood that there was no meaningful consent.[461] What force adds to this evaluation, in its soft interpretation that captures different types of situations under which a lack of consent can be brought about, is merely redundancy. [462]

Certainly, as Klein suggests, over-expansion of the affirmative consent doctrine may result in unfair prosecution and offend the principles of criminal law. However, if the law does not compensate for the failings of perpetrators, letting them ignore a lack of consent at their own peril,[463] what will? When the perpetrators cause the victims harm that potentially lasts over their lifetime, what other than the law can compensate for their failings and procure some sense of justice and safety for the victims? "Criminal law expects people to act reasonably and may rightly punish them when they do not."[464]

As Klein acknowledges, courts in the United States, as those in Japan reviewed in this paper, have long adopted a male understanding of force and threat that, unless women have resisted while risking her safety, and unless overt violence has not been used, there has been no rape, when acquittance and date rape can be as traumatic for the victims.[465] If one has, on one hand, those who have forced sexual acts onto another person out of their own needs and desires and, on the other hand, the victims who have suffered from them, and above all, social

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[461] Craig Byrnes, *supra* note 442 at 294-5.
[462] *Id*. at 285.
[463] *Id*. at 298.
[464] *Id*. at 285.
[465] At 133, Lynne Henderson, Rape and Responsibility, 11 L. & Phil. 127, 130-32 (1992); *also see* Susan Estrich, *supra* note 74.

misconceptions that prevent the justice system from fairly recognizing harm for sex crime victims, why should not the former carry the social responsibility to ensure to a reasonable degree that their actions are not hurting anyone by at least establishing the means element that more accurately captures the culpable nature of the act?

Certainly, whether men or women, those who have initiated sexual acts, not those on the receiving end, need to act with the responsibility that their actions are not causing harm for the people with whom they wish to engage in intimate physical interactions. Above all, while it is imperative that the criminal justice system should function properly to prevent conviction based on false accusations, when it comes to a contest of credibility in a trial, rape case is no different from others.[466] As the definition of robbery does not change every time there are a few cases based on a false accusation and as, under a proper definition, a defendant can properly defend himself from false accusation of robbery, so can a defendant in a rape trial.[467]

C. Evaluation of laws based on a consent-based element

Additionally, while limited in the amount of information, post-evaluations after rape reforms on force element may shed some light on the concerns of experts in Japan about whether abolishing or alleviating the force or threat element would bring out meaningful results in sex crime prosecution. Many legal scholars in the United States have sought to examine whether sex crime reforms that have taken place in various forms over the centuries have been actually "successful," a measure that varies according to studies but is often evaluated by examining whether there has been an increase in the number of reporting or convicted cases. While singling out the effect of the amendment to the force or threat element on case processing may be challenging, as most reforms accompany various changes to the sex crime laws of a state at once, some scholars have made attempts at such an analysis. However, for scholars, the availability of data has also served as another impediment, as there is no effective national tool to measure an accurate number of cases of consent-based offenses.

Most states prepare their data on crime statistics in the format of Uniform Crime Records program (hereinafter "UCR"), or National Incident-Based Reporting System (hereinafter "NIBRS"), which is a revised program to update UCR by the Federal Bureau of Investigations (hereinafter "FBI").[468] In 2013, the definition used for collecting summary rape counts changed from "the carnal knowledge of a female forcibly and against her will"[469] to "the 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. Attempts or assaults to commit rape are also included; however, statutory rape and incest are excluded."[470] However, as the FBI's definition for collecting data is still limited to forcible sexual assault, the state crime data, including those for sexual assault, are reported based on the FBI definition and do not serve as a tool to analyze case processing for consent-based offenses.

One comprehensive analysis of the effect of rape law reform on rape case processing reflects this limitation. The study found that more feminist and liberal laws than traditional and

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[466] Craig Byrnes, *supra* note 442 at 298.
[467] *Id*.
[468] The Federal Bureau of Investigations, National Incident-Based Reporting System ("NIBRS"), (last accessed Nov. 3, 2021), available at: https://www.fbi.gov/services/cjis/ucr/nibrs; The Federal Bureau of Investigation, Uniform Crime Reporting ("UCR") Program, (last accessed Nov. 3, 2021), available at: https://www.fbi.gov/services/cjis/ucr
[469] The U.S. Dept. of Justice Archives, An Updated Definition of Rape, Off. Pub. Affairs (2012), (last accessed Jan. 20, 2022), available at: https://www.justice.gov/archives/opa/blog/updated-definition-rape
[470] *Id*.

conservative ones are associated with higher per-capita counts of actual rapes.[471] However, at the same time, their data indicated lower per-capita counts of rapes for laws that changed the reforms that made the definition of crimes more inclusive by including acts other than vaginal penetration, criminalizing lack of consent, and making the laws gender-neutral (although the counts were higher when the law explicitly allowed both male and female victims).[472] The authors pointed out that the negative effects may "reflect errors in reporting that our correction for censoring did not overcome."[473] Their results, based on a pro-bit regression analysis, showed strong signs of censoring for these kinds of laws, thus indicating that the data are incomplete in respect to these laws.[474] The statistical shortcomings were inevitable, given the available data used in the study: the UCR data collected by the FBI.[475] The authors explained that despite attempts to make statistical corrections, as the FBI's data for both actual rape cases and clearances are defined by forcible rape rather than for sexual offenses in general, the effects may have been distorted.[476] Additionally, the authors point out the possibility that broader and more-consent-oriented definitions of sex crime laws deterred potential perpetrators by reducing rape counts, although, again, the limited available data have prevented the authors from testing the possibility.[477]

Similarly, while Montana's crime report, which may indicate a very slight increase in rape cases (approximately 370 cases in 2013[478], 423 in 2014,[479] 443 in 2015,[480] 482 in 2016,[481] 519 in 2017 [October of which consent-based law became effective],[482] 468 in 2018,[483] 546 in 2019[484], and 501 in 2020[485]), as the numbers are also collected for NIBRS reporting, they do not serve as a good base for analyzing how consent-based amendment may have affected case processing.

For the reasons demonstrated above, "…rape statistics available to researchers are notoriously untrustworthy."[486] However, despite these difficulties, Peter Landsman has engaged in a meaningful examination of force requirement by examining rape statistics through an empirical comparison between the state with a force requirement, Massachusetts, and the state without one, Colorado. While Landsman speculates that Colorado's general higher reporting rate of rape than Massachusetts may be due to jurisdictional differences rather than the role of the force requirement, he suggests that the rape rate trends over time suggest that force requirement

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[471] At 105, Stacy Futter & Walter Mebane, The Effects of Rape Law Reform on Rape Case Processing, 16 Berkeley W. L.J. 1, 72, 139 (2001).
[472] *Id*. at 106.
[473] *Id*. at 85.
[474] *Id*.
[475] *Id*.
[476] *Id*.
[477] *Id*. at 111.
[478] Statistical Analysis Center, Montana Board of Criminal Control, Crime in Montana Report 2017, (last accessed Jan. 20, 2022), available at: https://mbcc.mt.gov/Data/Montana-Reports/
[479] *Id*.
[480] *Id*.
[481] *Id*.
[482] *Id*.
[483] *Id*.
[484] *Id*.
[485] *Id*.
[486] At 774, Peter Landsman, Does Removing Force Element Matter?: An Empirical Comparison of Rape Statistics in Massachusetts and Colorado, 21 Wm. & Nary J. Women & J. 767 (2015).

may have played some role. [487] While the author has analyzed the effect of removing the force requirement by comparing the two states' data with the national average, an accurate analysis could not be conducted without better statistics.

As the data available for the United States are limited, perhaps it may be conducive to refer to the statistics of Sweden, where sexual offenses were amended in July of 2018 to adopt the element of affirmative consent[488] and to introduce a new offense based on negligence.[489] While the data for Sweden may be likewise still limited to provide accurate analysis, the relatively detailed report allows more specific examination. The prosecution rate based on the investigation and case processing statistics for sexual assault for women and men, 18 years or older, were 9% and 4%, respectively (with person-based prosecution rates of 8% and 3%, respectively) in 2016,[490] 6% and 6% in 2017 (6% and 5%),[491] 8% and 4% in 2018 (8% and

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[487] *Id*. at 785-7.

[488] 6 kap. 1§ (Swed.):

> A person who performs sexual intercourse, or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse, with a person who is not participating voluntarily is guilty of rape and is sentenced to imprisonment for at least two and at most six years. When assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way. A person can never be considered to be participating voluntarily if: 1. their participation is a result of assault, other violence or a threat of a criminal act, a threat to bring a prosecution against or report another person for an offence, or a threat to give detrimental information about another person; 2. the perpetrator improperly exploits the fact that the person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodily injury, mental disturbance or otherwise in view of the circumstances; or 3. the perpetrator induces the person to participate by seriously abusing the person's position of dependence on the perpetrator. If, in view of the circumstances associated with the offence, the offence is considered less serious, the person is guilty of rape and is sentenced to imprisonment for at most four years. If an offence referred to in the first paragraph is considered gross, the person is guilty of gross rape and is sentenced to imprisonment for at least five and at most ten years. When assessing whether the offence is gross, particular consideration is given to whether the perpetrator used violence or a threat of a particularly serious nature, or whether more than one person assaulted the victim or took part in the assault in some other way, or whether, in view of the method used or the young age of the victim or otherwise, the perpetrator exhibited particular ruthlessness or brutality. Act 2018:618.

Brottsbalken [BrB] [Penal Code] 6:1§ (Swed.).

[489] 6 kap. 1a§ (Swed.):

> A person who commits an act referred to in Section 1 and is grossly negligent regarding the circumstance that the other person is not participating voluntarily is guilty of negligent rape and is sentenced to imprisonment for at most four years. If, in view of the circumstances, the act is less serious, the person is not held responsible. Act 2018:618.

Brottsbalken [BrB] [Penal Code] 6:1a§ (Swed.).

[490] "The person-based clearance rate reports person-based clearances expressed as a percentage of processed offences." Brottsförebyggande rådet [The Swedish National Council for Crime Prevention], Crime & Statistics, Processed Offenses 2016 (last accessed Jan. 20, 2022), available at: https://bra.se/bra-in-english/home/crime-and-statistics/crime-statistics.html.

[491] Brottsförebyggande rådet [The Swedish National Council for Crime Prevention], Crime & Statistics, Processed Offenses 2017 (last accessed Jan. 20, 2022), available at: https://bra.se/bra-in-english/home/crime-and-statistics/crime-statistics.html.

4%)[492], the year when the reform took place, and 13% and 6% in 2019 (12% and 5%). [493] While the other changes do not seem significant, there appears to be a substantial increase in the prosecution rate for female adult sexual assault victims in 2019.

As the full statistical report is not available for the year 2020, only the prosecution rate for *all* sexual offenses combined is available as of now, which is indicated to be 23%.[494] Compared to 22% in 2016,[495] 19% in 2017,[496] and 26% in 2018,[497] from what can be gathered from the available data, the prosecution rate for every sex offense under Chapter 7 does not indicate a significant increase. While whether the reform would indeed have a meaningful effect on the prosecution rate for sex offenses or not is to be more accurately analyzed in the future, the absence of a sudden increase may, in fact, be a good thing, as it alleviates the concern that the introduction of sex offenses based on affirmative consent and negligence would lead to frivolous reporting and convictions. Finally, while the reported number of sexual offenses has increased over the same four-year span, from 20,284 cases in 2016 to 25,030 cases in 2020 for all sexual offenses (with 204 reported offenses per 100,000 of the mean population in 2016 and 241 in 2020) and 6,715 in 2016 to 9,360 cases in 2020 for rape and aggravated rape (68 cases in 2016 and 90 cases in 2020), from the analysis based on limited data, the change in the number of reported cases may not be the result of the reform, as the number tends to increase since 1950.[498]

A final point that needs to be remembered is that the purpose of rape reform goes beyond the mere reflection of the number of cases prosecuted "…to have both symbolic and instrumental impacts." [499] It "reflects women's autonomy in [American] society and to encourage respect for their diverse roles and behavior."[500] It may contribute to the restoration of justice for victims by encouraging them to report the cases; hence, it may increase the number of cases reported, but at the same time, it may serve as a better notice to the potential perpetrators that they should stay away from engaging in criminal behavior. What is also apparent is that a single-handed change to the force element would not dramatically result in improvement of rape case processing. It

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[492] Brottsförebyggande rådet [The Swedish National Council for Crime Prevention], Crime & Statistics, Processed Offenses 2018 (last accessed Jan. 20, 2022), available at: https://bra.se/bra-in-english/home/crime-and-statistics/crime-statistics.html.
[493] Brottsförebyggande rådet [The Swedish National Council for Crime Prevention], Crime & Statistics, Processed Offenses 2019 (last accessed Jan. 20, 2022), available at: https://bra.se/bra-in-english/home/crime-and-statistics/crime-statistics.html.
[494] Brottsförebyggande rådet [The Swedish National Council for Crime Prevention], Crime & Statistics, Processed Offenses 2020 (last accessed Jan. 20, 2022), available at: https://bra.se/bra-in-english/home/crime-and-statistics/crime-statistics.html.
[495] Brottsförebyggande rådet [The Swedish National Council for Crime Prevention], Crime & Statistics, Processed Offenses 2016 (last accessed Jan. 20, 2022), available at: https://bra.se/bra-in-english/home/crime-and-statistics/crime-statistics.html.
[496] Brottsförebyggande rådet [The Swedish National Council for Crime Prevention], Crime & Statistics, Processed Offenses 2017 (last accessed Jan. 20, 2022), available at: https://bra.se/bra-in-english/home/crime-and-statistics/crime-statistics.html.
[497] Brottsförebyggande rådet [The Swedish National Council for Crime Prevention], Crime & Statistics, Processed Offenses 2018 (last accessed Jan. 20, 2022), available at: https://bra.se/bra-in-english/home/crime-and-statistics/crime-statistics.html.
[498] Brottsförebyggande rådet [The Swedish National Council for Crime Prevention], Crime & Statistics, Reported Offenses 1950 – 2020 (last accessed Jan. 20, 2022), available at: https://bra.se/bra-in-english/home/crime-and-statistics/crime-statistics.html. As for reported offenses per 100,000 of the mean population, there were 68 cases in 2016, 73 cases in 2017, and 78 cases in 2018, 83 cases in 2019, and 90 cases in 2020.
[499] Futter & Mebane, *supra* note 471 at 73.
[500] *Id*. at 73.

should be accompanied by comprehensive sex reform, improving all aspects of sex crime laws, education to legal professionals, and the creation of safeguards to protect victims from secondary victimization.

3. Discussion

> The law has spent a great deal of time and energy attempting to discern rape victims' state of mind. The time has come to spend our time in a more fruitful and relevant endeavor: deciding whether defendants are culpable. Regardless of the origins of current rape law, it is clearly out of step with other areas of the criminal law. By establishing that "no means no," and requiring that people at least act reasonably when dealing with one another, rape law can achieve some consistency, and, perhaps, some justice.

Craig Byrnes, *supra* note 442 at 305.

An analysis of sex crime laws of both Japan and the United States demonstrate the challenges of determining the means elements for sex offenses. Every means seems to carry its own problems and side effects. Despite this challenge, this section analyzes whether there is any room for improvement in the current means elements for sex crime laws in Japan.

It seems evident that changing the means element is certainly called for if sex crime law in Japan is to be amended to have more positive impacts. Given the earlier discussion, while many experts in Japan seem to agree that the current means element in Japan serves as an insufficient tool to protect victims, they are unsure whether departure from the force or threat element would be an effective way to go about doing it. This section first addresses these concerns, as projected by both committee members and legal scholars in Japan. After establishing that the element based on the concept of consent would not cause confusion or produce ineffective results in Japan, an analysis into, then, what kind of alternative means element would be appropriate or ideal follows. Finally, other additional points that need to be considered are noted, including if and how *non compos mentis* and inability to resist requirements should also be amended to fit in with the changes made to the force or threat requirement.

A. Addressing the concerns of experts in Japan

Based on the earlier review of committee discussions, there seems to have been recognition among many expert members that there may be insufficiency with the current application of force and threat elements and that a better means element, if available, can be a solution for the existing problems. On the other hand, while recognizing the need to a certain degree, many committee members nonetheless showed concerns about the practical applicability of an element based on consent. In the discussion of whether consent would serve as a better element of a crime, there are a few points of objection that need serious consideration. First is the concern that the consent element would cause the opposite effect that it has purported to achieve and instead shifts all the burden on the victim to resist, which is "exactly what social constraints and disparate power make it difficult or impossible for her to do."[501] The argument also warrants special consideration in the context of Japan, where experts such as Hashizume continuously express concern about the level of understanding of sexual consent among the public in general.[502]

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[501] At 340, Stephen Schulhofer, Reforming the Law of Rape, 35 L. & Ineq., 2, 335, 343 (2017), citing Catharine A. MacKinnon, Rape Redefined, 10 HARV. L. & POL'Y REV. 431,446 (2016).

[502] 性犯罪の罰則に関する検討会, *supra* note 42 at 22-23.

A victim does not have to resist, and it may not be safe for him or her to do so, just as it is neither required nor recommended for a robbery victim to resist. Additionally, the literature has long established that many victims are not physically able to resist due to freezing reactions, and the same has been found for male victims.[503] While in Japan, there is no legal requirement for a victim to resist *per se*, as force and threat are evaluated by asking if they are of the degree that makes a victim's resistance conspicuously difficult, an earlier analysis of court cases demonstrates that courts often engage in a discussion of how a reasonable rape victim should have behaved during and after the assault.[504] While it may not be entirely the product of the force or threat element but the persisting misconceptions and rape myth, it is difficult to say that the force or threat element is successfully playing the role of gatekeeper in courts' engagement of victim-blaming. Even worse, Kei Ishii points out that the force or threat element interplays with the latent yet persistent prejudice that only women who fight back to preserve their chastity are truly worthy of protection to create a *de facto* requirement for resistance by setting a high bar for establishing force or threat.[505] The point demonstrates significance in devising a better means element that ensures better victim protection during sex crime prosecution and more effective case processing.

Related to this concern, several arguments made by Kamon introduced in the review section should be examined. First, while Kamon suggests that the adoption of a consent-based element is unnecessary, as there are already means in place to evaluate the difficulty of resistance by a victim,[506] again, as the court cases reviewed in this chapter demonstrate, the standard does not always serve as a proper guidance tool for the courts, resulting in inconsistency in addition to unfair scrutiny into a victim's behavior and expression of resistance. In fact, while the force and threat element as it is currently applied in Japan may seem specific and concrete, as courts apply the standard and make an evaluation about whether there has been force or threat that made the victim's resistance conspicuously difficult, what could be considered to meet the bar can be subject to a great deal of subjective evaluation of judges. This covert flexibility under the surface of a concretely defined element offered by the current force or threat element may also help judges make decisions on the element by engaging in a case-by-case approach to determining whether the victim has been under duress that resembles force or threat. However, at the same time, it causes courts to make inconsistent decisions and allows cunning perpetrators to escape punishment. As explained by Hashizume, even if a legal construction is well-founded, if there is unresolved disparity observed in practice and limitations observed by the public,[507] it may be time to consider a way to make changes.

Additionally, Kamon's prediction that a consent-based element would lead to increased secondary victimization to victims by causing the police and the court to accuse victims of not resisting harder needs to be addressed.[508] Kanasugi expressed a similar concern that sex crimes based on consent will increase scrutiny into the victim's testimony.[509] Yet, the evaluation of the

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[503] At 208, Gillian Mezey & Michael King, The Effects of Sexual Assault on Men: a Survey of 22 Victims, 19 Psych. Med., 1, 205, 209 (1989).
[504] *See* discussion *infra* Sec. I of this chapter.
[505] At 129, 石居圭「性犯罪の保護法益」法学研究論集 53 号（2020 年）125 頁-145 頁.
[506] At 67, 嘉門優「性犯罪規定の見直しに向けて――不同意性交等罪の導入に対する疑問」立命館法学 387＝388 号（2019 年）52 頁-72 頁.
[507] 性犯罪の罰則に関する検討会, *supra* note 18 at 8-9.
[508] 嘉門優, *supra* note 408 at.68.
[509] 金杉美和, *supra* note 36.

Tokyo case[510] and Nagoya case[511] demonstrate that even under the current law, the courts, or at least some courts, are already judging victims' behavior with undue scrutiny, evaluating if the victims are acting as if a victim is supposed to act by judging the naturalness of their acts and using their attempts at seeking help as evidence that there was no use of the required means element. Kamon's concern stems from the assumption that the consent-based element, or the no-means-no model, necessarily assumes an "image of a strong victim"(「強い被害者像」).[512] However, state laws based on the element of consent, such as those in Colorado or Montana, neither assume a strong type of victim nor require resistance of victims. Rather, state laws have rape shield laws in place to protect victims from secondary victimization during a criminal prosecution.

Indeed, this discussion, as much as it is relevant to the element of force and threat, goes to the general attitude of the police and the professionals in the justice system in their treatment of the victims, and the enactment of rape shield law would be the most proper way of effectively addressing the issue. While the rape shield laws are beyond the scope of this paper, the issue will be mentioned again in the discussion section.

Finally, then, would sex crime laws based on consent element significantly impair the public's right to sexual activity in Japan?[513] Does the social tendency not to explicitly talk about sexual acts run so deeply in Japan that it prevents people from freely engaging in a sexual act if they have to be more mindful of their partners' consent? While more robust forms of a consent-based element, such as affirmative consent, may not be suitable given the public's "social tendency," the argument that all kinds of consent-based elements cannot be accepted by the public seems overly unmerited because this would mean that the public lacks any ability to communicate one's willingness to engage in sexual acts with each other. As Prosecutor Jennifer Clark explained during the legislative hearing for the state of Montana to amend its law to that based on consent, through conduct and words, people engaging in sexual conduct need to be able to read each other and understand whether consent has been conveyed.[514]

Additionally, Miyata argues that it should first be decided whether the problem lies in a lack of proper evidence or inadequate legal elements.[515] Given the characteristics of sex crimes where criminal behavior does not leave distinguishing evidence from non-criminal behavior, a lack of physical evidence will always contribute to the challenges of sex offense cases. This is all the more reason that the means element should be enacted to play an effective and fair role in discerning which acts should be criminalized and which should not.

The argument that a relaxed sex-crime element from that of force or threat cannot be successful because social awareness about sexual consent is not mature enough is not a novel one. Such an argument in all forms and colors is frequent in sex law reform discussions in any jurisdiction. In the United States, changing the public conception about sexual violence has been a difficult challenge throughout sex reforms, and while feminist movements and legal reforms have made monumental shifts in the public's awareness, the work is still not done, as some

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[510] *See* 東京地判平成４年２月１７日 LEX/DB 27921244. *See also infra* notes 300-371 and accompanying text.
[511] *See* 名古屋地判平成 31 年 3 月 26 日判時 2437 号 100 頁（rev'd by 名古屋高判令和 2 年 3 月 12 日判時 2467 号 137 頁）. *See also infra* notes 420-424 and accompanying text.
[512] 嘉門優, *supra* note 408 at.68.
[513] *Id*. at 70.
[514] Revise Laws Regarding Sex Crimes (Short Title): Hearing on S.B. 29 Before H. Jud. Comm., 69th Leg (Mont. 2017); *See also* Sou Hee Yang, *supra* note 23 at 63.
[515] 性犯罪の罰則に関する検討会, *supra* note 22 at 7.

gender stereotypes based on rape myth and misguided beliefs about violence persist.[516] As introduced in Klein's quote, reformers in the United States have also continuously expressed frustration over some courts that refuse to accept no means no.[517] However, such inept awareness of consent in a society is not something to be remedied by letting those who have caused sexual harm to others escape liability. Rather, it is a problem that needs to be remedied by holding perpetrators accountable for their actions, thereby leading to a social and cultural shift in regard to consent during sexual interactions.

On this point, Kojima makes an argument that is perhaps the most integral to the issues of this chapter and sex crimes as a whole: when engaging in a sexual act, one needs to acquire clear consent, and the risk of being indolent about it should be borne by the person who has benefited from it.[518] While acknowledging the lack of social agreement about what constitutes sexual consent in Japan, Kojima points out that it should be recognized that it is mainly men who have taken advantage of such ambiguity, an issue that needs to be resolved.[519]

Kojima further suggests that it should be an aim for a society to make such an understanding about consent in the context of sexual relationships generally accepted, a task that goes beyond the scope of criminal law.[520] Therefore, for better protection of human rights, society should aim to promote and create a mutual understanding of the a healthy concept of consent.[521] However, if criminal law allows an inadequate understanding about consent for some to serve as an excuse for placing the perpetrator's disregard for the victim's refusal and prioritizing his sexual and other desires above the safety of the victim, even with all the other social safety nets in place, such as in the case of California, the jurisdiction will not be able to escape criticism that it fails to properly render justice for sex offenses.

B. A search for the proper means element

As suggested by Estrich, the consent element "that allowed the individual woman to say 'yes' as well as 'no,'…would be a means of empowering women." [522] The pertinent question to be asked is: if consent is to be the element, how should it be legally defined? In answering this question, it is imperative to address concerns shared by experts in Japan that the definition should be finite enough so that there is no ambiguity or arbitrary prosecution. At the same time, it would be significant that it does not require victims to resist to "communicate their unwillingness."[523]

Some members expressed concern that if the term "non-consent" is included in the statute as an element, there is a possibility that it would lead to the prosecution of cases that should not be prosecuted.[524] Thus, they suggest that it may be better to list different forms of non-consensual sexual intercourse in the statute.[525] Additionally, Kojima stressed the importance of declaring in the statute that non-consensual sexual intercourse will be penalized by providing

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[516] At 584, Aya Gruber, Rape, Feminism, and the War on Crime, 84 Wash. L. Rev. 581, 660 (2009).
[517] At 1013, Richard Klein, An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness, 41 Akron L. R. 4, 7, 981, 1057 (2018).
[518] 性犯罪に関する刑事法検討会, *supra* note 18 at 4-5.
[519] *Id*. *See also* 性犯罪に関する刑事法検討会, *supra* note 42 at 26.
[520] 性犯罪に関する刑事法検討会, *supra* note 18 at 4-5.
[521] 性犯罪に関する刑事法検討会, *supra* note 42 at 26.
[522] Susan Estrich, *supra* note 74 at 1132.
[523] Stephen Schulhofer, *supra* note 501 at 345.
[524] 性犯罪に関する刑事法検討会, *supra* note 42 at 7 and generally.
[525] *Id*.

concrete elements of consent such as (by using the means of) intimidation, surprise, shock, deception, confinement, or by alcohol consumption or impairment, among others, although it may need to be further debated. [526] Nonetheless, some committee members, such as Hashizume, suggest that it is impossible to list all situations where they can cause the non-consent of a victim. [527]

Additionally, as mentioned in the first section of this chapter, Okada's suggestion to incorporate hate crimes and intimate partner violence as elements that can be deemed to satisfy force or threat[528] is worth consideration. However, there may be some evidentiary hurdles to the addition of such elements. One is how to separate different incidents of intimate partner violence and sex crime offenses. If any past violence between partners is deemed to satisfy force or threat element, any sexual engagement between the two with a past incident of violence would be considered a form of a sexual offense. Alternatively, while persistent intimate partner violence ideally provides good grounds to find that there is a disparity of power between the abuser and the victim that makes the victim vulnerable to sex crimes committed by the abuser, even without the use of force, it may be still difficult to declare that any sexual engagement between them would be criminal or nonconsensual on the part of the victim. This may be why jurisdictions around the world, including the United Kingdom,[529] Ireland,[530] and California,[531] among many others, have begun to punish the acts of submission itself as coercive control, a domination strategy that involves "some combination of degrading, isolating, micromanaging, manipulating, stalking, physically abusing, sexually coercing, threatening or punishing"[532] as a form of domestic violence, rather than using them as a legal element or evidence for punishing domestic violence or sex crimes.

Problems also arise when attempting to use evidence of hate crime to satisfy the force or threat element. If hate crime were too strictly construed, it would be more difficult to prove than other forms of force or threat, losing its purpose. Alternatively, questions, such as how close in time and place such acts of hate crime and the alleged sexual act need to be, may linger. Additionally, a perpetrator who is cunning enough would be able to hide his hateful motives as he commits sexual violence against LGBTQIA+ victims. Therefore, rather than including intimate partner violence or hate crime themselves as an element, finding an element that can sufficiently and broadly cover such circumstances may provide better protection for LGBTQIA+ victims.

Listing different circumstances where a victim's non-consent can be assumed may provide a consistent execution of the penalty and more clarity to the statutes. On the other hand, it may nonetheless leave out many circumstances where non-consent should be deemed satisfied. Therefore, listing given situations where victims cannot provide consent and a general section that more broadly captures a lack of consent may be practical.

As an alternative to the force or threat element, Masaki Ueda suggests a standard of "by using lack of resistance."[533] This serves as a good alternative in that it shifts the focus from

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[526] *Id*. at 7.
[527] *Id*. at 16.
[528] 性犯罪に関する刑事法検討会, *supra* note 107 at 9-12.
[529] S.76, Serious Crime Act 2015, 2015 c.9 [UK].
[530] Section 39, Domestic Violence Act 2018.,No. 6., PT.3 [Ireland].
[531] Sec. 2. Section 6320 of the Family Code (2019).
[532] At 1, Lisa A. Fontes, Invisible Chains: Overcoming Coercive Control in Your Intimate Relationship, Guilford Publications (2015).
[533] 上田正基, *supra* note 35 at 109-127.

whether a victim has resisted to a perpetrator's behavior of using the lack of resistance. While Ueda suggests that it serves as a better option than consent, as it more effectively prevents a perpetrator's mistake of consent argument,[534] his suggested standard alone may not be sufficient to guide the courts in Japan about when a lack of resistance can be found and when a perpetrator can be considered to have used it. This lack of sufficient guidance may leave the door open for judges' bias and prejudice to play roles in decisions and perhaps to willingly accept perpetrators' mistake of consent defenses, contrary to Ueda's expectations. Alternatively, combining the foundation of his element that the focuses on a perpetrator's use of the victim's lack of resistance and the concept of consent may lead to the development of a clear standard under which a perpetrator cannot make the unreasonable mistake of consent defense that runs afoul of social virtues.

If new means element based on consent were to be adopted, it would be imperative the standard is clearly worded, using phrases such as "without genuine and voluntary consent or by using circumstances where the victim's ability to consent is compromised." As discussed in detail in the following chapter on subjective element, or alternatively, *mens rea*, it should also be explored whether codifying what kinds of mistakes are allowed would be beneficial. Codifying allowed mistakes may provide more clarification to the public and limit the possibility that perpetrators may claim the unreasonable disregard for non-consent serves as their legal defense. However, on the other hand, such codification may be redundant under a well-defined means element and may only become a cause for confusion.

Second, if force and threat element is to be modified, to address the change of scope, the element of *non compos mentis* or the inability to resist should also be accordingly modified. In regard to *non compos mentis* and the inability to resist, committee members such as Yamamoto criticized the elements for being too narrow to reflect on the realities of sex crimes, and they proposed an expansion of the definition[535], with Ida suggesting wording such as "by putting one in a state in which one's abilities to make free decisions have been robbed" (「自由な能力を奪われた状態にして」).[536] Therefore, the element needs to be broadened so that cases involving victims who were in various circumstances where they could not provide meaningful consent to sexual acts can meet the element. Because the determination of the scope of the element, however, also pertains to the discussion of vulnerable victims that will follow later, the scope of the element needs to be decided so that it covers all other circumstances, under which a victim cannot render meaningful consent but are not covered by the extra layer of legal protection offered to the members of vulnerable groups.

Ueda, while proposing his alternative element and its possibility for increasing the reporting rate, suggests that even when more cases are reported, and more law enforcement becomes aware of sex crimes, without an increase in resources allocated to sex crimes, the number of prosecuted sex crime cases would not increase dramatically.[537] However, it should be remembered that the purpose of rape reform goes beyond mere reflection of the number of cases prosecuted "…to have both symbolic and instrumental impacts." [538] It "reflects women's autonomy in [American] society and to encourage respect for their diverse roles and

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[534] *Id*. at 119.
[535] 性犯罪に関する刑事法検討会, *supra* note 42 at 12-13.
[536] *Id*. at 12.
[537] 上田正基, *supra* note 35 at 123.
[538] Futter & Mebane, *supra* note 471 at 73.

behavior."[539] It may contribute to the restoration of justice for victims by encouraging them to report the cases; hence, it may increase the number of cases reported, but also at the same time, it may serve as a better notice to the potential perpetrators that they should stay away from engaging in criminal behavior.

Kanasugi's suggestion that civil lawsuits may sometimes be a better way to provide a remedy to victims is valid.[540] In fact, criminal penalties, such as incarceration and criminal fines imposed to the perpetrators, will only go so far in diminishing sexual violence within a society or helping victims recover. Nevertheless, in Japan, where the doubt about the victims' motivations is easily called into question (even by Kanasugi herself), laying out that sexual acts without consent are crimes and that they should be penalized can be a meaningful way of promoting social awareness about sex crimes and providing victims with some sense of redemption.

What is also apparent is that a single-handed change to the force element would not dramatically result in an improvement of rape case processing. It should be accompanied by comprehensive sex reform, improving all aspects of sex crime laws, education to legal professionals, and various safeguards to protect victims from secondary victimization. Nonetheless, in the least, the adoption of the consent-based means element will serve as a symbolic message that the criminal justice system in Japan understands sex crime for what it is and is ready to make meaningful efforts to prosecute perpetrators who commit such crimes.

[539] *Id*.
[540] 金杉美和, *supra* note 36.

iii. VULNERABLE GROUPS

Individuals in certain groups may be at greater risk of being victims of sex crimes, such as children, those with intellectual disabilities, and prison inmates. Such vulnerabilities may arise from the characteristics of the victim, such as the victim's age or disability or their relationships with the perpetrator. Those in special relationships, such as that of a prisoner and a correctional officer or that of a parent and a child, may be placed in greater danger of sex crimes that arise out of inherent disparity in power in those relationships. Therefore, people with such vulnerabilities should be afforded an extra layer of legal protection. While this chapter focuses on the protection of children from sexual violence in criminal law, online sex crimes targeting children are discussed in Chapter iv. Online and Technology-Facilitated Sex Crimes. In the United States, states provide additional protection for special groups with vulnerabilities by enacting sex crime statutes specific to the groups or imposing graver penalties for crimes against members of these groups. This section introduces Japan's recently passed Article 179, considers the discussions around it, and evaluates its efficacy. After that, various statutes protecting special groups are presented as a point of comparison.

1. Japan

A. Children

In Japan, during its 2017 amendment by the 193rd session of the National Diet, Article 179, which penalizes sexual intercourse or indecency committed by a guardian, has been newly enacted. While Article 179 of the Penal Code of Japan was previously introduced in Chapter i. Acts, it is introduced again here as a whole for an in-depth discussion. It reads as follows:

> (1) A person who, by taking advantage of the person's influence as a guardian in fact for a person under eighteen years of age, commits an indecent act against the person under the age of eighteen shall be punished in the same manner as prescribed in Article 176.
> (2) A person who, by taking advantage of the person's influence as a guardian in fact for a person under eighteen years of age, commits acts such as sexual intercourse against the person under the age of eighteen shall be punished in the same manner as prescribed in Article 177.[541]
> 監護者わいせつ及び監護者性交等[Crime of Indecency & Sexual Intercourse et al. by a Guardian], KEIHO [KEIHO] [Pen. C.] 第百七十九条 [Art. 179], 1907, Ch. 22, (Japan).

While Article 179 is the first criminal law that affords special protection for children from sex crimes in Japan, there have been considerable criticisms of it from various perspectives. Some experts and practitioners have pointed out that the scope of the law is too broad and general, while others have suggested that the law is so narrow in its scope that it cannot provide proper protection for sex crimes against children.

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[541] 刑法第第百七十九条「十八歳未満の者に対し、その者を現に監護する者であることによる影響力があることに乗じてわいせつな行為をした者は、第百七十六条の例による。
２　十八歳未満の者に対し、その者を現に監護する者であることによる影響力があることに乗じて性交等をした者は、第百七十七条の例による。」.

The controversy began even before the law was enacted. The Japan Federation of Bar Associations (hereinafter the "Federation") issued an opinion paper adopted by the legislative council at its 177th session, stating that the statute's text should clearly state that it only punishes acts committed against a victim's will.[542] While the Federation recognizes the need to enact new penal law addressing continuous sexual abuse committed by guardians, which rarely involves force or threat and, thus, cannot satisfy legal elements of the sex crime laws before the 2017 amendment, the Federation argues that punishing consensual sex would be "excessive interference by the government."[543] While acknowledging those under 13 lack the ability to appreciate the meaning of sexual acts or provide consent to engage in such acts, the Federation argues that when the child is older than 13, it cannot be said with certainty that there is no serious consent because the perpetrator is the victim's guardian.[544] The Federation argues that the proposed wording "by taking advantage of the person's influence" is abstract and does not serve as a proper element to effectively limit who is to be punished.[545] The Federation further argues that it would be difficult to defend a client accused of violation of the proposed article as influence is an abstract concept, and in order to make the wording clear so that attorneys can provide sufficient defense, only sexual intercourse committed against the will of those who are in custody should be penalized.[546]

The argument that a child can provide meaningful consent for sexual engagement with a parent or guardian is uninformed, as literature has long established that a child, even if over the age of 13, can be groomed into acquiescence, especially when pressured by a person in the position of power such as a parent or guardian. In other words, children who depend on those in power and authority for their basic needs would "…typically do whatever they perceive to be necessary to preserve that relationship, including complying with sexual abuse."[547] This shared understanding has resulted in the protection of children from sexual engagement or even grooming in many developed countries. A comparative study on the age of consent laws of 59 jurisdictions has identified a clear trend over the past few decades of raising the age of consent and abolishing "very low ages of consent,"[548] namely those under the age of fourteen.[549] Moreover, research has found that sexual predators use grooming to make it difficult for children to resist sexual abuse, even without threat or force, one study reporting that perpetrators utilize tactics such as building trust, favoritism, alienation, secrecy, and boundary to groom their daughters for sexual abuse and discourage them from disclosing the abuse to others.[550] Based on the understanding, many countries, including the United States and the United Kingdom, have

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[542] 日本弁護士連合会，性犯罪の罰則整備に関する意見書「諮問第１０１号別紙要綱（骨子）」(Sep. 15, 2016), available at: https://www.nichibenren.or.jp/library/ja/opinion/report/data/2016/opinion_160915_4.pdf

[543] *Id*. at 2.

[544] *Id*.

[545] *Id*. at 3.

[546] *Id*. at 2-3.

[547] At 9, Canadian Centre for Child Protection, UNDERSTANDING CHILD SEXUAL ABUSE (2018).

[548] At 14, Guangxing Zhu & Suzan Aa, Trends of Age of Consent Legislation in Europe: A Comparative Study of 59 Jurisdictions on the European Continent, 8 New J. Eur. Crim. L. 1, 14, 42 (2017) (*See also* at 21, Table 2, presenting an overview of the age of consent legislation as of 2017).

[549] *Id*.

[550] John Christiansen & Reed Blake, The Grooming Process in Father-Daughter Incest, *in* THE INCEST PERPETRATOR: A FAMILY MEMBER NO ONE WANTS TO TREAT, 88, 98 (Anne L. Horton et al. ed., 1990).; *See also* Natalie Bennett & William O'Donohue, The Construct of Grooming in Child Sexual Abuse: Conceptual and Measurement Issues, 23 J. Child Sexual Abuse, 8, 957, 976 (2014).

enacted laws penalizing acts on or following grooming.[551] As the text of Article 179 demonstrates, the Federation's opinion was not reflected in the enactment of the article. Nonetheless, arguments in the opinion paper are worth noting as they have been often-made arguments for skeptics of Article 179.

Concerning this point, Hiroko Goto has pointed out that there is an overwhelming disparity in social and financial power between children and adults.[552] Especially, the power of those with custody is warranted by the system, as demonstrated by the right to exercise physical discipline under the Civil Code Article 882.[553] Pointing out it is not well known that sex abuse to a child causes harm to the child's life over a long span, H. Goto argues that although this law signifies advancement in child protection in Japan,[554] many important tasks have not been addressed, such as sex crimes against children by adults who meet the children on a daily basis, such as school teachers or sports coaches. [555]

After its enactment, court decisions for cases based on Article 179 again provoked further opinions about how the article needs to be further amended. In fact, examination of a few cases can contribute to an accurate evaluation of this highly debated article. First, a case decided by the Tsu District Court may be the exemplary case, which brought about the desired and intended consequence of the article. After evaluating the consistency of the victim's testimony for reliability, the court rendered a guilty verdict to a stepfather who had used his influence as a guardian on a 14-year-old girl with a mental disability, who had to rely on the stepfather mentally and financially.[556] The court sentenced the stepfather to seven years of imprisonment, holding that the court recognized the damage to the victim, including the emotional distress, the gravity of invasion into the victim's sexual autonomy and deterrence to the victim's further healthy development.[557]

Other cases proceeded in different directions. In one case, a defendant who was the stepfather and a guardian in fact to the victim, an intellectually disabled 13-year-old with an IQ of 53, the mental age of a six-year-old and social acceptability of a seven-and-a-half-year-old at the time of the alleged incident, was charged with having sexual intercourse with the victim.[558] The victim told a teacher at school that the defendant had sexual intercourse with her and explained what had happened as the teacher asked A for details, which led to A's filing a report.[559] The court found the defendant not guilty, holding, *inter alia*, that given the intellectual disability of the victim, the questioning by the teacher who used hand gestures to ask whether there was sexual intercourse could have been leading; that the defendant's location records from his cell phone generally corresponded with his account of the story and his claim that he did not have sexual intercourse with the victim; and that there was not enough evidence otherwise to convict the defendant.[560] The prosecutor argued the gynecologist's diagnosis showed chronic sexual contact on the victim's genitalia, and finding of the defendant's semen from his car

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[551] Bennett & O'Donohue, *Id*. at 958-9; *See* 18 U.S.C.§ 2252A (U.S. federal law) & S. 15 of Sexual Offences Act 2003 (U.K.).
[552] At 84, 後藤弘子「性犯罪規定の性犯罪規定の改正が意味するもの」現代思想46 号(2018年) 84頁.
[553] *Id*.
[554] *Id*.
[555] *Id*.
[556] 津地判令和元年 12 月 17 日 LEX/DB: 25564905.
[557] 名古屋地裁岡崎支判平成 31 年 3 月 26 日判時 2437 号 100 頁.
[558] 福島地郡山支判平成 30 年 9 月 20 日 LEX/DB: 25561591.
[559] *Id*.
[560] *Id*.

corresponded with the victim's account of the story and contradicted the defendant's account of the day.[561]

However, the court found that the arguments did not support A's account of the story, as other evidence and A's testimony showed that A had sexual contact with others and as the defendant testified he had masturbated in his car several times.[562] The court additionally found that the fact the victim's testimony showed a degree of consistency and lacked a motive for falsification did not support that the testimony as a whole was credible.[563] Indubitably, interviews with children with intellectual disabilities should be handled carefully, as literature has consistently found that children with an intellectual disability or learning disability have poorer memories and are more suggestible than other children.[564] However, while people with intellectual disabilities are at increased risk for both violent and sexual victimization,[565] they have been generally excluded from the legal system "based on the belief that they are incompetent to provide accurate, reliable testimony."[566] This assumption leads to an increased risk that people with intellectual disabilities can be victimized and those who have abused them can escape liability for their culpable behavior.

It should be acknowledged that the law is only recently enacted, and only a few cases have so far been decided. Adequate evaluation of its effectiveness may take some time, but the members of the committee found that many parts of the article needs improvements. However, making those improvement is challenging since opinions on such improvements vary.

During the third committee meeting, Takayuki Harada, a psychology professor at Tsukuba University, presented his findings on sex crime perpetrators to the committee. He suggested that subconsciously or consciously many perpetrators choose victims they deem to be easy targets for mind control, often creating a relationship of such a nature so that they can take advantage of it and commit sexual violence within the context of the relationship.[567] These predators create a false impression that the events have occurred through the victim's choice.[568] Harada provided examples of predators targeting children who did not have a proper sense of judgment, those with disabilities, those where perpetrators could use their superiority in social position, or those who were highly suggestible.[569]

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[561] *Id*.
[562] *Id*.
[563] *Id*.
[564] *See*, i.e., Gisli H. Gudjonsson & Lucy Henry, Child and Adult Witnesses with Intellectual Disability: The Importance of Suggestibility, 8 L. & Crim. Psy., 241, 252 (2003), citing *inter alia*, Denis Cardone & Helen Dent, Memory and Interrogative Suggestibility: The Effects of Modality Of Information Presentation and Retrieval Conditions upon The Suggestibility Scores of People With Learning Disabilities. 1, L. Crim. Psy., 165, 177 (1996) & Isabel C. H. Clare, & Gisli H. Gudjonsson, Interrogative Suggestibility, Confabulation, and Acquiescence in People With Mild Learning Difficulties (Mental Handicap): Implications for Reliability during Police Interrogation. British J. Clinical Psy., 32, 295, 301 (1993).
[565] Billy Fogden, Stuart Thomas, Michael Daffern & James Ogloff, Crime and Victimisation in People with Intellectual Disability: A Case Linkage Study, 16 BMC Psychiatry 170 (2016), available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4884349/
[566] Denise C. Valenti-Hein & Linda Schwartz, Witness Competency in People with Mental Retardation: Implications for Prosecution of Sexual Abuse, 11 Sexuality and Disability, 287, 294 (1993).
[567] At 20-21, 法務省, 性犯罪に関する刑事法検討会第３回会議議事録 (Jul. 9, 2020); *see also* 石田郁子氏提出資料１－１「教師による生徒への性的経験・性暴力被害アンケート集計結果（2020 年５月 11~31 日実施）」.
[568] *Id*.
[569] *Id*.

The committee actively debated the sufficiency of Article 179. Sachiko Nosaka, a psychology professor at Osaka University who explained the characteristics of children in the context of sex crimes during the second committee meeting, suggested expanding the scope of the article to broadly include those involved in children's education and care.[570] Nosaka explained that while some of those involved in children's education, such as tutors, do not engage in the daily care of the children, a disparity in terms of their position with children is, nonetheless, clear. [571] Therefore, since children are often more submissive with educators than with parents, it is realistic to include those who participate in children's education in the scope of Article 179.[572]

On the other hand, Sadato Goto, a lawyer giving a presentation from the perspective of a criminal lawyer during the third meeting, argued that while there are instances where a perpetrator uses the influence of his relationship with the victim as a sports coach and a player, a teacher and a student, or a superior and an employee, "such use takes various forms" and some may result in actual feelings of affection (「恋愛感情」).[573] Much aligned with the arguments made by the Federation, S. Goto argued that when penalizing sexual acts just for exercising influence of such relationships, the scope of penalization would be unduly broadened, leaving the lawyers with the challenging task of proving that the sexual act the defendant has engaged in was not based on the influence of the relationship, which essentially shifts the burden of proof to the defendant's side.[574] S. Goto further argued that while lack of consent may be inferred for a parent or guardian and a child, the same cannot be true for other relationships, alluding that even if there is some disparity of power, for example, between a coach and his student, a sexual act between them could be truly consensual, based on their feelings of affection.[575]

On the other hand, Ikuko Ishida, during the same meeting, shared her experience of abuse from a teacher when she was a minor and highlighted the difficulties for students in resisting sexual advances from teachers.[576] Yamamoto summarized that given the power disparity and limited abilities as a minor to make choices, victims are led to believe that they are in romantic relationships with the perpetrator.[577] Takako Konishi suggested Ishida's account is not merely personal but is a general case in practice, as children do not have sufficient ability to think about or verbalize their experiences.[578]

B. Others

In addition to amendments to Article 179, the committee discussed ways to improve the current law to protect those in vulnerable groups who were not currently being protected.[579] Hashizume recognized that while it is not feasible to use disability uniformly as a characteristic to penalize sexual acts, there is ambiguity in terms of *non compos mentis* and the inability to resist that needs to be clarified.[580] Kojima agreed that it is difficult to put all forms of disability

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[570] 性犯罪に関する刑事法検討会, *supra* note 107 at 14-22.
[571] *Id*.
[572] *Id*.
[573] 性犯罪に関する刑事法検討会, *supra* note 567 at 26.
[574] *Id*.
[575] *Id*.
[576] *Id*. at 2-7.
[577] *Id*. at 8.
[578] *Id*. at 8-9.
[579] At 2-10, 法務省, 性犯罪に関する刑事法検討会第 9 回会議議事録 (Dec. 8, 2020).
[580] *Id*. at 3.

in one category but additionally suggested that sexual abuse from those in positions of disability-related facility employees should be addressed.[581] The addition of abuse of position or relationship was also considered, especially with respect to minors.[582]

Additionally, the committee also discussed whether it would be necessary to enact a new article penalizing grooming. [583] To this end, Yamamoto, presented an explanation of grooming provided by the American Bar Association, which describes grooming as a brainwashing tactic (「洗脳操作」) employed by a perpetrator to slowly move to commit sexual acts against a victim so the victim would not even notice that he or she is being sexually abused.[584] Discussing whether penalizing grooming could be possible for Japan, committee members such as Keiko Miyata argued that it may be challenging to formulate an article that can capture various acts aimed at committing sexual abuse, because it would be difficult to discern whether there are underlying motives for some acts, such as talking to a child or a teacher offering to give a child a lesson.[585] Hashizume added that penalizing apparently neutral acts for their purposes, especially if the acts do not carry objective risks, may be difficult to justify as its violation of protected interest may not be obvious.[586] Sato, providing an example of the grooming laws of Germany and England, suggested if such law was to be enacted, factors such as what kind of acts should be punished and at what point of interaction should the elements of the article aim to capture, need to be discussed.[587]

Another important point of discussion regarding vulnerable groups included suspension of the statute of limitation and the investigative interview process. In particular, Saito suggested during the seventh committee meeting that if elimination would be difficult, at least extension and suspension of the statute of limitation until the victim reaches a certain age would be desirable. Saito explained that in the cases where a victim is a minor, it is not rare for the victim to take over 10 years to understand his or her experience as sexual violence.[588] Saito further explained that while shorter, it can still take more than a year even for many adult victims to understand and acknowledge sex violence committed against them.[589] Saito explained that many facts impact on the prosecution of sex crimes. A sex crime is seldom reported, and it takes time for the victim to recognize that they were victims of sexual violence, even when the harm is recognized. [590] Moreover, victims often hesitate to report in fear of their safety. When the victim has finally summoned up the courage to report, it is too late.[591] Regarding the concern about the sufficiency of evidence, Saito explained that the law should be focused on cases where there is still solid evidence, as is true for many cases now where digital data such as photographs or videos may be available[592] for cases after many years. Kojima shared a similar opinion, explaining that given there are also special circumstances for many minor sex abuse victims that make it difficult for them to safely report the incidents until they are fully independent, when

[581] *Id*. at 4-5.
[582] *Id*. at 2-10.
[583] *Id*. at 17-22.
[584] *Id*. at 17-18.
[585] *Id*. at 20.
[586] *Id*. at 21.
[587] *Id*. at 18-20.
[588] At 9-10, 法務省，性犯罪に関する刑事法検討会第 7 回会議議事録 (Oct. 20, 2020).
[589] *Id*.
[590] *Id*.
[591] *Id*.
[592] *Id*.

there is solid evidence such as digital media, the statute of limitation should not bar the perpetrator's prosecution. [593] Toshihiro Kawaide, however, expressed concern, suggesting that while abolishment of the statute of limitation should be decided based on societal agreement that it brings about unfair results in prosecution of crime, he is unsure that Japanese society had yet reached such general agreement on sex crimes. [594]

As reviewed in the section, detailed discussions on Article 179 and the protection of children from sexual abuse took place during the committee meetings. Vulnerable groups were also an important point of discussion, with a particular focus on how to protect victims in a position of disparity of power with the perpetrator. In particular, it was recognized that there are groups who are not afforded sufficient protection, in addition to the shortcomings of Article 179 in protecting children. A review of the current state of protection of vulnerable groups from sexual violence demonstrates that there is room for improvement in Japan's current criminal sex crime law, both by improving Article 179 and by adding elements to protect other vulnerable groups. The direction for such changes is still disputed in Japan. As various states in the United States often provide broader and more robust protection for vulnerable victims, a review of these approaches would serve as a helpful reference point.

2. United States

A. All-inclusive provisions

Dividing up the section into different elements is not straightforward as all state laws have different forms, with some combining two or more groups or relationships under one law and others dealing with each group separately. For example, touching on various vulnerable groups and relationships, Connecticut's sexual assault in the second degree states is as follows:

> (a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and:
> (1) Such other person is *thirteen years of age or older but under sixteen years of age and the actor is more than three years older than such other person* (emphasis added); or
> (2) such other person is impaired because of *mental disability or disease* (emphasis added); to the extent that such other person is unable to consent to such sexual intercourse; or
> (3) such other person is *physically helpless* (emphasis added); or
> (4) such other person is less *than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare* (emphasis added); or (5) such other person is in *custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over such other person* (emphasis added); or
> (6) the actor is a *psychotherapist* (emphasis added) and such other person is
> (A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session,
> (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or
> (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception; or

[593] *Id*. at 11-12.
[594] *Id*. at 12.

(7) the actor accomplishes the sexual intercourse by means of false representation that the sexual intercourse is for a bona fide medical purpose by a *health care professional* (emphasis added); or
(8) the actor is a *school employee* (emphasis added); and such other person is a student enrolled in a school in which the actor works or a school under the jurisdiction of the local or regional board of education which employs the actor; or
(9) the actor is a *coach in an athletic activity* (emphasis added) or a person who provides intensive, ongoing instruction and such other person is a recipient of coaching or instruction from the actor and (A) is a *secondary school student* (emphasis added)and receives such coaching or instruction in a secondary school setting, or (B) is *under eighteen years of age* (emphasis added); or
(10) the actor is *twenty years of age or older and stands in a position of power, authority or supervision over such other person by virtue of the actor's professional, legal, occupational or volunteer status and such other person's participation in a program or activity, and such other person is under eighteen years of age* (emphasis added); or
(11) such other person is placed or receiving services under the direction of the *Commissioner of Developmental Services in any public or private facility or program* (emphasis added) and the actor has *supervisory or disciplinary authority* (emphasis added)over such other person.

CT Gen Stat § 53a-71 (2016).

Alternatively, in Georgia:

§ 16-6-5.1. Sexual assault by persons with supervisory or disciplinary authority; sexual assault by practitioner of psychotherapy against patient; consent not a defense; penalty upon conviction for sexual assault

(a) As used in this Code section, the term:
(1) "Actor" means a person accused of sexual assault.
(2) "Intimate parts" means the genital area, groin, inner thighs, buttocks, or breasts of a person.
(3) "Psychotherapy" means the professional treatment or counseling of a mental or emotional illness, symptom, or condition.
(4) "Sexual contact" means any contact between the actor and a person not married to the actor involving the intimate parts of either person for the purpose of sexual gratification of the actor.
(5) "School" means any educational program or institution instructing children at any level, pre-kindergarten through twelfth grade, or the equivalent thereof if grade divisions are not used.

(b) A person who has supervisory or disciplinary authority over another individual commits sexual assault when that person:
(1) Is a *teacher, principal, assistant principal, or other administrator of any school and engages in sexual contact with such other individual who the actor knew or should have known is enrolled at the same school*; (emphasis added) provided, however, that such contact shall not be prohibited when the actor is married to such other individual;

(2) Is an employee or agent of *any community supervision office, county juvenile probation office, Department of Juvenile Justice juvenile probation office, or probation office* (emphasis added) under Article 6 of Chapter 8 of Title 42 and engages in sexual contact with such other individual who the actor knew or should have known is a probationer or parolee under the supervision of any such office;
(3) Is *an employee or agent of a law enforcement agency* (emphasis added) and engages in sexual contact with such other individual who the actor knew or should have known is being detained by or is in the custody of any law enforcement agency;
(4) Is *an employee or agent of a hospital* (emphasis added) and engages in sexual contact with such other individual who the actor knew or should have known is a patient or is being detained in the same hospital; or
(5) Is *an employee or agent of a correctional facility, juvenile detention facility, facility providing services to a person with a disability*, (emphasis added) as such term is defined in Code Section 37-1-1, or a facility providing child welfare and youth services, as such term is defined in Code Section 49-5-3, who engages in sexual contact with such other individual who the actor knew or should have known is in the custody of such facility.

(c) A person who is an actual or *purported practitioner of psychotherapy* (emphasis added) commits sexual assault when he or she engages in sexual contact with another individual who the actor knew or should have known is the subject of the actor's actual or purported treatment or counseling or the actor uses the treatment or counseling relationship to facilitate sexual contact between the actor and such individual.

(d) A person who is an employee, agent, or volunteer at any facility licensed or required to be licensed under Code Section 31-7-3, 31-7-12, or 31-7-12.2 or who is required to be licensed pursuant to Code Section 31-7-151 or 31-7-173 commits sexual assault when he or she engages in sexual contact with another individual who the actor knew or should have known had been admitted to or is receiving services from such facility or the actor.

(e) Consent of the victim shall not be a defense to a prosecution under this Code section.

(f) A person convicted of sexual assault shall be punished by imprisonment for not less than one nor more than 25 years or by a fine not to exceed $100,000.00, or both; provided, however, that:
(1) Except as provided in paragraph (2) of this subsection, any person convicted of the offense of sexual assault of a child under the age of 16 years shall be punished by imprisonment for not less than 25 nor more than 50 years and shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2; and
(2) If at the time of the offense the victim of the offense is at least 14 years of age but less than 16 years of age and the actor is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.
GA Code § 16-6-5.1 (2018).

These laws demonstrate how some state criminal laws list provisions targeted at the protection of different groups. They may serve as good reference points if the legislature of

Japan considers listing various groups and relationships in a similar manner. Compartmentalized analysis of laws may not be ideal in gaining a holistic understanding of state criminal law on sex crime against children. However, some laws are introduced in parts in the following sections to promote a clearer understanding of the state laws in each of the discussed aspects.

B. Children (age)

All states have laws that penalize sex crimes against children. Many states punish any sexual acts against children under a certain age, while others generally use the same legal elements as adult sex crimes but impose harsher punishment or relax elements when a child is a victim. This section presents several examples of state laws regarding sex crimes against children and evaluate their effectiveness and problems. Same as earlier sections, since it is not feasible to review every state law on sex crime against children, this section provides example state laws that serve as good reference points.

Most U.S. states have penal laws on sex crime against children with a broader scope than Japan. One of the important issues here is the strict liability often imposed by sex crime against children, which is explained in the Chapter IV. Subjective Element, and this section concentrates on a review of other elements of the laws.

First, many sex crime laws divide age groups for children. For example, in California, §261.5 states:

> (a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age.
>
> (b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.
>
> (c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.
>
> (d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.
>
> (e) (1) Notwithstanding any other provision of this section, an adult who engages in an act of sexual intercourse with a minor in violation of this section may be liable for civil penalties in the following amounts:

(A) An adult who engages in an act of unlawful sexual intercourse with a minor less than two years younger than the adult is liable for a civil penalty not to exceed two thousand dollars ($2,000).

(B) An adult who engages in an act of unlawful sexual intercourse with a minor at least two years younger than the adult is liable for a civil penalty not to exceed five thousand dollars ($5,000).

(C) An adult who engages in an act of unlawful sexual intercourse with a minor at least three years younger than the adult is liable for a civil penalty not to exceed ten thousand dollars ($10,000).

(D) An adult over the age of 21 years who engages in an act of unlawful sexual intercourse with a minor under 16 years of age is liable for a civil penalty not to exceed twenty-five thousand dollars ($25,000).

(2) The district attorney may bring actions to recover civil penalties pursuant to this subdivision. From the amounts collected for each case, an amount equal to the costs of pursuing the action shall be deposited with the treasurer of the county in which the judgment was entered, and the remainder shall be deposited in the Underage Pregnancy Prevention Fund, which is hereby created in the State Treasury. Amounts deposited in the Underage Pregnancy Prevention Fund may be used only for the purpose of preventing underage pregnancy upon appropriation by the Legislature.

(3) In addition to any punishment imposed under this section, the judge may assess a fine not to exceed seventy dollars ($70) against any person who violates this section with the proceeds of this fine to be used in accordance with Section 1463.23. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

CA Pen. Code § 261.5 (2019).

Prescribing for not only the age of the victim but also that of a perpetrator with respect to the victim ensures that children are protected from inappropriate sexual advances from those significantly older than them while also protecting their right to engage in sexual activity with their peers. However, in *In re T.A.J.*, subdivision (b) of section 261.5 has become the focus of a question involving whether it infringes on the constitutionally protected privacy right of minors to engage in consensual sexual intercourse. In this case, the appellant,16-year-old T.A.J., was charged for engaging in an act of unlawful sexual intercourse with another minor no more than three years older or younger than himself.[595] The appellant contended that subdivision (b) of section 261.5 is unconstitutional both facially and as applied in the case, raising questions regarding whether the statute (1) violates his right to privacy guaranteed under article 1, section 1 of the California Constitution (2) is unconstitutional as applied for the appellant as he was a

[595] At 1353, *In re T.A.J.*, 62 Cal. App. 4th 1350, 73 Cal. Rptr. 2d 331 (1998).

member of the protected class by the definition of the statute at the time of the alleged offense.[596] The Court of Appeal, First District, Division 2 of California, answered both questions in the negative.[597]

In regard to the first question, while the court agreed that minors also enjoy the right of privacy protected by the California Constitution, the court ruled that they do not have a constitutionally protected right to engage in sexual intercourse.[598] The court, finding that the reality is that many California teenagers are sexually active does not establish minors' right of privacy to engage in sexual intercourse, and held that:

> We accept the premise that due to age and immaturity, minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences. While they may have the ability to respond to nature's call to exercise the gift of physical love, juveniles may yet be unable to accept the attendant obligations and responsibilities. For all of these reasons, we conclude there is no privacy right among minors to engage in consensual sexual intercourse.

In re T.A.J., 62 Cal. App. 4th at *1360.

Additionally, the court ruled that the fact that a minor may be a victim does not *ipso facto* exclude a minor from being charged as a perpetrator. The court, citing cases offered by the respondent involving other charges against minors under analogous statutes, such as the offense of contributing to the delinquency of a minor or lewd and lascivious act under 14 years of age, held that "[t]he question of when, who, and under what circumstances a minor should be charged with a violation of section 261.5 must reside within the sound exercise of prosecutorial discretion."[599] Similarly, in a juvenile proceeding against a 13-year-old who allegedly compelled a younger child to perform an oral sex act upon him, the Court of Appeal, Third District, held that the juvenile court must consider the child's age, experience, and understanding of the crime when determining whether a minor is capable of committing the crime.[600] The court further held that a minor's knowledge of his act's wrongfulness can be inferred from the circumstances, the method of commission, and concealment.[601] Based on facts *inter alia* that the petitioner asked a younger child to give him oral sex by meeting him behind bushes (indicating awareness that he had to accomplish the act in private in order to "minimize the risk of detection and punishment"[602]) and that he had initially denied the act when questioned by the police, the court found that substantial evidence supports that the petitioner knew the wrongfulness of his conduct. [603] The answers to two questions well demonstrate that, at least in the state of California, while children's right to privacy is protected, it does not extend to the right to engage in sexual activities. Furthermore, the element of age does not prevent children from being convicted of sex crimes.

On the other hand, Anna High, commenting on *In re T.A.J.*, suggests that using prosecutorial discretion to determine which cases involving two minors are punishable and who should be regarded as the offenders in such cases is undesirable because it leaves too much room

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[596] *Id.* at *1353-1354.
[597] *Id.* at *1353.
[598] *Id.* at *1360.
[599] *Id.* at *1365.
[600] At *52, *In re Paul C.*, 221 Cal. App. 3d 43, 270 Cal. Rptr. 369 (Ct. App. 1990).
[601] *Id.*
[602] *Id.* at *53, citing *In re Tony C.*, 582 P.2d 957, 148 Cal. Rptr. 366 (Cal. 1978).
[603] *Id.* at *52-53.

for high risk of "over-criminalization and discriminatory and inconsistent enforcement."[604] Given the grave consequences for the minors, High argues that the laws should be predicated on a clearly defined punitive target.[605] The question of whether minors should be criminally liable for engaging in sexual activities with younger minors continues to be debated, but at least in California, they can be, even if with less penalty.

As another example, in Delaware:

> (a) A person is guilty of unlawful sexual contact in the first degree when:
> …
> (3) The person intentionally has sexual contact with another person who is less than 13 years of age or causes the victim to have sexual contact with the person or a third person.

11 DE Code §769 (2019).

> A person is guilty of unlawful sexual contact in the second degree when the person intentionally has sexual contact with another person who is less than 18 years of age or causes the victim to have sexual contact with the person or a third person.

11 DE Code §768 (2019).

> (a) A person is guilty of rape in the first degree when the person intentionally engages in sexual intercourse with another person and any of the following circumstances exist:
>
> (1) The sexual intercourse occurs without the victim's consent and during the commission of the crime, or during the immediate flight following the commission of the crime, or during an attempt to prevent the reporting of the crime, the person causes physical injury or serious mental or emotional injury to the victim; or
> …
> (5) The victim has not yet reached that victim's twelfth birthday, and the defendant has reached that defendant's eighteenth birthday.
> …
> (c) Notwithstanding any law to the contrary, a person convicted of rape in the first degree shall be sentenced to life imprisonment without benefit of probation, parole or any other reduction if:
>
> (1) The victim had not yet reached that victim's sixteenth birthday at the time of the offense and the person inflicts serious physical injury on the victim; or
> …

11 DE Code §773 (2019).

> (a) A person is guilty of rape in the second degree when the person:
> …
> (2) Intentionally engages in sexual penetration with another person under any of the following circumstances:

[604] Anna High, Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class, 69 Ark. L. Rev. 787, 821 (2017).
[605] *Id*.

…

c. The victim has not yet reached that victim's sixteenth birthday and during the commission of the crime, or during the immediate flight from the crime, or during an attempt to prevent the reporting of the crime, the person causes serious physical injury to the victim; or

…

e. The victim has not yet reached that victim's sixteenth birthday and during the commission of the crime, or during the immediate flight from the crime, or during an attempt to prevent the reporting of the crime, the person displays what appears to be a deadly weapon or represents by word or conduct that the person is in possession or control of a deadly weapon or dangerous instrument; or

…

g. The victim has not yet reached that victim's twelfth birthday, and the defendant has reached that defendant's eighteenth birthday.

…

11 DE Code § 772(2019).

(a) A person is guilty of rape in the third degree when the person:

(1) Intentionally engages in sexual intercourse with another person, and the victim has not reached that victim's sixteenth birthday and the person is at least 10 years older than the victim, or the victim has not yet reached that victim's fourteenth birthday and the person has reached that person's nineteenth birthday and is not otherwise subject to prosecution pursuant to § 772 or § 773 of this title; or

(2) Intentionally engages in sexual penetration with another person under any of the following circumstances:

…

b. The victim has not reached that victim's sixteenth birthday and during the commission of the crime, or during the immediate flight from the crime, or during an attempt to prevent the reporting of the crime, the person causes physical injury or serious mental or emotional injury to the victim.

…

11 DE Code §771 (2019).

(a) A person is guilty of rape in the fourth degree when the person:

(1) Intentionally engages in sexual intercourse with another person, and the victim has not yet reached that victim's sixteenth birthday; or

(2) Intentionally engages in sexual intercourse with another person, and the victim has not yet reached that victim's eighteenth birthday, and the person is 30 years of age or older, except that such intercourse shall not be unlawful if the victim and person are married at the time of such intercourse; or

(3) Intentionally engages in sexual penetration with another person under any of the following circumstances:

a. The sexual penetration occurs without the victim's consent; or

b. The victim has not reached that victim's sixteenth birthday.

…

11 DE Code §770 (2019).

Finally, a provision on continuous sexual abuse of a child states:

(a) A person is guilty of continuous sexual abuse of a child when, either residing in the same home with the minor child or having recurring access to the child, the person intentionally engages in 3 or more acts of sexual conduct with a child under the age of 18 years of age over a period of time, not less than 3 months in duration.

(b) Sexual conduct under this section is defined as any of those criminal sexual acts defined under § 768, § 769, § 770, § 771, § 772, § 773, 777A, § 778, § 778A or § 1108 of this title.

(c) To convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred, not on which acts constitute the requisite number.

(d) Continuous sexual abuse of a child is a class B felony.

11 DE Code §776 (2019).

As demonstrated by the examples, the age of the victim, as well as the disparity of age between the victim and the perpetrator, are significant factors for determining a perpetrator's charge. Assuming there are no other aggravating circumstances such as serious injury or commission of another crime when a victim under the age of twelve engages in sexual intercourse with a perpetrator over the age of eighteen, the perpetrator can be charged with rape in the first degree, a class A felony with a penalty of not less than 15 years and up to life imprisonment.[606] A perpetrator over 19 who has engaged in sexual intercourse with someone under the age of 14 may be charged with rape in the third degree, a class B felony with a penalty of imprisonment of not less than two years and up to 25 years.[607] On the other hand, when the victim is under the age of 16, or alternatively, if the victim is under the age of 18 and the perpetrator is over the age of 30, he may be charged with rape in the third degree, a class C felony with a penalty of not more than 15 years with no prescribed minimum penalty.[608] The disparity of age of the victim and the perpetrator plays an important role in preventing penalization of so-called "Romeo and Juliet" cases where two minors engage in a mutually agreed sexual act, as a consensual relationship with two minors cannot be the basis of charges of rape in the first to third degrees, but a minor may nonetheless be adjudicated as delinquent based on conduct constituting unlawful sexual contact in the first or second degree or rape in the fourth

[606] 11 DE Code § 4205(b)(1) (2020).
[607] 11 DE Code § 4205(b)(2) (2020).
[608] 11 DE Code § 4205(b)(3) (2020).

degree. In *Farmer v. State*, the Supreme Court of Delaware affirmed a judgment by a family court that adjudicated a 13-year-old juvenile as a delinquent based on conduct constituting attempted rape in the fourth degree for attempting to sexually penetrate a 12-year-old victim with his finger during a bus ride home from school.[609] In such cases, whether to bring a charge for a sexual act between two juveniles rests on prosecutorial discretion.

In addition to the traditional sex crime laws, some states penalize preparation stages for sexual contact with a child or acts following the grooming of a child in an effort to provide more robust protection for children. For example, the laws of the District of Columbia are as follows:

> § 22-3010. Enticing a child or minor.
> (a) Whoever, being at least 4 years older than a child or being in a significant relationship with a minor, (1) takes that child or minor to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 to 22-3009.02, or (2) seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both.
>
> (b) Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts (1) to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact, or (2) to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both.
>
> (c) No person shall be consecutively sentenced for enticing a child or minor to engage in a sexual act or sexual contact under subsection (a)(2) of this section and engaging in that sexual act or sexual contact with that child or minor, provided, that the enticement occurred closely associated in time with the sexual act or sexual contact.

D.C. Code Ann. §22-3010 (2021).

> § 22-3010.02. Arranging for a sexual contact with a real or fictitious child.
> (a) It is unlawful for a person to arrange to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child at least 4 years younger than the person, or to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger than the person. For the purposes of this section, arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer.

D.C. Code Ann. §22-3010.02 (2021).

Alternatively, in Georgia:

> § 16-6-5. Enticing a child for indecent purposes

[609] *Farmer v. State*, 844 A.2d 297, 301 (Del. 2004).

(a) A person commits the offense of enticing a child for indecent purposes when he or she solicits, entices, or takes any child under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts.

(b) Except as provided in subsection (c) of this Code section, a person convicted of the offense of enticing a child for indecent purposes shall be punished by imprisonment for not less than ten nor more than 30 years. Any person convicted under this Code section of the offense of enticing a child for indecent purposes shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

(c) If the victim is at least 14 but less than 16 years of age and the person convicted of enticing a child for indecent purposes is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.
GA Code § 16-6-5 (2019).

As the example statutes demonstrate, state laws on enticement of children for sexual purposes penalize various acts such as soliciting, enticing, or taking any child to a place for sexual purposes. While the general intent for penalizing enticement of children for sexual purposes is understood to be the protection of children,[610] the detailed intent of such laws is often not clear from the text of the statutes. In one interesting clarification involving enticement of a minor, Utah has amended its law on enticing a minor to clarify the mental state, *inter alia*,[611] to reflect its original intent "to protect minors by stopping and punishing the predatory behavior at the solicitation state"[612] and clarify that it did not intend to be applied to those who have actually intended to engage in illegal sexual activity with a minor.[613] Thus, "[r]ather, the Legislature intended that the crime be complete at the keyboard with a mere request to engage in sexual activity."[614]

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[610] At 866, Julie Herward, To Catch All Predators: Toward a Uniform Interpretation of "Sexual Activity" in the Federal Child Enticement, Statute, 63 Am. U. L. R. 3, 879, 918 (2014).

[611] UT. Code §76-4-401(2) Enticing a minor -- Elements – Penalties

(2) (a) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to solicit, seduce, lure, or entice a minor, or to attempt to solicit, seduce, lure, or entice a minor, or another person that the actor believes to be a minor, to engage in any sexual activity which is a violation of state criminal law.

(b) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to:

(i) initiate contact with a minor or a person the actor believes to be a minor; and

(ii) subsequently to the action under Subsection (2)(b)(i), by any electronic or written means, solicits, seduces, lures, or entices, or attempts to solicit, seduce, lure, or entice the minor or a person the actor believes to be the minor to engage in any sexual activity which is a violation of state criminal law.

UT. Code §76-4-401(2)(2020).

[612] At 51, Matthew Bates & Matthew Morrise, Developments in Utah Law: Significant 2012-13 Cases, 1 UTAH J. CRIM. L. 38 (2014).

[613] *Id*. at 52.

[614] *Id*., *citing* Enticing a Minor Amendments: Hearing on H.B. 31 before the Senate Judiciary, Law Enforcement, and Criminal Justice Committee, Utah 2013 General Session (March 5, 2013)(statement of Paul Boyden, Director, Statewide Association of Prosecutors), audio recording, available at: http://le.utah.gov/~2013/bills/static/HB0031.html.

Among those, District of Columbia's § 22-3010 is particularly worth noting as it penalizes the arrangement of sexual contact even with a fictitious child. By the wording of the statute, the intent is clear: the part makes it possible to bring charges against perpetrators who have proposed sexual contact for undercover law enforcement officers who posed as children for the child sexual exploitation investigation.[615] Such a clear legal allowance for the punishment of a perpetrator who did not have contact with a real child allows active police activity to promote the protection of children in the jurisdiction from sexual violence, especially in the context of online sex crimes that often take place privately. However, the defense often argues in cases brought on by undercover police investigation that such investigation is unconstitutional entrapment.[616] As mentioned during the introduction of this section, online sex crime and children are discussed in more detail in the next chapter.

C. Position of trust or authority (or the equivalent of Article 179)

This section introduces state laws equivalent to Japan's Article 179. While usually broader in scope than Article 179, many states have laws penalizing sexual acts by those in a position of trust or authority against children. For example, Colorado's Sexual Assault on a Child by One in a Position of Trust states:

> (1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child by one in a position of trust if the victim is a child less than eighteen years of age and the actor committing the offense is one in a position of trust with respect to the victim.
>
> (2) Sexual assault on a child by one in a position of trust is a class 3 felony if:
> (a) The victim is less than fifteen years of age; or
> (b) The actor commits the offense as a part of a pattern of sexual abuse as described in subsection (1) of this section. No specific date or time need be alleged for the pattern of sexual abuse; except that the acts constituting the pattern of sexual abuse whether charged in the information or indictment or committed prior to or at any time after the offense charged in the information or indictment, shall be subject to the provisions of section 16-5-401 (1)(a), concerning sex offenses against children. The offense charged in the information or indictment shall constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse as defined in section 18-3-401 (2.5). Prosecution for any incident of sexual contact constituting the offense or any incident of sexual contact constituting the pattern of sexual abuse may be commenced and the offenses charged in an information or indictment in a county where at least one of the incidents occurred or in a county where an act in furtherance of the offense was committed.

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[615] The child sexual exploitation investigation involving undercover officers actively takes place in the U.S. on both local and federal level. The Child Exploitation and Human Trafficking Task Forces of the Federal Bureau of Investigation often work with the state and local law enforcement agencies for their Crimes against Children program to conduct child sexual exploitation investigations.
See, for more information, Federal Bureau of Investigation, What We Investigate, Violent Crime: Crimes Against Children/Online Predators (last accessed on Oct. 18, 2021), available at: https://www.fbi.gov/investigate/violent-crime/cac

[616] *See*, i.e., *Squyres v. State*, 2015 Ark. App. 665, 476 S.W.3d 839 (2015).

(3) Sexual assault on a child by one in a position of trust is a class 4 felony if the victim is fifteen years of age or older but less than eighteen years of age and the offense is not committed as part of a pattern of sexual abuse, as described in paragraph (b) of subsection (2) of this section.

(4) If a defendant is convicted of the class 3 felony of sexual assault on a child pursuant to paragraph (b) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

(5) A person who is convicted on or after July 1, 2013, of sexual assault on a child by one in a position of trust under this section, upon conviction, shall be advised by the court that the person has no right:
(a) To notification of the termination of parental rights and no standing to object to the termination of parental rights for a child conceived as a result of the commission of that offense;
(b) To allocation of parental responsibilities, including parenting time and decision-making responsibilities for a child conceived as a result of the commission of that offense;
(c) Of inheritance from a child conceived as a result of the commission of that offense; and
(d) To notification of or the right to object to the adoption of a child conceived as a result of the commission of that offense.

CO Rev Stat § 18-3-405.3 (2018).

In deciding a case where a defendant was charged with the violation of section 18–3–405.3(1), the Supreme Court of Colorado held that a person need not be performing a specific task related to the child victim to be in a position of trust, as long as there is an ongoing and continuous supervisory relationship with the victim.[617]

According to the definition section,

(3.5) One in a "position of trust" includes, but is not limited to, any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities concerning a child, including a guardian or someone otherwise responsible for the general supervision of a child's welfare, or a person who is charged with any duty or responsibility for the health, education, welfare, or supervision of a child, including foster care, child care, family care, or institutional care, either independently or through another, no matter how brief, at the time of an unlawful act.

CO Rev Stat § 18-3-401(3.5) (2018).

Moreover, in Delaware, these two statutes are noteworthy:

§ 778 Sexual abuse of a child by a person in a position of trust, authority or supervision in the first degree; penalties.
A person is guilty of sexual abuse of a child by a person in a position of trust, authority or supervision in the first degree when the person:

[617] At *1125, *Pellman v. People*, 252 P.3d 1122 (Colo. 2011).

(1) Intentionally engages in sexual intercourse with a child who has not yet reached that child's own sixteenth birthday and the person stands in *a position of trust, authority or supervision over the child*, (emphasis added) or is an *invitee or designee of a person who stands in a position of trust, authority or supervision over the child* (emphasis added).

(2) Intentionally engages in sexual penetration with a child who has not yet reached that child's own sixteenth birthday and the person stands in *a position of trust, authority or supervision over the child*, (emphasis added) or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

(3) Intentionally engages in sexual intercourse or sexual penetration with a child who has reached that child's own sixteenth birthday but has not yet reached that child's own eighteenth birthday *when the person is at least 4 years older than the child and the person stands in a position of trust, authority or supervision over the child*, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

(4) Intentionally engages in sexual intercourse or sexual penetration with a child and the victim has reached that child's own sixteenth birthday but has not yet reached that child's own eighteenth birthday and the person stands in *a position of trust, authority or supervision over the child*, (emphasis added) or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

(5) Engages in an act of sexual extortion, as defined in § 774 of this title, against a child who has not yet reached that child's own sixteenth birthday and the person stands in *a position of trust, authority or supervision over the child*, (emphasis added) or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

(6) a. 1. Sexual abuse of a child by a person in a position of trust, authority or supervision in the first degree as set forth in paragraph (1) of this section is a class A felony.

2. Notwithstanding any law to the contrary, a person convicted of sexual abuse of a child by a person in a position of trust, authority or supervision in the first degree as set forth in this paragraph (6) shall be sentenced to life imprisonment without benefit of probation, parole or any other reduction if:

A. At the time of the offense the person inflicts serious physical injury on the victim; or

B. The person intentionally causes serious and prolonged disfigurement to the victim permanently, or intentionally destroys, amputates or permanently disables a member or organ of the victim's body; or

C. The person is convicted of sexual abuse of a child by a person in a position of trust, authority or supervision in the first degree as set forth in this paragraph (6) against 3 or more separate victims; or

D. The person has previously been convicted of sexual abuse of a child by a person in a position of trust, authority or supervision in the first degree, unlawful sexual intercourse in the first degree, rape in the second degree or rape in the first degree, or any equivalent offense under the laws of this State, any other state or the United States.

…

11 DE Code § 778 (2019).

§ 778A Sexual abuse of a child by a person in a position of trust, authority or supervision in the second degree; penalties.

A person is guilty of sexual abuse of a child by a person in a position of trust, authority or supervision in the second degree when the person:

(1) Intentionally has sexual contact with a child who has not yet reached that child's sixteenth birthday or causes the child to have sexual contact with the person or a third person and the person stands in a *position of trust, authority or supervision over the child*, (emphasis added) or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

(2) a. Is a male who intentionally exposes his genitals or buttocks to a child who has not yet reached that child's sixteenth birthday *under circumstances in which he knows his conduct is likely to cause annoyance, affront, offense or alarm when the person is at least 4 years older than the child and he stands in a position of trust, authority or supervision over the child*, (emphasis added) or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

b. Is a female who intentionally exposes her genitals, breast or buttocks to a child who has not yet reached that child's sixteenth birthday *under circumstances in which she knows her conduct is likely to cause annoyance, affront, offense or alarm when the person is at least 4 years older than the child and she stands in a position of trust, authority or supervision over the child*, (emphasis added) or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

(3) *Suggests, solicits, requests, commands, importunes or otherwise attempts to induce* (emphasis added) a child who has not yet reached that child's sixteenth birthday to have sexual contact or sexual intercourse or unlawful sexual penetration with the person or a third person, *knowing that the person is thereby likely to cause annoyance, affront, offense or alarm to the child or another when the person is at least 4 years older than the child and the person stands in a position of trust, authority or supervision over the child*, (emphasis added) or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

(4) a. Sexual abuse of a child by a person in a position of trust, authority or supervision in the second degree as set forth in paragraph (1) of this section is a class D felony.

b. Sexual abuse of a child by a person in a position of trust, authority or supervision in the second degree as set forth in paragraph (2) of this section is a class F felony.
c. Sexual abuse of a child by a person in a position of trust, authority or supervision in the second degree as set forth in paragraph (3) of this section is a class G felony.

(5) Nothing contained in this section shall preclude a separate charge, conviction and sentence for any other crime set forth in this title, or in the Delaware Code.

11 DE Code § 778A (2019).

For the statutes, the term "position of trust, authority or supervision over a child" is defined broadly as follows:

(e) "*Position of trust, authority or supervision over a child" includes*, but is not limited to (emphasis added):
(1) *Familial, guardianship or custodial authority or supervision* (emphasis added); or
(2) *A teacher, coach, counselor, advisor, mentor* (emphasis added) or any other person providing instruction or educational services to a child or children, whether such person is compensated or acting as a volunteer; or
(3) *A babysitter, child care provider, or child care aide*, (emphasis added) whether such person is compensated or acting as a volunteer; or
(4) *A health professional*, (emphasis added) meaning any person who is licensed or who holds himself or herself out to be licensed or who otherwise provides professional physical or mental health services, diagnosis, treatment or counseling which shall include, but not be limited to, doctors of medicine and osteopathy, dentists, nurses, physical therapists, chiropractors, psychologists, social workers, medical technicians, mental health counselors, substance abuse counselors, marriage and family counselors or therapists and hypnotherapists, whether such person is compensated or acting as a volunteer; or
(5) *Clergy*, (emphasis added) including but not limited to any minister, pastor, rabbi, lay religious leader, pastoral counselor or any other person having regular direct contact with children through affiliation with a church or religious institution, whether such person is compensated or acting as a volunteer; or
(6) *Any law-enforcement officer*, (emphasis added) as that term is defined in § 222 of this title, and including any person acting as an officer or counselor at a correctional or counseling institution, facility or organization, whether such person is compensated or acting as a volunteer; or
(7) *Any other person who because of that person's familial relationship, profession, employment, vocation, avocation or volunteer service has regular direct contact with a child or children and in the course thereof assumes responsibility, whether temporarily or permanently, for the care or supervision of a child or children*. (emphasis added).

11 Del. Code §761(e) (2019).

Alternatively, in Maryland:

§3-308. Sexual Offense in the Fourth Degree

(a) In this section, "*person in a position of authority*" (emphasis added):
(1) means a person who:
(i) is at least 21 years old;
(ii) is *employed as a full-time permanent employee by a public or private preschool, elementary school, or secondary school*; (emphasis added) and
(iii) because of the person's *position or occupation, exercises supervision over a minor who attends the school*; (emphasis added) and

(2) includes a *principal, vice principal, teacher, or school counselor* (emphasis added) at a public or private preschool, elementary school, or secondary school.

(b) A person may not engage in:
(1) *sexual contact with another without the consent* (emphasis added) of the other;

(2) except as provided in § 3-307(a)(4) of this subtitle, a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 4 years older than the victim; or

(3) except as provided in § 3-307(a)(5) of this subtitle, vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 4 years older than the victim.

(c) (1) Except as provided in § 3-307(a)(4) of this subtitle or subsection (b)(2) of this section, a person in a position of authority may not engage in a sexual act or sexual contact with a minor who, at the time of the sexual act or sexual contact, is a student enrolled at a school where the person in a position of authority is employed.

(2) Except as provided in § 3-307(a)(5) of this subtitle or subsection (b)(3) of this section, a person in a position of authority may not engage in vaginal intercourse with a minor who, at the time of the vaginal intercourse, is a student enrolled at a school where the person in a position of authority is employed.

(d) (1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of the misdemeanor of sexual offense in the fourth degree and on conviction is subject to imprisonment not exceeding 1 year or a fine not exceeding $1,000 or both.

(2) (i) On conviction of a violation of this section, a person who has been convicted on a prior occasion not arising from the same incident of a violation of §§ 3-303 through 3-312 or § 3-315 of this subtitle or § 3-602 of this title is subject to imprisonment not exceeding 3 years or a fine not exceeding $1,000 or both.

(ii) If the State intends to proceed against a person under subparagraph (i) of this paragraph, it shall comply with the procedures set forth in the Maryland Rules for the indictment and trial of a subsequent offender.

M.D. Crim Law Code § 3-308 (2013).

In Kentucky, a person is punishable for rape in the third degree when:

> 510.060 Rape in the third degree
> …
> (d) *Being a person in a position of authority or position of special trust,* (emphasis added) as defined in KRS 532.045, he or she engages in sexual intercourse with a minor under eighteen (18) years old with whom he or she comes into contact as a result of that position; or
>
> (e) Being a *jailer, or an employee, contractor, vendor, or volunteer of the Department of Corrections, Department of Juvenile Justice*, *or a detention facility as defined in KRS 520.010, or of an entity under contract with either department or a detention facility for the custody, supervision, evaluation, or treatment of offenders*, (emphasis added) he or she subjects a person who he or she knows is incarcerated, supervised, evaluated, or treated by the Department of Corrections, Department of Juvenile Justice, detention facility, or contracting entity, to sexual intercourse.
>
> (2) Rape in the third degree is a Class D felony.

Ky. Rev. Stat. Ann. § 510.060 (2020).

As mentioned in the above statute, the definition under §532.045 (Persons prohibited from probation or post-incarceration supervision; procedure when probation or post incarceration supervision not prohibited) states:

> (1) As used in this section:
> (a) "Position of authority" means but is not limited to *the position occupied by a biological parent, adoptive parent, stepparent, foster parent, relative, household member, adult youth leader, recreational staff, or volunteer who is an adult, adult athletic manager, adult coach, teacher, classified school employee, certified school employee, counselor, staff, or volunteer for either a residential treatment facility or a detention facility as defined in KRS 520.010(4), staff or volunteer with a youth services organization, religious leader, health-care provider, or employer*; (emphasis added)
> (b) "Position of special trust" means a *position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the minor*; and (emphasis added)
> (c) "Substantial sexual conduct" means penetration of the vagina or rectum by the penis of the offender or the victim, by any foreign object; oral copulation; or masturbation of either the minor or the offender.
> …

Ky. Rev. Stat. Ann. § 532.045 (2020).

Similar to Article 179 in its scope, at least in regard to section (a), North Carolina's sexual activity by a substitute parent or custodian states:

> § 14-27.31. Sexual activity by a substitute parent or custodian

(a) If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, the defendant is guilty of a Class E felony.

(b) If a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony.

(c) Consent is not a defense to a charge under this section.

NC Gen. Stat §14-27.31 (2020).

As observed in the example statutes above, those in a position of trust and authority is interpreted broadly and includes a wide circle of those involved in educating, caring, and supervising the child, including parents, relatives, nannies, teachers, school employees, coaches, clergies, religious leaders, counselors, employers, and those providing child-related services. Moreover, while social relationships with some disparity of power, such as employer-employee relationships, are rarely afforded an extra layer of protection for adults under the criminal law, given the immaturity and vulnerability to undue pressure for minors, those who hold power over minors, including employees, are also considered to be in the position of authority in the case of Ky. Rev. Stat. Ann. § 532.045. The broader scope of positions considered to have sufficient undue influence over children to be included in a separate offense for sexual activity with children, which protects state interest in protecting its children, is noteworthy in comparison with Article 179.

D. School employees

Many states have criminal laws that prohibit school employees from engaging in a sexual act with a student, whether it be a part of a general provision that includes different circumstances where a defendant may be found guilty or specific provisions prohibiting school employees from engaging in a sexual act with students. The following are examples of the specific laws:

Alaska's Section 13A-6-81 is as follows:

Alaska's Section 13A-6-81 - School employee engaging in a sex act or deviant sexual intercourse with a student under the age of 19 years

School employee engaging in a sex act or deviant sexual intercourse with a student under the age of 19 years.

(a) A person commits the crime of a school employee engaging in a sex act or deviant sexual intercourse with a student under the age of 19 years if he or she is a school employee and engages in a sex act or deviant sexual intercourse with a student, regardless of whether the student is male or female. Consent is not a defense to a charge under this section.

(b) As used in this section, sex act means sexual intercourse with any penetration, however slight; emission is not required.

(c) As used in this section, deviant sexual intercourse means any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another.

(d) The crime of a school employee engaging in a sex act or deviant sexual intercourse with a student is a Class B felony.

AL Code § 13A-6-81 (2012).

In North Carolina:

§ 14-27.32. Sexual activity with a student

(a) If a defendant, who is a teacher, school administrator, student teacher, school safety officer, or coach, at any age, or who is other school personnel, and who is at least four years older than the victim engages in vaginal intercourse or a sexual act with a victim who is a student, at any time during or after the time the defendant and victim were present together in the same school, but before the victim ceases to be a student, the defendant is guilty of a Class G felony, except when the defendant is lawfully married to the student. The term "same school" means a school at which the student is enrolled and the defendant is employed, assigned, or volunteers.

(b) A defendant who is school personnel, other than a teacher, school administrator, student teacher, school safety officer, or coach, and is less than four years older than the victim and engages in vaginal intercourse or a sexual act with a victim who is a student, is guilty of a Class I felony.

(c) This section shall apply unless the conduct is covered under some other provision of law providing for greater punishment.

(d) Consent is not a defense to a charge under this section.

(e) For purposes of this section, the terms "school", "school personnel", and "student" shall have the same meaning as in G.S. 14-202.4(d). For purposes of this section, the term "school safety officer" shall include a school resource officer or any other person who is regularly present in a school for the purpose of promoting and maintaining safe and orderly schools.

N.C. Gen. Stat §14-27.32 (2020).

As in the example of North Carolina, school employees include those conducting various roles related to a child's education, including a sports coach and a safety officer.

E. Correctional officers and juvenile guards

Given the conspicuous disparity in power, sexual acts by correctional officers, including employees of juvenile correctional facilities against the facility residents are one of the most frequently prohibited act under specific laws. For example, in Arizona:

> § 13-1412 Unlawful sexual conduct; peace officers; classification; definitions
> A. *A peace officer*(emphasis added) commits unlawful sexual conduct by knowingly engaging in sexual contact, oral sexual contact or sexual intercourse with *any person who is in the officer's custody or a person who the officer knows or has reason to know is the subject of an investigation* (emphasis added).
>
> B. Unlawful sexual conduct with a victim who is under fifteen years of age is a class 2 felony. Unlawful sexual conduct with a victim who is at least fifteen years of age but less than eighteen years of age is a class 3 felony. All other unlawful sexual conduct is a class 5 felony.
>
> C. This section does not apply to either of the following:
> 1. Any direct or indirect touching or manipulating of the genitals, anus or female breast that occurs during a lawful search.
> 2. An officer who is married to or who is in a romantic or sexual relationship with the person at the time of the arrest or investigation. The following factors may be considered in determining whether the relationship between the victim and the defendant is currently a romantic or sexual relationship:
> (a) The type of relationship.
> (b) The length of the relationship.
> (c) The frequency of the interaction between the victim and the defendant.
> (d) If the relationship has terminated, the length of time since the termination.
>
> D. For the purposes of this section:
> 1. " Custody" includes the imposition of actual or constructive restraint pursuant to an on-site arrest, a court order or any contact in which a reasonable person would not feel free to leave. Custody does not include detention in a correctional facility, a juvenile detention facility or a state hospital.
> 2. " Peace officer" has the same meaning prescribed in section 1-215 but does not include adult or juvenile corrections or detention officers.

AZ Rev Stat § 13-1412 (2019).

The statute makes it clear that custody does not include detention in a correctional facility or a juvenile detention facility, thus limiting the scope of the relationships that are the object of the statute. On the other hand, in Iowa:

> 709.16 Sexual misconduct with offenders and juveniles.
> 1. *Any peace officer, or an officer, employee, contractor, vendor, volunteer, or agent of the department of corrections, or an officer, employee, or agent of a judicial district department of correctional services*, (emphasis added) who engages in a sex act with an

individual committed to the custody of the department of corrections or a judicial district department of correctional services commits an aggravated misdemeanor.

2. a. *Any peace officer, or an officer, employee, contractor, vendor, volunteer, or agent of a juvenile placement facility* (emphasis added) who engages in a sex act with a juvenile placed at such facility commits an aggravated misdemeanor.
b. For purposes of this subsection, a "juvenile placement facility" means any of the following:
(1) A child foster care facility licensed under section 237.4.
(2) Institutions controlled by the department of human services listed in section 218.1.
(3) Juvenile detention and juvenile shelter care homes approved under section 232.142.
(4) Psychiatric medical institutions for children licensed under chapter 135H.
(5) Facilities for the treatment of persons with substance-related disorders as defined in section 125.2.

3. Any peace officer, or an officer, employee, contractor, vendor, volunteer, or agent of a county who engages in a sex act with a prisoner incarcerated in a county jail commits an aggravated misdemeanor.

IA Code § 709.16 (2019).

Along with other vulnerable relationships, §709.16 specifies it penalizes sex acts by officers of correctional facilities and juvenile facilities against those placed in the facilities even when there is consent.

F. Client-therapist

Being mindful of the power differential that makes a client vulnerable to his or her psychotherapist's sexual exploitation, and the deleterious outcomes of such exploitation,[618] many states penalize any sexual intrusion, sexual penetration, or sexual contact with the client's psychotherapist. As an illustration, in Colorado:

(1)(a) Any actor who knowingly inflicts sexual penetration or sexual intrusion on a victim commits aggravated sexual assault on a client if:

(I) The actor is *a psychotherapist and the victim is a client of the psychotherapist*; (emphasis added) or.

(II) The actor is *a psychotherapist and the victim is a client* (emphasis added) and the sexual penetration or intrusion occurred by means of therapeutic deception.

(b) Aggravated sexual assault on a client is a class 4 felony.

(2)(a) Any actor who knowingly subjects a victim to any sexual contact commits sexual assault on a client if:

[618] Michael Capawana, Intimate Attractions and Sexual Misconduct in the Therapeutic Relationship: Implications for Socially Just Practice, 3 Cogent Psych. 1, 1194176 (2016).

(I) The actor is *a psychotherapist and the victim is a client of the psychotherapist*; (emphasis added) or

(II) The actor is *a psychotherapist and the victim is a client* (emphasis added) and the sexual contact occurred by means of therapeutic deception.

(b) Sexual assault on a client is a class 1 misdemeanor.

(3) Consent by the client to the sexual penetration, intrusion, or contact shall not constitute a defense to such offense.

(4) As used in this section, unless the context otherwise requires:

(a) "Client" means a person who seeks or receives psychotherapy from a psychotherapist.

(b) "Psychotherapist" means any person who performs or purports to perform psychotherapy, whether the person is licensed or registered by the state pursuant to title 12, C.R.S., or certified by the state pursuant to part 5 of article 1 of title 25, C.R.S.

(c) "Psychotherapy" means the treatment, diagnosis, or counseling in a professional relationship to assist individuals or groups to alleviate behavioral or mental health disorders, understand unconscious or conscious motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors that interfere with effective emotional, social, or intellectual functioning.

(d) "Therapeutic deception" means a representation by a psychotherapist that sexual contact, penetration, or intrusion by the psychotherapist is consistent with or part of the client's treatment.

(5) A person who is convicted on or after July 1, 2013, of sexual assault on a client by a psychotherapist under this section, upon conviction, shall be advised by the court that the person has no right:

(a) To notification of the termination of parental rights and no standing to object to the termination of parental rights for a child conceived as a result of the commission of that offense;

(b) To allocation of parental responsibilities, including parenting time and decision-making responsibilities for a child conceived as a result of the commission of that offense;

(c) Of inheritance from a child conceived as a result of the commission of that offense; and

(d) To notification of or the right to object to the adoption of a child conceived as a result of the commission of that offense.

CO Rev Stat § 18-3-405.5 (2019).

By recognizing that a psychologist may have influence on their clients that make it difficult for the clients to resist their psychologist's sexual advances, states, such as those illustrated above, either specifically penalize sexual act by a psychologist towards their clients or make it an aggravated factor.

G. Pretext of medical treatment

Some states have enacted provisions that specifically penalize sexual assault that has been committed under the pretext of providing medical treatment.

In North Carolina:

§ 14-27.33A. Sexual contact or penetration under pretext of medical treatment

(a) Definitions.--The following definitions apply in this section:

(1) Incapacitated.--A patient's incapability of appraising the nature of a medical treatment, either because the patient is unconscious or under the influence of an impairing substance, including, but not limited to, alcohol, anesthetics, controlled substances listed under Chapter 90 of the General Statutes, or any other drug or psychoactive substance capable of impairing a person's physical or mental faculties.

(2) Medical treatment.--Includes an examination or a procedure.

(3) Patient.--A person who has undergone or is seeking to undergo medical treatment.

(4) Sexual contact.--The intentional touching of a person's intimate parts or the intentional touching of the clothing covering the immediate area of the person's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or done in a sexual manner.

(5) Sexual penetration.--Sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, regardless of whether semen is emitted, if that intrusion can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or done in a sexual manner.

(b) Offense; Penalty.--Unless the conduct is covered under some other provision of law providing greater punishment, a person who undertakes medical treatment of a patient is guilty of a Class C felony if the person does any of the following in the course of that medical treatment:

(1) Represents to the patient that sexual contact between the person and the patient is necessary or will be beneficial to the patient's health and induces the patient to engage in sexual contact with the person by means of the representation.

(2) Represents to the patient that sexual penetration between the person and the patient is necessary or will be beneficial to the patient's health and induces the patient to engage in sexual penetration with the person by means of the representation.

(3) Engages in sexual contact with the patient while the patient is incapacitated.

(4) Engages in sexual penetration with the patient while the patient is incapacitated.

(c) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law that is committed by that person while violating this section.

(d) The court may order a term of imprisonment imposed for a violation of this section to be served consecutively to a term of imprisonment imposed for any other crime, including any other violation of law arising out of the same transaction as the violation of this section.

N.C. Gen. Stat. § 14-27.33A (2020).

H. Those whose ability to consent is impaired due to a disability

There is a wealth of literature demonstrating that adults and children with intellectual disabilities are at a higher risk of sexual abuse than others.[619] A study has found that adults with intellectual disabilities had significantly less understanding about all aspects of sex, had increased vulnerability for sexual abuse and difficulty distinguishing between abusive relationship and consensual ones.[620] With recognition that those with a disability, especially those with an intellectual disability may be especially vulnerable to sexual exploitation, many states include provisions that specifically address those with mental or physical disability in their sex crime laws.

For example, in Connecticut,

Section 53a-71 - Sexual assault in the second degree: Class C or B felony.
(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and:
(2) such other person is impaired because of mental disability or disease to the extent that such other person is unable to consent to such sexual intercourse; or
(3) such other person is physically helpless
…

CT Gen Stat § 53a-71 (2019).

Additionally,

Section 53a-67 - Affirmative defenses.
(a) In any prosecution for an offense under this part based on the victim's being mentally incapacitated, physically helpless or impaired because of mental disability or disease, it shall be an affirmative defense that the actor, at the time such actor engaged in the conduct constituting the offense, did not know of such condition of the victim.

(b) In any prosecution for an offense under this part, except an offense under section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b, it shall be an affirmative defense that

[619] *See*, i.e., at 206, Bettle Bottoms, Kari Nysse-Carris, Twana Harris & Kimberly Tyda, Jurors' Perceptions of Adolescent Sexual Assault Victims Who Have Intellectual Disabilities, 27 L. Human Behavior, 2, 205, 227 (2003), citing, *inter alia*, William Friedrich & Jerry Boriskin, Primary Prevention of Child Abuse: Focus on the Special Child, 29 Hospital and Community Psychiatry, 248, 251 (1978); Dick Sobsey, VIOLENCE AND ABUSE IN THE LIVES OF PEOPLE WITH DISABILITIES: THE END OF SILENT ACCEPTANCE? (Paul Brookes ed., 1994); Dick Sobsey, Equal Protection Of The Law For Crime Victims With Developmental Disabilities, 10 Impact, 2, 6, 7 (1997).
[620] Glynis Murphy & Ali O'Callaghan, Capacity of Adults with Intellectual Disabilities to Consent to Sexual Relationships, 34 Psych. Med. 7, 1147, 1357 (2004).

the defendant and the alleged victim were, at the time of the alleged offense, living together by mutual consent in a relationship of cohabitation, regardless of the legal status of their relationship.

CT Gen Stat § 53a-67 (2019).

In North Carolina, a sex crime against those with disability can be punishable by different crimes depending on the act.

§ 14-27.22. Second-degree forcible rape

(a) A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person:

(1) By force and against the will of the other person; *or* (emphasis added)

(2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know the other person has a mental disability or is mentally incapacitated or physically helpless.

…

N.C. Gen. Stat. § 14-27.22 (2020).

§ 14-27.27. Second-degree forcible sexual offense

(a) A person is guilty of second degree forcible sexual offense if the person engages in a sexual act with another person:

(1) By force and against the will of the other person; *or* (emphasis added)

(2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know that the other person has a mental disability or is mentally incapacitated or physically helpless.

…

N.C. Gen. Stat. § 14-27.27 (2020).

§ 14-27.33. Sexual battery

(a) A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person:

(1) By force and against the will of the other person; *or* (emphasis added)

(2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know that the other person has a mental disability or is mentally incapacitated or physically helpless.

…

N.C. Gen. Stat. § 14-27.33 (2020).

Mental incapacitation, mental disability, and physical helplessness have been defined as follows:

§ 14-27.20. Definitions

…

(2) Mentally incapacitated.--A victim who due to any act is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act.

(2a) Person who has a mental disability.--A victim who has an intellectual disability or a mental disorder that temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.
(3) Physically helpless.--Any of the following:
a. A victim who is unconscious.
b. A victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act.

N.C. Gen. Stat. § 14-27.20 (2020).

The example laws demonstrate that states such as North Carolina consider sex offenses committed against those with a mental disability or intellectual disability that makes the victim unable to appraise the nature of his or her conduct as culpable as sex offenses committed by force and against the will of the other person.

I. Dependent adults and the elderly

While sex crime against the elderly has not received well-deserved attention from either legislatures or researchers, it has been found that elderly sexual assaults are more violent and cause more serious injuries.[621] Some states, such as Delaware, have provisions that penalize sexual offenses against vulnerable adults by defining it broadly to include those who are dependent and those with a disability,[622] while a few states offer specific protection against dependent adults and the elderly. This section introduces the example state laws that do offer special protection for the elderly and other dependent adults such as nursing home residents.

California's Section 368 states:

§ 368. Crimes against elder or dependent adults
a) *The Legislature finds and declares that elders, adults whose physical or mental disabilities or other limitations restrict their ability to carry out normal activities or to protect their rights, and adults admitted as inpatients to a 24-hour health facility deserve special consideration and protection* (emphasis added).

(b) (1) A person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or

[621] Julien Chopin & Eric Beauregard, Sexual Abuse of Elderly Victims Investigated by the Police: From Motives to Crime Characteristics, 36 J. Interpersonal Violence 13-14, 6722, 6744 (2021).
[622] In Delaware, vulnerable adult is broadly defined to include those with disability:
(c) "Vulnerable adult" means a person 18 years of age or older who, by reason of isolation, sickness, debilitation, mental illness or physical, mental or cognitive disability, is easily susceptible to abuse, neglect, mistreatment, intimidation, manipulation, coercion or exploitation. Without limitation, the term "vulnerable adult" includes any adult for whom a guardian or the person or property has been appointed.
11 DE Code § 1105(c)(2020).

dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed six thousand dollars ($6,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or four years.

(2) If, in the commission of an offense described in paragraph (1), the victim suffers great bodily injury, as defined in Section 12022.7, the defendant shall receive an additional term in the state prison as follows:

(A) Three years if the victim is under 70 years of age.
(B) Five years if the victim is 70 years of age or older.

(3) If, in the commission of an offense described in paragraph (1), the defendant proximately causes the death of the victim, the defendant shall receive an additional term in the state prison as follows:

(A) Five years if the victim is under 70 years of age.
(B) Seven years if the victim is 70 years of age or older.

(c) *A person who knows or reasonably should know that a person is an elder or dependent adult* (emphasis added) and who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon *unjustifiable physical pain or mental suffering*, (emphasis added) or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health may be endangered, is guilty of a misdemeanor. A second or subsequent violation of this subdivision is punishable by a fine not to exceed two thousand dollars ($2,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

…(omitted)…

(g) As used in this section, "elder" means a person who is 65 years of age or older.

(h) As used in this section, "dependent adult" means a person, regardless of whether the person lives independently, who is between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. "Dependent adult" includes a person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(i) As used in this section, "caretaker" means a person who has the care, custody, or control of, or who stands in a position of trust with, an elder or a dependent adult.

> …(omitted)…
> (l) Upon conviction for a violation of subdivision (b), (c), (d), (e), or (f), the sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. This protective order may be issued by the court whether the defendant is sentenced to state prison or county jail, or if imposition of sentence is suspended and the defendant is placed on probation.

CA Pen. Code § 368 (2019).

Additionally, in Missouri:

> 566.115. Sexual conduct with a nursing facility resident or a vulnerable person, first degree, penalty
> 1. A person commits the offense of sexual conduct with a nursing facility resident or vulnerable person in the first degree if he or she:
> (1) *Being an owner or employee of a skilled nursing facility, as defined in section 198.006, or an Alzheimer's special care unit or program* (emphasis added), as defined in section 198.505, has sexual intercourse or deviate sexual intercourse with a resident; or
> (2) *Being a vender, provider, agent, or employee of a certified program operated, funded, licensed, or certified by the department of mental health, has sexual intercourse or deviate sexual intercourse with a vulnerable person* (emphasis added).
> 2. The offense of sexual conduct with a nursing facility resident or vulnerable person in the first degree is a class A misdemeanor. Any second or subsequent violation of this section is a class E felony.
> 3. The provisions of this section shall not apply to any person who is married to the resident or vulnerable person.
> 4. Consent of the victim is not a defense to a prosecution under this section.

MO Rev Stat § 566.115 (2019).

> 566.116. Sexual conduct with a nursing facility resident or a vulnerable person, second degree, penalty
> 1. A person commits the offense of sexual conduct with a nursing facility resident or vulnerable person in the second degree if he or she:
> (1) *Being an owner or employee of a skilled nursing facility as defined in section 198.006, or an Alzheimer's special care unit program as defined in section 198.505, has sexual contact with a resident* (emphasis added); or
> (2) *Being a vender, provider, agent, or employee of a certified program operated, funded, licensed, or certified by the department of mental health, has sexual contact with a vulnerable person* (emphasis added).
> 2. The offense of sexual conduct with a nursing facility resident or vulnerable person in the second degree is a class B misdemeanor. Any second or subsequent violation of this section is a class A misdemeanor.
> 3. The provisions of this section shall not apply to any person who is married to the resident or vulnerable person.

4. Consent of the victim is not a defense to a prosecution pursuant to this section.
MO Rev Stat § 566.116 (2019).

The state laws demonstrate how penal law can provide specific protection against sex crimes for the elderly and other dependent adults, such as Alzheimer patients.

3. Discussion

The review of the example U.S. state laws demonstrates that the scope of protection provided for vulnerable groups against sex crimes is much wider than in Japan. In addition to specified protection for those in special relationships, such as therapists and patients or correctional officers and inmates, there is also often more robust protection for children against sex crimes under state laws, with varying penalties according to the ages of the victims and the definition of those in the position of authority and power, which generally includes everyone in the roles of teaching, guiding, and taking care of children. Based on an overview of the sex crime laws of Japan and the United States that provide additional protection for vulnerable groups, this section reviews two questions. First, this section asks whether Article 179 of Japan needs to be amended, and, if so, how. Second, it asks whether additional protection for other groups or relationships should be added to the sex crime laws of Japan, and, if so, for which groups and how.

While Japan took its first step in protecting children by enacting Article 179, the aforementioned discussion of the law among committee members demonstrates that the law does not provide sufficient protection. When a victim is over the age of 13, if the perpetrator is not a guardian or parent in fact who can be proven to have taken advantage of their influence over the victim, which arose out of the relationship, the law may offer no protection. This may serve as a cause of deficiency in the effective functioning of Article 179 to protect children from sexual advances by people who are supposed to protect them. The protected interest for Article 179 should be protection for children from any sexual advancements by adults so that they can grow and develop in a safe environment until they become mature enough to make their own sexual decisions. Most importantly, children have adults, besides their guardians, in their lives who they meet on a daily basis, such as their relatives, sports coaches, or teachers. Laws that offer proper protection for children against adults who are heavily involved in their lives seem necessary to ensure that the law serves its purpose.

During the third committee meeting,, Ikuko Ishida submitted a survey result about students' experiences of sexual violence from their teachers to the committee for a third meeting that could serve as a reason for expanding Article 179. [623] The survey found, *inter alia*, among 736 valid responses they have received, 304 students or 42.4% of the respondents replied that they had experienced sexual encounters or sexual violence from a teacher at school when the respondents were at school or after graduation.[624] Among those, 29.2% or 145 respondents reported that they had been touched or had been made to touch, and 7.7% or 38 respondents reported that they had received sexual acts or had been made to engage in sexual acts.[625] The survey illustrates that in Japan, like anywhere else, children can experience sexual violence from authority figures in their lives besides their legal guardians. Given its comparison with state laws protecting children and recognition in Japan that the law does not provide sufficient

[623] 性犯罪に関する刑事法検討会，石田郁子氏提出資料１－１, *supra* note 567.
[624] *Id*. at 3.
[625] *Id*.

protection,[626] Article 179 should be expanded to provide more robust and realistic protection for children, at least to include others who play integral roles in children's lives.

At the same time, the discussion on how to draw the line of protecting the sexual autonomy and rights of special groups to engage in sexual relationships and protecting them from sex crimes should not be forgotten. In order to deal with this issue with respect to children, many states have adopted so-called Romeo and Juliet laws that exclude consensual sexual relationships among underaged children from their definitions of sex crimes. At least for juveniles, such explicit guarantee of their rights to make their own decisions about sexual relationships with those in equal relationships and levels of maturity seems necessary. As in an example of Iceland, active legal intervention for people with intellectual disabilities in their sexual relationships may raise questions about the violation of the people's right to self-determination and sexual autonomy, no matter what the intentions of the government may be.[627]

It should be additionally noted that criminal law alone does not serve the role of prohibiting sex crimes against children in Japan. The Youth Protection and Development Ordinance provided by prefectures in Japan and the Child Welfare Act have also been mentioned as ways of regulation to consider in conjunction with penal law, as they both play their respective roles in protecting children from inappropriate sexual advances.[628] The provisions under the ordinance do not require force or threat, but while the boundary of the punished act is broader, their penalty is lesser than those prescribed by the penal law.[629] Additionally, a new law prohibiting sexual violence against children and students by educational personnel[630] is enacted with the recognition that "sexual abuse by educational personnel seriously infringes on the rights of students and cause trauma as well as other serious mental and physical harm that is difficult to overcome throughout the victim's lives."[631] This law deters, at least to some extent, sexual activities by teachers and others with educational roles carried out against children.

The availability of other legal safeguards and the importance of respecting children's (at least juveniles') right to make their own decisions pose additional difficulties in determining whether the penal law of Japan should be further expanded to provide additional protection for children. Among the discussions, there has been enthusiastic debate on whether the age of consent should be lowered in Japan's sex crime laws. During the committee meeting, Sato proposed challenges associated with the problem of raising age of consent, which may lead to penalization of cases involving juveniles in romantic relationships.[632] Citing an example where a 14-year-old and 17-year-old who were in a romantic relationship, in which case the 17-year-old may face punishment upon turning 18, Sato explained potential concerns associated with age-

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[626] At 84, 後藤弘子「性犯罪規定の性犯罪規定の改正が意味するもの」現代思想 46 号(2018 年) 84 頁.

[627] Kristín Björnsdóttir & Guðrún V. Stefánsdóttir, Double Sexual Standards: Sexuality and People with Intellectual Disabilities Who Require Intensive Support, 38 Sexuality and Disability, 421, 438 (2020). This issue in Iceland presents a more complex discussion regarding involuntary sterilization and fundamental human rights, which is beyond the scope of this paper and will not be discussed here.

[628] 性犯罪に関する刑事法検討会, *supra* note 443 at 12-15.

[629] At 41, 鎮目征樹「児童に対する性犯罪処罰規定の現状と課題について」刑事法ジャーナル 69 号（2021 年）40 頁.

[630] 教育職員等による児童生徒性暴力等の防止等に関する法律教育職員等による児童生徒性暴力等の防止等に関する法律（令和３年法律第 57 号）.

[631] 文部科学省, 教育職員等による児童生徒性暴力等の防止等に関する法律の公布について（通知）3 文科教第 268 号（令和３年 6 月 11 日）.

[632] *Id*. 性犯罪の罰則に関する検討会, *supra* note 443 at 7-9.

based penalization.[633] Explaining that the traditional notion of sex crime law has been based on fault in the process of sexual activities where a person did not want to engage in the sexual act, Sato argued that if a crime based on age is introduced, it is possible that penalization of cases where even victims do not want punishment of the perpetrators might take place, warranting a reason to provide for less penalty. [634] Sato suggested that this matter presents a difficult question because of people's different values. [635] Sato also mentioned that sexual intercourse against children can be punished under the Youth Protection and Development Ordinance, suggesting that different opinions about its relationship and role with respect to criminal law in child protection should be considered before introducing laws based on age difference.[636]

On the other hand, Yamamoto pointed out there have been many people who could not gain justice because they did not fall under the specific groups, such as juveniles who are over 13. Yamamoto, suggesting that the younger people are still maturing in terms of their social experience and abilities, claimed that it would be too harsh to require a force or threat element for cases involving victims over 13 and suggested that those under the age of 16, that is, those still receiving compulsory education, should be protected with an additional measure to respect children's decisions by adding clauses such as that those under 14 would not be convicted unless they are in a position of power, as in the case of Canada.[637] Yamamoto also argued, with respect to Sato's argument on different values, that when there is a great disparity in age, there is no equal relationship that leads to a sexual act, referring to the cases provided during the ninth meeting.[638] Yamamoto clarified that given the disparity in the relationship between those in a position of authority and juveniles, it is not a matter of different values.

Konishi agreed, suggesting that the question here is that everyone should know that when there is a significant age difference, consent and romantic relationship should be dealt with carefully as it is easy to manipulate and take advantage of the young by position and relationship.[639] Konishi also added that while Sato mentioned that it is a matter of differing values, it should be understood that those in the age of 14 to 16 can be easily affected by adults' words.[640]

Furthermore, in the discussion of those in the age groups of juveniles, such as those from the age of 16 to 18, Sakura Kamitani suggested that the issue of age in the context of sex crimes inherently accompanies the problems associated with positions and relationships, and by focusing on the abuse of power and position and providing immunity clause for those under the age of 16, the purpose of protecting children should be promoted.[641] In the least, it seems clear that the current law fails to provide sufficient protection for juveniles over 13 who are still immature with respect to their decisions and are vulnerable to adults' influence.

Moreover, although the new law prohibiting educational personnel from engaging in sexual acts with children has been enacted, as the law and its measures for violation are administrative, it may not carry the same power in discouraging such acts as criminal law. Nor can it send as strong a message to the public that a teacher should not engage in sexual activities

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[633] *Id*. at 15.
[634] *Id*.
[635] *Id*.
[636] *Id*.
[637] 性犯罪の罰則に関する検討会, *supra* note 18 at 33.
[638] 性犯罪の罰則に関する検討会, *supra* note 443 at 15, citing 性犯罪の罰則に関する検討会, *supra* note 579.
[639] 性犯罪の罰則に関する検討会, *supra* note 443 at 15-16.
[640] *Id*.
[641] 性犯罪の罰則に関する検討会, *supra* note 443 at 4.

with students as would the criminal law. Given the understanding provided during the committee meeting, as discussed earlier, that children are often more submissive to educators than parents, the power of deterrence by potential penal sanctions can be valuable.[642] While the exact age that should be considered as competent to engage in sexual activity may be debatable, the current age of 13 under Article 176 and 177 may be too low. An increase of the age to at least 16, with added protection for children's right to make their own sexual decisions by prescribing for the age difference between the perpetrator and the victim, may be appropriate.

Additionally, Japan should consider creating laws that provide protection for other special groups from sex crimes. For example, with an increase in the older population in Japan, with those over the age of 65 taking up 28.7% of the population,[643] the elderly is a significant group of individuals who can be vulnerable to sexual violence due to potential physical and psychological difficulties and possible social isolation. Therefore, as illustrated by the example U.S. states discussed in this chapter that provide a special protection against the elderly or vulnerable adults from sexual violence, the legislature in Japan may consider offering special protection to the elderly, vulnerable adults or residents in nursing homes who do not have physical and mental strength to resist sexual advances and who are in a great disparity of power with the people who take care of them.

For Japan, where the criminal provisions are more succinct compared to those in the U.S. states, it may be unpractical to list every special group mentioned above in the penal law, as in the case of many U.S. states. It is also true that some groups may be afforded enough protection by the general sex crime provisions if the general provisions sufficiently consider the circumstances under which the crime has been committed. Moreover, amendment to means elements that properly expand the scope of sex crime prosecution alone may lead to a more robust protection of sex crime victims in many groups. Nonetheless, for members of certain groups, such as children over 13 under the current law, a specific protection is desirable to ensure that they do not become a vulnerable target of sexual violence. As illustrated by the above example U.S. state laws, some phrases, such as those in power, authority and supervision, may serve as a reference for how to properly capture the essence of the protection that is to be afforded. Moreover, Article 179, which purports to provide protection for many of the vulnerable groups discussed in this section through the element of loss of consciousness or inability to resist, may be rearranged or re-worded to make it clear who is or what kind of characteristics are protected under the law.

Therefore, along with the expansion of Article 179 and the increase of the age of consent, a new way of rephrasing existing laws, particularly Article 178, should be considered to provide more concrete protection for vulnerable groups. The groups discussed in this section are especially vulnerable to the harm of sex crimes due to their characteristics and their relationships with the perpetrator. Active protection for such groups is important, even if it implicates overcoming some administrative and legal challenges. It should always be remembered:

> The law in its majesty protects from assault
> those who are too weak and feeble to protect themselves.
> No society worthy of being called civilized may do any less.[644]

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[642] 性犯罪に関する刑事法検討会, *supra* note 107 at 21-22.

[643] 総務省，統計からみた我が国の高齢者、統計トピックス No.126（令和２年９月 20 日）.

[644] At * 683, *United States v. James*, 810 F.3d 674 (9th Cir. 2016).

iv. ONLINE AND TECHNOLOGY-FACILITATED SEX CRIMES

Recently, there has been a serious increase in sex crimes using the internet and technology.[645] Especially, the number of predators targeting minors on the internet and social networking services (hereinafter "SNS") has surged. In fact, in the United States, a study based on a national survey of a stratified random sample of 2,574 law enforcement agencies found that 75% of victims around the age of 13 to 15 met male offenders in internet chatrooms, and 76% of the offenders were older than 25.[646] While it is hard to estimate an actual number of sex crimes taking place in cyberspace, which is usually committed privately, the number reported by the National Juvenile Online Victimization Study tripled from 2000 to 2009.[647] In addition to an increased number of internet-initiated sex crimes in recent years, there has been an increase in cases where victims suffered from surreptitious filming or photographing. Where the victims consented to the media recording itself, distributing private material on the internet without the victims' consent is also on the increase. Added to that, sex crimes using artificial intelligence technology, such as creating synthetic media of a sexual nature featuring a victim is increasing more than ever. At first, this type of media manipulation mainly targeted celebrities but it has since expanded to include lay victims whose digital information can be retrieved from pictures posted on social media.

The new types of technology-facilitated sex crimes are increasing all around the globe, with many jurisdictions moving to amend their sex crime laws to deal with this issue. Japan is, surely, no exception to this problem. Kamitani pointed out during a self-introduction for the committee that today, most people own cellphones with cameras, and the problem of spreading sexual media by surreptitious photography or SNS is becoming a serious issue in Japan.[648]

Special attention to this new type of sex crimes is required because the methods the offenders use in committing these crimes and the type of offenders differ from those in traditional sex crimes. Briggs and others have found that perpetrators committing sex crimes using the internet have less severe criminogenic factors than more traditional types of sex offenders.[649] Especially, the perpetrators targeting children approach the children more evasively, and the methods that the perpetrators employ to sexually exploit victims are changing in ways that are difficult for the traditional sex crime law provisions to be applied, leaving jurisdictions with intricate challenges for amending their laws to efficiently deal with these newly emerging sex crimes.

Focusing on these issues, this chapter first reviews the relevance of the problem in Japan. A review of state laws that have been enacted to specifically deal with technology-facilitated sex

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[645] Michael Seto, Chapter 4: Internet Facilitated Sexual Offending, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking, Sex Offender Management Assessment and Planning Initiative (2015), available at: https://smart.ojp.gov/somapi/chapter-4-internet-facilitated-sexual-offending

[646] Janis Wolak, David Finkelhor, Kimberly Mitchell, Internet-initiated Sex Crimes against Minors: Implications for Prevention Based on Findings from a National Study, 35 J. Adolescent Health, 424.E.11, 424.E.20 (2004).

[647] Michael Seto, *supra* note 645, citing Janis Wolak, Statement to the U.S. Sentencing Commission Public Hearing on Federal Child Pornography Offense, U.S. Sentencing Commission (2012); Janis Wolak, David Finkelhor & Kimberly Mitchell, Child Pornography Possessors: Trends in Offender and Case Characteristics. 23 Sexual Abuse: A Journal of Research and Treatment, 1, 22, 42 (2011).

[648] 上谷さくら, *supra* note 36.

[649] Peter Briggs, Walter Simon & Stacy Simonsen, An Exploratory Study of Internet-Initiated Sexual Offenses and the Chat Room Sex Offender: Has the Internet Enabled a New Typology of Sex Offender?, 23 Annals. Sex Research 1, 72, 91 (2011).

crimes follows, although some laws, such as those on artificial intelligence-facilitated crimes, are still limited in number. Lastly, based on an evaluation of state laws, the question of whether Japan should enact new provisions to deal with these types of sex crimes is addressed in the discussion section. As used in this chapter, the definition of "images" is borrowed from LA Rev Stat § 14:283.2 (2018), which is discussed below, and it refers to any photograph, film, videotape, digital recording, or other depiction or portrayal.

1. Japan

A. Laws and prefectural ordinances

While no comprehensive law under the Penal Code of Japan specifically deals with online or technology-facilitated sex crimes in Japan, three types of "online sexual crimes" are addressed in Japanese Law. First, the Child Prostitution and Pornography Prohibition Act[650] penalizes acts of producing and distributing sexually explicit images depicting minors, with the purpose of punishing child sexual exploitation.[651] Various prefectural ordinances also prohibit acts such as solicitation of sexually explicit materials from minors.[652] Second, depending on the region, there are prefectural ordinances regulating surreptitious photography. For example, in Tokyo, surreptitious photography at various places, including residential places, restrooms, showers, changing rooms, and other public places where people may get undressed, is prohibited under its ordinance.[653] Additionally, although the article has not been enacted with the purpose of protecting victims featured in distributed private images without their consent, the act of distributing sexual images can be punishable under Article 175 of the Penal Code on distribution of obscene objects. If a victim has consented to photography or filming of an intimate act with a partner but not to distribution, the act of distribution can be punishable under the Act on the Prevention of Harm from Distribution of Recordings Featuring Private Sexual Images.[654]

B. Committee discussions

While there are various laws working together to provide protection for victims against technology-facilitated sex crimes, to provide more comprehensive protection under criminal law, the committee discussed whether technology-facilitated crimes are being properly addressed under the current laws. During the fourth meeting, Yamamoto and Kamitani suggested the acts of distributing private material on the internet need to be reviewed with the consideration of an amendment, with Kamitani adding that when such material is distributed online, it threatens the sense of safety for the victims during the entirety of their lives.[655]

During the sixth meeting, members engaged in a discussion on whether it is necessary to introduce criminal laws on photographing or filming of sexual nature.[656] First, regarding enacting a provision penalizing surreptitious photographing of sexual nature, Kamitani suggested that

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[650] 児童買春，児童ポルノに係る行為等の規制及び処罰並びに児童の保護等に関する法律（平成 11 年法律第 52 号).

[651] At 95, 瀧本京太朗「いわゆる「自画撮り」行為の刑事規制に関する序論的考察（1）」北大法学論集 68 巻 3 号（2017 年） 71 頁-126 頁.

[652] 東京都青少年の健全な育成に関する条例（昭和 39 年 8 月 1 日条例第 181 号）.

[653] 公衆に著しく迷惑をかける暴力的不良行為等の防止に関する条例（昭和 37 年東京都条例第 103 号） 5 条 2 項、3 項.

[654] 私事性的画像記録の提供等による被害の防止に関する法律（平成 26 年法律第 126 号）.

[655] At 13-14, 法務省, 性犯罪に関する刑事法検討会第 4 回会議議事録 (Jul. 27, 2020).

[656] 性犯罪に関する刑事法検討会, supra note 132 at 29-36.

while the prefectural ordinances regulate surreptitious photographing at various places, they are outdated as they were not enacted recently and cameras on cellphones are now a common features.[657] While updating the ordinances could be a potential solution, the disparity of regulation and punishment according to prefectures indicates that national criminal law on the issue may be necessary.[658] Yamamoto agreed, emphasizing the vicious circle where perpetrators of surreptitious photographing commits another offense as they threaten, control, and sexually assault a victim with images that the victim does not want others to see.[659] Yamamoto raised an example case where a victim of nonconsensual sexual intercourse was filmed during the assault and was continuously sexually abused, controlled, and even financially robbed by the threat of the pictures.[660] The victim reported that it was impossible to escape the relationship out of fear that the perpetrator may do something with the images.[661] Saito also suggested that surreptitious photography harms a person's dignity just by the fact that such private photos or media are owned by another person, leaving a victim feeling continual fear and loathing that he or she is being sexually used by others.[662] Kojima agreed that there is a need for a national law on the matter.[663]

Hashizume agreed that surreptitious photographing or filming without a victim's consent is an act that severely harms a victim's interest, since the images remain and may be distributed.[664] Given the severity, Hashizume suggested that the matter may be better dealt with by criminal law rather than ordinances.[665] Hashizume further suggested that there is a need to criminalize the act of surreptitious photographing itself in order to make the data and media the objects for forfeiture or deletion.[666] He also shared his opinion that protected interest behind such an act should be confirmed first, mainly that the act may cause a victim feelings of shame, insult, and severe anxiety.[667] Finally, Hashizume mentioned that the problem of forcing one to feature on adult videos, while sharing certain aspects with surreptitious photographing, should be dealt with separately as they are different acts by nature. [668]

Kawaide suggested that the view that some form of surreptitious filming or photography needs to be punished appears to be generally undisputed. Kawaide organized the acts that should be considered for penalization into three groups: surreptitious photographing and filming; photographing and filming of criminal sexual acts, with or without a victim's awareness; and forcing a victim to feature in pornography by using means such as deception or threats.[669] Kawaide explained that while protected interest for these acts is still unsettled, with some arguing for the right to self-determination and others arguing for the protection of private information, any interpretation would include various acts of filming and photographing of others of sexual nature.[670]

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[657] *Id*. at 30-31.
[658] *Id*.
[659] *Id*. at 31-32.
[660] *Id*.
[661] *Id*.
[662] *Id*. at 32-33.
[663] *Id*. at 33.
[664] *Id*. at 33-34.
[665] *Id*.
[666] *Id*.
[667] *Id*.
[668] *Id*.
[669] *Id*. at 35-36.
[670] *Id*.

C. Sexual exploitation of children

The acts of filming and photographing are an especially grave issue when the victim is a minor. Since the spring of 2020, with an increase in the time that children spend at home due to the COVID-19 pandemic and the subsequent suspension of school in Japan, the hours children spend on SNS activities have increased.[671] The increased hours, along with the increased number of students who own cellphones, signify an elevated risk that children may be involved in sex crimes.[672] The number of young children who have experienced sexual violence with SNS increased during the COVID-19 pandemic, and especially cases related to child pornography.[673]

Some measures to address this harm are in place in Japan, although there is no provision under the Penal Code solely dedicated to the issue. For example, the Japanese government sought to promote a safe internet environment for children by enacting laws such as the Laws on Making Safe Internet Environment for Juveniles in 2008[674] and organizing cyber-patrol by police to identify postings on SNS that may lead to sexual harm for children.[675] Among the victims of child pornography, the highest number of cases involve those who have been harmed by the images taken by the children themselves, usually by using their cellphones.[676]

In considering how to legislate the increasing sexual violence targeting children, discussion in Japan on the issue of how to regulate sexual abuse that arises out of images children have taken voluntarily has increased. The laws on threat and coercion may be applicable to acts of solicitation in some cases involving sexual materials featuring children produced by minors.[677] Moreover, minors who produce or create sexually explicit materials featuring themselves or other minors could be technically subjected to penalization under the Child Prostitution and Pornography Prohibition Act, which does not exclude children from its objective for penalization.[678] Prosecution of children for these crimes rarely takes place in practice, especially for children who produced sexually explicit materials featuring themselves.[679] Setting aside whether such cases are actually prosecuted, Takimyoto Kyotaro points out that there is potential confusion as to where protected interest lies if a child can be considered as an accomplice for sending a picture of him or herself following an adult's solicitation.[680] Reflecting on the discussions during the enactment of the Child Prostitution and Pornography Prohibition Act that the penalty is prescribed for the purpose of punishing acts of violation directed at children, the act of forsaking children's own protected interest, if they are voluntarily taking pictures of a sexually explicit nature, does not justify subjecting children to punishment without further development of the theories behind the protected interests.[681] On the other hand, the adult

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[671] 髙山善裕「SNS の利用に起因する児童の性被害の現状と対策―自画撮り被害を中心に―」青少年をめぐる課題 総合調査報告書（2021 年）51 頁－70 頁.

[672] *Id*.

[673] The number has actually increased from 1,239 in 2010 to 2,082 in 2019. *Id*. at 52, citing at 20, 警察庁生活安全局少年課「令和元年における少年非行、児童虐待及び子供の性被害の状況　訂正版」（2020 年）.

[674] *Id*. at 54, citing 青少年が安全に安心してインターネットを利用できる環境の整備等に関する法律（平成 20 年法律第 79 号）.

[675] *See Id*. for general discussion of measures by the government.

[676] *Id*. at 55.

[677] *Id*. at 57; 脅迫罪（刑法第 222 条）や強要罪（刑法第 223 条）.

[678] 児童買春，児童ポルノに係る行為等の規制及び処罰並びに児童の保護等に関する法律（平成 11 年法律第 52 号）.

[679] 瀧本京太朗, *supra* note 651 at 129.

[680] *Id*.

[681] *Id*. at 129 & 138.

who asks children to produce sexually explicit materials would be guilty of production even if the children voluntarily produce materials featuring themselves, given that children have limited abilities of sexual self-determination.[682]

Additionally, the Child Prostitution and Pornography Prohibition Act prohibits acts of making a child send sexual images of him or herself under coercion, but such acts are punishable only if the images have actually been sent, and it is not applicable for acts of solicitation.[683] State ordinances provide a more direct regulation on the issues, some prohibiting the acts of solicitation and others prohibiting specific types of solicitation, such as soliciting a child to engage in sexual activity or prostitution.[684] Despite these measures, there has been a call for legal regulation that can provide clear and uniform rules on acts of solicitation of sexual materials from children in Japan.[685]

Finally, whether children who have solicited sexual material from other children should be punished has become an issue, with some suggesting that such measures are necessary given that there are cases involving a minor solicitor and a minor victim.[686] Some regulations, such as the ordinance provided by Tokyo, explicitly exclude children from the application by stating:

> …given the societal responsibility [to protect the youth], [t]he ordinance purports to prevent acts that may deter welfare of the youth rather than regulating acts of the youth themselves, and with understanding of this aim, it is proper that the penalty of the ordinance does not apply for a youth engages in the acts of solicitation.

Supra note 697 at 14, citing 東京都青少年問題協議会「児童ポルノ等被害が深刻化する中での青少年の健全育成について―第 31 期東京都青少年問題協議会緊急答申―」(平成 29 年５月 30 日).[687]

Many prefectures follow the same approach.[688] On the other hand, a child may be subject to penalties under the Child Prostitution and Pornography Prohibition Act, and there is a case where a child has been investigated for violation for soliciting self-produced pornographic

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[682] *Id*. at 129-30.

[683] 児童買春，児童ポルノに係る行為等の規制及び処罰並びに児童の保護等に関する法律（平成 11 年法律第 52 号）.

[684] *See* e.g., 東京都青少年の健全な育成に関する条例（昭和39年8月1日条例第181号）第十五条の三「何人も、青少年に対し、次に掲げる行為を行つてはならない。
一　青少年が一度着用した下着又は青少年のだ液若しくはふん尿を売却するように勧誘すること。
二　性風俗関連特殊営業（風俗営業等の規制及び業務の適正化等に関する法律（昭和二十三年法律第百二十二号。以下「風適法」という。）第二条第五項に規定する性風俗関連特殊営業をいう。）において客に接する業務に従事するように勧誘すること。
三　接待飲食等営業（風適法第二条第四項に規定する接待飲食等営業のうち、同条第一項第一号に該当する営業をいう。）の客となるように勧誘すること。」.

[685] 髙山善裕, *supra* note 671 at 62.

[686] *Id*. at 63.

[687] *See* at 14,「……健全育成条例は、青少年の行為に対して直接制限の形式を取らず、青少年を取り巻く社会の責任において、青少年の福祉を阻害するおそれのある行為を防止するという間接的な方法により、目的の達成を図ることとしているものであり、このような健全育成条例の趣旨を踏まえれば、この禁止規定については、青少年が勧誘をした場合、条例違反にはなるものの罰則の適用はないこととするのが適当である。」, available at: https://www.tomin-anzen.metro.tokyo.lg.jp/jakunenshien/singi/seisyokyo/31ki-menu/31toushin.pdf

[688] As cited at 髙山善裕, *supra* note 671 at 63.

material from another child.[689] However, the measures, including the state ordinances and the laws on child prostitution or pornography, do not provide definite regulation or penalty schemes for cases involving a child who has been involved in child pornography cases by voluntarily taking images of him or herself.

D. Confiscation of sexual exploitation materials

Additionally, concerning a broader scope of online harm, including pictures and videos of child victims and adults, the role of criminal law in properly curbing the spread of sexual exploitation materials should be contemplated. In Japan, the Supreme Court decided on whether forfeiture of four video cassette tapes depicting the perpetrator's commission of one count of forcible sexual intercourse and three counts of forcible indecent act qualified as "(ii) [a]n object used or intended for use in the commission of a criminal act;" under the penal law on confiscation, Article 19 Provision 1, Section 2. [690] The Supreme Court, affirming the lower court's decision that held that the tapes could be properly considered as an object used in the commission of a criminal act, found that the decision can be evidenced by the fact that the perpetrator secretly filmed the acts to threaten victims to give up pursuing their cases by telling them about the existence of the tapes.[691]

During the committee meetings, members such as Kojima and Saito also pointed out the importance of mandating forfeiture of distributed media.[692] During its seventh meeting, as the committee further considered the matter, Yamamoto emphasized the importance of requiring confiscation, raising cases where a victim was threatened using images of sexual nature as an example.[693] Yamamoto explained that victims live in fear that their sexual images are still available on the internet and that perpetrators often profit from the images, to argue that confiscation should be granted in law as a right. [694] Yamamoto also raised a vexed question involving the punishment of those who purchase sexual exploitation materials from the internet.[695] Kamitani added that confiscation is challenging as filming or photographing that took place during the commission of forcible sexual intercourse or forcible sexual indecency does not itself constitute a crime.[696] She also suggested that discussion about confiscation should be made in a broad context to include circumstances such as surreptitious photographing or filming committed without sexual assault, so that the victims can be properly protected.[697]

Yuri Watanabe, General Manager of Sendai High Public Prosecutors Office, shared the perspective of a prosecutor, pointing out that under the current law, the prosecutors make tremendous efforts to make the defendant give up the rights to the sexual exploitation materials, and when defendants do not agree, they have no other way of solving the matter but to continuously contact them and ask them to give up the materials.[698] Watanabe also added that as confiscation under Article 19 of the Penal Code subjects the original copy of the images filmed or photographed during the commission of a crime, but as copy and transfer of images has

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[689] *Id*.
[690] At 1, 最決平成30年6月26日刑集72巻2号209頁.
[691] *Id*.
[692] 性犯罪に関する刑事法検討会, supra note 132 at 32-33.
[693] 性犯罪に関する刑事法検討会, *supra* note 588 at 1.
[694] *Id*.
[695] *Id*. at 1-2.
[696] *Id*.
[697] *Id*.
[698] *Id*. at 2-3.

become tremendously simple now, update to the law to broaden its scope may be necessary.[699] All in all, while there was limited possibility that confiscation could be made under Article 19 as an object used in a crime, the process can be challenging. The application is limited, with uncertainty surrounding the possibility of whether the confiscation can be conducted in conjunction with punishing perpetrators for sex crimes and whether the requirement under Article 19[700] can be met when the property is not a tangible object.[701] Therefore, the current process does not seem to afford timely and assured protection for victims who may be living in fear that their digital sexual image may be available for a perpetrator or online.

E. Surreptitious photography

Finally, there was limited discussion on producing synthetic media, as Miyata mentioned that addressing the problem of surreptitious photographing or photographing without consent should be considered with awareness of developing technology for producing synthetic sexual media.[702] However, Miyata suggested that because of the varied forms, attention should be paid to how to help victims rather than whether such acts can be penalized.[703] On this matter, a court in Tokyo has found that a person engaging in producing and distributing fake media featuring a celebrity without the celebrity victim's consent can be found to violate Article 230 of the Penal Code, which punishes acts of defamation.[704] However, as the Article is not directly legislate over the matter of production of sexual synthetic images, whether a perpetrator can be punished under the act is predicated upon finding that there has been some degree of condemnation of the person's reputation in a case.[705] This can be inferred from the fact that the cases involving the creation and distribution of synthetic sexual images depicting children in violation of the Child Prostitution and Pornography Prohibition Act did not involve prosecution for defamation.[706] Therefore, a comprehensive penal code that enables punishment of creation and distribution of

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[699] *Id*.

[700] Article 19. (Confiscation)

> (1) The following objects may be confiscated: (i) An object which is a component of a criminal act; (ii) An object used or intended for use in the commission of a criminal act; (iii) An object produced or acquired by means of a criminal act or an object acquired as reward for a criminal act; (iv) An object received in exchange for the object set forth in the preceding subparagraphs.
>
> (2) An object set forth in the preceding paragraph may be confiscated only if it does not belong to a person other than the criminal; provided, however, that it may be confiscated when a person other than the criminal acquires the object after the crime with knowledge of the applicability of the preceding subparagraphs.

KEIHO [KEIHO] [Pen. C.] 第十九条 [Art. 19], 1907, Ch. 2, (Japan), as translated at: https://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf

[701] 性犯罪に関する刑事法検討会, *supra* note 588 at 3.

[702] 性犯罪に関する刑事法検討会, *supra* note 132 at 34-35.

[703] *Id*.

[704] 島田聡一郎「インターネット上に専用掲示板を開設し、いわゆるアイドル・コラージュの投稿を呼びかけた者が、名誉毀損罪の共同正犯とされた事例―東京地判平成 18. 4. 21 公刊物未登載」刑事法ジャーナル 9 号(2007 年)135 頁-145 頁; 東京地判平成 18 年 4 月 21 日(公刊物未登載)(Westlaw Japan 文献番号2006 WLJPCA04210003). Defamation also serves to cover other technology facilitated crimes, such as acts of distributing private images in violation of the Act on the Prevention of Harm from Distribution of Recordings Featuring Private Sexual Images. *See* 横浜地判平成 5 年 8 月 4 日判タ 831 号 244 頁.

[705] At FN 56, 岡田好史「リベンジポルノをめぐる新たな問題」専修法学論集 138 号 (2020 年)31 頁-54 頁.

[706] *See* 東京地判平成 28 年 3 月 15 日判時 2335 号 105 頁; 東京高判平成 29 年 1 月 24 日判時 2363 号 110 頁.

synthetic images of a sexual nature, with or without facts involving defamation, may be desirable.

2. United States

With increased awareness about online sex crimes and a special national focus on preventing technology-facilitated child sexual exploitation,[707] state legislatures have attempted to manage these newly emerging sex crimes on different fronts. This section introduces the U.S. state laws on online enticement of children, creation, and distribution of sexual photography and video recording of a victim, including surreptitious photography and filming, nonconsensual photography and video recording, nonconsensual distribution, creation, and distribution of deepfake materials, and finally, forfeiture of such media.

A. Online enticement of children

In addition to a federal law that penalizes enticement or coercion of a minor for engagement in sexual offense using the mail or any facility or means of interstate or foreign commerce,[708] many states have enacted penal law prohibiting online enticing of children for sexual purposes. For example, Alaska, Arkansas, Idaho, and Hawaii penalize these following acts, respectively:

a. State laws

Alaska:

> Section 11.41.452. Enticement of a minor.
> (a) A person commits the crime of enticement of a minor if the person, *being 18 years of age or older, knowingly communicates with another person to entice, solicit, or encourage the person to engage in an act* (emphasis added) described in AS[(AK)] 11.41.455(a)(1) - (7) and
> (1) the other person is a child *under 16 years of age* (emphasis added); or
> (2) the person believes that the other person is a child under 16 years of age.

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[707] There have been national efforts to prevent such crimes, including the Internet Crimes Against Children Task Force Program ("ICAC program") that:

> …helps state and local law enforcement agencies develop an effective response to technology-facilitated child sexual exploitation and Internet crimes against children. This help encompasses forensic and investigative components, training and technical assistance, victim services, and community education. The program was developed in response to the increasing number of children and teenagers using the Internet, the proliferation of child sexual abuse images available electronically, and heightened online activity by predators seeking unsupervised contact with potential underage victims.

Office of Juvenile Justice and Delinquency Prevention, The Internet Crimes Against Children Task Force Program (last access on Oct. 21, 2021), available at: https://ojjdp.ojp.gov/programs/internet-crimes-against-children-task-force-program

[708] § 2422 (b) (Coercion & Enticement):

> (b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

18 U.S.C.§ 2422 (b).

Note that the phrase "using the mail or any facility or means of interstate or foreign commerce" provides federal jurisdiction to the matter of sex offenses, usually a state matter, pursuant to the Commerce Clause under U.S. Const. Art. I, §8, cl. 8.

(b) In a prosecution under (a)(2) of this section, it is not a defense that the person enticed, solicited, or encouraged was not actually a child under 16 years of age.

(c) In a prosecution under this section, it is not necessary for the prosecution to show that the act described in AS 11.41.455(a)(1) - (7) was actually committed.

(d) Except as provided in (e) of this section, enticement of a minor is a class B felony.

(e) Enticement of a minor is a class A felony if the defendant was, at the time of the offense, required to register as a sex offender or child kidnapper under AS 12.63 or a similar law of another jurisdiction.

AK Stat § 11.41.452 (2020).

AS[(AK)] 11.41.455 (Unlawful exploitation of a minor)(a)(1) - (7) include:

(a) A person commits the crime of unlawful exploitation of a minor if, in the state and *with the intent of producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts* (emphasis added) the conduct listed in (1) - (7) of this subsection, the person *knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in* (emphasis added), the following actual or simulated conduct:

(1) sexual penetration;

(2) the lewd touching of another person's genitals, anus, or breast;

(3) the lewd touching by another person of the child's genitals, anus, or breast;

(4) masturbation;

(5) bestiality;

(6) the lewd exhibition of the child's genitals; or

(7) sexual masochism or sadism.

AK Stat § 11.41.455(a)(2020).

Arkansas:

Section 5-27-306. Internet Stalking of a Child

(a) A person commits the offense of internet stalking of a child if the person being twenty-one (21) years of age or older *knowingly uses a computer online service, internet service, local internet bulletin board service, or any means of electronic communication* (emphasis added) to:

(1) *Seduce, solicit, lure, or entice* (emphasis added) a child fifteen (15) years of age or younger in an effort to arrange a meeting with the child for the purpose of engaging in:

(A) Sexual intercourse;

(B) Sexually explicit conduct; or

(C) Deviate sexual activity;

(2) *Seduce, solicit, lure, or entice* (emphasis added) an individual that the person believes to be fifteen (15) years of age or younger in an effort to arrange a meeting with the individual for the purpose of engaging in:
(A) Sexual intercourse;
(B) Sexually explicit conduct; or
(C) Deviate sexual activity;

(3) *Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, email address, residence address, picture, physical description, characteristics, or any other identifying information on a child fifteen (15) years of age or younger in furtherance of an effort to arrange a meeting with the child* (emphasis added) for the purpose of engaging in:
(A) Sexual intercourse;
(B) Sexually explicit conduct; or
(C) Deviate sexual activity;

(4) *Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, email address, residence address, picture, physical description, characteristics, or any other identifying information on an individual that the person believes to be fifteen (15) years of age or younger in furtherance of an effort to arrange a meeting with the individual* (emphasis added) for the purpose of engaging in:
(A) Sexual intercourse;
(B) Sexually explicit conduct; or
(C) Deviate sexual activity; or

(5) *Arrange a meeting with another person who holds himself or herself out as the parent, guardian, family member, or other person of authority over a child fifteen (15) years of age or younger or an individual that the person believes to be fifteen (15) years of age or younger in order to seduce, solicit, lure, or entice the child fifteen (15) years of age or younger or an individual that the person believes to be fifteen (15) years of age or younger for the purpose of engaging in*(emphasis added):
(A) Sexual intercourse;
(B) Sexually explicit conduct; or
(C) Deviate sexual activity.

(b) Internet stalking of a child is a:
(1) Class B felony if the person attempts to arrange a meeting with:
(A) A child fifteen (15) years of age or younger, even if a meeting with the child never takes place;
(B) An individual that the person believes to be fifteen (15) years of age or younger, even if a meeting with the individual never takes place; or
(C) A person who holds himself or herself out as the parent, guardian, family member, or other person of authority over a child fifteen (15) years of age or younger or an individual that the person believes to be fifteen (15) years of age or younger, even if a meeting with the person never takes place; or

(2) Class Y felony if the person arranges a meeting with a child fifteen (15) years of age or younger or an individual that the person believes to be fifteen (15) years of age or younger and an actual meeting with the child or the individual takes place, even if the person fails to engage the child or individual in:
(A) Sexual intercourse;
(B) Sexually explicit conduct; or
(C) Deviate sexual activity.

(c) This section does not apply to a person or entity providing an electronic communications service to the public that is used by another person to violate this section, unless the person or entity providing an electronic communications service to the public:
(1) Conspires with another person to violate this section; or
(2) Knowingly aids and abets a violation of this section.

AR Code § 5-27-306 (2019).

Idaho:[709]

18-1509A. ENTICING A CHILD THROUGH USE OF THE INTERNET OR OTHER COMMUNICATION DEVICE — PENALTIES — JURISDICTION.
(1) A person aged eighteen (18) years or older shall be guilty of a felony if such person *knowingly uses the internet or any device that provides transmission of messages, signals, facsimiles, video images or other communication to solicit, seduce, lure, persuade or entice by words or actions, or both* (emphasis added), a person under the age of sixteen (16) years or a person the defendant believes to be under the age of sixteen (16) years to engage in any sexual act with or against the person where such act would be a violation of chapter 15, 61 or 66, title 18, Idaho Code.

(2) Any person who is convicted of a violation of this section shall be punished by imprisonment in the state prison for a period not to exceed fifteen (15) years.

(3) It shall not constitute a defense against any charge or violation of this section that a law enforcement officer, peace officer, or other person working at the direction of law enforcement was involved in the detection or investigation of a violation of this section.

(4) In a prosecution under this section, it is not necessary for the prosecution to show that an act described in chapter 15, 61 or 66, title 18, Idaho Code, actually occurred.

(5) The offense is committed in the state of Idaho for purposes of determining jurisdiction if the transmission that constitutes the offense either originates in or is received in the state of Idaho.

ID Code § 18-1509A (2020).

Chapter 15 includes criminal provisions related to children and vulnerable adults. Chapter 61 includes those on rape, and Chapter 66 includes those on sex crimes.

[709] *See also*, for offline enticement, ID Code § 18-1509 (2020).

Hawaii:

> §707-756 Electronic enticement of a child in the first degree. (1) Any person who, using a computer or any other electronic device:
>
> (a) *Intentionally or knowingly communicates* (emphasis added):
> (i) With a minor known by the person to be under the age of eighteen years;
> (ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or
> (iii) With another person who represents that person to be under the age of eighteen years;
>
> (b) With the intent to promote or facilitate the commission of a felony:
> (i) That is a murder in the first or second degree;
> (ii) That is a class A felony; or
> (iii) That is another covered offense as defined in section 846E-1,
> agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and
>
> (c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time,
>
> is guilty of electronic enticement of a child in the first degree.
>
> (2) Electronic enticement of a child in the first degree is a class B felony. Notwithstanding any law to the contrary, a person convicted of electronic enticement of a child in the first degree shall be sentenced to an indeterminate term of imprisonment as provided by law.

HI Rev Stat § 707-756 (2020).

> §707-757 Electronic enticement of a child in the second degree. (1) Any person who, using a computer or any other electronic device:
>
> (a) *Intentionally or knowingly communicates* (emphasis added):
> (i) With a minor known by the person to be under the age of eighteen years;
> (ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or
> (iii) With another person who represents that person to be under the age of eighteen years;
>
> (b) With the intent to promote or facilitate the commission of a felony, agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and
>
> (c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time;

is guilty of electronic enticement of a child in the second degree.

(2) Electronic enticement of a child in the second degree is a class C felony. Notwithstanding any law to the contrary, if a person sentenced under this section is sentenced to probation rather than an indeterminate term of imprisonment, the terms and conditions of probation shall include, but not be limited to, a term of imprisonment of one year.

HI Rev Stat § 707-757 (2020).

Hawaii's laws on electronic enticement of a child in the first and second degree are comparable to the laws of other states as the Hawaii's laws penalize the mere act of intentional and knowing communication, rather than an extended list of acts including solicitation, seduction, and enticement.

b. Analysis

Alaska's section 11.41.452 penalizes various acts by someone older than the age of 18 of enticing, soliciting, or encouraging a person under the age of 16 to commit sexual exploitation. On the other hand, Arkansas' Section 5-27-306 specifically penalizes acts committed using online services or electronic communications. It penalizes enumerated acts of someone older than the age of 21 to seduce, solicit, lure, or entice a child of the age of 15 or younger (or someone that the perpetrator believes to be younger than the age of 15) to engage in sexual conduct. It also penalizes various acts committed in furtherance of meeting with the child, including but not limited to acts of transmitting, publishing, buying, selling, receiving, and exchanging information such as the name, telephone number, email address, residence address, picture, and physical description, among others. The section is also noteworthy because it explicitly excludes a person or entity providing an electronic communications service from the object of the penalty unless the person or entity is a conspirator or an aider-and-abettor.

Idaho's section 18-1509A likewise penalizes a person at or over the age of 18 for knowingly using the internet or other devices to solicit, seduce, lure, persuade or entice by words or actions, or both, a person under the age of 16 years or a person the defendant believes to be under the age of 16 years to engage in any sexual act with or against the person where such act would be a violation of Chapter 15, 61, or 66, Title 18 of the Idaho Code, although the violation does not have to actually take place. Article (3) of the section additionally specifies that involvement of a law enforcement officer, peace officer, or others working under law enforcement in the act does not constitute a defense, coupled with the provision that allows prosecution even if the person does not actually have to be under the age of 16 as long as the perpetrator believed him or her to be so. The article and other similar provisions included in many state laws serve to specifically allow prosecution that has been brought on by a law enforcement officer posing as someone at or under 16.

Finally, as a court has held,"[t]he Legislature's intent in enacting the statute was to protect children by addressing the relatively new dangers created by the internet and the use of computers to communicate with minors for the purpose of committing crime."[710] Hawaii's law on electronic enticement of a child allows punishment of a perpetrator who intended to engage in a criminal sexual act and traveled to the meeting place with the intention to do so, if the

[710] At *339, *State v. McKnight*, 128 Haw. 328, 338, 289 P.3d 964, 974 (Ct. App. 2012), as corrected (Feb. 22, 2012), *aff'd in part, vacated in part*, 131 Haw. 379, 319 P.3d 298 (2013).

perpetrator intentionally and knowingly communicated with (1) someone the perpetrator knew to be a minor, (2) someone whom the perpetrator did not necessarily know to be a minor but nonetheless would have known if not for a reckless disregard for the fact and (3) someone who presented to be a minor, such as a law enforcement officer. The statutes prescribe for the age of the victim to be older than the laws of other state laws introduced above. Moreover, unlike those of other states, the laws do not prescribe the age of the perpetrator, potentially allowing a minor to be prosecuted under the statute. However, while allowing punishment of a broader age range both in terms of the victim and the perpetrator, the statutes are narrower in that the perpetrator should have intentionally or knowingly traveled to the agreed-upon meeting place at the agreed-upon meeting time. Additionally, Hawaii's two sections also impose different penalties according to what kind of felonies against children the perpetrator intended to commit. While all the other state laws provided above are felonies, in Arkansas, the class of felony varies according to factors, such as the age of the victim and whether the meeting with the victim has actually taken place.

The broad definition of enticement that includes soliciting, seducing, luring, or enticing is desirable to cover different types of perpetrators who approach children on the internet or the SNS. A study has found that for internet-based sex crimes against children, there are largely two groups of chat room sex crime perpetrators: those who are "contact-driven," motivated to meet and engage in sexual behavior and those who are "fantasy-driven," motivated to engage in cybersex.[711] It is germane to make this distinction because the perpetrators may engage in different types of criminal behavior depending on which groups they fall into. Contact-driven offenders, mostly younger and unmarried compared to fantasy-driven offenders, do not actively seek to engage adolescents in online sexual behaviors while chatting with them and instead engage in more online grooming for the purpose of meeting them.[712] For example, while 66.7% of fantasy-driven offenders engaged in exhibitionism on web cameras, only 6.7% of contact-driven perpetrators did so.[713] On the other hand, only 14.3% of fantasy-driven perpetrators attempted to meet adolescents they met online or scheduled a face-to-face meeting, while 80% of contact-driven perpetrators attempted to meet and 93.3% scheduled face-to-face meetings.[714] While the study needs further validation as it is based on only 51 perpetrators, the unmistakable distinction well demonstrates even within the small sample expounds that they need to be considered a separate perpetrator group with differing criminal intentions. The implication of the distinction is similarly worthy of attention for the state laws penalizing online enticement, such as the above example laws of Hawaii that would not serve to effectively penalize many fantasy-driven perpetrators who rarely attempt to meet children. Moreover, there can be different arguments as to whether it would be effective, or even feasible, to subject fantasy-driven perpetrators to criminal sanctions, especially when they fall short of committing any kind of directly harmful acts of sexual violence, such as requesting images of a sexual nature from children. Evaluation of the state laws would also need to be made on whether the laws sufficiently target both types of offenders and, if the laws do not intend to do so, which type of offenders the laws purport to penalize.

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[711] Peter Briggs, Walter Simon & Stacy Simonsen, *supra* note at 649.
[712] *Id*.
[713] *Id*. at Table 5.
[714] *Id*.

B. Creation and distribution of private sexual images

This section reviews state penal laws on the creation and distribution of private sexual images, including those targeting child victims. Similar U.S. laws are also examined in comparison with the aforementioned problem of self-produced private sexual images in Japan. Many states' criminal laws penalize the distribution of private images of a sexual nature, regardless of a victim's age. Most states make such a crime a misdemeanor,[715] but some states treat it more seriously as a felony. This section introduces some of these laws.

a. Installing or using a device to observe, broadcast or record

First, state laws that penalize acts of installing or using a device to capture or secretly watch private acts or states are introduced. Some states have penalized acts of installing or using a device to observe, broadcast, record, *inter alia*, as a violation of privacy.

First, Kansas penalizes such acts as a violation of the reasonable expectation of privacy, including those under a non-sexual context. The statute is as follows:

> 21-6101. Breach of privacy.
> (a) Breach of privacy is knowingly and without lawful authority:
> …
>
> (4) *installing or using outside or inside a private place any device for hearing, recording, amplifying or broadcasting sounds originating in such place, which sounds would not ordinarily be audible or comprehensible without the use of such device, without the consent of the person or persons entitled to privacy therein* (emphasis added);
>
> (5) installing or using any device or equipment for the interception of any telephone, telegraph or other wire or wireless communication without the consent of the person in possession or control of the facilities for such communication;
>
> (6) *installing or using a concealed camcorder, motion picture camera or photographic camera of any type to secretly videotape, film, photograph or record, by electronic or other means* (emphasis added);, another identifiable person under or through the clothing being worn by that other person or *another identifiable person who is nude or in a state of undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to invade the privacy of that other person, under circumstances in which that other person has a reasonable expectation of privacy* (emphasis added);
>
> (7) *disseminating or permitting the dissemination of any videotape, photograph, film or image obtained in violation of subsection* (emphasis added)(a)(6); or
>
> (8) *disseminating any videotape, photograph, film or image of another identifiable person 18 years of age or older who is nude or engaged in sexual activity and under circumstances in which such identifiable person had a reasonable expectation of privacy* (emphasis added), with the intent to *harass, threaten or intimidate* (emphasis added);

[715] e.g., AK Stat. §11.61.120 (2020); CA Pen. Code §647(j)(4) (2019); Fl. St. §784.049 (2021). 17-A ME Rev. Stat. §511-A (2020); MI Comp. L §750.145e & f (2020); NY Pen. L. §245.15 (2020)*, inter alia*.

such identifiable person, and such identifiable person did not consent to such dissemination.

…(omitted)…

Kan. Stat. § 21-6101(a)(8)(2020).

It is notable that as the law is on privacy, the acts of capturing sexual acts or nudity in violation of expectation of privacy is categorized under Article 61, which includes crimes involving violations of personal rights, rather than sex offense.[716] Paragraphs (7) and (8) are discussed in the following part on dissemination and distribution.

Hawaii's Violation of Privacy in the First Degree states:

§711-1110.9 Violation of privacy in the first degree.

(1) A person commits the offense of violation of privacy in the first degree if, except in the execution of a public duty or as authorized by law, the person *intentionally or knowingly installs or uses, or both, in any private place, without consent of the person or persons entitled to privacy therein, any device for observing, recording, amplifying, or broadcasting another person in a stage of undress or sexual activity* (emphasis added) in that place.

(2) Violation of privacy in the first degree is a class C felony. In addition to any penalties the court may impose, the court may order the destruction of any recording made in violation of this section. [L 1999, c 278, §1; am L 2003, c 48, §3; am L 2004, c 83, §2]

HI Rev. Stat. §711-1110.9 (2013).

The law in Hawaii similarly penalizes the act of *installing or using* a device for observing, recording, amplifying, or broadcasting another person in a state of undress or sexual activity in that place, rather than the act of filming and photographing the person, enabling penalization even when the perpetrator was not successful in capturing the acts with the device.

In New York:

§ 250.45 Unlawful surveillance in the second degree.

A person is guilty of unlawful surveillance in the second degree when:

1. For his or her own, or another person's *amusement, entertainment, or profit, or for the purpose of degrading or abusing a person* (emphasis added), he or she intentionally uses or installs, or *permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record* (emphasis added) a person *dressing or undressing or the sexual or other intimate parts of such person* (emphasis added) at a place and time when such person *has a reasonable expectation of privacy, without such person's knowledge or consent* (emphasis added); or

2. For his or her own, or another person's *sexual arousal or sexual gratification* (emphasis added), he or she intentionally *uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record a person*

[716] Since Kansas only requires sex offender registration for those who have committed sexually violent crimes (KS Stat. §22-4902 (2020)), there is no additional problem arising from categorizing the acts as those violating rights of privacy instead of sex crimes.

dressing or undressing or the sexual or other intimate parts (emphasis added) of such person at a place and time when such person has a reasonable expectation of privacy, without such person's knowledge or consent; or

3. (a) For *no legitimate purpose* (emphasis added), he or she *intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record a person in a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a motel, hotel or inn* (emphasis added), without such person's knowledge or consent.
(b) For the purposes of this subdivision, when a person uses or installs, or permits the utilization or installation of an imaging device in *a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a hotel, motel or inn, there is a rebuttable presumption that such person did so for no legitimate purpose* (emphasis added); or

4. Without the knowledge or consent of a person, he or she *intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record, under the clothing being worn by such person, the sexual or other intimate parts of such person* (emphasis added); or

5. For his or her own, or another individual's *amusement, entertainment, profit, sexual arousal or gratification* (emphasis added), or *for the purpose of degrading or abusing a person, the* actor *intentionally uses or installs or permits the utilization or installation of an imaging device to surreptitiously view, broadcast, or record* (emphasis added)such person in an identifiable manner:
(a) engaging in sexual conduct, as defined in subdivision ten of section 130.00 of this part;
(b) in the same image with the sexual or intimate part of any other person; and
(c) at a place and time when such person has a reasonable expectation of privacy, without such person's knowledge or consent.
Unlawful surveillance in the second degree is a class E felony.
NY Pen. L. §250.45 (2020).

§ 250.50 Unlawful surveillance in the first degree.
A person is guilty of unlawful surveillance in the first degree when he or she commits the crime of unlawful surveillance in the second degree and *has been previously convicted within the past ten years of unlawful surveillance in the first or second degree* (emphasis added).

Unlawful surveillance in the first degree is a class D felony.
NY Pen. L. §250.50 (2020).

The laws of New York may be differentiated from those of Hawaii in that a perpetrator's purpose is an element of the crime. Different articles under §250.45 prescribe for various purposes of the perpetrator depending on different locations and circumstances, ranging from those for amusement, entertainment, or profit, and for sexual arousal or sexual gratification of

the perpetrator or others. Article 3, on the other hand, states that no legitimate purpose is required for acts of intentionally using, installing, or permitting the utilization or installation of an imaging device to surreptitiously view, broadcast, or record a person for designated places where privacy would be generally expected, with rebuttable presumption for no legitimate purposes. Additionally, when the act is committed with the stated purposes, the act of permitting utilization or installation of an imaging device is punishable. When a perpetrator is in violation of §250.45 again after being convicted of the same offense within the past 10 years, he or she can be punishable under §250.50.

b. Dissemination of private images

Many states penalize the act of distribution of images obtained by means of surreptitious taking of pictures and videos. New York's subsequent two provisions are as follows:

> § 250.55 Dissemination of an unlawful surveillance image in the second degree.
>
> A person is guilty of dissemination of an unlawful surveillance image in the second degree when he or she, *with knowledge of the unlawful conduct by which an image or images of the sexual or other intimate parts of another person or persons were obtained and such unlawful conduct* (emphasis added) would satisfy the essential elements of the crime of unlawful surveillance in the first or second degree, as defined, respectively, in section 250.50 or 250.45 of this article, *intentionally disseminates* (emphasis added) such image or images.
>
> Dissemination of an unlawful surveillance image in the second degree is a class A misdemeanor.

NY Pen. L. §250.55 (2020).

> §250.60 Dissemination of an unlawful surveillance image in the first degree.
>
> A person is guilty of dissemination of an unlawful surveillance image in the first degree when:
>
> 1. He or she, with knowledge of the unlawful conduct by which an image or images of the sexual or other intimate parts of another person or persons were obtained and such unlawful conduct would satisfy the essential elements of the crime of unlawful surveillance in the first or second degree, as defined, respectively, in section 250.50 or 250.45 of this article, *sells or publishes such image or images* (emphasis added); or
>
> 2. *Having created a surveillance image in violation of section 250.45 or 250.50 of this article, or in violation of the law in any other jurisdiction which includes all of the essential elements of either such crime, or having acted as an accomplice to such crime* (emphasis added), or acting as an agent to the person who committed such crime, he or she *intentionally disseminates* (emphasis added) such unlawfully created image; or
>
> 3. He or she commits the crime of dissemination of an unlawful surveillance image in the second degree and *has been previously convicted within the past ten years of*

dissemination of an unlawful surveillance image in the first or second degree (emphasis added).

Dissemination of an unlawful surveillance image in the first degree is a class E felony. NY Penal L §250.60 (2020).

§250.55, a misdemeanor, penalizes intentional dissemination of image or images with knowledge of the unlawful conduct that can satisfy section §250.50 or §250.45, by which the images were obtained, while §250.60, a felony, penalizes publication and selling of image or images with knowledge of the unlawful conduct that can satisfy section §250.50 or §250.45, by which the images were obtained. Moreover, a person can also be punishable under §250.60 if the person intentionally disseminates images that the person has created in violation of §250.45 or §250.50 or in violation of the law in any other jurisdiction with all of the essential elements of §250.45 or §250.50 or having acted as an accomplice or an agent to the commission of such crime. Finally, if a person in violation of § 250.55 has been previously convicted of the same offense within the past 10 years, the person can be charged with § 250.55.On the other hand, while section 7 of the aforementioned Kansas law § 21-6101(a)(8)[717] requires the images to be obtained from illegal acts to punish its dissemination, Section 8 requires the prosecution to prove specific purpose to harass, threaten or intimidate. Accordingly, laws of both states require a showing of specific knowledge or purpose of a perpetrator to convict the person for dissemination.

c. Distribution of private and intimate images without consent

Other state laws penalize non-consensual disclosure of intimate images, usually regardless of whether or not taking the image or images has occurred with the consent of the victim. The District of Columbia and forty-eight states have laws that penalize distribution of private and intimate images or acts, under various labels, some as sex offenses as in the case of Louisiana, others as violation of privacy or public morals. Moreover, the scope of such laws greatly varies. For example, classified as sexual offense, Arizona's Section 13-1425 states is as follows:

> 13-1425. Unlawful disclosure of images depicting states of nudity or specific sexual activities; classification; definitions
> A. It is unlawful for a person *to intentionally disclose an image of another person* (emphasis added) who is identifiable from the image itself or from information displayed in connection with the image if all of the following apply:
> 1. The person in the image is depicted in *a state of nudity or is engaged in specific sexual activities* (emphasis added).

[717] §21-6101 (Breach of Privacy) (reintroduced here for convenience):

> (7) *disseminating or permitting the dissemination of any videotape, photograph, film or image obtained in violation of subsection* (emphasis added)(a)(6); or (8) disseminating any videotape, photograph, film or image of *another identifiable person 18 years of age or older who is nude or engaged in sexual activity and under circumstances in which such identifiable person had a reasonable expectation of privacy* (emphasis added), *with the intent to harass, threaten or intimidate* (emphasis added); such identifiable person, and such identifiable person did not consent to such dissemination.

KS Stat § 21-6101 (2020).

2. The depicted person has a *reasonable expectation of privacy* (emphasis added). *Evidence that a person has sent an image to another person using an electronic device does not, on its own, remove the person's reasonable expectation of privacy for that image* (emphasis added).
3. The image is disclosed with *the intent to harm, harass, intimidate, threaten or coerce the depicted person* (emphasis added).

B. This section does not apply to any of the following:
1. The reporting of unlawful conduct.
2. Lawful and common practices of law enforcement, criminal reporting, legal proceedings or medical treatment.
3. Images involving voluntary exposure in a public or commercial setting.
4. An interactive computer service, as defined in 47 United States Code section 230(f)(2), or an information service, as defined in 47 United States Code section 153, with regard to content wholly provided by another party.
5. *Any disclosure that is made with the consent of the person who is depicted in the image* (emphasis added).

C. A violation of this section is a class 5 felony, except that a violation of this section is a:
1. Class 4 felony if the image is disclosed by electronic means.
2. Class 1 misdemeanor if a person threatens to disclose but does not disclose an image that if disclosed would be a violation of this section.

D. For the purposes of this section:
1. " Disclose" means display, distribute, publish, advertise or offer.
2. " Disclosed by electronic means" means delivery to an e-mail address, mobile device, tablet or other electronic device and includes disclosure on a website.
3. " Harm" means physical injury, financial injury or serious emotional distress.
4. " Image" means a photograph, videotape, film or digital recording.
5. " Reasonable expectation of privacy" means the person exhibits an actual expectation of privacy and the expectation is reasonable.
…

AZ Rev. Stat. § 13-1425 (2020).

While §13-1425 clearly states that the fact a victim has sent a private or intimate image to another person using an electronic device does not, on its own, remove the person's reasonable expectation of privacy for that image, the law is somewhat narrow in its scope of penalization as it requires that the purpose of disclosure to be intent to harm, harass, intimidate, threaten or coerce the depicted person. While such purpose may be broadly defined, it nonetheless limits the cases that can be prosecuted under the statute. Additionally, in Louisiana, non-consensual disclosure of an intimate image is a felony, and the statute is as follows:

§283.2. Nonconsensual disclosure of a private image

A. A person commits the offense of nonconsensual disclosure of a private image when all of the following occur:
(1) The person *intentionally discloses an image of another person who is seventeen years of age or older, who is identifiable from the image or information displayed in connection with the image, and whose intimate parts are exposed in whole or in part* (emphasis added).
(2) The person who discloses the image obtained it under circumstances in which *a reasonable person would know or understand that the image was to remain private* (emphasis added).
(3) The person who discloses the image knew or should have known that the person in the image *did not consent* (emphasis added) to the disclosure of the image.
(4) The person who discloses the image has *the intent to harass or cause emotional distress to the person in the image, and the person who commits the offense knew or should have known that the disclosure could harass or cause emotional distress to the person in the image* (emphasis added).

B. Disclosure of an image under any of the following circumstances does not constitute commission of the offense defined in Subsection A of this Section:
(1) When the disclosure is made by any criminal justice agency for the purpose of a criminal investigation that is otherwise lawful.
(2) When the disclosure is made for the purpose of, or in connection with, the reporting of unlawful conduct to law enforcement or a criminal justice agency.
(3) When the person depicted in the image voluntarily or knowingly exposed his or her intimate parts in a public setting.
(4) When the image is related to a matter of public interest, public concern, or related to a public figure who is intimately involved in the resolution of important public questions, or by reason of his fame shapes events in areas of concern to society.

C. For purposes of this Section:
(1) "Criminal justice agency" means any government agency or subunit thereof, or private agency that, through statutory authorization or a legal formal agreement with a governmental unit or agency, has the power of investigation, arrest, detention, prosecution, adjudication, treatment, supervision, rehabilitation, or release of persons suspected, charged, or convicted of a crime; or that collects, stores, processes, transmits, or disseminates criminal history records or crime information.
(2) "Disclosure" means to, electronically or otherwise, transfer, give, provide, distribute, mail, deliver, circulate, publish on the internet, or disseminate by any means.
(3) "Image" means any photograph, film, videotape, digital recording, or other depiction or portrayal of an object, including a human body.
(4) "Intimate parts" means the fully unclothed, partially unclothed, or transparently clothed genitals, pubic area, or anus. If the person depicted in the image is a female, "intimate parts" also means a partially or fully exposed nipple, including exposure through transparent clothing.

D. Nothing in this Section shall be construed to impose liability on the provider of an interactive computer service as defined by 47 U.S.C. 230(f)(2), an information service as

defined by 47 U.S.C. 153(24), or a telecommunications service as defined by 47 U.S.C. 153(53), for content provided by another person.

E. Whoever commits the offense of nonconsensual disclosure of a private image shall be fined not more than ten thousand dollars, imprisoned with or without hard labor for not more than two years, or both.

LA Rev Stat § 14:283.2 (2018).

Louisiana's § 14:283.2 is classified as an offense affecting public morals. To convict a person under this statute, it is necessary for the prosecution to prove that the perpetrator has acted with the intent to harass or cause emotional distress to the person in the image, and the person who commits the offense knew or should have known that the disclosure could harass or cause emotional distress to the person in the image.

C. Sexual exploitation of minors

The federal and state governments of the United States treat sexual exploitation of children as a serious issue. All jurisdictions have laws on child pornography. For this section, federal law is first introduced as it is one area of a sex offense, a matter traditionally considered a state interest, where federal criminal law exercises active governance, preempting state laws where it has jurisdiction.

18 U.S. Code § 2252 - Certain activities relating to material involving the sexual exploitation of minors
(a)Any person who—
(1) knowingly *transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails* (emphasis added)[718], any visual depiction, if—
(A)the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
(B)such visual depiction is of such conduct;

(2) *knowingly receives, or distributes, any visual depiction* (emphasis added) using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, *by any means including by computer, or knowingly reproduces any visual depiction for distribution* (emphasis added) using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—
(A) the *producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct* (emphasis added); and
(B)*such visual depiction is of such conduct* (emphasis added);

(3) either—

[718] This element enables the federal government to exercise jurisdiction over the certain matters of sex crimes (which usually falls under state jurisdiction) under The Commerce Clause under Article 1, Section 8, Clause 3 of the U.S. Constitution.

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or
(B) *knowingly sells or possesses with intent to sell any visual depiction* (emphasis added) that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—
(i)the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
(ii)such visual depiction is of such conduct; or

(4) either—
(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, *knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction* (emphasis added); or
(B) *knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction* (emphasis added) that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, *by any means including by computer* (emphasis added), if—
(i) the producing of *such visual depiction involves the use of a minor engaging in sexually explicit conduct* (emphasis added); and
(ii) such visual depiction is of such conduct;
shall be punished as provided in subsection (b) of this section.

…

(c) Affirmative Defense.—It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant—
(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—
(A) took reasonable steps to destroy each such visual depiction; or
(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.
18 U.S.C.§ 2252.

18 U.S. Code § 2252A - Certain activities relating to material constituting or containing child pornography
(a) Any person who—
(1) *knowingly mails, or transports or ships* (emphasis added) using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, *including by computer, any child pornography* (emphasis added);

(2) *knowingly receives or distributes* (emphasis added) —
(A) *any child pornography* (emphasis added) using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or
(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(3) knowingly—
(A) *reproduces any child pornography for distribution* (emphasis added) through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or
(B) *advertises, promotes, presents, distributes, or solicits* (emphasis added) through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—
(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—
(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), *knowingly sells or possesses with the intent to sell any child pornography* (emphasis added); or
(B) *knowingly sells or possesses with the intent to sell any child pornography* (emphasis added) that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

…

(b)
(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title *and imprisoned not less than 5 years and not more than 20 years* (emphasis added), but, if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under

section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

…

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—

(1)

(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) *each such person was an adult* (emphasis added) at the time the material was produced; or

(2) the alleged child pornography was *not produced using any actual minor or minors* (emphasis added).No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

…

(f) Civil Remedies.—

(1) In general.—

Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

(2) Relief.—In any action commenced in accordance with paragraph (1), *the court may award appropriate relief* (emphasis added), including—

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

…

18 U.S.C.§ 2252A

Where the federal laws acting as broader-jurisdiction provisions that preempt state laws, for other matters related to child pornography that occur under a state jurisdiction, each state governs the matters according to its own law. For example, in Indiana:

IC 35-42-4-4 Child exploitation; possession of child pornography; exemptions; defenses
Sec. 4. (a) The following definitions apply throughout this section:
(1) "Disseminate" means to transfer possession for free or for a consideration.
(2) "Matter" has the same meaning as in IC 35-49-1-3.
(3) "Performance" has the same meaning as in IC 35-49-1-7.
(4) "Sexual conduct" means:
(A) sexual intercourse;
(B) other sexual conduct (as defined in IC 35-31.5-2-221.5);
(C) exhibition of the:
(i) uncovered genitals; or
(ii) female breast with less than a fully opaque covering of any part of the nipple;
intended to satisfy or arouse the sexual desires of any person;
(D) sadomasochistic abuse;
(E) sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) with an animal; or
(F) any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or the other person.

(b) A person who:
(1) *knowingly or intentionally manages, produces, sponsors, presents, exhibits, photographs, films, videotapes, or creates a digitized image of any performance or incident that includes sexual conduct by a child under eighteen (18) years of age* (emphasis added);
(2) *knowingly or intentionally disseminates, exhibits to another person, offers to disseminate or exhibit to another person, or sends or brings into Indiana* (emphasis added) for dissemination or exhibition matter that depicts or describes sexual conduct by a child under eighteen (18) years of age;
(3) *knowingly or intentionally makes available to another person a computer, knowing that the computer's fixed drive or peripheral device contains matter that depicts or describes sexual conduct by a child less than eighteen (18) years of age* (emphasis added); or
(4) with the intent to satisfy or arouse the sexual desires of any person:
(A) knowingly or intentionally:
(i) manages;
(ii) produces;
(iii) sponsors;
(iv) presents;
(v) exhibits;
(vi) photographs;
(vii) films;
(viii) videotapes; or
(ix) creates a digitized image of;
any performance or incident that includes the uncovered genitals of a child less than eighteen (18) years of age or the exhibition of the female breast with less than a fully opaque covering of any part of the nipple by a child less than eighteen (18) years of age;

(B) knowingly or intentionally:
(i) disseminates to another person;
(ii) exhibits to another person;
(iii) offers to disseminate or exhibit to another person; or
(iv) sends or brings into Indiana for dissemination or exhibition;
matter that depicts the uncovered genitals of a child less than eighteen (18) years of age or the exhibition of the female breast with less than a fully opaque covering of any part of the nipple by a child less than eighteen (18) years of age; or
(C) makes available to another person a computer, knowing that the computer's fixed drive or peripheral device contains matter that depicts the uncovered genitals of a child less than eighteen (18) years of age or the exhibition of the female breast with less than a fully opaque covering of any part of the nipple by a child less than eighteen (18) years of age;
commits child exploitation, a Level 5 felony[719].

(c) However, the offense of child exploitation described in subsection (b) is a Level 4 felony[720] if:
(1) the sexual conduct, matter, performance, or incident depicts or describes a child less than eighteen (18) years of age who:
(A) engages in bestiality (as described in IC 35-46-3-14);
(B) is *mentally disabled or deficient* (emphasis added);
(C) *participates in the sexual conduct, matter, performance, or incident by use of force or the threat of force* (emphasis added);
(D) physically or verbally resists participating in the sexual conduct, matter, performance, or incident;
(E) receives a bodily injury while participating in the sexual conduct, matter, performance, or incident; or
(F) is less than twelve (12) years of age; or
(2) the child less than eighteen (18) years of age:
(A) engages in bestiality (as described in IC 35-46-3-14);
(B) is mentally disabled or deficient;
(C) participates in the sexual conduct, matter, performance, or incident by use of force or the threat of force;
(D) physically or verbally resists participating in the sexual conduct, matter, performance, or incident;
(E) receives a bodily injury while participating in the sexual conduct, matter, performance, or incident; or

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[719] §35-50-2-6(b) 5 (Level 5 felony):
Sec. 6. (b) A person who commits a Level 5 felony (for a crime committed after June 30, 2014) shall be imprisoned for a fixed term of between one (1) and six (6) years, with the advisory sentence being three (3) years. In addition, the person may be fined not more than ten thousand dollars ($10,000).
IN Code§35-50-2-6(b) (2020).

[720] §35-50-2-5.5 (Level 4 felony):
Sec. 5.5. A person who commits a Level 4 felony shall be imprisoned for a fixed term of between two (2) and twelve (12) years, with the advisory sentence being six (6) years. In addition, the person may be fined not more than ten thousand dollars ($10,000).
IN Code §35-50-2-5.5 (2019).

(F) is less than twelve (12) years of age.

(d) A person who knowingly or intentionally possesses or accesses with intent to view:
(1) a picture;
(2) a drawing;
(3) a photograph;
(4) a negative image;
(5) undeveloped film;
(6) a motion picture;
(7) a videotape;
(8) a digitized image; or
(9) any pictorial representation;
that depicts or describes sexual conduct by a child who the person knows is less than eighteen (18) years of age or who appears to be less than eighteen (18) years of age, and that lacks serious literary, artistic, political, or scientific value commits possession of child pornography, a Level 6 felony[721].

(e) However, the offense of possession of child pornography described in subsection (d) is a Level 5 felony[722] if:
(1) the item described in subsection (d)(1) through (d)(9) depicts or describes sexual conduct by a child who the person knows is less than eighteen (18) years of age, or who appears to be less than eighteen (18) years of age, who:
(A) engages in bestiality (as described in IC 35-46-3-14);
(B) is mentally disabled or deficient;
(C) participates in the sexual conduct, matter, performance, or incident by use of force or the threat of force;
(D) physically or verbally resists participating in the sexual conduct, matter, performance, or incident;
(E) receives a bodily injury while participating in the sexual conduct, matter, performance, or incident; or
(F) is less than twelve (12) years of age; or
(2) the child whose sexual conduct is depicted or described in an item described in subsection (d)(1) through (d)(9):
(A) engages in bestiality (as described in IC 35-46-3-14);
(B) is mentally disabled or deficient;
(C) participates in the sexual conduct, matter, performance, or incident by use of force or the threat of force;
(D) physically or verbally resists participating in the sexual conduct, matter, performance, or incident;

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[721] §35-50-2-7(b)(Level 6 felony):
> Sec. 7. (b) A person who commits a Level 6 felony (for a crime committed after June 30, 2014) shall be imprisoned for a fixed term of between six (6) months and two and one-half (2 1/2) years, with the advisory sentence being one (1) year. In addition, the person may be fined not more than ten thousand dollars ($10,000).

IN Code § 35-50-2-7(b) (2020).
[722] IN Code §35-50-2-6(b), *supra* note 719.

(E) receives a bodily injury while participating in the sexual conduct, matter, performance, or incident; or
(F) is less than twelve (12) years of age.

(f) Subsections (b), (c), (d), and (e) do not apply to a bona fide school, museum, or public library that qualifies for certain property tax exemptions under IC 6-1.1-10, or to an employee of such a school, museum, or public library acting within the scope of the employee's employment when the possession of the listed materials is for legitimate scientific or educational purposes.

(g) It is a defense to a prosecution under this section that:
(1) the person is a school employee; and
(2) the acts constituting the elements of the offense were performed solely within the scope of the person's employment as a school employee.

(h) Except as provided in subsection (i), it is a *defense to a prosecution* (emphasis added) under subsection (b), (c), (d), or (e) if all of the following apply:
(1) *A cellular telephone, another wireless or cellular communications device, or a social networking web site* (emphasis added) was used to possess, produce, or disseminate the image.
(2) *The defendant is not more than four (4) years older or younger than the person who is depicted in the image or who received the image* (emphasis added).
(3) The relationship between the defendant and the person who received the image or who is depicted in the image was a *dating relationship or an ongoing personal relationship* (emphasis added). For purposes of this subdivision, the term "ongoing personal relationship" does not include a family relationship.
(4) The crime was committed by a person *less than twenty-two (22) years of age* (emphasis added).
(5) The person receiving the image or who is depicted in the image *acquiesced in the defendant's conduct* (emphasis added).
(i) The defense to a prosecution described in subsection (h) *does not apply* (emphasis added) if:
(1) the person who receives the image *disseminates it to a person other than the person* (emphasis added):
(A) who sent the image; or
(B) who is depicted in the image;
(2) the image is of a person *other than the person who sent the image or received the image*(emphasis added); or
…(omitted)…

(j) It is a defense to a prosecution under this section that:
(1) the person was less than eighteen (18) years of age at the time the alleged offense was committed; and
(2) the circumstances described in IC 35-45-4-6(a)(2) through IC 35-45-4-6(a)(4) apply.

> (k) A person is entitled to present the defense described in subsection (j) in a pretrial hearing. If a person proves by a preponderance of the evidence in a pretrial hearing that the defense described in subsection (j) applies, the court shall dismiss the charges under this section with prejudice.

IN Code § 35-42-4-4 (2019).

The law penalizes various acts related to the production, distribution, and possession of material sexually depicting a child. However, the degree of felony, with differing severity of the penalty imposed to each act is different, depending on, *inter alia*, the act, characteristics of the victim, and the nature of the act depicted in the materials. The law also provides a defense for when the defendant and the victim are in an intimate relationship to consider circumstances that a child voluntarily exchanges such images with an intimate partner not four years older than the victim and is under the age of 22. This defense, however, can be successful only when the defendant can meet every condition under the law, including that the person receiving the image or who is depicted in the image acquiesced in the defendant's conduct and that the defendant did not distribute the image or images.

Finally, states take various approaches to address minors' self-produced child pornography. For example, in Florida, a court upheld the conviction of a minor for child pornography for sharing the videotape of himself and a female minor with a third person.[723] The court held that:

> Assuming that a minor's privacy interests are implicated in the instant case, we recognize that the state's compelling interest in section 827.071 is different. The statute is not limited to protecting children only from sexual exploitation by adults, nor is it intended to protect minors from engaging in sexual intercourse. The state's purpose in this statute is to protect minors from exploitation by anyone who induces them to appear in a sexual performance and shows that performance to other people.

At 1387, *State v. A.R.S.*, 684 So.2d 1383 (Fla. 1st DCA 1996).

On the other hand, in *A.H. v. Florida*, a Florida court upheld a conviction for a 16-year-old juvenile for child pornography for emailing digital pictures of herself and her 17-year-old boyfriend engaging in sexual behavior to another computer at her home. The court, upholding the conviction, agreed with the lower court that held the state has a compelling interest in seeing that such materials are never produced.[724] The court, while citing the compelling state interest in *State v. A.R.S.* of protecting children from sexual exploitation, seems to deviate from its decision in *State v.* A.*R.S* to a certain degree, by holding that, given the compelling state interest found by the legislature in seeing that videotape or picture depicting sexual conduct by a child is never produced,[725] neither the facts of the case, including her age, nor the privacy provision of the state constitution protect the behavior of the appellant.[726] Many states handle sexting among minors through the state's child pornography laws but only by prosecuting if necessary through exercising prosecutorial discretion, while other states such as Arizona, Connecticut, Louisiana, and Utah make sexting a misdemeanor so that convicted juveniles do not have to register as sex

[723] *State v. A.R.S.*, 684 So.2d 1383 (Fla. 1st DCA 1996).
[724] At *238, *A.H. v. Florida*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).
[725] *Id*. at *238.
[726] *Id*. at *235.

offenders.[727] In particular, Arizona prescribes that juveniles do not violate the law if they did not solicit texts containing sexual images and if they took reasonable steps to destroy them. [728]

With increased instances of sexting, sending, and receiving images of a sexual nature portraying themselves on the internet or SNS, whether to penalize self-produced child pornography has become a challenge facing many countries. It has certainly increased in the United States, where 95% of all children between 12 to 17 reported engaging in online activities in 2011,[729] and 76% of children between 15 to 17 reported owning a smartphone in 2015. [730] In the United States, a study that examined 675 sexting cases between 2008 and 2009 from the stratified national sample of 2,712 law enforcement agencies found that US law enforcement agencies handled an estimated 3,477 cases of youth-produced sexual images during 2008 and 2009.[731] Two-thirds of these cases were aggravated cases with an adult involved (36%) or with malicious, non-consensual, or abusive behavior involving a minor (31%).[732] In a few of the aggravated cases, sex offender registration was required.[733] Finally, research conducted at Pew Research Center has reported that while only 2% of 12 to 17-year-old teen respondents reported sending sexually suggestive images, one in six reported receiving them.[734]

One of the factors that makes the question of whether children who produce and distribute such images need to be prosecuted especially difficult is that the children who have produced pornography voluntarily take on the roles of both the victim and perpetrator of sexual exploitation.[735] Furthermore, prosecution of the children alone does not address the problems arising from the additional roles that third parties may play, such as coercion and grooming, which lead a child to produce sexually explicit material portraying him or herself.[736] On the other hand, providing a blanket immunity to all minors for engagement in child pornography is also undesirable, as there are young people who engage in extortion of other minors and distribution of child pornography material without third-party coercion or even with intent to harass.[737]

Some experts advocate for laws that provide a graduated punishment structure, with many researchers proposing that incarceration is not an effective way to address the problem. [738] Researchers and practitioners also agree that sex offender registration is not required for juvenile offenders.[739] On the other hand, while acknowledging the importance of addressing coercion in children's involvement in child pornography, one study has warned against routine immunity

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[727] At *712, Todd A. Fichtenberg, Sexting Juveniles: Neither Felons Nor Innocents, 6 I/S: J.L. & Pol'y for Info. Soc'y 695, 712 (2011).
[728] *Id*.
[729] Amanda Lenhart, Mary Madden, Aaron Smith, Kristen Purcell & Kathryn Zickuhr, Teens, Kindness and Cruelty on Social Network Sites. Pew Research Center Report, Pew Research Center (2011).
[730] Bryce Westlake, Delineating Victims from Perpetrators: Prosecuting Self-Produced Child Pornography in Youth Criminal Justice Systems, 12 Int. J. Cyber Crim. 12 (2018), *citing* Amanda Lenhart, A majority of American Teens Report Access to a Computer, Game Console, Smartphone and a Tablet, Pew Research Center (2018).
[731] Janis Wolak, David Finkelhor & Kimberly Mitchell, How Often Are Teens Arrested for Sexting? Data from a National Sample of Police Cases, 129 Pediatrics 1, 4, 12 (2018).
[732] *Id*.
[733] *Id*.
[734] Eva Lievens, Bullying and Sexting in Social Networks: Protecting Minors from Criminal Acts or Empowering Minors to Cope with Risky Behaviour? 42 Int. J. L. Crim. J. 251, 270 (2014), citing Lenhart et al. at *supra* note 729.
[735] Bryce Westlake, Delineating Victims from Perpetrators: Prosecuting Self-Produced Child Pornography in Youth Criminal Justice Systems, 12 Int. J. Cyber Crim. 12 (2018).
[736] *Id*.
[737] *Id*.
[738] *Id*. at 260-61.
[739] *Id*. at 260-61.

deals as it can encourage the youth to engage in the acts without fear of punishment.[740] While an effective method of regulating sexting among teens is still under discussion, the statistics indicate that children *can* be penalized for engaging in self-produced pornography, including sexting, in the United States, although the imposed penalty may be lighter compared to the penalties imposed on adult counterparts.

D. Deepfakes

Some federal and state laws on online sex crimes, including the above-mentioned laws such as 18 U.S. Code §2252A and HI Rev Stat §707-750(4), include computer-generated materials, allowing punishment where the same crime has been committed using synthetic images. The definition of child pornography as "any pornographic visual representation, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexual conduct" under HI Rev Stat §707-750(4) enables penalization of acts, *inter alia*, of producing or participating in the preparation of deepfake or other synthetic materials of a child engaging in sexual conduct. Likewise, under 18 U.S. Code §2252A, acts of knowing distribution, among other acts, of materials created by computer or other electronic, mechanical, and other means are punishable:

> (6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct…

18 U.S. Code §2252A(a)(6).

By inclusion of terms such as "computer-generated images" to their statutes, such laws enable penalization of deepfake images in the same manner as those of traditional sexually explicit materials when a child victim is involved.

Nonetheless, states have only recently introduced laws directly targeting deepfakes and other technology-facilitated sex crimes, especially against adult victims, as laws on child pornography often already cover many technology-facilitated sex crimes against children. California was the first to enact laws to regulate deepfakes, but its newly enacted law was a civil provision on the private right of action.[741] Other states made the creation of deepfakes a criminal offense but only in the context of interfering with an election, as is the case in Texas.[742]

Nevertheless, U.S. states are moving to reflect the harm from digital sex crimes as they become more aware of them. States such as Virginia amended their existing law on the illegal distribution of sexual images to include deepfakes. Massachusetts has a bill on the floor that intends to penalize creation with the intent of distribution of deep fake materials that facilitate criminal or tortious conduct, penalizing the creation of deepfakes in a broader context.[743] Legislatures of other states, such as New York, have made a continued effort to cast a broad ban on the creation and distribution of deepfakes or prevent deepfake porn.[744] As an example of enacted law, Virginia's Section 18.2-386.2, Unlawful Dissemination or Sale of Images of

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[740] *Id*.
[741] CA. Civ. Code §1708.86 (2020);AB-602, CA. Assm. Bill 491 (2019).
[742] Tex. Elec. Code §255.004 (2019). *See also* MA HB 198 (2020) (died in committee).
[743] MA HB No.3366, H. Docket No. 2046 (2019).
[744] NY A08155, S0587-B, Cal. No. 586 (2019-2022 Leg. Sess.)(expired at the end of term).

Another, which has been amended to penalizes dissemination of deep fakes in the context of sex crimes, is as follows:

> § 18.2-386.2. Unlawful dissemination or sale of images of another; penalty.
> A. Any person who, with the intent to coerce, harass, or intimidate, maliciously disseminates or sells any videographic or still image created by any means whatsoever, *including a falsely created videographic or still image*, (emphasis added) that depicts another person who is totally nude, or in a state of undress so as to expose the genitals, pubic area, buttocks, or female breast, where such person knows or has reason to know that he is not licensed or authorized to disseminate or sell such videographic or still image is guilty of a Class 1 misdemeanor. However, if a person uses services of an Internet service provider, an electronic mail service provider, or any other information service, system, or access software provider that provides or enables computer access by multiple users to a computer server in committing acts prohibited under this section, such provider shall not be held responsible for violating this section for content provided by another person.
> B. Venue for a prosecution under this section may lie in the jurisdiction where the unlawful act occurs or where any videographic or still image created by any means whatsoever is produced, reproduced, found, stored, received, or possessed in violation of this section.
> C. The provisions of this section shall not preclude prosecution under any other statute.

VA Code §18.2-386.2 (2020).

The wording "falsely created videographic or still image" of the statute enables penalizations of acts of distributing deepfakes and other synthetic images depicting a victim in a sexual way. The law only penalizes malicious dissemination or sales of deepfakes only when undertaken with "the intent to coerce, harass, or intimidate," making it difficult to prosecute those who produce and sell deepfake porn for the sole purpose of creating profit. However, despite its limitations, the law marks a significant step made by a state in preventing sex crimes using deepfake technology.

E. Forfeiture of property used in sex crimes

Many states include a provision for forfeiture of property used in sex crimes in their penal law to make sure that perpetrators do not maintain the ownership of media featuring victims. Such forfeiture may be criminal forfeiture imposed as a part of a defendant's criminal prosecution or civil forfeiture imposed via in rem proceeding.[745] Law on civil forfeiture allows the government to forfeit a property if it can establish that it is related to criminal activity by a preponderance of law. The lowered burden of proof makes it easier for the government to forfeit properties used for the commission of the crimes. As relevant examples, three relevant federal laws are as follows:

> §1467 Criminal Forfeiture

[745] *See* for brief explanation, U.S. Dept. Just., Types of Federal Forfeiture (updated Dec. 16, 2020), available at: https://www.justice.gov/afp/types-federal-forfeiture, citing the U.S. Dept. Just., A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies (1994).

(a)Property Subject to Criminal Forfeiture.—A person who is convicted of an offense involving obscene material under this chapter shall forfeit to the United States such person's interest in—
(1)any obscene material produced, transported, mailed, shipped, or received in violation of this chapter[746];
(2)any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and
(3)any property, real or personal, used or intended to be used to commit or to promote the commission of such offense.
(b)The provisions of section 413 of the Controlled Substances Act (21 U.S.C. 853), with the exception of subsections (a) and (d), shall apply to the criminal forfeiture of property pursuant to subsection (a).
(c)Any property subject to forfeiture pursuant to subsection (a) may be forfeited to the United States in a civil case in accordance with the procedures set forth in chapter 46 of this title.

18 U.S.C. §1467.

Additionally, the statute outlined below impose criminal forfeiture for a person convicted under §2251 (Sexual Exploitation of Children); §2251a (Selling or Buying of Children); §2252. (Certain Activities Relating to Material Involving the Sexual Exploitation of Minors); §2252a. (Certain Activities Relating to Material Constituting or Containing Child Pornography); §2252b. (Misleading Domain Names on the Internet); and §2260 (Production of Sexually Explicit Depictions of a Minor for Importation into the United States):

§ 2253. Criminal forfeiture
(a) Property subject to criminal forfeiture.--A person who is convicted of an offense under this chapter involving a visual depiction described in section 2251, 2251A, 2252, 2252A, or 2260 of this chapter or who is convicted of an offense under section 2252B of this chapter,1 or who is convicted of an offense under chapter 109A, shall forfeit to the United States such person's interest in--
(1) any visual depiction described in section 2251, 2251A, or 2252, 2252A, 2252B, or 2260 of this chapter, or any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped or received in violation of this chapter;
(2) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and
(3) any property, real or personal, used or intended to be used to commit or to promote the commission of such offense or any property traceable to such property.
(b) Section 413 of the Controlled Substances Act (21 U.S.C. 853) with the exception of subsections (a) and (d), applies to the criminal forfeiture of property pursuant to subsection (a).

18 U.S.C. § 2253.

Alternatively, for civil forfeiture:

[746] Chapter 71 on Obscenity.

> Any property subject to forfeiture pursuant to section 2253 may be forfeited to the United States in a civil case in accordance with the procedures set forth in chapter 46.

18 U.S.C. § 2254.

Under 18 U.S.C. §1467, the property can be forfeited if it "used or intended to be used to commit or to promote the commission of the obscenity offense by the statute's provision requiring consideration of 'the nature, scope, and proportionality of the use of the property in the offense.'"[747] In some cases, forfeiture of such property has been disputed as violating the First Amendment rights, but many courts, including the District Court for the District of Columbia, has held that although whether post-conviction forfeitures (in the case in the District of Columbia, of bookstores and other businesses) violate the First Amendment should be decided on a case-by-case basis, Section 1467 is not facially unconstitutional.[748]

However, a district court has found that "if the value of the property to be forfeited is within the range of fines authorized by Congress and the Sentencing Guidelines, a strong presumption arises that forfeiture is constitutional."[749] Moreover, concerning child pornography, "[t]he Supreme Court held that child pornography fell outside the protection of the First Amendment because of the States' compelling interest to safeguard the physical and psychological well-being of children."[750]

Additionally, in an *in rem* forfeiture action against real property owned by a defendant found guilty of Possession of Obscene Material Involving a Minor, Dissemination of Obscene Material Involving a Minor, and for Possession of Criminal Tools and Count 17 for Gross Sexual Imposition,[751] a district court granted the United States' motion for summary judgment, holding that the nexus between the real property the defendant used to enjoy privacy necessary to commit the offenses and to maintain computers containing child pornography and his offenses was found by a preponderance of the evidence.[752]

In another case where the perpetrator argued that the items containing child pornography were for "his research for 'The Child Pornography Myth,' an article published in the Cardozo Arts and Entertainment Law Journal," [753] the court found that the statute §2254 *prima facie* does not exclude materials of serious literary, scientific, or educational value, from forfeiture nor did Congress intend such exclusion.[754]

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[747] At 1386, *United States v. California Publishers Liquidating Corp.*, 778 F. Supp. 1377, 1386 (N.D. Tex. 1991), *aff'd in part, remanded in part sub nom*; *United States v. Inv. Enterprises, Inc.*, 10 F.3d 263 (5th Cir. 1993).

[748] At 483-4, *American Library Ass'n v. Thornburgh*, 713 F.Supp. 469, 486 (D.D.C.1989).

[749] At 942, *United States v. 7046 Park Vista Rd.*, 537 F. Supp. 2d 929, 942 (S.D. Ohio 2008), *aff'd sub nom*; *United States v. 7046 Park Vista Rd.,* 331 F. App'x 406 (6th Cir. 2009), citing *U.S. v. Wilk*, 2007 WL 2263942 at *1.

[750] At 420, *Stanley v. United State*s, 932 F. Supp. 418, 420 (E.D.N.Y. 1996), citing at 763-64, *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

[751] *7046 PARK VISTA RD.*, 537 F. Supp. at 932:

> Counts 1–5 of the Second Superseding Indictment charged Gillingham with Pandering (Possession) of Obscenity Involving a Minor in violation of O.R.C. § 2907.321(A)(5). Counts 6–14 charged Gillingham with Pandering (Distribution) of Obscenity Involving a Minor in violation of O.R.C. § 2907.321(A)(2). Count 15 was dismissed by the State of Ohio prior to trial. Count 16 charged Gillingham with Possession of Criminal Tools in violation of O.R.C. § 2923.24(A). Count 17 charged Gillingham with Gross Sexual Imposition in violation of O.R.C. § 2907.05(A)(4).

[752] *Id*. at 939.

[753] At 420, *Stanley v. United States*, 932 F. Supp. 418, 420 (E.D.N.Y. 1996).

[754] *Id*. at *421.

As an example of state law, in Alaska, Forfeiture of Property Used in Sexual Offense is as follows:

> § 11.41.468. Forfeiture of property used in sexual offense
> (a) Property used to aid a violation of AS 11.41.410--11.41.458 or to aid the solicitation of, attempt to commit, or conspiracy to commit a violation of AS 11.41.410--11.41.458 may be forfeited to the state upon the conviction of the offender.
> (b) In this section, "property" means computer equipment, telecommunications equipment, photography equipment, video or audio equipment, books, magazines, photographs, videotapes, audiotapes, and any equipment or device, regardless of format or technology employed, that can be used to store, create, modify, receive, transmit, or distribute digital or analog information, including images, motion pictures, and sounds.

AK Stat § 11.41.468 (2020).

Alternatively, in Connecticut:

> Section 54-36p - Forfeiture of moneys and property related to sexual exploitation, prostitution and human trafficking. In rem proceeding. Disposition.
> (a) The following property shall be subject to forfeiture to the state pursuant to subsection (b) of this section:
>
> (1) All moneys used, or intended for use, in a violation of subdivision (3) of subsection (a) of section 53-21 or section 53a-86, 53a-87, 53a-88, 53a-90a, 53a-189a, 53a-189b, 53a-192a, 53a-196a, 53a-196b, 53a-196c or 53a-196i;
>
> (2) All property constituting the proceeds obtained, directly or indirectly, from a violation of subdivision (3) of subsection (a) of section 53-21 or section 53a-86, 53a-87, 53a-88, 53a-90a, 53a-189a, 53a-189b, 53a-192a, 53a-196a, 53a-196b, 53a-196c or 53a-196i;
>
> (3) All property derived from the proceeds obtained, directly or indirectly, from a violation of subdivision (3) of subsection (a) of section 53-21 or section 53a-86, 53a-87, 53a-88, 53a-90a, 53a-189a, 53a-189b, 53a-192a, 53a-196a, 53a-196b, 53a-196c or 53a-196i;
>
> (4) All property used or intended for use, in any manner or part, to commit or facilitate the commission of a violation of subdivision (3) of subsection (a) of section 53-21 or section 53a-83, 53a-86, 53a-87, 53a-88, 53a-90a, 53a-189a, 53a-189b, 53a-192a, 53a-196a, 53a-196b, 53a-196c or 53a-196i.
>
> (b) Not later than ninety days after the seizure of moneys or property subject to forfeiture pursuant to subsection (a) of this section, in connection with a lawful criminal arrest or a lawful search that results in an arrest, the Chief State's Attorney or a deputy chief state's attorney, state's attorney or assistant or deputy assistant state's attorney may petition the court in the nature of a proceeding in rem to order forfeiture of such moneys or property. Such proceeding *shall be deemed a civil suit in equity in which the state shall have the burden of proving all material facts by clear and convincing evidence*.(emphasis added)
> …(omitted)…

(c) The court shall hold a hearing on the petition filed pursuant to subsection (a) of this section not more than two weeks after the criminal proceeding that occurred as a result of the arrest has been nolled, dismissed or otherwise disposed of. The court shall deny the petition and return the property to the owner if the criminal proceeding does not result in (1) a plea of guilty or nolo contendere to any offense charged in the same criminal information, (2) a guilty verdict after trial to a forfeiture-eligible offense for which the property was possessed, controlled, designed or intended for use, or which was or had been used as a means of committing such offense, or which constitutes the proceeds of the commission of such offense, or (3) a dismissal resulting from the completion of a pretrial diversionary program.

(d) No moneys or property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission committed by another person if such owner or lienholder did not know and could not have reasonably known that such moneys or property was being used or was intended to be used in, or was derived from, criminal activity.

(e) Notwithstanding the provisions of subsection (a) of this section, no moneys or property used or intended to be used by the owner thereof to pay legitimate attorney's fees in connection with his or her defense in a criminal prosecution shall be subject to forfeiture under this section.

(f) Any property ordered forfeited pursuant to subsection (b) of this section shall be sold at public auction conducted by the Commissioner of Administrative Services or the commissioner's designee.

(g) The proceeds from any sale of property under subsection (f) of this section and any moneys forfeited under this section shall be applied: (1) To payment of the balance due on any lien preserved by the court in the forfeiture proceedings; (2) to payment of any costs incurred for the storage, maintenance, security and forfeiture of any such property; and (3) to payment of court costs. The balance, if any, shall be deposited in the Criminal Injuries Compensation Fund established in section 54-215.

CT Gen Stat § 54-36p (2019).

Finally, a federal law that enables algorithms and other technologies to identify and detect child pornography materials online is noteworthy. In reaction to developing technology that enables child exploitation on the internet to be conducted more easily and more expansively, law enforcement agencies in the United States are adopting technologies that enable them to quickly identify child sexual exploitation materials on the internet.[755]

One such technology is hashing, technology that allows "to identify suspect material from enormous masses of online data, through the use of specialized software programs— and to do so rapidly and automatically without the need for human searches."[756] Hashing evaluation serves as an effective way to search and identify undesirable materials from the internet. The

[755] Rebekah Branham, Hash It Out: Fourth Amendment Protection of Electronically Stored Child Exploitation, 53 Akron L. R., 1 (7) (2019).
[756] *Id*.; *United States v. Reddick*, 900 F.3d 636 (5th Cir. 2018).

adoption of this technology requires established legal bases and stipulation of circumstances where the use of such technology is allowed, as it may raise some invasion of privacy concerns. Under the federal law, in order to facilitate child sexual exploitation investigation, the use of such technology is authorized under specified circumstances by the following section:

> §2258C. Use to combat child pornography of technical elements relating to reports made to the CyberTipline
> (a) Elements.—
> (1) In general.—NCMEC ("National Center for Missing and Exploited Children")(explanation added) may provide elements relating to any CyberTipline report to a provider for the sole and exclusive purpose of permitting that provider to stop the online sexual exploitation of children.
> (2) Inclusions.—The elements authorized under paragraph (1) may include hash values or other unique identifiers associated with a specific visual depiction, including an Internet location and any other elements provided in a CyberTipline report that can be used to identify, prevent, curtail, or stop the transmission of child pornography and prevent the online sexual exploitation of children.
> (3) Exclusion.—The elements authorized under paragraph (1) may not include the actual visual depictions of apparent child pornography.
>
> (b) Use by Providers.—Any provider that receives elements relating to any CyberTipline report from NCMEC under this section may use such information only for the purposes described in this section, provided that such use shall not relieve the provider from reporting under section 2258A.
>
> (c) Limitations.—Nothing in subsections 1 (a) or (b) requires providers receiving elements relating to any CyberTipline report from NCMEC to use the elements to stop the online sexual exploitation of children.
>
> (d) Provision of Elements to Law Enforcement.—NCMEC may make available to Federal, State, and local law enforcement, and to foreign law enforcement agencies described in section 2258A(c)(3), involved in the investigation of child sexual exploitation crimes elements, including hash values, relating to any apparent child pornography visual depiction reported to the CyberTipline.
>
> (e) Use by Law Enforcement.—Any foreign, Federal, State, or local law enforcement agency that receives elements relating to any apparent child pornography visual depiction from NCMEC under subsection (d) may use such elements only in the performance of the official duties of that agency to investigate child sexual exploitation crimes and prevent future sexual victimization of children

18 U.S.C. § 2258C (2018).

In *United States v. Reddick*, the United States Court of Appeals, Fifth Circuit, decided on whether using hash values, "short, distinctive identifiers that enable computer users to quickly compare the contents of one file to another[,]"[757]such as Microsoft's PhotoDNA, would violate

[757] *Id*. at 636–37.

the defendant's constitutional rights under the Fourth Amendment, mainly "the liberty of the people 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'"[758] The court, recognized the importance that hash values play in an investigation by both private businesses and law enforcement agencies to fight the online distribution of child pornography.[759] The court also found that as hash evaluation enables law enforcement to identify child pornography materials with an exceptionally high degree of certainty, a detective's viewing of the suspected files, and those files only, did not violate the defendant's expectation of privacy.[760] Advocates of hash evaluation further support that the technology does not violate the constitutional rights of an individual, as hash values allow high accuracy detection without "exposing, if any, ancillary information" that may raise concern for a privacy violation.[761]

A similar approach may not be feasible under the criminal law of Japan. Nonetheless, with the recognition that the way in which sexual predators can share and distribute sexually explicit materials of victims is becoming easier, faster, and more deviant, a legal measure to allow such investigation under narrowly defined circumstances may be a consequential step in preventing the spread of sexual exploitation materials, and further, continued harm and mental suffering for the victims.

3. Discussion

The review has demonstrated that the existing sex crime laws of Japan may be insufficient in managing or preventing many newly emerging types of sex crimes. First and foremost, a comprehensive statute under the Penal Code that can protect children from online grooming for the purpose of sex crimes is desirable. Moreover, as mentioned during the committee meetings,[762] there are currently no adequate ways for law enforcement to confiscate or forfeit images depicting sexual exploitation owned by perpetrators, leaving victims in fear that such media may be distributed. There are acts and laws that cover different types of distribution introduced at the beginning of this chapter. However, there are no inclusive penal laws effectively prohibiting the production and distribution of images of a sexual nature without a victim's consent, although laws on threat and coercion enabling prosecution in a limited number of cases.[763] While various acts and ordinances can offer some protections, they are more likely to create legal loopholes and inconsistences in prosecution. As such crimes are likely to increase and become more sophisticated with further development of technology, creating new provisions to address evolving sex crimes may be an urgent solution for effective sex crime prosecution in Japan.

A. Evaluation of efficacy of current laws

The significance of enacting a comprehensive national law related to taking and distributing sexual images or those depicting the nudity of a victim without consent cannot be understated. Experts in Japan, as discussed during the committee meetings, are aware that the production and distribution of private and sexual images cause severe harm to victims, including

[758] *Id*. at 637.
[759] *Id*. at 639.
[760] *Id*.
[761] Rebekah Branham, *supra* note 755, citing at 41, Richard P. Salgado, Fourth Amendment Search and the Power of the Hash, 119 Harv. L. Rev. F. 38 (2005).
[762] 性犯罪に関する刑事法検討会, *supra* note 588 at 1-3.
[763] 脅迫罪（刑法第 222 条）や強要罪（刑法第 223 条）, 髙山善裕, *supra* note 671 at 57.

feelings of shame, insult, severe anxiety, and a sense of violation to the victim's right to self-determination and privacy.[764] Yamamoto suggested the need for forfeiture and penalization of individuals who have distributed sexually explicit images, while being aware that there may be potential concerns involving treatment of those who buy the images without knowing that the images are produced during the commission of a crime.[765] Those engaging in further distribution, as perpetrators of the crime, cause secondary victimization that leaves victims in constant fear and anxiety. In considering the penalization of these individuals, how to phrase the provision so that it is effectively applied to those who should have known that the images were products of sexual exploitation but recklessly disregarded the risk remains a difficult task.

While prefectural ordinances and laws discussed above take some role in protecting children from involvement in pornography. Nonetheless, given the comments by many committee members and the rapidly evolving online and technology-facilitated sex crimes, it seems proper that Japan's criminal law is amended to penalize at least surreptitious taking of pictures and videos and distribution for both children and adults. In enacting the laws, the example U.S. laws reviewed in this chapter may serve as good references, although a caveat should be considered. While the state laws provide detailed circumstances, limitations, and required elements to capture various acts while excluding circumstances where penalization is undesirable, it should be acknowledged that lengthy and descriptive law may not assimilate well to the Penal Code of Japan, which is more succinct by its nature.

Moreover, enacting child enticement laws would enable more robust protection of children from online sex crimes. It would be important to include provisions that can capture characteristics by both contact-driven offenders and fantasy-driven offenders by including acts of soliciting children to engage in online and offline sexual behavior.[766] Given the committee members' concern that it would be difficult to enact laws related to grooming,[767] if penalizing the general acts associated with grooming is not feasible, at least penalization of specific acts, such as arranging a physical meeting with a child following online communication of a sexual nature or asking children for images of a sexual nature should be punished. The laws on child prostitution and pornography may not be capable of providing sufficient protection for children, as the law does not penalize acts of solicitation without actual transmission of sexual images.[768] The penalty is also too light, with a penalty of less than one year of incarceration or a fine of less than 1,000,000yen for possession of child pornography with the purpose of satisfying sexual curiosity.[769] Given that conviction of possession under 18 U.S. Code § 2252 results in a fine and imprisonment of not less than five years and not more than 20 years, the penalty provided by the law on child prostitution and pornography seems insufficient, especially given its long-term harm to children and the deterrence to their development. However, it should be noted that penalties are generally much higher in the United States for most crimes, and comparison with the penalty imposed in the United States is not tenable. Even so, within the context of Japan's criminal law, the penalty should be increased by dealing with the matter by the Penal Code, given the culpability and harm of such acts. Penalizing apparent acts an adult has made to

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[764] 性犯罪に関する刑事法検討会, *supra* note 132 at 31-34.
[765] 性犯罪に関する刑事法検討会, *supra* note 588 at 1.
[766] Peter Briggs, Walter Simon & Stacy Simonsen, *supra* note at 649.
[767] *See* discussions in Section 1. Japan, Chapter iii. Vulnerable Groups of this dissertation.
[768] 児童買春，児童ポルノに係る行為等の規制及び処罰並びに児童の保護等に関する法律（平成 11 年法律第 52 号）.
[769] *Id*.

prepare for sexual exploitation of a minor and a criminal law provision with a harsher penalty addressing the production and distribution sexual images of a child would serve as a tool for more effective penalization of child predators and a stronger notice to the public that such acts are not tolerated.

Another difficult question that needs to be answered is whether to penalize children for engaging in the production and distribution of sexual images, in the case of Japan, under the juvenile system. While relevant prefectural ordinances tend not to include minors as an object of penalization, some degree of punitive measures may be necessary given the maliciousness involved in some cases where both the perpetrator and the victim are minors. For example, one case in Japan involved a now-deceased 14-year-old victim who was suffering from online bullying, including distribution of a sexually explicit video made under coercion by a group of minors.[770] Again, in cases involving minor perpetrators with high culpability, in Japan, a child can be subject to penalty under the laws on child prostitution and pornography along with the laws on threat and coercion.[771] However, a more structured and graduated penalty scheme for cases involving minors may be desirable to effectively address both cases for which minors may be considered victims and for which minors are highly culpable. While the penalty would need to be reduced compared to those of adult perpetrators, penalization in some cases may be necessary even if children are the perpetrators of such crimes.

Additionally, criminal forfeiture of materials used in sex crimes should be feasible for online and technology-facilitated crimes. As Kamitani suggested, forfeiture is particularly crucial for the products of filming or photographing during the commission of forcible sexual intercourse or forcible sexual indecency, where these products are used as a tool for control and coercion against the victim to commit further crimes.[772] Such inclusion of forfeiture provision in sex crime law may seem unnatural under the Penal Code of Japan, but a legal solution is a requisite for victim protection, as it is the most effective way to mitigate at least some harm for the victims.

Finally, it should be reviewed whether it would be conducive to enact a statute under the penal code that specifically prohibits creating and distributing sexual synthetic images of a person without consent. The government of Japan is making efforts to grasp issues related to this matter. As an illustration, the House of Representatives, in their report for amendment of laws on child prostitution and pornography, suggested that the government should research the relationship between acts violating children's rights and child pornography-like animated pictures including virtual child pornography.[773] However, mere research and discussion are not sufficient to resolve the problems and prevent harm to victims. During the committee meeting, Miyata suggested that because of the varied forms of harm involving sexual synthetic images, attention should be paid to how to help victims rather than how to penalize such acts.[774]

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[770] 文春オンライン　「自慰行為強要、画像を拡散…氷点下の旭川で凍死した女子中学生への“壮絶イジメ”」「文春オンライン」特集班 (Apr. 15, 2021)(last accessed on Jan. 26, 2022), https://bunshun.jp/articles/-/44766

[771] 髙山善裕, *supra* note 671 at 63.

[772] 性犯罪に関する刑事法検討会, *supra* note 588 at 1-2.

[773] For more information about the current amended version, *see* 衆議院, 児童買春、児童ポルノに係る行為等の処罰及び児童の保護等に関する法律 の一部を改正する法律案要綱（第 183 回国会）, (last accessed on Jan. 26, 2022), available at: https://www.shugiin.go.jp/internet/itdb_annai.nsf/html/statics/housei/pdf/186hou28youkou.pdf/$File/186hou28youkou.pdf

[774] 性犯罪に関する刑事法検討会, *supra* note 132 at 34-35.

Needless to say, victim aid and assistance are of tremendous significance for restorative justice, especially in the context of online sex crimes, which can be perpetuated by the continued distribution of victims' sexual images online. Varied forms of sex crimes involving synthetic images make it challenging to enact criminal law that can accurately capture culpable acts. Furthermore, it should always be heeded that criminal law enactment is a task requiring utmost caution, as haphazard enactment may cause more social harm than good. However, given the prospect that sex crimes involving sexual synthetic images depicting real-life victims are likely to continue to increase, the penalization of sex crimes committed with synthetic images cannot be put on hold. With no proper punishment, no matter how well the victims are assisted, the perpetrators who have learned that their acts are not penalized or with, if at all, a slap on the wrist, can continue to commit crimes, resulting in more victims. When a lack of legislation leaves victims devastated and enables perpetrators to commit further violence, it is not the time, because of the difficulty of the task, to dither on criminal law enactment that can address the issue.

IV. SUBJECTIVE ELEMENT

1. Japan

This section reviews subjective elements, or *mens rea*, for sex offenses. To be convicted of a crime, one must not only commit illegal acts, but the acts also need to be culpable.[775] That is, the actor should be blameworthy for the crime, causing the actor to be responsible for the acts that he or she has committed.[776] The requirement of culpability, or alternatively, a subjective element of a crime, is also required for sex crime laws. To gauge whether an actor has acted with necessary culpability, Japan adopts the concept of *koi* (故意) in its penal code. Applying the concept of koi, Article 38 of the Penal Code of Japan is as follows:

> (1) An act performed without the intent to commit a crime is not punishable; provided, however, that the same shall not apply in cases where otherwise specially provided for by law.
> (2) When a person who commits a crime is not, at the time of its commission, aware of the facts constituting a greater crime, the person shall not be punished for the greater crime.
> (3) Lacking knowledge of law shall not be deemed lacking the intention to commit a crime; provided, however, that punishment may be reduced in light of the circumstances.

故意[Intent], KEIHO [KEIHO] [Pen. C.] 第三十八条 [Art. 38], 1907, Ch. 12, (Japan).[777]

A. Koi

In Japan, *koi* serves as "a mandated constituent element and a pre-requisite to culpability."[778] The concept of *koi* is "generally understood to require evidence of an awareness or acknowledgment of the objective facts constituting the crime."[779] That is if an actor is aware of material facts that correspond to the constituent elements of the crime, that establishes his blameworthiness. However, to say applying this seemingly straightforward evaluation in the context of sex crimes is complicated is an understatement, as it is often encrusted with conflicting arguments and awareness of facts judged by the perpetrator and the victim.

Applying Article 38, courts in Japan have taken an approach in evaluating a defendant's koi for sex crime cases that may be construed as fairly conservative. In the past, the Supreme Court of Japan has held that sexual intent is necessary to find a defendant guilty of forcible indecency, finding that the purpose of insult or abuse in threatening a woman to be naked and taking pictures of her did not satisfy the necessary elements of forcible indecency.[780]

However, as briefly introduced in the Act chapter, with a better understanding about the nature of sex crimes and increased understanding of the protected interests of sex crimes as

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[775] Shigemitsu Dando, supra note 30 at 3.
[776] At 195, 山口厚『刑法総論〔第 3 版〕』（有斐閣、2016 年）; *Id*. at 4.
[777] As translated at: http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&vm=04&re=02&new=1
[778] Shigemitsu Dando, *supra* note 30.
[779] John O. Haley, *supra* note 268.
[780] 最判昭和 45 年 1 月 29 日刑集 24 巻 1 号 1 頁; *See* comments at 110, 佐伯仁志『刑法総論の考え方・楽しみ方』（有斐閣、2013 年）.

sexual liberty, the Supreme Court of Japan in 2017 held that sexual intent is not necessary for deciding whether the act itself is sexual in nature.[781] The Court found that the decision of whether an act is deemed sexual as to satisfy indecent act under Article 176 can be made by asking whether the act in question, reflecting on common sense and social standards (「社会通念」), has sexual meaning and the sexual connotation of sufficient strength based on the specific circumstances of the case.[782] Therefore, the common theory has become that sexual intent per se may not be necessary to convict a defendant of a sex crime.[783] In a similar case, a Tokyo district court found that when a defendant made a victim get undressed and took her pictures, he was guilty of forcible indecency as the facts of the case demonstrate that the defendant considered the victim as the object of his sexual interest and acted with the intent to sexually stimulate or excite himself.[784] While not directly opposing the Supreme Court's holding by re-phrasing the requirement in a subtle way, the court nonetheless held that the act only needs to carry some sexual meaning and that sexual intent *de facto* is unnecessary.[785]

a. Evaluation of *koi*

Even with the judicial opinion that sexual intent is not necessary for finding *koi*, criticism of the interpretation of *koi* in prosecuting sex crimes remains that it fails to accurately reflect the nature of sex crimes. During the fifth committee meeting, Kojima pointed out that *koi* may serve as an impediment to the proper functioning of law based on consent, as the victim's lack of consent would be inherently evaluated from the perpetrator's point of view to establish *koi*.[786] Further, when the perpetrator suggests that he has been mistaken concerning the victim's consent, the mistake would nullify *koi*, regardless of whether or not the mistake has been reasonable.[787] Regarding this point, Shimaoka, as she presented the laws of France, explained that while *koi* is also required in prosecuting sex crimes in France, the difference lies in that in France, the evaluation is based on objective analysis of the situation, while in Japan, the evaluation involves consideration of the perpetrator's subjective perspective, allowing the perpetrator to make excuses based on willful blindness or ignorance.[788] Shimaoka described the difference in the approach as "whether [the court] sides with perpetrators or the victims."[789] This interpretation of *koi* with a discernable proclivity toward the assumption that the perpetrator has innocently misunderstood a victim's consent naturally leads to a more frequent not guilty conviction.[790] Further, it leaves a victim who sought prosecution of a perpetrator who has wronged the victim, with no redeeming sense of justice, and rather, with even more cavernous despair than they were in before reporting the incident.[791]

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[781] At 110-113, 佐伯仁志『刑法総論の考え方・楽しみ方』（有斐閣、2013 年）.
[782] At 4, 最判平成 29 年 11 月 29 日刑集 71 巻 9 号 467 頁.
[783] 佐伯仁志, *supra* note 781 at 110-13.
[784] 東京地判昭和 62 年 9 月 16 日判時 1294 号 143 頁.
[785] 佐伯仁志, *supra* note 781 at 111-112.
[786] 性犯罪に関する刑事法検討会, supra note 18 at 13.
[787] *Id*.
[788] 性犯罪に関する刑事法検討会, supra note 567 at 16
[789] *Id*.
[790] *Id*. at 14-15.
[791] *Id*.

b. Judicial interpretation of *koi*

As illustrated by the committee members' comments, court cases in Japan demonstrate perpetrator-centered subjective element evaluation to a certain degree. While attempting to apply a reasonable man's standard in deciding whether a person acted with the necessary *koi* to commit sex crimes, courts in Japan have sometimes evaluated the circumstances more or less wholly from the perpetrator's perspective. This implies that even when the prosecution has overcome the high hurdle of proving that there has been force or threat sufficient to make a victim's resistance conspicuously difficult as required by Article 177,[792] courts have sometimes found defendants not guilty because defendants may not have recognized that they had employed such force or threat. A case decided in the Shizuoka district court[793] demonstrates this example.

In this case, the defendant stopped the victim, who was walking past a parking lot of a convenience store in Iwata, Shizuoka, around 2 am, brought her to the west side of the premises on a wood deck, and conversed.[794] He put the victim on his lap and touched the victim on several areas. After that, the defendant had the victim sit on the wood deck as he stood in front of her and had her touch his genitals.[795] The defendant touched the victim's chin area and brought his genitals near the victim's mouth.[796] The defendant then ejaculated. Right after this event, the victim called her friend, told the friend about the event, and sent a message about the event.[797] The victim went to the police station the same night and later went to the orthopedic clinic to get her injuries examined.[798] The court accepted the given facts, but the defendant and the victim had conflicting testimonies as to whether the defendant's acts against the victim were forcible.[799]

After examining testimonies from both sides, the court acknowledged that the defendant had opened the victim's mouth, placed the end of his genitals in her mouth, and digitally penetrated the victim.[800] The court also found a reasonable causal relationship between the defendant's forcible actions towards the victim and an orthopedic doctor's finding of oral injury, injury to lips and orbicular oris muscle, and a sprain of the temporomandibular joint on the doctor's report.[801] The court, considering the facts of this case, including the significant difference in the physique between the defendant, who was about 169 cm and 67 kg, and the victim, who was about 149 cm and 38 kg, found that the defendant sitting the victim on the unfrequented wood deck in the middle of the night and putting his finger in the victim's mouth as he stood in front of the victim would have made it conspicuously difficult for the victim to resist.[802]

Nevertheless, the court held, "if you see [the defendant's actions] from the defendant's perspective, you can conclude that he acted like someone who has examined the reaction of a person whom he has just picked up to see how far she is willing to go and has given up when he has sensed the unwillingness on her part."[803] The court further held that "reflecting on common

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[792] At 刑法第百七十七条 [Art. 177], *infra* at 21.
[793] 静岡地浜松支判平成 31 年 3 月 19 日 LEX/DB25563101.
[794] *Id*.
[795] *Id*.
[796] *Id*.
[797] *Id*.
[798] *Id*.
[799] *Id*.
[800] *Id*.
[801] *Id*.
[802] *Id*.
[803] *Id*.

sense,"[804] there is room for doubt that the defendant was not aware the victim was in a state where she felt like her resistance was conspicuously difficult. In other words, the court found that there remains a reasonable degree of possibility that the defendant may not have been aware that the victim's resistance was rendered conspicuously difficult.

In principle, the courts in Japan are supposed to make a decision on *koi*, a subjective element, through an objective evaluation based on the evidence and facts of a case using common sense or a reasonable person standard. However, under the current approach, as demonstrated by the above case, courts sometimes apply the standard that favors perpetrators over victims. Indeed, even after clearing the male-centered[805] and already-high-hurdle of proving force or threat enough to make resistance conspicuously difficult, the victims face another challenge in their search for justice when courts resort to the perpetrator's perspective to give undue consideration to how the perpetrator could have seen things differently. This extended benefit of the doubt can feel devastating for the victims. Court decisions like this in effect also create a *de facto* obligation for the victims to resist by requiring victims to provide perpetrators a notice in order to make the punishment possible.[806] Nonetheless, making sure that *koi* evaluation is not perpetrator-centered is challenging because no matter how much courts try to remain objective, *koi* is in its nature subjective to a degree, as it is formed and connected to actions through the perpetrator's point of view.

c. Various ways of evaluating *koi*

Because of the limitation of evaluation of the subjective element in Japan for sex crimes stemming from its tendency for a perpetrator-centered approach and vulnerability to misconceptions and prejudice about sex crimes, experts have explored different approaches for evaluating the subjective element. First, as the application of *koi* is a general principle that underlies not only sex crime offenses but the criminal law of Japan in general, modification to the interpretation of *koi* while maintaining the requirement may seem like the most convenient option. To this end, Kojima commented that the application of *mihitsu no koi* (「未必の故意」) to the interpretation of koi in sex crimes should be discussed.[807] Nonetheless, except for Kojima's comments and the general discussion about implications of the *koi* requirement in the context of sex crimes,[808] modification to the interpretation of *koi* was not further discussed by the committee.

Mihitsu no koi (「未必の故意」), comparable to *dolus eventualis*, has been sometimes applied to the interpretation of *koi* by courts in Japan in their criminal rulings. For example, in deciding a case related to Penal Code Article 256, Acceptance of Stolen Property, the Supreme Court of Japan held that the defendant had the necessary koi (alternatively, "willful" koi[809] or

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[804] *Id*.
[805] 島岡まな, *supra* note 31 at 30.
[806] For information on how sex crime cases have been decided in Japan, *see* 性犯罪に関する刑事法検討会 第１回会議 (Jun. 4, 2020), 配布資料５－２「性犯罪に関する施策検討に向けた実態調査ワーキンググループ取りまとめ報告書 (別紙 8)」; *see also Id*. at 30-33, for the discussion concerning male-centered judicial approach on sex crimes in Japan.
[807] At 13-4, 法務省，性犯罪に関する刑事法検討会第 15 回会議議事録 (Apr. 12, 2021).
[808] 性犯罪に関する刑事法検討会, *supra* note 567 at 15-33.
[809] 「未必の故意」.

mihitsu no koi), as his conditional intent was established when he acquired the goods, suspecting that they may have been stolen.[810]

On the other hand, others advocating for a change have argued for the creation of a *kasitsu*-based sex offense. Criminal law in Japan requires *koi,* or alternatively, *kasitsu*, as a subjective element. Therefore, the creation of a *kasitsu* based sex offense was one of the most discussed potential solutions, which could improve the application of the subjective element while not offending, or at least not deviating too much from, the fundamental principles of criminal law in Japan.

Kasitsu corresponds to the concept of negligence in the United States. *Kasitsu* theory for sex crimes rests on the premise that one needs to be responsible when one engages in a sexual act with another person. To wit, a person is obliged by the duty to make sure that the person does not commit sexual acts either without a partner's consent or as set forth in the criminal elements of sex crimes. Applying the duty of care standard[811], a court would find a defendant guilty if the defendant had acted without such a duty of care when engaging in the sexual act.

Mihitsu no koi may seem interchangeable with *kasitsu* with awareness. However, they are fundamentally different. While various theories address this distinction, the discussion in this paper is limited to a review of the current way of distinctions used in Japan. The widely accepted theory (「通説」) and the theory adopted by the courts (「判例」) in Japan both embrace the acceptance theory (「認容説」).[812] According to the acceptance theory, assuming that there is awareness as to the actualization of a criminal fact, what differentiates *mihitsu no koi* and *kasitsu* with awareness is the acceptance of at least some actualization of a criminal act.[813]

If there is some degree of acceptance of the possibility for causing a criminal act, there is *mihitsu no koi*, and when there is no such acceptance, there is *kasitsu* with awareness. For example, the Supreme Court, applying this theory in the above-mentioned case of selling of stolen goods, held while it was not clear that the defendant thought the goods were stolen, *koi* was satisfied because there was *mihitsu no koi* by the defendant's engagement in selling the goods while suspecting that they were stolen goods.[814] The Court supported its finding with the external facts, which demonstrated suspicion on the part of the defendant that the goods were stolen and the circumstantial evidence that spoke to the defendant's psychological state of acknowledgment.[815] As demonstrated by the case, what differentiates *mihitsu no koi* and *kasitsu* is that an actor acting with the former does so with more awareness about the circumstances that amount to acknowledgment, which satisfies the element of *koi*. The actor acting with *kasitsu* would not act with the same degree of awareness that would amount to finding *koi*.

It would be useful to highlight the fundamental differences between *koi* and *kasitsu*. *Koi* crime and *kasitsu* crime operate under a different scope (mainly in their degree of deviation from societal norms concerning the protected interest, and alternatively, in their degree of culpability), resulting in offenses comprised of different criminal elements.[816] Crimes requiring *koi* and

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[810] 最判昭和 23 年 3 月 16 日刑集 2 巻 3 号 227 頁.

[811] 最判昭和 42 年 5 月 25 日刑集 21 巻 4 号 584 頁.

[812] At 177, 井田良『講義刑法学・総論〔第 2 版〕』（有斐閣、2018 年）.

[813] *Id*. Both *mihitsu no koi* and *kasitsu* without awareness requires awareness of possibility that criminal fact can be actualized. *See Id*. for the criticisms regarding the possibility theory's approach in differentiating between *mihitsu no koi* and *kasitsu* with awareness.

[814] 最判昭和 23 年 3 月 16 日刑集 2 巻 3 号 227 頁, as cited at 177, 井田良, *supra* note 812.

[815] *Id*. at 178.

[816] *Id*. at 119.

kasitsu significantly differ in the kind of norms the criminal provisions purport to regulate, mainly in terms of social condemnation against the acts, significance in protecting the legal interest, and social interest in enforcing the norm.[817] The distinction between the two is integral since punishment based on *kasitsu* is relatively light compared to other offenses that apply the default subjective element of *koi*.[818]

The significant difference between *koi* and *kasitsu*, thus, is the considerable relaxation of the required degree of culpability for the latter. Under the kasitsu standard, a person should be found liable if the person violated the duty of care required for engaging in the sexual act, even if the person did not "intend" to commit a sex crime. For example, even if a person has engaged in a sexual act by using force or threat that makes a victim's resistance conspicuously difficult, under the current application of *koi*, the person would not be held liable under Article 177 if it can be successfully argued that the person was not aware that he or she was exercising such force against the victim. Even though the action, the use of force, was willful enough to make the victim feel as if he or she could not resist the sexual act, the courts would still allow the defendant to argue that the exercise of force and the subsequent sexual act against the victim's will was committed without the required *koi*. Crime based on a *kasitsu* standard has the potential to successfully depart from this problematic evaluation that is inherently based on the perpetrator's perspective.

In fact, some committee members argued for it, including Kojima, who suggested that creating an offense based on *kasitsu* should be considered during the fifth meeting.[819] Kojima argued that a sex offense based on *kasitsu* would enable penalizing an offender who has been negligent about his or her duty to confirm the partner consented to a sexual act.[820] On the other hand, according to Wada, practical difficulties remains for creating a sex offense based on *kasitsu* as there is neither social consensus on what should constitute consent, leading to numerous problems associated with applying the *kasitsu* standard, nor plausible possibility that a new type of *kasitsu* standard that deviates from the traditional principles of criminal law in Japan can be created solely for sex crimes.[821]

More specifically, Wada suggested that punishing sex crimes based on *kasitsu* may be difficult because *kasitsu*-based offense requires violation of duty, and thus, duty in the context of sex crimes, such as the duty to understand the partner's consent or the duty not to engage in unwanted sex should be conceptualized in a concrete way.[822] Wada argued that this would be challenging.[823] He explained that as there are a variety of ways to earn consent and to react to a person's sexual advances, defining and applying such a duty would involve answering challenging questions about how and when such a duty should be imposed and completed.[824] Wada also raised the possibility that the application of the duty in actual cases would be

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[817] *Id*. at 118-9. The proponents of *Erfolgsunwert* (or proponents of objective legal interests theory or 結果無価値論 – theory that focuses on that certain acts have brought about violation of protective interest) only consider the traditional, subjective illegality elements as the illegality element, while the proponents of *Handlungsunwert* (行為無価値論 – theory that focuses on acts on which value evaluation concerning illegality is given based, in its narrow sense) also generally includes *koi* and *kasitsu* as illegality element.

[818] 井田良, *supra* note 812 at 175.

[819] 性犯罪に関する刑事法検討会, *supra* note 18 at 13.

[820] 性犯罪に関する刑事法検討会, *supra* note 42 at 26.

[821] At 31-32, 法務省, 性犯罪に関する刑事法検討会第 13 回会議議事録 (Mar. 8, 2021).

[822] *Id*.

[823] *Id*.

[824] *Id*.

challenging, as the standard for determining facts that satisfy a violation of the duty would be ambiguous. [825] Therefore, Wada suggested that creating a *kasitsu*-based offense "…would be quite difficult, under the system of rules."[826] Wada's opinion well demonstrates the challenges associated with creating an offense for *kasitsu* based sex crime.

Based on the review, there are two points to bear in mind regarding the subjective element of sex crimes in Japan. First, it seems evident that the current interpretation of *koi* in sex crime cases is susceptible to misapplication where the courts unduly consider the case from a perpetrator's perspective and ultimately cause injustice to the victims by letting the perpetrators escape liability by arguing that he or she did not know better or that the victim led him on. Second, while creating an offense based on the *kasitsu* standard is the most plausible option for resolving the problem, there are concerns about whether it would be feasible to do so. The discussion section will therefore include a further evaluation on how to improve the sex crime laws of Japan based on these two points and given the following comparative analysis with mens rea requirements in the United States.

2. United States

In the United States, states employ different mens rea standards for sex crimes. Additionally, required mens rea may differ for different sex offenses in a state. This section reviews four mens rea standards commonly used in the United States, as well as malice, a theoretical suggestion by Kari Hong, to explore whether other standards may be more suitable for sex crimes than the current standard in Japan. To aid the understanding of each standard, the definition of which may somewhat vary according to states, the definitions in the Model Penal Code, a model code produced by the American Legal Institute that serves as a reference for state criminal codes, is introduced for each mens rea, followed by an examination of the mens rea as used in state examples.

A. Intentionally and purposefully

Model Penal Code defines, purposefully as:

> A person acts purposely with respect to a material element of an offense when:(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

§ 2.02. General Requirements of Culpability., Model Penal Code § 2.02 (2)(a).

Being a high bar to clear, most states do not require mens rea of purpose in their sex crime provisions, with few exceptions. For example, Delaware's rape in the first-degree provision and the second-degree provisions require intention. They state:

> § 773. Rape in the first degree; class A felony

[825] *Id*.
[826] *Id*. at 31,「やはり規定の形式上，かなり難しいのではないかと思うのです。」.

(a) A person is guilty of rape in the first degree when the person *intentionally* (emphasis added) engages in sexual intercourse with another person and any of the following circumstances exist:
(1) The sexual intercourse occurs without the victim's consent and during the commission of the crime…
(2) The sexual intercourse occurs without the victim's consent and it was facilitated by or occurred during the course of the commission or attempted commission of:
a. Any felony; or
b. Any of the following misdemeanors…

11 Del. Code §773 (2019).

§ 772. Rape in the second degree; class B felony
(a) A person is guilty of rape in the second degree when the person:
(1) *Intentionally* (emphasis added) engages in sexual intercourse with another person, and the intercourse occurs without the victim's consent; or
(2) *Intentionally* (emphasis added) engages in sexual penetration with another person under any of the following circumstances:
a. The sexual penetration occurs without the victim's consent and during the commission of the crime, or during the immediate flight following the commission of the crime, or during an attempt to prevent the reporting of the crime, the person causes serious physical injury to the victim; or
b. The sexual penetration occurs without the victim's consent, and was facilitated by or occurred during the course of the commission or attempted commission of:
1. Any felony; or
2. Any of the following misdemeanors: …

11 Del. Code §772 (2019).

Similar to the definition set forth by the Model Penal Code, "intentionally" in Delaware is defined as "the person's conscious object to engage in conduct of that nature or to cause that result" or "the person is aware of the existence of such circumstances or believes or hopes that they exist."[827] A Delaware court has held that a victim's testimony on the attack against the victim can serve as the direct evidence of intent for first-degree rape,[828] although the jury may also infer that intention from the circumstances surrounding the pertinent act.[829]

In New York, § 130.52, the offense of forcible touching states:

A person is guilty of forcible touching when such person *intentionally* (emphasis added), and for no legitimate purpose:
1. forcibly touches the sexual or other intimate parts of another person *for the purpose of degrading or abusing such person (emphasis added),* or for the purpose of gratifying the actor's sexual desire; or
2. subjects another person to sexual contact *for the purpose of gratifying the actor's sexual desire and with intent to degrade or abuse such other person (emphasis added)* while such other person is a passenger on a bus, train, or subway car operated by any

[827] 11 Del. Code §231 (2019).
[828] *State v. Conaway*, 2019 WL 3431594 at *9 (Del. Super. Ct. 2019).
[829] *Id*.; 11 Del. Code § 307(a)(2019).

transit agency, authority or company, public or private, whose operation is authorized by New York state or any of its political subdivisions.

For the purposes of this section, forcible touching includes squeezing, grabbing or pinching.

N.Y. Pen. L. § 130.52 (2020).

In *People v. Guez*, a Supreme Court, Appellate Team of New York, found given that the defendant was alleged to have approached the victim from behind as she was squatting down to reach low shelves in a car wash and have rubbed his foot against her vagina by placing his foot between her legs, the facts of the case sufficiently support the conviction of forcible touching.[830] The court found that the defendant's argument that the prosecution had failed to prove his intention for the act was to degrade, abuse, or to gratify his sexual desire did not hold water.[831] The court, holding that the intent may be inferred from the act itself, found that the facts of the case were sufficient to find the culpable intent based on the standard from *People v. Hatton*.

In *People v. Hatton*, the Court of Appeals of New York ruled that the defendant's acts of smacking the buttocks of two victims supported findings of purpose elements of forcible touching. [832] The court, while recognizing the inherent challenges of proving an actor's mental state, that the intent may be inferred from the conduct itself and the surrounding circumstances,[833] by holding, "As we have said, intent is difficult to discern. Factors such as defendant's expressive conduct, the surrounding circumstances, the location of the incident and the existence of a prior relationship or a common understanding between the parties, may support or negate an inference that defendant harbored the statutory purpose."[834]

Additionally, the Court of Appeals of North Carolina decided on the issue of whether a case involving a perpetrator convicted in the superior court of attempted second-degree rape[835] satisfied the specific element of intent required for attempted rape under the overt act for the purpose. In this case, the defendant jumped on the 14-year-old victim who was walking to her summer soccer camp from home, pushed her down, and rubbed her crotch until the victim kicked him in the groin area.[836] In denying the defendant's argument that the prosecution failed to prove specific intent to have vaginal intercourse with the victim, as the evidence demonstrates that the perpetrator only intended to look at the victim or commit other less culpable offenses,[837] the court held that the precedent was clear on establishing that some overt act manifesting a sexual

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[830] *People v. Guez*, 56 Misc. 3d 36, 39, 56 N.Y.S.3d 772, 774 (N.Y. App. Term. 2017)

[831] *Id*. at 42.

[832] At **192-193, *People v. Hatton*, 26 N.Y.3d 364, 372, 44 N.E.3d 188, 194 (2015).

[833] *Id*., citing cases as the following:

> As a general matter, "intent is rarely proved by an explicit expression of culpability by the perpetrator" (*People v. Bueno*, 18 N.Y.3d 160, 169, 936 N.Y.S.2d 636, 960 N.E.2d 405 [2011] [internal quotation marks omitted]). In recognition of **193 ***118 the inherent challenges to demonstrating an actor's mental state, this Court has accepted that "[i]ntent may be inferred from conduct as well as the surrounding circumstances" (*People v. Steinberg*, 79 N.Y.2d 673, 682, 584 N.Y.S.2d 770, 595 N.E.2d 845 [1992]). Accordingly, in the context of assessing the sufficiency of an accusatory instrument, we have made clear that "intent may be inferred 'from the act itself' (People v. Bracey, 41 N.Y.2d 296, 301, 392 N.Y.S.2d 412, 360 N.E.2d 1094 [1977])" (*Dumay*, 23 N.Y.3d at 525, 992 N.Y.S.2d 672, 16 N.E.3d 1150).

[834] At **194, *People v. Hatton*, 26 N.Y.3d 364, 372, 44 N.E.3d 188, 194 (2015).

[835] N.C.G.S. §14–27.6 (1986)(Repealed by Laws 1994, Ex.Sess., c. 14, § 71(3), eff. Oct. 1, 1994)(currently under N.C.G.S. § 14-2.5).

[836] At 623 *State v. Dunston*, 90 N.C. App. 622, 625, 369 S.E.2d 636, 637 (1988).

[837] Second-degree forcible rape in North Carolina requires vaginal intercourse. N.C. Gen. Stat. §14-27.22 (2020).

purpose or motivation by the defendant is adequate evidence of an intent to commit rape.[838] Moreover, the court held that even when other inferences are possible, the courts have consistently held that the perpetrator's argument can be rejected if the evidence of sexual motivation of an attack supports a reasonable inference of an intent to engage in vaginal intercourse with the victim.[839]

While a part of Ohio's rape law is currently under revision because it has been preempted for being unconstitutionally vague, a court deciding under the past law with *mens rea* requirement of purpose held that the requirement includes "specific intent to purposely compel the victim to submit by force or threat of force."[840] The court held that "a person acts purposely either when it is his specific intention to cause a certain result, or when it is his specific intention to engage in prohibited conduct of a certain nature regardless of what the offender intends to accomplish through that conduct."[841]

As demonstrated by the examples, the mens rea of intention or purpose requires evidence that it was the conscious objective of the perpetrator to commit an illegal sex act, but such intent or purpose can be inferred from analyzing the nature and implications of the act itself and the surrounding factors, such as the time and location of the offense and the relationship between the victim and the perpetrator.

Because of the rather high hurdle of proving this mens rea element in the context of sex crimes, they are rarely employed by U.S. state sex crime laws, and especially not for those on rape or equivalently culpable sex crimes. As illustrated by the above-mentioned example of New York's § 130.52, the *mens rea* requirement is often coupled with act elements that are considered less culpable, creating an offense that penalizes less direct sex acts (such as grabbing or pinching) if committed with an obvious intention or purpose to engage in the alleged act.

B. General intent

Finding that rape has been historically a general intent crime, some U.S. states where sex crime statutes do not prescribe the required degree of mental state hold sex crimes as general intent crimes. Judges and scholars, however, have criticized general intent as confusing and ambiguous.[842] The drafter of the Model Penal Code has also criticized the vagueness of the

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[838] *DUNSTON*, 90 N.C. App. at 625, citing examples including:
State v. Whitaker, 316 N.C. 515, 342 S.E.2d 514 (1986) (defendant verbally expressed desire to perform cunnilingus with his victim and told her to pull down her pants); *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967) (defendant discussed with his brother "getting some sex," took their two victims to a secluded area, and ordered them to remove their clothes); *State v. Schultz*, 88 N.C.App. 197, 362 S.E.2d 853 (1987) (defendant touched victim's breast); *State v. Hall*, 85 N.C.App. 447, 355 S.E.2d 250, *disc. rev. denied*, 320 N.C. 515, 358 S.E.2d 525 (1987) (defendant pulled the victim's shirt down and touched her breasts); *State v. Wortham*, 80 N.C.App. 54, 341 S.E.2d 76 (1986), *rev'd in part on other grounds*, 318 N.C. 669, 351 S.E.2d 294 (1987) (defendant slit open the crotch of his sleeping victim's panties); *State v. Powell*, 74 N.C.App. 584, 328 S.E.2d 613 (1985) (*defendant entered victim's bedroom at night, undressed, and began fondling his genitalia*).

[839] *Id*. At *626, citing *State v. Whitaker*, 316 N.C. 515, 342 S.E.2d 514 (1986); *State v. Hudson*, 280 N.C. 74, 77, 185 S.E.2d 189, 191 (1971), *cert. denied*, 414 U.S. 1160, 94 S.Ct. 920, 39 L.Ed.2d 112 (1974); *State v. Schultz*, 88 N.C.App. 197, 362 S.E.2d 853 (1987); *State v. Hall*, 85 N.C.App. 447, 355 S.E.2d 250, *disc. rev. denied*, 320 N.C. 515, 358 S.E.2d 525 (1987).

[840] At 350, *State v. Martens*, 90 Ohio App. 3d 338, 350, 629 N.E.2d 462, 469 (1993).

[841] *Id*.

[842] Eric A. Johnson Understanding General and Specific Intent: Eight Things I Know for Sure, 13 Ohio St. J. Crim. L. 521 (2015-2016); Kin Kinports, *supra* note 433 at 777.

concept of general intent but has nonetheless outlined in the explanatory note of the Code that subsection (3) of §2.02 is roughly equivalent to general intent.[843] Subsection (3) states, "(3) Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto."[844]

Courts deciding general intent sex crimes interpreted general intent as requiring various degrees of mental state. Historically, courts have referred to the "common-law origins of crime"[845] to the statute "… as requiring proof of a culpable mental state which is appropriate in light of the nature of the offense and the policy considerations for punishing the conduct in question."[846] Adhering to the common law tradition, courts have often found that where a culpable mental state is not specified in the code of law, "the great weight of authority…holds the crime of rape requires no intent other than that indicated by the commission of the acts constituting the offense."[847] Thus, this interpretation finds that mens rea is evidenced by the fact that the perpetrator has satisfied *actus reus* elements of the crime. Another court has explained the general intent requirement for rape as "…that the defendant intended to make the bodily movement that constitutes the act forbidden by law, i.e., the act of penetration and the use of force to overcome resistance by the victim."[848] Courts even go so far as to hold that jury instruction stating that a defendant's state of mind is not a substantial issue is acceptable for general intent rape.[849] Appeals Court of Massachusetts, for example, has held that when the jury has found that the sexual act by the defendant was against the will or without consent of the victim, "…implies a finding of general intent without a separate instruction on that issue."[850]

Other courts have held that the general intent requirement is satisfied when the actor knowingly engages in criminal behavior. As an illustration, the Idaho court has found that "[a] general criminal intent requirement is satisfied if it is shown that the defendant knowingly performed the proscribed acts…"[851] In another example, the Supreme Court of New Hampshire, while pointing out that the general intent requirement for rape means that "no intent is requisite other than that evidenced by the doing of the acts constituting the offense,"[852] held that the most that is required for the mental state is that the defendant acts knowingly.[853] Citing *State v. Weitzman*, the court found that "[i]n order to act 'knowingly,' a person need only be aware that it is practically certain that his conduct will cause a prohibited result."[854] The Supreme Court of the United States also sided with this approach, finding that "In a general sense, 'purpose'

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[843] MODEL PENAL CODE §2.02 (Explanatory Note, Am. L. Inst. 1985).
[844] *Id*.
[845] At **941, *State v. Aldrich*, 124 N.H. 43, 47, 466 A.2d 938, 940 (1983), as cited in *State v. Ayer*, 136 N.H. 191, 193, 612 A.2d 923, 925 (1992).
[846] *Id*. at **940.
[847] At 752, *United States v. Thornton*, 498 F.2d 749, 753 (D.C. Cir. 1974).
[848] At 211, *Gov't of Virgin Islands v. Joyce*, 210 F. App'x 208 (3d Cir. 2006), citing *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000); *United States v. Dollar Bank Money Market Account No.* 1591768456, 980 F.2d 233, 237 (3d Cir.1992); 2 Wayne R. LaFave, Substantive Criminal Law, § 17.2(b), at 613–17 (2d ed.2003).
[849] At 1031, *State v. Plunkett*, 261 Kan. 1024, 934 P.2d 113 (1997).
[850] At n.12, *Com. v. Lefkowitz*, 20 Mass. App. Ct. 513, 520, 481 N.E.2d 227, 231 (1985).
[851] At 405, *State v. Stiffler*, 117 Idaho 405, 788 P.2d 220 (1990).
[852] At *194, *State v. Ayer*, 136 N.H. 191, 194, 612 A.2d 923, 925 (1992), citing 75 C.J.S. Rape §9 at 471 (1952).
[853] *Id*.
[854] *Id.*, citing *State v. Weitzman*, 121 N.H. 83, 89, 427 A.2d 3, 7 (1981) at *89.

corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent."[855]

Alternatively, some courts require mens rea of at least recklessness, with one court holding "…when a statute does not prescribe a particular mental state applicable to an element of an offense, then (unless it is a strict liability offense) the State's burden for showing a mens rea may be satisfied by showing that the defendant acted with either intent, knowledge, or recklessness."[856] Therefore, even among states that punish sex crimes as general intent crimes, the degree of mens rea required for the offenses vary according to the state jurisdiction's interpretation of general intent in the context of sex crimes.

Requiring general intent for sex crimes seems undesirable, especially in discussing sex crime law amendment for Japan. If construed as not requiring mental state as long as culpable acts have been proven, it may be easier to hold guilty parties liable. However, ambiguousness of the standard is an unignorable issue, leaving the possibility for unconstitutionality due to vagueness. Moreover, when courts find general intent mens rea from that *actus reus* of a sex crime has been satisfied, as many courts often do, especially in finding mens rea for the force element,[857] it necessarily leads to the question of whether the general intent as applied to sex crimes actually serves the role of mens rea. This is not to mention that this common law concept of general intent is not compatible with the subjective element requirement under Japan's criminal law.

C. Knowingly

Model Penal Code defines "knowingly" as:

> A person acts knowingly with respect to a material element of an offense when:
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

§ 2.02. General Requirements of Culpability., Model Penal Code § 2.02(2)(b).

Setting the baseline for culpability over criminal negligence, recklessness, and general intent crimes, the *mens rea* requirement of knowingly establishes a "very low, fixed level of accepted risk."[858] Sex crime statutes in a few states of the United States require a mental state of knowledge. For example, Hawaii's sexual assault in the first-degree provision requires:

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[855] At *404, *United States v. Bailey*, 444 U.S. 394,100 S.Ct. 624 (1980), citing MODEL PENAL CODE § 2.02, Comments, p. 125 (Tent. Draft No. 4, 1955) & At 201-2, Wayne LaFave & Austin Scott, Handbook on Criminal Law § 28 (1972) ("Sometimes 'general intent' is used in the same way as 'criminal intent' to mean the general notion of *mens rea*, while 'specific intent' is taken to mean the mental state required for a particular crime. Or, 'general intent' may be used to encompass all forms of the mental state requirement, while 'specific intent' is limited to the one mental state of intent. Another possibility is that 'general intent' will be used to characterize an intent to do something on an undetermined occasion, and 'specific intent' to denote an intent to do that thing at a particular time and place.")

[856] At *190, *People v. McMullen*, 91 Ill. App. 3d 184, 414 N.E.2d 214, (1980), citing *People v. Utinans*, 55 Ill.App.3d 306, 13 Ill. Dec. 53, 370 N.E.2d 1080 (1977).

[857] Kit Kinports, *supra* note 433 at 776-82.

[858] At 4, Eric Johnson, Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Rick, 99 J. Crim. L. & Criminology, 1 (2008).

(1) A person commits the offense of sexual assault in the first degree if:
(a) The person *knowingly* (emphasis added) subjects another person to an act of sexual penetration by strong compulsion;
(b) The person *knowingly* (emphasis added) engages in sexual penetration with another person who is less than fourteen years old;
(c) The person *knowingly* (emphasis added) engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old; provided that:
(i) The person is not less than five years older than the minor; and
(ii) The person is not legally married to the minor;
(d) The person *knowingly* (emphasis added) subjects to sexual penetration another person who is mentally defective; or
(e) The person *knowingly* (emphasis added) subjects to sexual penetration another person who is mentally incapacitated or physically helpless as a result of the influence of a substance that the actor knowingly caused to be administered to the other person without the other person's consent.
Haw. Rev. Stat. Ann. § 707-730.

Knowingly is defined under Hawaii Penal Code as:

(2) "Knowingly."
(a) A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.
(b) A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.
(c) A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.
Haw. Rev. Stat. § 702-206 (2)(2013).

In *State v. Keomany*, the defendant convicted of three counts of first-degree sexual assault, two counts of third-degree sexual assault, and one count of kidnapping, appealed and argued *inter alia* that the jury instruction for the knowingly requirement in the trial court was inadequate.[859] The court's instruction on the first-degree sexual assault was as follows:

> [Court's Instruction Nos. 27, 28 & 29]
> In Count [I, III and IV, respectively] of the Indictment, the [Defendant] is charged with the offense of Sexual Assault in the First Degree.
>
> A person commits the offense of Sexual Assault in the First Degree if he knowingly subjects another person to an act of sexual penetration by strong compulsion.
>
> There are four material elements to this offense, each of which the prosecution must prove beyond a reasonable doubt. These four elements are:

[859] At 147, *State v. Keomany*, 97 Haw. 140, 34 P.3d 1039 (2000).

> 1. That on or about March 16, 1997, in the City and County of Honolulu, State of Hawaii, the [Defendant] subjected [Complainant] to an act of sexual penetration by inserting his penis into her vagina; and
>
> 2. That the Defendant did so by strong compulsion; and
>
> 3. That the Defendant did so knowingly; and
>
> 4. That the Complainant did not consent.

At 146, *State v. Keomany*, 97 Haw. 140, 34 P.3d 1039 (2000).

The defendant argued that the jury instruction was erroneous because it inadequately informed the jury that "knowingly" applied to each element of each offense by listing certain elements afterward.[860] The defendant argued that the instruction was misleading because, in part, in the above mentioned instruction on first-degree sexual assault, the lack of consent element was provided after the instruction on "knowingly."[861] The court dismissed this argument, finding that the instruction sufficiently informed the jury of attendant circumstances, including lack of consent.[862] The court did not engage in the discussion of how *mens rea* should be applied to the facts of the case, while acknowledging that "strong compulsion" is an attendant circumstance element of a crime but nonetheless shifting its focus to the analysis of the defendant's state of mind as to lack of consent. [863]

In a different example, federal law for sexual abuse states:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison…(omitted)… *knowingly* (emphasis added) --
> (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or
> (2) engages in a sexual act with another person if that other person is--
> (A) incapable of appraising the nature of the conduct; or
> (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;
> or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

18 U.S.C. § 2242.

Federal courts in the United States have likewise held that the mens rea element of "knowingly" applies to each element of the statute.[864] Therefore, as held by *United States v.*

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[860] *Id*.
[861] *Id*.
[862] *Id*. at 150.
[863] Kit Kinports, *supra* note 433 at 769-70.
[864] *Flores-Figueroa v. United States*, 556 U.S. 646, 652, 129 S. Ct. 1886, 1891, 173 L. Ed. 2d 853 (2009), citing *United States v. X–Citement Video, Inc.*, 513 U.S. 64, 79, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994).

Bruguier, a case involving §2242(2) requires more than that the defendant has knowingly engaged in a sexual act with the victim, by requiring that the defendant has *known* that the victim is either incapable of appraising the nature of the conduct or physically incapable.[865] Courts have consistently followed *Bruguier* in recognizing that the mental state of knowledge also goes to the victim's incapable state, and courts, including *U.S. v. Rouillard,* have held that the jury instruction should include that knowledge requirement applies to both that the defendant was engaging in a sexual act and that the victim was incapacitated.[866]

Knowledge requirement, while being the "less stringent,"[867] may be viewed as a more concrete *mens rea* requirement because it allows direct examination of whether a defendant knew or was aware of the element of the crime or the attendant circumstance elements. However, when applied to force or forcible compulsion element, courts in the United States have often resorted to whether the defendant was aware of the lack of consent of the victim rather than the direct analysis of whether the defendant knowingly used the force.[868] This may be because if a court is to analyze whether the defendant knowingly used force, the discussion would inherently go to whether the defendant has satisfied *actus reus* of the crime, as in general intent cases, discussed earlier. The consideration that *mens rea* requirement concerning force is usually evaluated with a lack of context has sometimes evinced shortcomings of the force element, which are introduced in the discussion section. All in all, while "knowingly" may serve as a more concrete *mens rea* requirement than a general intent requirement, it is not without its own challenges.

D. Recklessly and negligently

Model Penal Code defines recklessness and negligence as follows:

> (c) Recklessly.
> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
> (d) Negligently.
> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

§ 2.02. General Requirements of Culpability., Model Penal Code § 2.02(2)(c)&(d).

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[865] *United States v. Bruguier*, 735 F.3d 754, 762 (8th Cir. 2013)(reversing a defendant's conviction upon *de novo* review by holding that the district court's failure to give instruction that he did not know that the victim was incapacitated or otherwise unable to deny consent; *see also* the dissent opinion objecting to the court's reading based on the best grammatical reading and public policy concerns, *inter alia*).
[866] At 1172, *United States v. Rouillard*, 740 F.3d 1170, 1172 (8th Cir. 2014).
[867] Kit Kinports, *supra* note 433 at 769.
[868] *Id*. at 771.

Setting a lower bar of proof for mens rea, while no states explicitly adopt a mens rea requirement of recklessness or criminal negligence, courts in some states set judicial precedents that have employed the standard.[869] Nonetheless, in some states, courts instruct juries that a mental element for intentionally, knowingly, or recklessly is required for certain sex crimes, setting recklessness as the lowest bar for *mens rea* for the crimes. For example, in Tennessee, a court held that pursuant to its Committee on Pattern Jury Instruction, elements of rape of a child should be met by proving the mental state of *at least* recklessness.[870] The court further held, pursuant to T.C.A. § 39–11–302(c), that "[r]eckless refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." A court thus found that the trial court's following jury instruction about the mental states of intentional, knowing, and reckless was proper:

> The word recklessly means that a person acts recklessly with respect to the circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature as [sic] degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

*14, *State v. Blanton*, 2009 WL 537558 (Tenn. Crim. App. 2009).

Likewise, negligence is not often elected as an explicit mens rea requirement for sex crimes. Alternatively, when a statute is silent with respect to the requirement for mens rea, negligence is sometimes applied by courts on determining required mental states in regards to certain elements of a crime.[871] For example, the Court of Appeals of Oregon has held that the commission of rape in the first degree requires that the actor commit each of the material elements of the crime either intentionally, knowingly, recklessly, or with criminal negligence,[872] citing Tenn. Code Ann. § 39-11-302. Under the section, negligence is defined as:

> (d) "Criminal negligence" refers to a person who acts with criminal negligence with respect to the circumstances surrounding that person's conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Tenn. Code Ann. § 39-11-302 (2019).

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[869] *Id*. at 774.
[870] "Thus, each element of rape of a child may be met by proving the defendant acted intentionally, knowingly, or recklessly." At *13, *State v. Blanton*, No. M200701384CCAR3CD, 2009 WL 537558 (Tenn. Crim. App. Mar. 4, 2009); *Chester Wayne Walters*, No. M2003–03019–CCA–R3–CD, 2004 WL 2726034, at *12 & *14 (Tenn. Crim. App., at Nashville, Nov. 30, 2004), *perm. app. denied* (Tenn. Mar. 21, 2005).
[871] Kit Kinports, *supra* note 433 at 774.
[872] At n.5, *State v. Wasson*, 45 Or. App. 169, 607 P.2d 792 (1980).

Both "recklessness" and "negligence" require juries to weigh the risks and relevant factors in determining whether the perpetrator's acts are justifiable given the risks under the circumstances known to the perpetrator.[873] The difference between recklessness and negligence is the degree of risk required. That is, recklessness requires that a defendant consciously disregard a substantial and unjustifiable risk.[874] On the other hand, criminal negligence lies in a failure to exercise the ability to think about and control the risk involved in a given act,[875] deviating from the standard of care that a reasonable man would exercise under like circumstances.[876] As "[c]riminal liability cannot follow every careless act merely … it should not be imposed unless the inadvertent risk created by the conduct would be apparent to anyone who shares the community's general sense of right and wrong."[877] A New York court has commented on the application of criminal negligence as following:

> Criminal negligence requires appreciably more serious carelessness than does civil negligence, and requires defendant to have engaged in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk of a proscribed result; nonperception of a risk, even if [the proscribed result occurs], is not enough.

At 70, *People v. Munck*, 92 A.D.3d 63, 937 N.Y.S.2d 334 (2011) (*citing People v. Conway,* 6 N.Y.3d 869, 816 N.Y.S.2d 731, 849 N.E.2d 954 [2006]).

Some scholars naturally express caution when applying "recklessness" and "negligence" mens rea standards for sex crimes. In applying negligence standard, there is an issue of whose perspective should be considered that of a "reasonable man" because of the gender gap that may create a different understanding as to what is considered reasonable under the same circumstances.[878] Moreover, in the United States, where layperson jurors determine the question of fact, negligence standard that requires jurors to assess the harm caused by the criminal act and balance the justifiability of the risk may not be proper, since they are not only ill-prepared to do so but also prone to improperly take factors like a victim's chastity into consideration.[879] Additionally, when negligence is the mental state requirement for sex crimes, jurors might be asked to make a determination not only about the motivation of the defendant but also make a moral assessment about it in order to determine the reasons for the defendant's indifference, leaving the jury with a task at hand that is replete with ambiguity.[880] This ambiguity also carries the danger of "turn[ing] criminality into an ad hoc, and post hoc, determination."[881] While professionally trained judges can be at least better at discerning different nuances of mens rea standards and applying the appropriate standard to the facts, there is no proof that a judge may be better at the same evaluation. Thus, regardless of whether the question of fact is left at the hands

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[873] Eric Johnson, *supra* note 858 at 6.
[874] Marcia Baron, Negligence, Mens Rea, and What We Want the Element of Mens Rea to Provide, 14 Crim. L. & Phil. 69, 71 (2020).
[875] At 157, H.L.A. Hart, Negligence, Mens Rea, and Criminal Responsibility, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (2008).
[876] 22 C.J.S. Criminal Law: Substantive Principles §32.
[877] *Id*.
[878] Kit Kinports, *supra* note 433 at 790. *See also Id*. at 790-792 for further discussion on the issue.
[879] Eric Johnson, *supra* note 858 at 20.
[880] At 320, Robin Charlow, Bad Acts in Search of a Mens Rea: Anatomy of a Rape, 71 Fordham L. Rev. 263, 327 (2002).
[881] *Id*. at 321.

of a jury or a judge, it is apparent that the standards leave too much room for ambiguity, leaving the door for prejudices and misconceptions about sex crimes to creep in.

E. Strict liability

Model Penal Code allows for strict liability in limited cases:

> (1) The requirements of culpability prescribed by Sections 2.01 and 2.02 do not apply to:
> (a) offenses that constitute violations, unless the requirement involved is included in the definition of the offense or the Court determines that its application is consistent with effective enforcement of the law defining the offense; or
> (b) offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.
> (2) Notwithstanding any other provision of existing law and unless a subsequent statute otherwise provides:
> (a) when absolute liability is imposed with respect to any material element of an offense defined by a statute other than the Code and a conviction is based upon such liability, the offense constitutes a violation; and
> (b) although absolute liability is imposed by law with respect to one or more of the material elements of an offense defined by a statute other than the Code, the culpable commission of the offense may be charged and proved, in which event negligence with respect to such elements constitutes sufficient culpability and the classification of the offense and the sentence that may be imposed therefor upon conviction are determined by Section 1.04 and Article 6 of the Code.
> § 2.05. When Culpability Requirements Are Inapplicable to Violations and to Offenses Defined by Other Statutes; Effect of Absolute Liability in Reducing Grade of Offense to Violation., Model Penal Code § 2.05

Some states impose strict liability for sex crimes against minors. Strict liability for sex crimes for minors means that a mistake of fact does not serve as defense, and a defendant's mistake of a victim's age, however sincere, does not help the defendant escape criminal liability. Legislature imposing strict liability for certain sex crimes may have judged that unjustifiable risk for certain criminal acts is partially based on the unforeseen consequences.[882] In the context of a sexual act with a minor, the unforeseen consequence would be the victim's age if the actor had thought that the partner was an adult. This effectively places the duty of making sure that one's sexual partner is not a minor, promoting the purpose of protecting children from sexual advances from adults. However, some critics have suggested that a defendant should not be convicted when the defendant reasonably believed that the partner was not a minor.[883]

For example, a man charged with the rape of a minor may have reasonably believed that the person he had engaged in sexual acts with was an adult, but he would nevertheless be found liable. He would be liable even if the minor misrepresented her age, or he met her under circumstances where he could not have thought she was underage, such as an adult-only club. Similarly, if applied to other sexual crimes, as long as a court finds that the defendant has met

[882] Eric Johnson, *supra* note 858 at 17.
[883] *Id*. at 2.

actus reus, there is neither a need to prove his culpable mental state nor a need to address the defense of mistake.

However, even in the United States, strict liability is applied in limited cases such as statutory rape. The Supreme Court of Rhode Island, finding that the state does not impose strict liability for statutory rape offenses, highlighted the criticisms for strict-liability laws. The court explained that strict liability for felony statutory rape has no philosophical, historical, or legal foundation. According to the court, strict liability for statutory statute cannot be justified either as a public welfare offense, an offense that imposes strict liability to create an effective regulation mechanism to prevent the potential outbreak of harm in a certain industry or commercial process, or under the morally wrong theory.[884]

The court analyzed that the morally wrong theory has an old English case, *Regina v. Prince*[885], at its foundation. In *Regina v. Prince,* Prince mistook the age of a 14-year-old girl and illegally took her from her father's household. A jury found that the daughter, who looked older than her age, told Prince that she was 18 years old.[886] A majority of *en banc* panel of judges found that mistake of age did not serve as a defense, holding that the legislature did not intend the mistake of fact to serve as an impediment to protecting the parental right of the possession of his daughter.[887] Under the morally wrong theory, an act is considered intrinsically or morally wrong even if a defendant acts with erroneous facts that he had reasonably believed to be true.[888] In *Regina v. Prince*, the intrinsic moral wrongfulness of the defendant's act arose from the harm to the possessory rights of their daughter for the parents, not the harm to the daughter herself.[889] The Supreme Court of Rhode Island, calling attention to the widespread criticism of this approach that it has no basis in criminal law, held that the applying the grounds of legitimacy for imposing strict liability based on the case from a "bygone era"[890] to present day criminal law is not appropriate.

Strict liability, in its practical application by courts, may not be distinguishable from general intent crimes that can be proven by meeting *actus reus* of a crime.[891] There is also a clear concern that applying strict liability for a variety of sex crimes can lead to heedless criminal prosecution. Without question, it is too radical and thus unrealistic to consider that courts in Japan might apply strict liability to sex offenses.

F. Malice

Some scholars propose a yet another approach. For example, Kari Hong has argued that malice serves as a better *mens rea* for rape.[892] She claims that compared to other mental state standards, malice is able to more accurately capture the "precise harm that unwanted sex implicates," which is "…the antisocial mindset that arises when one acts without regard to the objective risk that one's conduct poses."[893] She explains that malice explicates more than

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[884] At 780, *State v. Yanez*, 716 A.2d 759 (R.I. 1998).
[885] *Regina v. Prince*, [1875] L.R. 2 Cr.Cas.Res. 154 (1785)(Blackburn, J.),as cited in *State v. Yanez*, 716 A.2d 759, 780 (R.I. 1998).
[886] *Id*. at 156.
[887] *PRINCE*, L.R. 2 Cr.Cas.Res. at 172, as cited in *State v. Yanez*, 716 A.2d 759, 780 (R.I. 1998).
[888] *Id*. at 176.
[889] At 781, *State v. Yanez*, 716 A.2d 759 (R.I. 1998).
[890] *Id*. at 781-2.
[891] Kit Kinports, *supra* note 433 at 782.
[892] Kari Hong, Rape by Malice, Montana L. J. 187 (2017).
[893] *Id*. at 3.

recklessness, which simply represents risks involved in a given action because malice includes not only the reckless conduct but also the actor's "contempt"[894] in engaging in the conduct.[895] For example, *California v. Knoller* defined malice in the context of murder as "a base, antisocial motive and with wanton disregard for human life."[896] Therefore, in the crime of rape, malice can more precisely capture the culpability stemming from the actor's mindset that he or she would engage in a sexual act with the other person regardless of the other person's consent. Hong argues that malice serves as a better required mental state for rape than other standards, such as recklessness or criminal negligence.[897]

Hong's argument is worth nothing for several reasons. First, she attempts to precisely capture the characteristic of sex crimes, which is that they often involve a certain degree of disregard on the part of a defendant as to whether or not the other person has consented to the act. This is important even in a jurisdiction where rape is defined by force because many courts that evaluate the defendant's culpability in exercising force against the victim impertinently consider whether the defendant was aware of the victim's non-consent, which determines whether the actor should have known that his or her actions were forcible. Second, malice may be the alternative that maintains a proper balance between negligence and recklessness because negligence can be viewed as an excessively low bar for criminal law,[898] and unlike recklessness, "malice captures both reckless conduct and an actor's contempt animating his conduct."[899] Therefore, Hong suggests that malice serves as an alternative that does a better job at capturing the culpability in sex crimes by including the actor's wanton disregard for the absence or presence of the victim's consent while serving as a narrower and better-defined alternative to the negligence standard.[900]

While serving as good food for thought, the concept of malice is not adopted as mens rea for sex crimes, even in the United States. Similarly, just as with other alternatives, it is highly unlikely that the subjective element of malice would be single-handedly applied to sex crimes in Japan when other crimes apply that of *koi*. Nonetheless, malice serves as a good reference point for the following discussion, working as a reminder that the subjective element, or mens rea requirement of a sex crime, should function as a properly defined filter for culpability designed to capture "precise harm that unwanted sex implicates"[901] at its heart.

3. Discussion

A. Koi as a subjective element for sex crimes

Deciding which mental state would be the ideal one to attach to sex crimes is not an easy task to say the least, as either too narrow or too broad interpretation can lead to injustice.
One significant question in regard to a defendant's mental state requirement is how a defendant's argument as to the misjudgment of the victim's consent should be evaluated. In fact, it is not an

[894] *Id*. at 13.
[895] *Id*. at 16.
[896] *Id*. at n.119, citing *California v. Knoller*, 158 P.3d 731, 738 (Cal. 2007), quoting *People v. Thomas*, 261 P.2d 1, 7 (Cal. 1953).
[897] *Id*. at 16.
[898] *Id*.
[899] *Id*.
[900] *Id*. at 13.
[901] *Id*. at 3.

understatement to say that "[t]he mens rea of rape usually refers instead to the defendant's mental attitude towards the element of non-consent."[902]

An abundance of scholarly criticism on the subjective element evaluation in the context of sex crimes has been centered around that the evaluation is focused on whether the perpetrator intended to engage in non-consensual sex rather than determining the perpetrator's recklessness toward the victim's consent.[903] This approach would inadvertently resemble a subjective test, evaluating the subjective element from the defendant's perspective. Calling a subjective test for the defendant's mental state as the reintroduction of "the sexism that we have striven so greatly to remove,"[904] Craig Byrnes has argued that the subjective test "…would prevent a jury from convicting a man who honestly held unreasonable sexist beliefs. In failing to punish that unreasonableness, it would allow its continuance at the expense of victimizing women."[905] Courts in Japan, by giving too much consideration to the perpetrator's perspective, have resorted to the utilization of a subjective test for *koi*, allowing perpetrators to escape liability by arguing that they was ignorant of the victim's lack of consent.

To engage in this discussion in the context of Japan, it is necessary to first understand where *koi* lies in respect to the mens rea standards used in the United States courts. While *koi* is loosely translated as intent in English, intent is not the same as *koi*. Intention per se is not required when establishing koi, as long as the actor is fully aware that he or she is actualizing the material facts of a crime.[906] The concept of intention in evaluating *koi* is nonetheless vital. Criminal law should deter invasion into protected interest when a perpetrator acts while being aware of the danger of invading such interest. In this sense, having the will to actualize certain criminal events is the essence of *koi*.[907] Whether the elements of the crime have been, as a whole, included in the actor's object of actualization, determined by the balance between the strength of the intention and a degree of certainty of actualization, is a standard that covers the whole aspect of *koi*.[908] Therefore, whether the actor had the elements of the crime within the purview of his or her object of actualization, judged by balancing between the strength of the actor's intention and the degree of certainty for actualization, is a standard that embodies *koi*.[909]

Based on this understanding, let us consider a perpetrator engaging in a sexual act while ignoring the signs of the other person's lack of consent. As the maxim *ignorantia juris non excusat* goes, unawareness about illegality, that is, not knowing that an act is illegal, or a mistake of law, does not let a perpetrator escape criminal liability. Thus, whether the actor knew that the actor's skillful ignorance of the expressions of a victim's lack of consent could result in criminal penalty should not be relevant. This is an important reminder, especially for sex crimes, as many date rapists reject moral culpability by refusing to concede that their actions of forced sex qualify as rape.[910] What is important is not whether a perpetrator knew that the act was illegal but whether the perpetrator acted with the required illegality and culpability. Therefore, the analysis

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[902] Robin Charlow, *supra* note 880 at 268.
[903] At 381, Helen Power, Towards a Redefinition of the Mens Rea of Rape, 23 Oxford J. of Legal Studies, 3, 379, 404 (2003).
[904] Craig Byrnes, *supra* note 442 at 295.
[905] *Id*.
[906] *See* 井田良, *supra* note 812 at 178.
[907] *Id*.
[908] *Id*.
[909] *Id*.
[910] At 15, Andrew Taslitz, Willfully Blinded: On Date Rape and Self-Deception, 28 Harv. J. L. & Gender 381 (2021).

should be focused on whether a defendant's willful ignorance of the facts, especially in regard to the victim's lack of consent, can be justified.

The essence of human interaction is reciprocity. Those who engage in sexual acts, the most intimate acts of human activities, should at least understand that the other person agrees to the act. Thus, given the characteristics of sex crimes, when one engages in sexual activities, there should be an inherent understanding of the facts surrounding the circumstances, including the consent of the other person. A perpetrator's strong intention to carry on with the sexual act for the sole satisfaction of the perpetrator's own desire and deliberate ignorance of the signs of refusal by the other person carries sufficient willingness to achieve the perpetrator's objective to engage in a sexual act with or without the victim's consent. Especially, when one party initiates a highly intimate and private act toward the other party, the action is being carried out solely with the actor's intention, and the actor is responsible for making sure that the other person is in agreement with the action. When this minimum sense of responsibility is lacking, this act should be blameworthy. This may be understood as the duty necessary for punishing sex crimes based on the *kasitsu* standard, which is to be introduced later in this section to engage in more in-depth discussion on the appropriateness of applying the standard for sex crimes, especially in regard to Wada's opinion given during the thirteenth committee meeting.

When a perpetrator acts with willful disregard of the victim's consent, the awareness that the perpetrator may be committing a sexual act against the victim's will and the willingness to let it happen should be sufficient to prove *koi*. However, it is difficult to say that courts in Japan take this view. While courts in Japan consider these factors, they often place more weight on the defendant's perspective and tend to reconstruct the case by walking in the perpetrator's shoes. Such tendency is well demonstrated by the aforementioned Shizuoka case finding that the defendant who used forcible means enough to make the victim, a stranger who was walking by the parking lot, suffer from minor injuries, may not have been aware that he used force or threat to make the victim's resistance conspicuously difficult.[911] Especially, a court's unwarranted consideration given to a perpetrator's excuses or mistakes regarding a victim's consent can inevitably lead to unwarranted scrutiny into the nature and strength of a victim's resistance and more benefit for doubt in the perpetrator's culpable purpose, eventually leading to perpetrator-centered evaluation.

This danger is also apparent in an old English case where a perpetrator, Morgan, who took three of his peers to his home, held his wife down and took turns with his peers to engage in forced sexual intercourse against the victim.[912] While the victim resisted, crying, and screaming, Morgan told the other men to ignore it because she was just "kinky."[913] While all of them were convicted, "the dangers of the subjective test were manifest,"[914] as the jury had been instructed that if defendants can be found to have had a reasonable belief about the victim's consent, they should be acquitted. [915] The instruction was held as a harmless error by the House of Lords, who found that no reasonable jury could have believed that they made an honest mistake.[916] This case demonstrates the perils of applying the subjective test to sex crime cases: "the defendant need

[911]静岡地浜松支判平成 31 年 3 月 19 日 LEX/DB25563101.
[912] *Regina v. Morgan*, 2 All E. R. 347 (1975), as cited in Craig Byrnes, *supra* note 442.
[913] *Id*.
[914] Craig Byrnes, *supra* note 442 at 296.
[915] *Id*., explaining MORGAN, 2 All E. R. 347.
[916] *Id*.

not have honestly believed in the woman's consent; he need not even reasonably have believed in it, as long as someone reasonably could have."[917]

Therefore, in Japan, compared to a current perpetrator-centered evaluation, a more neutral evaluation by the courts is necessary. However, this effort to improve the evaluation of *koi* as applied in sex crimes is hardly straightforward. For one, it can be difficult to determine how much courts should consider the perpetrator's side in evaluating the subjective element. Certainly, courts cannot simply ignore the analysis of the perpetrator's view about the facts of the case when evaluating his *koi*. Complete ignorance of the perpetrator's perspective would be inherently equivalent to strict liability, as explained earlier in this section. In the least, it leads to the wholesale elimination of the need to prove the defendant's mental state, obfuscating the line between subjective and objective elements.

Moreover, contrary to its purpose, courts may mistakenly delve into a close examination of a victim's behavior and the degree of resistance in an effort to more objectively examine whether the perpetrator's actions, in reflection on the victim's actions, reasonably warrant deducing *koi*. With these challenges associated with finding the right way of capturing the culpability of a sex crime perpetrator in mind, the two solutions, which have been mentioned during the earlier discussion of Japan, should be discussed here as potential solutions for improving the current application of *koi*.

B. Potential solutions

First, maintenance of koi with modification of its interpretation should be considered. The modification may benefit from applying the concept of *dolus eventualis* for sex crimes may lead to a more proper application of the subjective element in sex crimes. If the actor could have objectively and reasonably foreseen the possibility that his or her actions would bring about certain results, the actor should be considered blameworthy for the results of the actions. The benefit of employing *dolus eventualis* for sex crimes is that it effectively addresses common situations where a sex crime perpetrator takes an indifferent attitude toward the victim's reactions during the commission of a sex crime and later argues that the perpetrator did not know that the victim did not agree to the sexual act. As a form of "conditioned intent,"[918] the attitude of personal indifference toward producing certain results can create intent. Even when a perpetrator argues that the perpetrator, in all honesty, was not able to observe that the victim did not want to engage in the sexual acts, if the perpetrator's indifferent personal attitude in disregarding the other person's willingness to participate in the sexual act is contrary to the norm, intent can be established.[919]

Applying this approach in the context of sex crimes, if a perpetrator could have objectively foreseen that he or she was forcibly compelling a person to engage in a sexual act, then the perpetrator can be held liable for the act. Additionally, this approach ensures a judgment of the subjective element separate from the objective element without the wholesale dismissal of consideration for a defendant's account of events.

This approach may resolve at least some issues associated with the current analysis of *koi* for sex crimes. However, unfortunately, this approach is also not without its limitations. The most significant barrier is the foreseeable unwillingness by Japanese courts to expand the concept of *dolus eventualis* in its interpretation of sex crimes. It is questionable that the

[917] Craig Byrnes, *supra* note 442 at 296.
[918] Shigemitsu Dando, *supra* note 30 at 155.
[919] *See generally*, *Id.* at 155-6.

conservative judiciary in Japan would take a rather gallant step of expanding the boundary of blameworthiness to the sex crime perpetrators by actively applying the concept of conditioned intent in sex crime cases without given an ineluctable reason to do so.

Moreover, some might also argue that this approach does not eliminate the inappropriate attention to a victim's actions and behaviors when deciding a sex crime case. While this approach more effectively proves intent for a perpetrator who irresponsibly argues that he or she did not notice the victim's lack of consent, courts taking this approach may evaluate the perpetrator's indifferent attitude toward a victim's consent by closely examining the perpetrator's possible perception of the victim's actions or words, thus placing undue focus on the victim.

This approach also implicates practical concerns. First, it does not address the problem of judges using a personal bias in deciding sex crime cases. Just as with the current analysis by courts in Japan, this approach does not effectively prevent judges from using their own perceptions about sex crimes and the expected behavior of a victim in evaluating the subjective element. Additionally, when lay judges make decisions in the *saiban-in* (裁判員) system, the court may have difficulty explaining the concept of *dolus eventualis* or *mihitsu no koi* to laypersons.

Nonetheless, it may be a more feasible way of expanding the boundaries of punishing sex crimes based on *koi*, as it only involves some modification to the same element that courts in Japan have already employed, albeit seldomly, in criminal cases. The applicability of this first approach to the concept of *koi* is particularly appealing as some experts in Japan have argued that expanding the interpretation of *koi* instead of creating an offense based on *kasitsu* would be a more feasible option for Japan. Wada, for example, suggested that expanding on current boundaries of punishment for sex crimes and having rules in place to provide notice about it would be more realistic and impactful than punishing crimes based on *kasitsu*.[920] Therefore, Wada recommended gradually expanding the boundaries of punishment by applying *koi* by setting it as a long-term goal.[921]

On the other hand, there has been an increase in scholarly interest in applying the concept of *kasitsu* in sex crimes, as the Swedish Penal Code that contains negligent rape provision has been of profound interest for the experts in Japan.[922] However, many scholars are opposed to the adoption of *kasitsu* to sex crimes in Japan,[923] arguing, *inter alia*, that it can lead to unwarranted expansion of criminal law that subjects individuals to punishment for being merely inattentive toward their partner's reactions to sexual advances.[924] This argument should be heeded with a pinch of salt, as using the "reasonable man" standard to judge whether an actor could have been mistaken about the victim's consent often not only defines force from the perpetrator's perspective while dismissing the victim's perspective but puts the victim on trial for not being more obvious about his or her lack of consent, thereby requiring *de facto* resistance.[925]

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[920] 性犯罪の罰則に関する検討会, *supra* note 821 at 31-2.
[921] *Id.*
[922] "A person who commits an act referred to in Section 1 and is grossly negligent regarding the circumstance that the other person is not participating voluntarily is guilty of negligent rape and is sentenced to imprisonment for at most four years." Brottsbalken [BrB] [Penal Code] 6:1a§ (Swed.).
[923] *See* 嘉門優, *supra* note 408 at 70.
[924] *Id*. at 69.
[925] Mary Ruffolo Rauch, Rape—From a Woman's Perspective, 82 Ill. B.J. 614, 618 (1994)(alternatively suggesting "reasonable woman" standard).

The foundation of the idea of applying *kasitsu* to sex crimes is to make people act more responsibly as they engage in sexual acts so that they do not harm others with their sexual desires. Many scholars believe that the public's understanding of sex crime and the sense of right and wrong in sex crimes in Japan are not ready for such adoption.[926] However, creating a sex crime offense based on *kasitsu* may also bring the effect of increasing public awareness that one should not engage in sexual acts without the partner's clear consent.

C. Recapitulation

Thus far, this chapter has reviewed alternative ways for applying the subjective element or mens rea in sex crimes. In Japan, there is an evident need for the current judicial analysis of koi for sex crimes to be expanded to bring much-deserved justice for sex crime victims and render a more effective punishment for sex crime offenders who often find it a breeze to claim that they were not aware of non-consent on the part of the victim. This may have led to a persistent disparity in Japan between the significant damage done to the sex crimes victims and frequent claims for lack of awareness by perpetrators about the implications or seriousness of their actions.[927] The legislature and courts of Japan, thus, may need to re-evaluate their koi analysis for sex crimes and clear themselves of the accusation that the system takes the side of sex crime perpetrators and helps them escape liability.

Judicial analysis of the subjective element for sex crimes, which opens undue space for courts to embrace a sex crime perpetrator's excuses, may have significantly contributed to the sense of injustice for sex crime punishment in Japan. Shimaoka, while criticizing the male-centered approach taken by courts in Japan to decide sex crime cases, suggest that the laws have failed to enable proper sex crime punishment in the country because the lawmakers, prosecutors and criminal law experts in Japan do not understand the matter at the heart of sex crimes: protection of the gender-based human rights.[928]

The extreme caution in expanding the subjective element can try the public's patience as the public may view the lack of subjective element merely serves as an excuse for a sex crime perpetrator to escape liability.[929] As reviewed in this chapter, some proponents of more lax mental state requirements would go so far as to say that the elements of acts that constitute sex crimes *per se* should establish a perpetrator's culpability as the acts signify a willful disregard for the other person's consent. However, a radical elimination of the subjective element will raise an issue of constitutionality and may conversely lead to less prosecution by motivating law enforcement to handpick cases they believe worthy of conviction.

Of the two possible solutions suggested, the first approach may seem more realistic in its application. Given the current disinclination for deviance from the *koi* standard in Japan's criminal justice system, encouraging a more neutral (or less perpetrator-centered, lacking a better term) evaluation of *koi* in the context of sex crimes would provide at least some remedy to the current way of analysis to depart from the perpetrator-centered understanding of sex crimes. In an ideal scenario, courts' analysis of the cases would adhere to the following scheme: while determining a defendant's *koi* under Article 177, the court decides whether a defendant in violation of 177 has acted with due awareness about the possible lack of consent by the victim. In the context of Article 178, a court should focus on whether the defendant demonstrated

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[926] 嘉門優, *supra* note 408 at 70.

[927] *See* the discussion on the impact on the victim, *e.g.*, 性犯罪に関する刑事法検討会, *supra* note 18 at 5-6.

[928] 島岡まな, *supra* note 31 at 36.

[929] *See* Robin Charlow, *supra* note 880 at 268.

reasonable attention in noticing the inability of the victim to resist, rather than considering different ways how a perpetrator personally might have misinterpreted the situation. However, the expectation that courts would consistently follow the model scheme seems unrealistic. If this was possible, current evaluation, which in theory is founded upon the principle that the perpetrator has acted with the required *koi* if the perpetrator has dared to do actions for which he was aware of the potential criminal consequences, would not have been problematic in the first place. Coupled with the unlikeliness that analysis by the courts would follow this ideal scenario, the first approach may not bring about changes meaningful enough to improve sex crime laws in Japan.

Therefore, creating an offense based on *kasitsu* standard, despite its difficulties, seems desirable. Despite the difficulties in enacting such offense and the lesser penalty, introducing a new *kasitsu* sex crime offense is likely to hold more perpetrators liable, especially those who act with willful disregard for the victim's consent and later claim to have mistakenly thought that there was consent.

If an offense based on *kasitsu* were to be created for sex crimes, then the proper penalty should also be discussed. Given the low penalty of *kasitsu*-based offenses under Japan's penal law, the question as to what kind of penalty should be appropriate for a sex crime based on *kasitsu* considering that the penalty for involuntary manslaughter is a fine under 500,000 yen.[930] While a mere fine is not sufficient for penalization for most sex crimes, the penalty for a *kasitsu* sex crime should be considered carefully in balance with the penalties for other *kasitsu*-based offenses. Naturally, this would mean that the newly created offense would prescribe for a weaker sentence than the existing sex crime law provisions. However, even with less penalty, a *kasitsu* based offense would be able to provide the public with a clear notice that one is not supposed to act with disregard for lack of consent of a person that one purports to engage in a sexual act with.

In addition to the discussion about the *kasitsu*-based offense as a potential solution for the shortcomings of the subjective element analysis in Japan, there are also additional points to be discussed in regard to subjective element. First, sex education for members of the society, especially about sexual consent, can be an important factor in reducing sex crimes in Japan. Moreover, educating judges about sex crimes, especially in regard to how sex crimes often occur in real life, would aid in a more informed interpretation of *koi*. A state's punishment for its citizens should always be imposed with justifiable legitimacy, and overly expansive prosecution contradictory to the public sentiment or understanding of what a sex crime is would undermine the public's respect for the law. On the other hand, relying on education alone would be neither practical nor effective. Both legal reform and education, therefore, need to take place for a meaningful change. An amendment to sex crime law would also function better when accompanied by proper sex education provided for public and legal professionals. Therefore, promoting sex education that increases understanding of sex crimes for the public, law enforcement, and the bench is integral for the better understanding and prosecution of *koi* in the context of sex crimes.

Additionally, it may be useful to codify in the statute at least some degree of duty. For example, with Article 178, duty may be imposed for an actor who wishes to engage in a sexual act to pay reasonable attention to the victim's state, that is, his or her loss of consciousness or inability to resist. Mistake of fact defense is sometimes codified as a defense under U.S. state

[930] 刑法第二百十条「過失により人を死亡させた者は、五十万円以下の罰金に処する。」.

laws, more effectively controlling the kind of acceptable mistakes.[931] While prescribing duties in the statutes may be challenging, writing out some duties that defendants must exercise would increase clarity of the offenses and provide better notice for defendants.

Yet another point that is worth noting is the relationship between mens rea and the discussion of force or consent requirement. Kit Kinports, finding that the force requirement is rarely a subject of courts' application of *mens rea*, which should be applied to every element of a crime, suggests that courts that evaluate *mens rea* of rape merely focus on the defendant's beliefs and mistakes about a victim's consent.[932] Based on this analysis, Kinports suggests "…this almost universal disregard of mens rea issues as applied to the element of force confirms the redundancy of the force requirement, once the absence of consent and its accompanying mens rea have been established." [933] Therefore, mens rea analysis also goes to the question of the appropriateness of force as an element of a sex crime, providing another reason that force may not be as effective a means element as consent.

In the sea of innumerable considerations, it is important to keep in mind what a criminal law intends to protect. When the public feels as if the perpetrators are not brought to justice, it may lead to distrust in the criminal justice system. In extreme cases, the public may feel the need to take the matter into their own hands, as was the case in South Korea when "a digital prison" website that posted personal information of alleged sex crime offenders became a controversy.[934] The site was mainly brought about by the public's anger and frustration that child sex crime perpetrators and sexual offenders of the recent SNS platform-based sexual abuse scandal got away with, at best, a slap on the wrist.[935] A court decision on a forced sexual intercourse case where it found that a perpetrator did not have *koi* to use force to the degree that renders a victim's resistance conspicuously difficult based on facts, *inter alia*, that she served some food on his dish, further fueled the public anger and distrust of the system.[936] This example illustrates that substandard criminal prosecution can bring about dangerous consequences for society. Therefore, despite the challenges, it may be time for Japan to take on the difficult, yet still possible, challenge of creating a *kasitsu*-based sex crime offense.

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[931] At 12, Kari Hong, A New Mens Rea for Rape: More Convictions and Less Punishment, 55 Am. Crim. L. Rev. 259 (2018).
[932] *Id*. at 760-1.
[933] Kin Kinports, *supra* note 433 at 761.
[934] Min-ho Jung, 'Digital Prison' Reveals Identities of Child Porn Site Operator And Judges Who Released Him, The Korea Times (Jul. 9, 2020)(last accessed Oct. 10, 2020), available at http://m.koreatimes.co.kr/pages/article.amp.asp?newsIdx=292556
[935] Haeryun Kang, South Korea's 'nth Rooms' Are Toxic Mixture of Tech, Sex and Crime, Nikkei Asia, (Apr. 10, 2020)(last accessed Oct. 10, 2020), https://asia.nikkei.com/Opinion/South-Korea-s-nth-rooms-are-toxic-mixture-of-tech-sex-and-crime
[936] The court found no *koi*, based on the facts, *inter alia*, that they have spent time together that day; the perpetrator drove the victim home; the perpetrator asked if the victim wanted to spend the night together; and the victim's statement that she served food on his plate. This case was reversed by the appellate court. Euljungbu District Court [Dist. Ct.], 2019 Go-Hap ○○, Nov.12, 2019 (S. Kor.).

V. RECOMMENDATION

1. A Review of Analysis

In the previous chapters, a comparative analysis of elements of sex crime laws in Japan and the United States has yielded several recommended changes for the sex crime laws of Japan. During the discussion of the acts, the analysis led to the conclusion that while indecent act properly serves its role as a catch-all element that captures acts of sex crimes other than sexual intercourse, sexual intercourse needs to be broadened to include different types of sexually violent acts suffered by victims of varying gender identities, including penetration by body parts other than sex organs or objects. From the analysis of the means element, the need to adopt a consent-based element in place of the force or threat element, which contributes to perpetrator-centered decisions in sex crime cases in Japan, has been suggested. Along with the change, *non compos mentis* and the inability to resist element should be more broadly defined so that it can fill in the gaps between the protection offered by the consent element and the protection provided to vulnerable groups.

To offer more robust protection for vulnerable groups from sex crimes, specific protection needs to be provided for those in relationships based on an inherent disparity of power, such as prisoners and inmates, residents in in-patient facilities, and employers of facilities. Moreover, Article 179 needs to be expanded to include more adults involved in children's lives, such as their teachers, relatives, and employers. To properly address technology-facilitated crimes, which are increasing with developing technology and the availability of cell phones, enactment of a comprehensive law under the Penal Code targeting the acts of taking and distributing private and intimate images without consent, whether such images are synthetic or genuine, is recommended. Moreover, with recognition of substantial harm caused by such crimes targeting minors, the enactment of a new law targeting a concrete act of grooming is advisable.

Finally, the analysis of the subjective element, especially the review of court cases in Japan, has yielded the conclusion that *koi* alone does not function as a sufficient element for sex crime laws in Japan, and *kasitsu*-based offense needs to be introduced to enable a more just sex crime prosecution. Based on these conclusions from the comparative analysis, this chapter lays out recommendations for revision for sex crime laws in Japan.

2. Principles for Building the Recommendations

The recommendation aims to present a set of recommendations that embodies practical yet necessary changes to sex crime laws in Japan analyzed through comparison with the laws of the United States. To make sure the recommendation serves its purpose, it is drafted while being cognizant of the following principles. First, the elements of crime and the penalty prescribed for each Article are drafted with fundamental consideration of the illegality and culpability of the acts and the proportionality for the penalty. Each recommendation is made with careful examination of whether the suggestion promotes protected interests and further the purpose of sex crime laws identified in this dissertation, which is to discourage and punish acts that cause long-lasting grave harm to a victim at the expense of the mere sexual gratification of the perpetrator,[937] whether the conduct captured by the elements is culpable, whether the provision

[937] *See infra* at 14-15.

gives fair warning and notice to the public about the conduct, and whether the penalty is proportional with respect to the culpability of the conduct and other crimes.

Second, the recommendation aims to achieve the exact scope of penalization that can bridge the gap between the realities of the victims and the criminal justice system by making sure that the sex crime laws reflect the realities of sex crimes and harms resulting from them while also ensuring that the laws do not offend the principles of criminal law. The set of recommended laws is carefully drafted so that the laws do not infringe the rights of criminal defendants by shifting the burden of proof to the defendant or making the legal elements too abstract to make it unduly difficult to prove their innocence. For proportionality of the penalties, adopting or comparing penalties for sex crime offenses under the state laws is not tenable, because, overall, the penalties administered under state penal laws are much heavier. The penalties are accordingly set for the offenses in the recommendation by comparing those for other criminal offenses and Shimaoka's model amendment, which is explained in the following section.

Third, the recommendation is made with an awareness of its practical implications. The recommendation serves as a conducive reference and building block that facilitates the development of improved sex crime laws in Japan. The recommendation, while proposed as one attainable solution to better address sex crimes in Japan, it is not the *only* feasible solution. Moreover, it should be acknowledged that while the recommendations are prepared with sufficient consideration for practical implications and proportionality, as it reflects every recommended change, some may view it as too drastic. Therefore, combining and expanding different ideas, including this one, may result in a more desirable amendment recommendation. Especially, while the penalties prescribed under the recommendation has been carefully set with ample consideration for fairness and proportionality, as the discussion of whether the punishment fits the crime is to be determined by the legislature after considering social agreement, public policy, and the perspectives of both victims and defendants in Japan, they are to be regarded as a mere reference. Elementally, the recommendation is drafted with the recognition that its role is not to serve as a version of the amendment that is to be adopted by the legislature in Japan as a whole but as a reference as to how Japan's sex crime laws can be amended to reflect necessary changes reviewed in the earlier sections.

3. Approach: Shimaoka's Model Amendment at its Foundation

To faithfully adhere to the principles, the revision is developed from the current statutes by using the model amendment proposed by Shimaoka[938], which serves as a desirable and concrete foundation for three reasons. First, the format of the model amendment is ideal as it does not offend the overall structure of the Penal Code of Japan yet allows codification of different lists of acts where necessary without offending the principles of criminal law. Second, the model amendment already reflects many of the changes that need to be made, with ample consideration of the realities of sex crimes and harms caused to a diverse group of victims. Therefore, finding the amendment based on Shimaoka's model amendment is practical in observing the principle that the amendment should bridge the gap between the realities of the victims and those of criminal law enforcement. Some parts that do not correspond to the recommendation from this paper have been modified, and the rationale for the change is provided for each Article. Third, the penalty prescribed, including that for negligent rape, is

[938] At 119-120, 島岡まな「ジェンダー視点を取り入れた立法論――国際水準を踏まえた刑法性犯罪改正案」刑事法ジャーナル 69 号（2021 年）114 頁.

proper and well-balanced with other provisions, given the harm and seriousness of sex offenses. Therefore, Shimaoka's model amendment provides a solid foundation to build revision that offers proportional penalty. In reflecting the recommendations from this paper in the recommendation, some parts deviate from the model amendment. For these parts, an explanation is provided as to why the recommendation proposes different approaches from those suggested by Shimaoka.

The approach taken to draft recommendation is as follows: Using Shimaoka's model amendment, recommended changes identified from this paper have been made to the text of current sex crime laws. When there is a need to create a new offense, the law has been drafted either by using Shimaoka's model amendment that addresses the same offense or by following the structure of the Penal Code when there is no available reference. In drafting the recommended articles, practical implications for courts have been taken into account. For newly created offenses, the penalty has been compared with other sex crime offenses and other relevant laws to make sure the penalty is proportional.

4. Grounds of Legitimacy

The recommendation serves as a legitimate reference for three reasons. First, it is inclusive. The recommendation is made by reflecting changes drawn from evaluating whether the current sex crime laws are properly applied by courts. The recommended changes are also derived from evaluating whether judicial application of the existing laws sufficiently addresses harms of different victims, such as LGBTQIA+ victims. Therefore, the recommendation serves as a set of laws that properly addresses the realities of sex crimes. Second, it is comparative. As it is based on a comparative analysis of the laws of the United States, the recommendation embodies an international perspective. Moreover, as the laws have been compared with U.S. state laws with diverse approaches and characteristics, the recommendation is well-informed. Third, it is practical. The recommendation is developed from Shimaoka's model recommendation, which reflects modifications based on the current sex crime laws of Japan. Therefore, it does not offend the structure of the Penal Code of Japan. Moreover, each recommended change has been analyzed with consideration for practical implications of criminal prosecution. Moreover, as the recommendation is intended to serve as a reference rather than a draft of legislation for wholesale adaptation by Japan, the recommendation can be usefully referenced by the experts and the legislature of Japan in part or as a whole. The following recommendation that embodies changes identified with a careful comparative analysis with various U.S. state laws may serve as a milepost in future amendments.

5. Recommendation

With the above rudimentary points of considerations, the following recommendation for amendment is made:

第百七十六条　（不同意わいせつ）

16 歳以上の者に対し、真正かつ自発的な同意がないのに、又はその同意をする能力に瑕疵ある状況に乗じて、わいせつな行為をした者は、婚姻関係の有無にかかわらず、10年以下の懲役に処する。暴行、脅迫、威迫、不意打ち、欺罔を用いて、若しくは監禁し、又は地位若しくは権力を利用した圧力、被害者の畏怖、驚愕、困惑、若しくは誤信に乗じて、わいせつな行為をしたときは、真正かつ自発的な同意がないものとみなす。

② 人の無意識、睡眠、酩酊、薬物の影響、心身の疾病、若しくは心身の障害により、同意が困難な状態若しくは不同意の伝達が困難な状態に乗じて、又は酩酊、昏睡させて、わいせつな行為をした者も、前項と同様とする。
③ 16 歳未満の者に対し、わいせつな行為をした者も、第一項と同様とする。ただし、３歳以上の年齢差のない者の間で行われ、真正かつ自発的な同意に基づくときは、この限りでない。

Article 176 (Nonconsensual Indecent Act)
A person who commits an indecent act against a person 16 years of age or older without genuine and voluntary consent or by using circumstances where the victim's ability to consent is compromised shall be punished by imprisonment with work for not more than 10 years, regardless of whether or not the person is married to the victim. When a person uses force, threat, intimidation, surprise, deception, confinement, or pressure based on position or authority, or engages in indecent acts by taking advantage of the victim's fear, astonishment, bafflement, or misbelief, the act shall be deemed to be without genuine and voluntary consent.
(2) The same shall apply to a person who takes advantage of a victim's state of unconsciousness, sleep, drowsiness, intoxication, influence of drugs, mental or physical illness, mental or physical disability, or any other states, which makes it difficult for the person to consent or to communicate disagreement, or who commits an indecent act by causing the person to become drowsy or comatose. The same shall apply to a person who engages in an indecent act with a person under 16 years of age.
(3)The same shall apply to a person who engages in an indecent act with a person under 16 years of age, except in the case of a consensual act between persons less than three years apart in age.

第百七十七条 （不同意性的挿入等）
16 歳以上の者に対し、 真正かつ自発的な同意がないのに、又はその同意をする能力に瑕疵ある状況に乗じて、性的挿入(物体や体の一部を用いて、人の肛門、口腔、膣の開口部に、わずかであっても性的に侵入すること)をした者は、 婚姻関係の有無にかかわらず、３年以上の懲役に処する。暴行、 脅迫、 威迫、 不意打ち、 欺罔を用いて、若しくは監禁し、又は地位若しくは権力を利用した圧力、被害者の畏怖、驚愕、困惑、若しくは誤信に乗じて、性的挿入をしたときは、真正かつ自発的な同意がないものとみなす。
② 人の無意識、睡眠、酩酊、薬物の影響、心身の疾病、若しくは心身の障害により、同意が困難な状態若しくは不同意の伝達が困難な状態に乗じて、又は酩酊、昏睡させて、性的挿入をした者も、前項と同様とする。
③ 16 歳未満の者に対し、性的挿入をした者も、第一項と同様とする。ただし、３歳以上の年齢差のない者の間で行われ、真正かつ自発的な同意に基づくときは、この限りでない。

Article 177 (Nonconsensual Sexual Penetration and Other Crimes)
A person who commits sexual penetration (any sexual penetration, however slight, into a person's anal, oral and vaginal opening using an object or a body part) against a person 16 years of age or older without genuine and voluntary consent or by using circumstances where the victim's ability to consent is compromised shall be punished by imprisonment with work for no less than three years, regardless of whether or not the person is married to the victim. When a person uses force, threat, intimidation, surprise, deception, confinement, or pressure based on

position or authority, or engages in sexual penetration by taking advantage of the victim's fear, astonishment, bafflement, or misbelief, the act shall be deemed to be without genuine and voluntary consent.
(2) The same shall apply to a person who takes advantage of a person's state of unconsciousness, sleep, drowsiness, intoxication, influence of drugs, mental or physical illness, mental or physical disability, or any other states, which makes it difficult for the person to consent or to communicate disagreement, or who commits sexual penetration by causing the person to become drowsy or comatose.
(3)The same shall apply to a person who engages in sexual penetration with a person under 16 years of age, except in the case of a consensual act between persons less than three years apart in age.

第百七十八条 （重過失性犯罪）
重大な過失により、真正かつ自発的に同意していないことを認識せず、第 176 条第 1 項若しくは第 2 項又は第 177 条第 1 項若しくは第 2 項の罪にあたる行為をした者は、3 年以下の懲役又は 100 万円以下の罰金に処する。
②重大な過失により、16 歳未満であることを認識せず、第 176 条第 3 項又は第 177 条第 3 項の罪にあたる行為をした者も、前項と同様とする。
Article 178 (Grossly Negligent Sex Crime)
A person who commits the crimes set forth in Article 176 or Article 177 without being aware, through gross negligence, that the other person has not genuinely and voluntarily consented shall be punished by imprisonment with work for not more than three years or a fine of not more than one million yen.
(2) The same shall apply to a person who, through gross negligence, fails to recognize that the other person is under 16 years of age.

第百七十九条 （地位· 関係性利用性的行為· 性的挿入等）
監護者、親族(3 親等内の姻族ないし 6 親等内の血族)若しくは教師の職にある者が、18 歳未満の者に対し、わいせつな行為をしたとき、又は、矯正職員、又は、法令により拘禁された者を看守し又は護送する者がその拘禁された者に対して（すでに婚姻関係のある場合を除く。）わいせつな行為をしたときは、第 176 条の例による。スポーツ等の指導者、 職業上の上司その他一定の権限若しくは影響力がある者が、その影響力に乗じて、 又は医療施設若しくは障害者施設その他の場所に収容されている者に対して、その者が置かれた弱い立場を利用して、 わいせつな行為をした者は、 第 176 条の例による。
② 監護者、 親族、 教師の職にある者が 18 歳未満の者に対し、性的挿入をしたとき、又は、矯正職員、又は、法令により拘禁された者を看守し又は護送する者がその拘禁された者に対して性的挿入をしたときは、第 177 条の例による。スポーツ等の指導者、 上司その他一定の権限又は影響力があることに乗じて、 又は医療施設、 障害者施設その他の場所における被収容者の弱い立場を利用して、 性的行為をした者は、 第 177 条の例による。
Article 179 (Sexual Penetration and Other Crimes Using Status & Relationship)
When a person in the position of a guardian, relative (relatives by affinity within the third degree or blood relatives within the sixth degree), or teacher commits an indecent act against a person

under 18 years of age or when a correctional officer or a person who guarding or escorting a person pursuant to laws and regulations commits an indecent act against a detainee (except when a preceding marital relationship exists), the person shall be punished in the same manner as prescribed in Article 176. A person who commits an indecent act against a person by taking advantage of the fact that the person is an instructor (educator), such as a sports coach, a supervisor, or any other person having a certain authority or influence, or by taking advantage of a victim's vulnerable position in a medical facility, an institution for the disabled, or any other place, shall be punished in the same manner as prescribed in Article 176.
(2) When a person in the position of a guardian, relative, or teacher commits sexual penetration against a person under 18 years of age or when a correctional officer or a person who guarding or escorting a person pursuant to laws and regulations commits sexual penetration against a detainee, and there is no preceding marital relationship, the person shall be punished in the same manner as prescribed in Article 177. A person who commits sexual penetration against a person by taking advantage of the fact that the person is an instructor (educator), such as a sports coach, a supervisor, or any other person having a certain authority or influence, or by taking advantage of a victim's vulnerable position in a medical facility, an institution for the disabled, or any other place, shall be punished in the same manner as prescribed in Article 177.

第百八十条 （未遂罪）
第 176、第 177 条又は第 179 条の罪の未遂は、罰する。
Article 180 (Attempt)
Attempts to commit crimes under Articles 176, 177, or 179 shall be punished.

第百八十一条 （加重類型）
第 176 条、 第 177 条又は第 179 条の罪を犯した場合において、次の各号のいずれかに該当するときは、 5 年以上の懲役に処する。
1 強度の暴行又は脅迫を用いて行われたとき。
2 重度の障害、著しい低年齢その他の状況により脆弱な状態にある者に対して行われたとき。
3 2 人以上の者によって行われたとき。
4 常習として行われたとき。
5 継続的な性的虐待の結果、行われたとき。
Article 181 (Aggravated Offenses)
An offense under Article 176, 177, or 179 shall be punished by imprisonment for not less than five years if the case meets any of the following circumstances:
1. The offense was committed by using a severe degree of force or threat.
2. The offense was committed against a person with severe disability, extremely young age, or any other conditions that make the person vulnerable.
3. When the offense was committed by two or more persons.
4. When the offense has occurred habitually.
5. The act was committed as a result of continuous sexual abuse.

第百八十一条の二 （結果的加重犯）
第 176 条、 第 177 条、第 179 条の罪又はこれらの罪の未 遂罪を犯し、よって人を死傷させた者は、 無期又は 6 年以上の役に処する。

Article 181-2 (Aggravated Consequential Offense)
A person who commits the crimes set forth in Articles 176, 177, or 179, or any attempt to commit such crimes, and thereby causes death or injury to any person, shall be punished by imprisonment for life or by imprisonment for not less than six years.

第百八十二条　（デジタル性犯罪）
人の性的行為若しくは裸体等私的な姿態を描写する写真、動画、人工的に作られた影像又は動画その他の媒体を、その者の同意なしに製造し、電磁的記録に係る記録媒体その他に描写し、又は撮影した者は 2 年以下の懲役又は 30 万円以下の罰金に処する。
人の性的行為若しくは裸体等私的な姿態を描写する写真、動画、人工的に作られた影像又は動画その他の媒体を、その者の同意がないことを知りつつ、提供し、又は公然と陳列した者は 3 年以下の懲役又は 50 万円以下の罰金に処する。
②　本罪に利用されたすべての媒体は、 第十九条により没収する。
Article 182 (Technology-Facilitated Sex Crimes)
A person who, knowing that such act is without consent of a victim, produces, portrays in any electronic recording device or films any photographs, videos, artificially created images or videos or other media that depicts a person's private state such as sexual activity or nudity shall be punished by imprisonment with work for not more than two years or a fine of not more than 300,000 yen.
A person who, while being aware of a person's lack of consent, disseminates any photographs, videos, artificially created images or videos, or other media that depicts a person's private state such as sexual activity or nudity shall be punished by imprisonment with work for not more than three years or a fine of not more than 500,000 yen.
(2) All media used for this crime shall be confiscated in accordance with Article 19.

第百八十二条の二　（児童に対するデジタル性犯罪）
第 176 条、第 177 条又は第 182 条の罪を犯す目的で、電気通信回線を用いて、１６歳未満の者と会う約束をした者は、3 年以下の懲役又は 50 万円以下の罰金に処する。

②16 歳未満の者から性的行為及び裸体等私的な様態を描写する写真、動画、人工的に作られた影像又は動画その他の媒体を製造する目的で１６歳未満の者の様子を描写する媒体の共有を勧誘又は要求した者は 3 年以下の懲役又は 50 万円以下の罰金に処する。

③性的な目的で 16 歳未満者に性的行為及び裸体等私的な様態を描写する写真、動画、人工的に作られた影像又は動画その他の媒体を送る者は二年以下の懲役又は 30 万円以下の罰金に処する。
Article 182-2 (Technology-facilitated Sex Crimes against Children)
(1) Any person who uses the Internet to arrange a meeting with a person under 16 years of age for the purpose of committing crimes set forth in Articles 176, 177, and 182 shall be punished by imprisonment with work for not more than three years or a fine of not more than 500,000 yen.

(2) A person who requests or solicits a person under 16 years of age to share a medium that depicts a person under 16 years of age for the purpose of producing a photograph, video, artificially created images or videos, or any other medium that depicts a person's private state,

such as sexual activity or nudity, shall be punished by imprisonment with work for not more than three years or a fine of not more than 500,000 yen.

(3) A person who, for sexual purposes, sends to a person under 16 years of age a photograph, video, artificially created images or videos, or any other medium that depicts a person's private state such as sexual activity or nudity shall be punished by imprisonment for not more than two years or a fine of not more than 300,000 yen.

第百八十三条　（性的嫌がらせ）

人に対し、継続的かつ悪質な性的嫌がらせを加えた者は、二年以下の懲役又は30万円以下の罰金に処する。オンライン上で人に対し、継続的かつ悪質な性的嫌がらせを加えた者も、同様とする。

Article 183 (Sexual Harassment)
A person who repeatedly and maliciously sexually harasses another person shall be punished by imprisonment with work for not more than two years or a fine of not more than 300,000 yen. The same shall apply to a person who repeatedly and maliciously sexually harasses another person online.

6. Discussion

A. Article 176

Several points need to be noted for Article 176, although many of the same points also pertain to Article177. First, as with Shimaoka's model amendment for Article 176,[939] the age of consent has been increased from 13 to 16 to better protect juveniles from sexual violence and to consider a disparity of power between them and adults.[940] This recommendation reflects the need to provide an extra layer of legal protection for adolescents against sex crimes, demonstrated by the review of preceding committee discussions on protecting juveniles from sexual violence and raising the age of consent and U.S. state laws with a higher age of consent. While maintaining Romeo and Juliet provision that releases liability for juveniles in the same age group who engage in a consensual sexual act, three years has been added in recognition that defined flexibility may need to be afforded in some cases where a student may meet and engage in a relationship with those in age groups slightly above or below theirs.

As suggested by Shimaoka, codification that a spousal relationship does not serve as an excuse has been maintained.[941] As discussed Chapter i. Acts, if the concept that marital relationship does not serve as a defense for sex crimes against spouses falls short of being common sense, it would be conducive to make it apparent through codification.[942]

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[939]「(不同意性的行為)16 歳以上の者に対し、暴行、脅迫、威迫、不意打ち、欺罔等を用い、若しくは監禁し、被害者の畏怖、驚愕、困惑、誤信等に乗じて、その意思に反する性的行為をした者は、婚姻関係の有無に拘らず、10 年以下の懲役に処する。②人の無意識、睡眠、酩酊、薬物の影響、心身の疾病、心身の障害等により、同意が困難な状態若しくは不同意の伝達が困難な状態に乗じ、又は酩酊、昏睡させて、性的行為をした者も、前項と同様とする。③16 歳未満の者に対し、性的行為をした者も、同様とする。ただし、年齢差のない者同士の同意のある場合を除く。」 *Id*. at 123-124.
[940] *Id*. at 119-120.
[941] *Id*. at 118.
[942] *See*, generally, discussions at Chapter i. Acts, *infra* at 46.

Unlike Shimaoka's model amendment that has modified indecent act to sexual act,[943] following the precedented discussion about act elements in this dissertation,[944] the concept of the indecent act has been maintained to avoid further confusion with Article 177. Finally, while maintaining the list of circumstances or a victim's states in Shimaoka's model amendment that provides clarification and detailed guidance, the recommendation made in this dissertation departs from Shimaoka's amendment by providing a general, overarching means element that the act is committed without genuine and voluntary consent or under circumstances where the victim's ability to consent is compromised.

The general and overarching element is added for two reasons. First, it serves to include other circumstances where the list does not cover but nonetheless involves criminal sexual act committed without the victim's meaningful consent. Second, a statutory declaration that a non-consensual sexual act is penalized serves a symbolic and practical role in both noticing the public and raising awareness that sexual act without consent is criminal and promoting better protection for sex crime victims, the importance of which is also recognized by Kojima.[945] The amalgamation of the general element and the detailed list is expected to serve as concrete guidance for the judiciary but with some room for flexibility in deciding cases that, while not falling under the listed elements, involve facts that are the object of penalization.

Additional codification of the mistake defense has not been prescribed because, given that there is already a detailed means element in place, it may only further complicate the text while not necessarily providing further clarification. Finally, in the second section, as with Shimaoka's model amendment, the means element of *non compos mentis* and the inability to resist have been expanded and included as a part of the non-consensual situation to improve clarity.[946]

B. Article 177

The discussion of the means element for Article 177 remains largely unchanged as that provided in the precedented discussion on Article 176. In Article 177, the definition adopted by Shimaoka, "sexual penetration or any sexual acts of an equivalent degree of maliciousness,"[947] has not been adopted due to apprehension that its ambiguous phrasing would not serve as a sufficient guidance for courts. While the phrase "any sexual acts of an equivalent degree of maliciousness" provides flexibility to include various types of acts, it is doubtful whether courts in Japan would be able to properly reflect the paradigm shift to include minority and female perspectives and recognize harm in the broad perspective, the importance of inclusion of which has been discussed earlier.[948]

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[943] 島岡まな, *supra* note 938 at 123.
[944] *Infra* at 38-47.
[945] 性犯罪に関する刑事法検討会, *supra* note 42 at 26.
[946] 島岡まな, *supra* note 938 at 121&123.
[947] *See Id*. at 124:「(不同意性的挿入等) 16 歳以上の者に対し、暴行、脅迫、威迫、欺罔等を用い、若しくは監禁し、被害者の畏怖、驚愕、困惑、誤信等に乗じて、その意思に反する性的挿入ないしそれと同等の悪質な性的行為をした者は、婚姻関係の有無に拘らず、3 年以上の懲役に処する。② 人の無意識、睡眠、酩酊、薬物の影響、心身の疾病、心身の障害等により、同意が困難な状態若しくは不同意の伝達が困難な状態を利用して、又は酩酊、昏睡させて、性的挿入ないしそれと同等の悪質な性的行為をした者も、前項と同様とする。③ 16 歳未満の者に対し、性的挿入ないしそれと同等の悪質な性的行為をした者も、同様とする。ただし、年齢差のない者同士の同意のある場合を除く。」.
[948] *Infra* at 38-47.

Instead, sexual penetration, which is defined as "any sexual penetration, however slight, into a person's anal, oral and vaginal opening using an object or a body part" is adopted. As it is broadly defined to include penetration by objects or different body parts, including fingers, the concrete definition also serves to accurately capture the nature of sex crimes by reflecting minority and female perspectives on harms associated with sexual acts.[949]

C. Article 178

Article 178 adopts the *kasitsu*-based offense suggested by Shimaoka by only modifying consent with genuineness and voluntariness to provide consistency.[950] As suggested in Chapter IV. Subjective Element, the introduction of *kasitsu*-based offense allows more effective prosecution of sex crimes in Japan by requiring perpetrators who have committed a sexual act with reckless disregard for the other person's lack of consent to take responsibility for the harm they have caused to the victims. Shimaoka, recognizing the potential lifelong psychological and physical harm from sex crimes that can be comparable to "murder of soul" and cases where the mistake of consent has been recognized because victims could not resist due to a freezing reaction, advocates for the enactment of negligence-based offense.[951] Shimaoka also rightfully points out that negligence-based offense may even serve a defendant's interest as the expansion of other provisions would also increase the possibility that the perpetrator may be found guilty of *koi*-based crimes, for which the imposed penalty is heavier.[952]

One question asked in Chapter IV. Subjective Element needs to be addressed:[953] whether the penalty of imprisonment of not more than three years or a fine of less than 1,000,000 yen is fair, proportional, and consistent compared to other provisions under the Penal Code of Japan. Given the penalty for involuntary manslaughter under Article 210 (Causing Death through Negligence) is a fine under 500,000 yen,[954] some may suggest that the penalty for grossly negligent sex crime is set too high. However, the more accurate comparison is to be made with Article 211, under which a person who neglects to exercise necessary social duties and causes death or injury of a person or a person who causes death or injury to a person by gross negligence shall be punished by imprisonment with or without work for not more than five years or a fine of not more than 1,000,000 yen.[955] In addition to that the adopted subjective element is gross negligence like that prescribed under Article 211, the penalty for this *kasitsu*-based sex offense is more comparable to that of Article 211 than Article 210, given the nature of the acts falling under the provisions. While Article 210 functions as a catch-all provision for all acts of negligence that cause a person's death, Article 211 specifically penalizes cases where a person has committed gross negligence or breached the person's duty. A similar comparison can be made for the penalty for Article 116 (Fire Caused through Negligence)[956] and Article 117-2 (Fire

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[949] 島岡まな, *supra* note 938 at 117.
[950] See *Id*. at 124:「(重過失性犯罪)相手が同意していないことを重過失により認識せず、第 176 条ないし第 177 条の罪を犯した者は、3 年以下の懲役又は 100 万円以下の罰金に処する。 ② 相手が 16 歳未満であることを重過失により認識しなかった者も、前項と同様とする。」.
[951] *Id*. at 120.
[952] *Id*. at 120.
[953] *Infra* at 200.
[954] KEIHO [KEIHO] [Pen. C.] 第二百十条 [Art. 210], 1907, Ch. 28 (Japan).
[955] KEIHO [KEIHO] [Pen. C.] 第二百十一条 [Art. 210],1907, Ch. 28, (Japan).
[956] Article 116. (Fire Caused through Negligence)

Caused through Negligence in the Pursuit of Social Activities),[957] where the penalty for the former is a fine under 500,000 yen and for the latter is imprisonment without work for not more than three years or a fine of not more than 1,500,000 yen.

What makes the *kasitsu*-based sex offense more comparable with the latter offenses in terms of its penalty is the nature of the sexual act. Unlike in cases of manslaughter or arson, it is highly difficult to imagine a situation where a person would accidentally engage in a sexual act with another person. When a person engages in a sexual act, one almost always does so with the person's own desire or motive. Unlike someone who commits involuntary manslaughter while negligently turning on a dangerous machine, not even knowing there was a person nearby or someone who negligently starts a fire without knowing that he has done so, a person engages in a sexual act with the intention for and awareness of the act. Therefore, reflecting the discussions in Chapter II. Why Punish Sex Crimes?, a person who engages in sexual acts with another to satisfy the person's desires needs to act with the minimum sense of duty that the person's actions do not harm the other person. In this way, a perpetrator committing a sexual act with negligence is always more culpable than those whose negligent act results in unintended criminal consequences. Because of this characteristic, the culpability of negligent sex offenders and the penalty for their offenses are more comparable to those of later offenses where perpetrators are assigned with duty. As mentioned many times throughout this paper, this merely makes a person who engages in sexual acts, intimate and private acts by nature, to do so with a minimum sense of responsibility to make sure that the acts are not against the other person's will.

D. Article 179

As the recommendation for this article, while using Shimaoka's model amendment as the foundation, significantly departs from it with respect to some elements, Shimaoka's version is introduced here to enable a discussion of why some changes were made while other elements were adopted:

> （地位· 関係性利用性的行為· 性的挿入等）監護者、親族、教師、スポーツ等の指導者、上司その他一定の権限又は影響力があることに乗じて、又は刑務所、 拘置所、医療施設、障害者施設その他の場所における被収容者の弱い立場を利用して、性的行為をした者は、第 176 条の例による。

> (1) A person who causes a fire through negligence and thereby burns the object provided for in Article 108 or the object provided for in Article 109 which belongs to another person shall be punished by a fine of not more than 500,000 yen.
> (2) The same shall apply to a person who causes a fire through negligence and thereby burns any of the person's own objects provided for in Article 109 or any object provided for in Article 110 and thereby endangers the public.

KEIHO [KEIHO] [Pen. C.] 第百十六 [Art. 116], 1907, Ch. 9, (Japan), as translated at: https://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf

[957] Article 117-2. (Fire Caused through Negligence in the Pursuit of Social Activities)

> When an act prescribed for in Article 116 or in paragraph 1 of the preceding Article is committed as a result of a failure to exercise necessary care in the pursuit of social activities or through gross negligence, imprisonment without work for not more than 3 years or a fine of not more than 1,500,000 yen shall be imposed.

KEIHO [KEIHO] [Pen. C.] 第百十七の二条 [Art. 117－2], 1907, Ch. 9, (Japan), as translated at: https://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf

② 監護者、親族、教師、スポーツ等の指導者、その他一定の権限又は影響力があることに乗じて、 又は刑務所、拘置所、医療施設、障害者施設その他 の場所における被収容者の弱い立場を利用して、性的挿入をした者は、第 177 条の例による。

(Sexual Penetration and Other Crimes Using Status & Relationship) Any person who takes advantage of a certain authority or influence as a *caretaker, relative, teacher*, (emphasis added) instructor (educator) such as a sports coach, supervisor, or any other person, or takes advantage of a vulnerable position of an inmate in a *prison, jail*, (emphasis added) medical facility, institution for the disabled, or any other place, to commit sexual acts, shall be punished in accordance with the provisions of Article 176. (2) Any person who takes advantage of a certain authority or influence as a *caretaker, relative, teacher*, (emphasis added) instructor (educator) such as a sports coach, supervisor or any other person, or takes advantage of a vulnerable position of an inmate in a *prison, jail*, (emphasis added) medical facility, institution for the disabled, or any other place, to commit sexual penetration, shall be punished in accordance with the provisions of Article 177.

島岡まな, *supra* note 938 at 124.

Shimaoka's comprehensive list of all the vulnerable groups in her model amendment has been directly adopted in the recommended text of Article 179. However, for certain relationships, including those of guardians (and naturally parents), relatives, teachers, and prison guards, the recommendation departs from Shimaoka's model amendment as it makes *any engagement* of sexual act with the members of the vulnerable group an object of penalization by making the clauses, such as, by taking advantage of authority, power, or a victim's vulnerable position, inapplicable for the groups. The rationale for penalizing any engagement for sexual act with vulnerable members in these groups is straightforward: As discussed during the discussions of Chapter iii. Vulnerable Groups, parents, teachers, and relatives, play integral roles in children's lives and have great influence over them. Therefore, any sexual relationship based on true consent can never be assumed between children and their parents, teachers, or relatives. The same is true for prison guards and prison inmates, given the inherent disparity of power in their positions in the relationship.

Article 195 of the Penal Code, Article on Assault and Cruelty by Special Public Officers[958], provides some protection from sexual violence for prison inmates. However, it is difficult to say that it provides sufficient protection. The great disparity of power makes it impossible to provide a meaningful consent to a sexual act between those in a detainer and detainee relationship, which is why state laws penalize any sexual act by a correctional officer

[958] Article 195 (Assault and Cruelty by Special public officers)

(1) When a person performing or assisting in judicial, prosecutorial or police duties commits, in the performance of his or her duties, an act of assault or physical or mental cruelty upon the accused, suspect or any other person, imprisonment with or without work for not more than 7 years shall be imposed.

(2) The same shall apply when a person who is guarding or escorting another person detained or confined in accordance with laws and regulations commits an act of assault or physical or mental cruelty upon the person.

KEIHO [KEIHO] [Pen. C.] 第百九十五条 [Art. 195], 1907, Ch. 9, (Japan), as translated at: https://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf).

toward an inmate.[959] On the other hand, it is unlikely that courts in Japan would consider that any sexual act by a prison guard toward an inmate is an act of assault or physical or mental cruelty upon the accused, as required by Article 195.

However, given that there may be rare cases where a marital relationship has existed before the formation of the prison guard and inmate relationship, such an exception has been noted. Penalization of the sexual act without prescribing further means element, such as taking advantage of undue influence or power, may seem overly strict under the Penal Code of Japan. However, for some relationships, at least for those including parents, guardians, and prison guards, it is important to provide notice to the public that sexual intercourse against the people they are supposed to protect and foster can never be consensual and, further, be legal.

E. Article 180 and 181

Articles 180 and 181, as they recognize the seriousness of sex crimes and properly places aggravation factors, have been adopted from Shimaoka's model amendment. However, Article 183 of Shimaoka's model amendment[960], an equivalent of Article 181 of the current Penal Code, has been added under Article 181 as Article 181-2 to create space for the following two articles. For Article 181-2, the penalty prescribed has been compared with Article 242 of the Penal Code, which addresses robbery causing death or injury.[961] For the same reason, Article 182 of Shimaoka's model amendment[962] that prescribes for an offense of preparatory act has been omitted, as while it is consequential, the offenses of a digital sex crime and sexual harassment are more essential additions for this recommendation.

F. Article 182 and 182-2

As discussed during the tenth committee meeting[963] and during the discussions on technology-facilitated sex crimes, the need for enacting offenses to manage newly emerging sex crimes is apparent and profound. The statute under Article 182 has been broadly defined to cover different harms, from those involving stealth photography to deepfakes. Moreover, the penalty is comparable to the penalty for the production of child porn, which is under three years of imprisonment and a fine of not more than 300,000 yen. When there is no distribution, the penalty in terms of imprisonment is less, as imprisonment of no more than two years. The penalty increase for distribution takes into account that harm to the victim becomes more grave when the material is distributed. Given that many victims of online-facilitated crimes, even without distribution, live in constant fear that their materials may get distributed, with their suffering and psychological harm having no end, the penalty equivalent to that of coercion under Article 223 does not seem disproportional.

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[959] *Infra* at 119.

[960] 島岡まな, *supra* note 938 at 125.

[961] Article 240 (Robbery Causing Death or Injury)

> When a person who has committed the crime of robbery causes another to suffer injury at the scene of the robbery, the person shall be punished by imprisonment with work for life or for a definite term of not less than 6 years, and in the case of causing death, the death penalty or imprisonment with work for life shall be imposed.

KEIHO [KEIHO] [Pen. C.] 第二百四十条 [Art. 240], 1907, Ch. 9, (Japan), as translated at: https://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf).

[962] 島岡まな, *supra* note 938 at 125:「第 181 条の罪を犯す目的で、その予備をした者は、2 年以下の懲役に処する。ただし、情状により、その刑を免除することができる。」.

[963] 性犯罪に関する刑事法検討会, *supra* note 137 at 22-32.

Article 182-2 has been added to protect children from increasing online and technology-facilitated sex crimes. First, while the boundary of punishment may be narrower than online enticement U.S. state provisions introduced during the earlier discussions, the act of arranging a meeting with a child under 16 by using the means of online communication to commit sex crimes is penalized. While limiting the acts to arranging a meeting may let perpetrators escape criminal liability for engaging in other types of grooming for criminal purposes, its definitiveness purports to ease the concern that penalizing grooming or enticement would result in frivolous prosecution.

Furthermore, with recognition based on the earlier discussion about the technology-facilitated sex crimes that in Japan and anywhere else in the world, more children become targets of online sex crimes by sending or receiving sexual images portraying themselves or others using SNS, paragraph 2 penalizes acts of inviting, requesting, and soliciting images of a person under 16 to create a sexual image. Paragraph 3 further protects children from receiving sexual images from others, but with a lesser penalty. Paragraphs 2 and 3 provided here fill in the gaps of laws on child prostitution and pornography by penalizing acts of solicitation to create sexual materials featuring children or acts of sending, rather than receiving, sexual materials to children, respectively.

G. Article 183

Finally, a provision on sexual harassment has been introduced to serve as a fallback and catch-all provision for sex crimes that do not satisfy certain elements of other offenses. As sex crimes evolve with the development of modern technology and the various ways the younger generation utilizes SNS, a general fallback provision can serve as a useful tool when an unexpected type of crimes emerge. For example, this may serve as a good provision to penalize those who use online sexual harassment as a way of bullying a victim. However, as with other general and flexible provisions, it may leave courts with too much leeway, especially in determining how often an act needs to occur to satisfy the "repeatedly" element and what kind of act can be considered malicious. Additionally, imprisonment of less than two years or a fine of not more than 300,000 yen has been prescribed for the crime, with the recognition that the cases penalized under this article would involve highly culpable acts of repeated and malicious sexual harassment toward a victim, causing the victim a sense of anxiety and severe mental distress. While its general nature may be criticized, this article plays a pertinent role in this recommendation by enabling penalization of sexual violence committed in a non-traditional and cunning way that allows a perpetrator escape punishment under the traditional offenses.

H. Table of penalties

The following table organizes the penalty set forth in each recommended Article:

ARTICLE	SENTENCE
Article 176 (Nonconsensual Indecent Act)	I≦10
Article 177 (Nonconsensual Sexual Penetration et al.)	I≧3
Article 178 (Grossly Negligent Sex Crime)	I≦3 or F≦100,000 yen

Article 179 (Sexual Penetration et al Using Status & Relationship)	Indecent Act: I≦10 (Same as Art. 176)	Sexual Penetration: I≧3 (Same as Art. 177)
Article 181 (Aggravated Offense)	I≧5	
Article 181-2 (Aggravated Consequential Offense)	Life or I≧6	
Article 182 (Technology-Facilitated Sex Crimes)	Production et al. : I≦2 or F≦300,000 yen*	
	Dissemination: I≦3 or F≦500,000 yen*	
Article 182-2 (Technology-Facilitated Sex Crimes against Children)	Arrange a meeting: I≦3 or F≦500,000 yen	
	Request or Solicit: I≦3 or F≦500,000 yen*	
	Send images et al for sexual purposes: I≦2 or F≦300,000 yen*	
Article 183 (Sexual Harassment)	I≦2 or F≦300,000 yen*	

Table 1) Table of Penalties for the Model Amendment

I: Imprisonment
F: Fine
*: Can be subject to forfeiture

7. General Comments

Some experts in Japan may consider this recommendation to be too progressive, while others who find it still too conservative to serve as a tool for active sex crime prosecution in Japan. Nonetheless, the recommendation presents a version of the amendment that reflects various necessary changes discussed throughout this dissertation through comparison with the U.S. state sex crime laws.

Along with the amendment, two critical points should be made. The most imperative point is victim protection. During rape reform, many states have adopted rape shield laws[964] to

[964] See e.*g*., § 60.42 (Rules of Evidence; Admissibility of Evidence of Victim's Sexual Conduct in Sex Offense Cases)

> Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty or in section 230.34 of the penal law unless such evidence:
> 1. proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or
> 2. proves or tends to prove that the victim has been convicted of an offense under section 230.00 of the penal law within three years prior to the sex offense which is the subject of the prosecution; or
> 3. rebuts evidence introduced by the people of the victim's failure to engage in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact during a given period of time; or
> 4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or

protect victims from secondary victimization and prevent prejudice from clouding the judgment of judges and juries. Implementation of the same law, if the Penal Code is not the right place, in the procedural or any other law, is imperative to encourage victims in Japan to report their cases and protect them from further harm during trials. Additionally, while the legislature in Japan may not be ready to penalize other forms of sexual violence that are being legislated for in some Western jurisdictions, such as stealthing, removing a condom during sexual intercourse,[965] it may be worthwhile to initiate social discussions about them.

With the ever-increasing public sentiment that criminal justice for sex crimes needs to be better administered, now may be the opportune time to consider taking a courageous step to make drastic changes for sex crime laws in Japan. This recommendation purports to serve as a reference point for considerations that need to be addressed in making such changes.

> 5. is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

NY Crim Pro L § 60.42 (2020).

[965] *See* e.*g*., California's Sexual Battery: Nonconsensual Condom Removal, A.B. 453, C.A. 2021-22 Leg. Sess. Ch. 613 (2021)(An act to amend the Civil Code)(Passed on Oct. 7, 2021).

VI. CONCLUSION

The warnings from Lord Matthew Hale's old remark, "…[R]ape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent,"[966] is still often quoted to discourage lawmakers from taking on active sex crime reforms. However, the reality remains that sex crime is still often underreported, and the statistics only present the "tip of the iceberg"[967] of the actual number of cases is less often highlighted.

It is difficult for rape victims to bring criminal rape charges, and when they finally summon up the courage to do so, the victims' character and chastity are often questioned, being put on trial for being victims.[968] Likewise, in Japan, many victims are hesitant to file a report,[969] and many who have summoned up the courage to file a report feel that their efforts have been all for nothing, as their perpetrators often get away with a slap on the wrist or no slap at all.[970] Kamitani, during the discussion about the force or threat element of the fourth committee meeting, emphasized that in addition to the legal elements that do not reflect commonsense of the public, there are many procedural or other hurdles that prevent victims from having their cases prosecuted.[971] The suggestion demonstrates the persistent gap between the reality of sex crimes suffered by the victims and the criminal law. In response to increasing public requests to improve criminal laws to curb sexual violence and bring justice for victims,[972] the criminal law experts, legal professionals, and the government of Japan should work together to make sure that Japan's sex crime laws are responding to changing social requests.

With the awareness about the significance of finding ways to improve sex crime prosecution in Japan, the dissertation compares sex crime laws and court cases of Japan and the United States to investigate how sex crime laws in Japan can be improved to reflect the realty of sexual violence experienced by the victims. First, by comparing the scope of punishable acts under the laws of Japan and the U.S. states, the dissertation recommends the act element of sexual intercourse under the laws of Japan to be broadened to capture a more diverse types of sexually violence suffered by victims of varying gender identities and sexual preferences. The comparison of means elements in the laws of Japan and the U.S. states demonstrate that the current means elements under the sex crime laws of Japan are limited in their scope and

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[966] At 165, Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND IV, § 242, 2421 (W. C. Jones ed., 1916).
[967] At 10, 法務省，性犯罪に関する刑事法検討会第 1 回会議議事録 (Jun. 4, 2020).
[968] Mary Ellen Lemieux, Whatever Made you think I Was Consenting: A Proposal to Silence Patriarchal Influence in Civil Sexual Assault Cases, 2 Hastings Women's L.J. 33 (1990)(noting how much has changed since the committee review in 2017).
[969] According to a survey conducted by the Cabinet Office, the percentage of survey respondents who reported having experienced forcible sexual intercourse or other (equivalent) acts were 56.1% (58.1% of female respondents and 39.1 percent of male respondents). When asked if that they told anyone about the incident, and only 3.7% (2.8% of female respondents and 8.7% of the male respondents) reported that they had talked to the police. *See* 男女間における暴力に関する調査, *supra* note at 133.
[970] *See generally*, 上谷さくら, *supra* note 36 (explaining, inter alia, that victims who have reported their case to the police feel neglected and do not get their well-deserved redemption by any means, while feeling like their court decision is boilerplate).
[971] 性犯罪に関する刑事法検討会, *supra* note 655 at 6.
[972] *See* 小島妙子, *supra* note 36.

ineffective in guiding courts to make fair and consistent decisions. Based on the analysis, the dissertation proposes that the adoption of a consent-based element in place of the force or threat element, coupled with the expansion of the definitions for *non compos mentis* and the inability to resist elements, can promote more effective and just sex crime prosecution in Japan. Additionally, recognizing the reality that the current sex crime laws in Japan fails to sufficiently protect many members of the vulnerable groups from sexual violence, as evidenced by the review of the court cases and committee discussions, addition of an extra layer of legal protection for those in relationships based on a great inherent disparity of power, such as prisoners and inmates, is recommended. Moreover, to protect children from sexual violence, the dissertation argues that in addition to an increase in the age of consent, Article 179 needs to be expanded to include more adults involved in the children's lives, such as their teachers, relatives, and employers, as do most U.S. state laws.

Recognizing the need for criminal law in Japan to address technology-facilitated sex crimes in a more comprehensive and effective manner is recognized, based on the review of the example U.S. state laws, introduction of criminal laws penalizing the production and distribution of private images without consent, as well as specific acts of grooming children for the purpose of sexual violence, is recommended. Finally, from the comparative analysis of the subjective element, as applied by courts in Japan and the United States, the dissertation reaches the conclusion that addition of *kasitsu*-based offense is necessary for a departure from perpetrator-centered judicial decisions on sex crimes in Japan.

Reflecting the recommendations made from a comparative analysis of the expert materials, text of the laws, legislative materials, and court cases of Japan and the United States, the dissertation provides an example of amended sex crime laws of Japan. While some commentators may see the recommendation made in this dissertation as too radical to fit in with the current Penal Code of Japan and social values, mere examination of how the expert discussions have developed over the years and the public's reaction to unjust sex crime decisions[973] may suggest otherwise, as they demonstrate how fast Japanese society is changing and legal professionals are embracing and acknowledging the need for change.[974]

With full awareness of the difficulties of the task, this paper has reviewed the sex crime laws of Japan through comparison with relevant U.S. state laws. The sex crime laws of the United States are by no means perfect models to follow. Rather, they are often overflowing with criticisms for their flaws. Moreover, several differences of the two jurisdictions yield limitations in this research. First, because of the differences in the justice systems of the two countries, including that most sex crime cases are decided by a jury of one's peers in the United States, an ideal sex crime law in a U.S. state may not function well in Japan. Additionally, because sex crimes are traditionally a matter of state jurisdiction in the United States, the national criminal law of Japan is compared with U.S. state laws, making it difficult to apply some aspects of the analysis to the recommendation. Some aspects of the laws, such as the penalty, cannot be fairly compared because criminal penalties in the United States are generally higher for all crimes. Additionally, a great deal of difference in social understanding of sex crimes and socio-cultural attitudes about criminal prosecutions may exist in Japan and the United States, which can make it difficult for the lessons learned from the U.S. sex crime reforms to be directly applied in the

[973] *See* e.g., Hundreds Protest across Japan over Acquittals of Men in Sex Crimes, Japan Times (last accessed on Nov. 9, 2021), available at: https://www.japantimes.co.jp/news/2019/06/12/national/hundreds-protest-across-japan-acquittals-men-sex-crimes/

[974] *See* e.g.,島岡まな, *supra* note 938 at 118.

context of Japan. Nonetheless, the comparison of the laws and the resulting amendments in the dissertation are made after careful evaluation of the differences and limitations, with ample consideration of feasibility for application in Japan. Therefore, the recommendations for amendment could, at minimum, present new perspectives and solutions for the legislature of Japan.

Amendment to criminal law must be preceded by careful consideration of criminal elements and viability for application in real cases without undue risks of bringing about arbitrary prosecution. With all due respect for carefulness that should rightfully be given in amending any criminal laws, the most careful reviews of foreign and domestic laws, cases, and policies cannot improve the protection of victims and punishment of sex crimes in Japan, unless changes are reflected in the law. Moreover, even if the review for amendment is made with utmost care and caution, no matter how many comparisons a jurisdiction makes, and no matter how many review committees it holds to consider different versions of the law, the full impact and consequences of an amendment cannot be appreciated until changes are made. After all, it is apparent that "[y]ou cannot learn to play the piano by going to concerts."[975] Any changes to sex crime laws should be made with the best planning possible, but uncertainties or concerns should not be used as excuses to make perfunctory amendment of a penal code that clearly has room for improvement.

If the efforts at redressing sex crimes carefully guided by advice from legal experts and members of the legislature have been unsuccessful in Japan, why not try to give a chance to the victims and their advocates who have been trying hard to have their voiced heard? Surely, what they have to say cannot be irrelevant if the victims believe sex crime prosecution is not properly being processed in Japan. Take an example of New Jersey. In *State in Interest of M.T.S.*, the Supreme Court of New Jersey held that force or coercion is not required for sexual assault as the legislature intended that any unauthorized sexual contact should be considered an assault under the reformed law.[976] In holding so, the court noted that in an attempt to capture precise harm of sexual assaults, the provision was "formulated by a coalition of feminist groups assisted by the National Organization of Women (NOW) Task Force on Rape."[977] As repeatedly mentioned throughout this paper, it is imperative to create sex crime laws that reflect victim's perspectives, including that of females and sexual minorities, if the laws are to provide meaningful protection for victims.[978]

In addition to changes reflecting victims' perspectives, the recommendation made in this dissertation embodies the spirit of many necessary changes that need to be made to improve sex crime laws of Japan. While it is unnecessary to adopt the recommendation as it is, any amendments to the law that builds on this recommendation or any other model amendment that incorporates integral changes would serve as references that can enhance the next sex crime law amendment in Japan. In the spirit of recognizing the impact of ideal sex crime amendment in addressing sexual violence in Japan, a few valuable points need to be addressed in addition to the discussion of criminal law amendment.

First, the fact that penal code, no matter how perfect, does not solve the problem of sexual violence in a society cannot be over-emphasized. Education and training for legal

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[975] Francis Moore, Ethical Problems Special to Surgery: Surgical Teaching, Surgical Innovation, and the Surgeon in Managed Care ,135 Arch Surg. 1, 14,16 (2000).
[976] At 443, *State in Int. of M.T.S.*, 129 N.J. 422, 609 A.2d 1266 (1992).
[977] *Id*. at 440.
[978] 島岡まな, *supra* note 938 at 117.

professionals, for example, would be essential in preventing secondary victimization to victims during sex crime prosecution. As discussed during the recommendation section, it is also important to consider enacting rape shield laws or victim protection laws. Victim support is also vital for supporting the victims toward recovery. For technology-facilitated sex crimes, making sure that the government takes leadership in removing illegal materials from the internet would aid victim recovery, by helping the victims alleviate their burden or fear that they are fighting alone to make sure that their private material does not get distributed over the internet.

Sex education both for the public and for children is essential. Sex education for children should include the contents about potential sexual violence they can be exposed to on the internet and potential dangers involved in making or distributing sexual images via SNS. Nonetheless, lack of public maturity about sexual consent should not serve as an excuse to allow sex crime perpetrators to escape punishment. The lazy excuse of "I did not know better" should not be the reason perpetrators escape liability when they have left victims with psychological harms that sometimes last for their lifetime to satisfy their own desires. Rather, a clear proclamation by the Penal Code that sexual intercourse without consent cannot be forgiven would serve as notice and a lesson for the public that they should be responsible in how they treat others. Nevertheless, future research providing recommendations for sex crime amendment in Japan based on empirical evidence on the readiness of the public in Japan for embracing comprehensive sex crime amendment, or comparative research with other jurisdictions with more similar cultural and social understanding about sexual violence may be conducive to devising a more practical recommendation for sex crime amendment for Japan.

Finally, on a different note, analysis of court decisions is an integral part of sex crime law review that provides insights into whether a statute is being interpreted and applied properly, as intended by the judiciary. As Miyada suggested during the eighth committee meeting, in Japan, publication of sex crime cases and presentation of the studies on the cases has been considered taboo to protect the victims' privacy.[979] Additionally, access to decisions for sex crime cases is severely restricted, as many are not published for the purpose of victim protection, which deters academia from making a meaningful evaluation of sex crime prosecution.[980] The utmost priority of ensuring victims' protection and privacy cannot be over-stressed. However, as Miyata suggests, understanding how cases have been decided may aid the research and development of the law. Therefore, it may be worthwhile to find a way to publish decisions in a way that does not cause secondary victimization or violate the privacy of the victims, such as redacting personal information or acquiring the victim's prior consent.

In addition to these measures, changes to criminal law should be, not a sufficient, but a necessary change that should be accompanied with the other suggested changes. Shimaoka suggests her model amendment embodies both the gender-based perspective and the international standard,[981] calling the Convention on Preventing and Combating Violence against Women and Domestic Violence especially important.[982] The call for penalization of "non-consensual acts of a sexual nature"[983] by the Council of Europe Convention on Prevention and Combating Violence against Women and Domestic Violence (hereinafter the "Istanbul

[979] 性犯罪に関する刑事法検討会, *supra* note 42 at 9-10.
[980] *Id*.
[981] 島岡まな, *supra* note 938 at 114.
[982] *Id*. at n.5.
[983] Convention on Preventing and Combating Violence Against Women and Domestic Violence, C.E.T.S. No. 210 (opened for signature in 2011).

Convention") is not suggesting drastic measures for jurisdictions: it is asking for the minimum to ensure the criminal law of a jurisdiction is able to protect women and others and let them live with the dignity to be free from unwanted sexual violation. The Penal Code of Japan should at least be able to rise to that minimum standard.

In the midst of an ongoing discussion on how to penalize sex crimes fairly and efficiently among the members of both the public and experts in Japan, it is hope by many victims and members of the society that the current legislative review of sex crime laws can bring about changes that lead to just penalization of those who rightfully deserve punishment. The different directions that U.S. state sex crime laws have employed and evaluation of their effectiveness pertains to the ongoing discussion in Japan to amend sex crime laws. The 2017 amendment, despite criticisms about its shortcomings, has been an improvement on the older version. Likewise, when made with mindfulness about the globally shared values of the Istanbul Convention and a sense of determination to make necessary changes to improve sex crime prosecution in Japan, the current review of sex crime law can bring about changes that can result in the successful prosecution of culpable defendants and better protection of all members of Japanese society.

Some may question why the penal code on sex crimes in Japan needs to be amended so drastically when the problems can be passed over to other social changes that are more integral to addressing sexual violence in Japan. As illustrated by the case of California, even with the best intention of the legislature and progressive laws of other areas, without changes to criminal law on sex crimes, the perpetrators get away and the victims are left without a semblance of justice. For those who are still riddled with doubt on why comprehensive sex crime law reform should accompany the other social changes, I leave them with Susan Estrich's words:

> It may be impossible - and even unwise - to try to use the criminal law to change the way people think, to push progress to the ideal. But recognition of the limits of the criminal sanction need not be taken as a justification for the *status quo*. Faced with a choice between reenforcing the old and fueling the new in a world of changing norms, it is not necessarily more legitimate or neutral to choose the old. There are lines to be drawn short of the ideal: The challenge we face in thinking about rape is to use the power and legitimacy of law to reinforce what is best, not what is worst, in our changing sexual mores.

Susan Estrich, *supra* note 74.

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