



---

12-24-2020

## Till Death Do Us Part: The Legal Remedies of Sexual Assault in Marriage - Or Lack Thereof

Kaylyn Presley

Follow this and additional works at: <https://lawrepository.ualr.edu/arkjsocialchangepublicservice>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Kaylyn Presley, *Till Death Do Us Part: The Legal Remedies of Sexual Assault in Marriage - Or Lack Thereof*, 10 Ark. J. Soc. Change & Pub. Serv. 29 (2020).

Available at: <https://lawrepository.ualr.edu/arkjsocialchangepublicservice/vol10/iss1/2>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in The Arkansas Journal of Social Change and Public Service by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

## TILL DEATH DO US PART: THE LEGAL REMEDIES OF SEXUAL ASSAULT IN MARRIAGE - OR LACK THERE OF

\*Kaylyn Presley

When a stranger does it, he doesn't know me, I don't know him. He's not doing it to me as a person, personally. With your husband, it becomes personal. You say, this man knows me. He knows my feelings. He knows me intimately, and then to do this to me - it's such a personal abuse.<sup>1</sup>

This quote, by a domestic violence survivor, really resonates the personal pain felt when abused by a partner. And to quote Law & Order SVU- “Sexually based offenses are considered especially heinous<sup>2</sup>.”

According to a survey by the Center for Disease Control, an estimated 420,000 women and 375,000 men in Arkansas have been victims of physical abuse, rape, and/or stalking by an intimate partner at some point in their lives. This means that 36% of the adults in Arkansas have been victims of IPV during their lifetimes.<sup>3</sup>

In the United States, domestic violence (also known as intimate partner violence), results in half of all female homicides<sup>4</sup>. On a typical day, over 20,000 calls are made to domestic violence hotlines<sup>5</sup>. In 2015 the courts in Arkansas heard over 2,000 cases of domestic violence. Intimate

---

\*Presley is a family law and child welfare attorney in Little Rock and focuses primarily on trauma informed approached to complex and difficult child custody cases.

<sup>1</sup> D Finkelhor & K Yllo, *License to Rape: Sexual Abuse of Wives*, (1985), <https://www.ncjrs.gov/App/publications/abstract.aspx?ID=111183> (last visited Nov. 2017).

<sup>2</sup> *Law and Order SVU*. Created by Dick Wolf. Transcript.

<sup>3</sup> Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention (2011).

<sup>4</sup> NCADV | NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, *The Nation's Leading Grassroots Voice on Domestic Violence*, <https://ncadv.org/statistics> (last visited Dec. 10, 2017).

<sup>5</sup> NCADV | NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, *The Nation's Leading Grassroots Voice on Domestic Violence*, <https://ncadv.org/statistics> (last visited Dec. 10, 2017).

Partner Violence is “a pattern of abusive and coercive behaviors that may include physical injury, psychological abuse, sexual assault, isolation, stalking, intimidation, and threats.”<sup>6</sup>

Some crimes of domestic violence such as assault, murder, and stalking cannot be prosecuted, but unfortunately other actions occurring within domestic violence, such as sexual coercion and reproductive coercion are not. Although these crimes are not prosecuted they are happening. Prosecutors face several obstacles with any sex crime, but case law has shown that prosecuting sexual offenses in marriages is even more difficult. One of the main challenges in prosecuting rape is that (frequently or in many states) an element of the rape statute is force, and lack of consent. Other obstacles of prosecuting sexual offenses in marriage are the factors surrounding domestic violence, low success rate, public policy issues, and lack of adequate representation.

#### I. PROSECUTION OF MARITAL RAPE

Marital rape has been recently recognized as a crime. For centuries rape occurred in marriages, but it was either not discussed, or it was deemed a wifely duty. Because sexual acts were expected in marriage there was a public mindset that rape could not occur within a marriage, and laws protected the abusers. Although almost every state has now abandoned these “wife rape” laws, there are still a few states that allow it.

In Arkansas, rape, as defined by statute, may be committed by two different acts, “sexual intercourse” or “deviate sexual activity.”<sup>7</sup>

“Sexual intercourse” means penetration, however slight, of the labia majora by a penis.<sup>8</sup> “Deviate sexual activity” means any act of sexual gratification involving: (A) The penetration,

---

<sup>6</sup> Intimate Partner Violence, <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2012/02/intimate-partner-violence>.

<sup>7</sup> ARK. CODE ANN. § 5-14-103 (2020).<sup>8</sup> ARK. CODE ANN. § 5-14-101 (2020).

however slight, of the anus or mouth of a person by the penis of another person; or (B) The penetration, however slight, of the labia majora or anus of a person by anybody member or foreign instrument manipulated by another person.<sup>9</sup> In 5-14-103, “Sexual contact” **means** any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female.<sup>10</sup> In Arkansas, case law indicates a presumption in cases of sexual violence that “*sexual contact*” is for sexual gratification or arousal.

For example, in *Caestellon v. State*<sup>11</sup>, the victim testified that the defendant was rubbing on her vagina when she woke up. Evidence that the defendant acted for purpose of sexual gratification was sufficient to support conviction of second-degree sexual assault<sup>12</sup>.

According to the court, in cases of sexual abuse, it may be assumed that the defendant had sexual contact with the victim for the purpose of sexual gratification, and it is not necessary for the State to directly prove that he was so motivated<sup>13</sup>.

#### A. Forcible compulsion

One of the difficulties in addressing the issue of wife rape, as is the case with rape in general, is defining what behaviors should be considered "rape." At its most basic definition, rape is forced sexual contact, yet what constitutes "force," and what sexual acts are included must be defined.<sup>14</sup>

“Forcible compulsion” is defined as physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person<sup>15</sup>. The existence of forcible compulsion does not depend on the amount of force applied, but on whether the act was against the person’s will.<sup>16</sup> The

---

<sup>9</sup> ARK. CODE ANN. § 5-14-101 (2020).

<sup>10</sup> ARK. CODE ANN. § 5-14-101 (2020).

<sup>11</sup> *Castrellon v. State*, 428 S.W.3d 607 (2013).

<sup>12</sup> *Id.*

<sup>13</sup> *Holbert v. State*, 308 Ark. 672, 826 S.W.2d 284 (1992); *See also* *McGalliard v State*, 306 Ark. 181, 813 S.W.2d 768; *Williams v. State*, 298 Ark. 317, 766 S.W.2d 931 (1989).

<sup>14</sup> *Dillon v. State*, 311 Ark. 529, 844 S.W.2d 944 (1993).

<sup>15</sup> *Id.*

<sup>16</sup> *Henson v. State*, 2009 Ark. App. 464 (2009).

Arkansas Court of Appeals has stated that the test to determine whether there was force is whether the act was against the will of the party whom the act was committed against<sup>17</sup>. It is important to note that “serious physical injury” is NOT an element of rape, and not necessary to prove forcible compulsion<sup>18</sup>.

For example, in *Rounsaville v. State Supreme Court of Arkansas*<sup>19</sup>, the victim testified that she refused when defendant demanded sex, and that she resisted when he began to take her clothes off. She said that he repeatedly slapped her in the face, that he tied her hands behind her back and anally raped her while she begged for him to stop. She said that he forced her to perform oral sex on him, that he forced her to have vaginal sex, and that after the attack was over, he told her that he would kill her if she told anyone about what had happened. The court ruled that the victim's testimony was more than sufficient to show that the sex acts were against her will, and thus, substantial evidence existed to support *the element of forcible compulsion*, as required for rape conviction.

## B. Consent

### 1. Consent in Arkansas

There is a lack of consent if a person engages in a sexual act with another person by forcible compulsion or with a person who is incapable of consent because he or she is physically helpless, mentally defective or mentally incapacitated.<sup>20</sup>

In *Henson v. State*, the court ruled that evidence was sufficient to support convictions for two counts of rape; the victims testified that she did not consent to have sexual relations with

---

<sup>17</sup> Johnson v. State, 80 Ark. App. 79 (2002).

<sup>18</sup> Dillon v. State, 311 Ark. 529, 844 S.W.2d 944 (1993).

<sup>19</sup> Rounsaville v. State, 2009 Ark. 479 (2009).

<sup>20</sup> ARK. CODE ANN. § 5-14-125

defendant on either of the two occasions when the parties engaged in sexual intercourse, that she told him no, and that she hit him during both ordeals.<sup>21</sup>

In *Barton v. State*, the victim was working alone in an office as a tax consultant and began to be suspicious of the defendant's behavior.<sup>22</sup> She called and informed her supervisor of her fears, and when she hung up the phone the defendant had a gun to her head. The defendant kept the gun to her head as he made her walk across the street to an abandoned building and raped her.<sup>23</sup> The court ruled that because the rape victim was having sex at gunpoint, failure to make outcry did not indicate consent.<sup>24</sup>

In this situation it did work out, and the defendant was found guilty. In this case, the victim did not know the offender. And that is where the problem lies with consent in marriage- historically, consent is assumed to be there. When two people get married, there is an assumption that there is consent, but legally, consent can never be assumed. Even when nothing is said, silence does NOT yield consent. Silence yields nothing. Even in marriage, even when two people have stood in front of friends and family and declared their love for each other- even then, they still need consent for sexual activity. Anything short of an enthusiastic response, and/or a verbal "yes, I want this" should not be considered consent. Currently, Arkansas laws do not require this level of consent, known as affirmative consent.

## 2. Affirmative Consent

Under the umbrella of consent lies a trending term, affirmative consent. This term, affirmative consent is simply known as a "yes means yes" law.<sup>25</sup> This term is mostly related back to

---

<sup>21</sup> *Henson v. State*, 2009 Ark. App. 464 (2009).

<sup>22</sup> *Barton v. State*, 256 Ark. 486, 508 S.W.2d 554 (1974).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Yes Means Yes, END RAPE ON CAMPUS*, <http://endrapeoncampus.org/yes-means-yes/> (last visited Sep 17, 2018).

college campuses, with California being the only state to actually have passed a law mandating affirmative consent on college campuses. In the state of Arkansas there is NO affirmative consent law. And although this term is becoming more popular among college academic arenas, it would be difficult for affirmative consent to become statutory in marriage.

### C. Age of Consent

#### 1. Age of Consent for Marriage

The age of consent is a highly contested element in felony sexual assault cases. A minor by definition is any person less than eighteen years of age. In Arkansas, adults- anyone over the age of eighteen can obtain a marriage license. Boys at age seventeen and girls as young as sixteen can get married with parental consent. Because of this, sixteen and seventeen year-old minors could also be married. Also, in 4 states, children can get married as young as fourteen.<sup>26</sup> Arkansas acknowledges marriages from other states, meaning married couples as young as fourteen could come to Arkansas.

#### 2. Age of Consent to Sexual Activity

Another part of age of consent is the age in which a person is mentally capable of consenting to sexual activity. In Arkansas, a person can give consent at fifteen years old.<sup>27</sup> The difference in age between the victim and actor in a prosecution of certain sexual offenses impacts whether the victim is capable of consenting to sexual activity:

Non-forcible Rape: A person under the age of fifteen is incapable of consenting to engage in sexual intercourse or deviate sexual activity.<sup>28</sup>

---

<sup>26</sup> Some states require this to be with parental consent, but it is still possible. Cornell Law School, , [https://www.law.cornell.edu/wex/table\\_marriage](https://www.law.cornell.edu/wex/table_marriage).

<sup>27</sup> ARK. CODE ANN. § 5-14-101(a)(1) (2020).

<sup>28</sup> ARK. CODE ANN. § 5-14-103(3)(A) (2020).

Second Degree Sexual Assault: A person under the age of fourteen is incapable of consenting to engage in sexual contact with a person eighteen years of age or older.<sup>29</sup> A person under twelve years old is incapable of consenting to engage in sexual contact with a minor who is older by more than three years.<sup>30</sup> A person between the ages of twelve and thirteen years old is incapable of consenting to engage in sexual contact with a minor who is older by more than four years.<sup>31</sup> Third Degree Sexual Assault: A person under fourteen years old is incapable of consenting to engage in sexual intercourse or deviate sexual activity with a minor who is older by more than three years and who is not his or her spouse.<sup>32</sup>

Sexual Assault in the Fourth Degree: A person under the age of sixteen is incapable of consenting to engage in sexual intercourse or deviate sexual activity or sexual contact with a person twenty years of age or older who is not the person's spouse.<sup>33</sup>

However, certain age differences can be asserted by the actor as an affirmative defense that may negate any criminal liability of the actor in a prosecution for certain non-forcible rape or sexual assault in the first through third degree.<sup>34</sup>

#### D. Relationship of Victim and Offender

The Pulaski County Prosecutor's office states that there is no difference in the state statutes that distinguish marital rape from rape occurring in other situations. There is **no statute** that distinguishes marital rape from other forms of rape. In fact, Arkansas has ruled that engaging in *sexual intercourse* or *deviate sexual activity* with a spouse *by forcible compulsion* is "rape"; thus, rape within a marriage is a crime, since the statute is neutral both as to gender and as to the relationship,

---

<sup>29</sup> ARK. CODE ANN. § 5-14-125(3)(A) (2020).

<sup>30</sup> ARK. CODE ANN. § 5-14-125(5) (2020).

<sup>31</sup> *Id.*

<sup>32</sup> ARK. CODE ANN. § 5-14-12 (2020).

<sup>33</sup> ARK. CODE ANN. § 5-14-127(a)(1) (2020).

<sup>34</sup> ARK. CODE ANN. § 5-14-125 (2020).

if any, between the perpetrator and the victim. *A.C.A. §§ 5-1-103(a), 5-14-103(a)(1). Jones v. State, 2002, 74 S.W.3d 663, 348 Ark. 619.*)

## II. PROSECUTION OF SEXUAL ASSAULT IN MARRIAGES

The prosecution of rape between married persons and unmarried persons is not different. However, there is a difference between the prosecution of rape, and the prosecution of other sexual assault crimes in marriage. There are more sexual offenses that happen in marriages beyond rape. The spectrum of sexual offenses ranges from rape, § 5-14-103; Sexual assault in the first degree, § 5-14-124; (d) Sexual assault in the second degree, § 5-14-125; (e) Sexual assault in the third degree, § 5-14-126; (f) Sexual assault in the fourth degree, § 5-14-127; (p) Exposing another person to the human immunodeficiency virus. The Arkansas Administrative Office of the Courts page states:

Sexual assault can be verbal, visual, or anything that forces a person to join in unwanted sexual contact or attention. Examples of this are voyeurism (when someone watches without the knowledge of the victim), exhibitionism (when someone exposes themselves in public), incest (sexual contact between family members), and sexual harassment. It can happen in different situations, by a stranger in an isolated place, on a date, or in a home with someone known or even related to the victim.<sup>35</sup>

However, Arkansas's sexual assault laws are actually a lot more specific, and mostly geared towards the sexual abuse of children.

### A. Sexual Assault Statutes

Sexual assault statutes are being addressed separately from the rape statute because there is a significant distinction in the statutory language of rape and sexual assault. Rape contains the element of forcible compulsion.<sup>36</sup> And here there is no distinction between spousal rape and other

---

<sup>35</sup> Administrative Office of the Courts, <https://www.arcourts.gov/administration>.

<sup>36</sup> ARK. CODE ANN. § 5-14-103 (2020).

forms of rape, as long as there is forcible compulsion the crime could technically meet the statute (does not mean it will be prosecuted- just means that the specifics of the crime could be prosecuted). However, sexual assault is different. Crimes of rape require some evidence of force- either actual or threatened- and sexual assault requires that the victim did not consent to sexual conduct. There are four sexual assault statutes in Arkansas: § 5-14-124, § 5-14-125, § 5-14-126, and § 5-14-127. Every single one of these statutes includes the language “not the person’s spouse.” That phrase, “not the person’s spouse” is an element of these crimes. It is important to clarify that because of the age of consent to marriage and sexual activity laws these laws could apply in marriage, but then lack of consent is negated because of the marriage. For example, these are the parts of the statute that contain the marital exemption:

A.C.A. 5-14-124. Sexual assault in the first degree

(a) A person commits sexual assault in the first degree if the person engages in sexual intercourse or deviate sexual activity **with a minor who is not the actor's spouse.**

A.C.A. §5-14-125 - Sexual Assault in the Second Degree

Second-degree sexual assault in Arkansas is categorized as a “crime of violence” under career offender provision of Sentencing Guidelines.<sup>37</sup> And, second-degree sexual assault is not a lesser-included offense of rape; second-degree sexual assault requires proof of two elements that rape does not, namely that the defendant's age is 18 or over, **and that the defendant is not married to the victim.**<sup>38</sup>

A person commits sexual assault in the second degree if the person: (3) Being eighteen (18) years of age or older, engages in sexual contact with another person who is: (A) Less than

---

<sup>37</sup> U.S. v. Dawn, 685 F.3d 790 (2012).

<sup>38</sup> Hartman v. State, 454 S.W.3d 721, 2015 Ark. 30 (2015).

fourteen (14) years of age; and **(B) Not the person's spouse;** (5)(A) Being a minor, engages in sexual contact with another person who is: i) Less than fourteen (14) years of age; and **(ii) Not the person's spouse.**

§5-14-126 - Sexual Assault in the Third Degree

A person commits sexual assault in the third degree if the person: (1) Engages in sexual intercourse or deviate sexual activity with another person who is not the actor's spouse, and the actor is: (2)(A) Being a minor, engages in sexual intercourse or deviate sexual activity with another person who is: (i) Less than fourteen years of age; and (ii) **Not the person's spouse.**

§5-14-127 - Sexual Assault in the Fourth Degree

A person commits sexual assault in the fourth degree if the person: (1) Being twenty years of age or older: (A) Engages in sexual intercourse or deviate sexual activity with another person who is: (i) Less than sixteen years of age; and (ii) **Not the person's spouse;** or (B) Engages in sexual contact with another person who is: (i) Less than sixteen (16) years of age; and (ii) **Not the person's spouse.**

Although the language in the statute states that “not the person’s spouse”, none of these cases would have needed that exemption. This is the lowest sexual assault offense in Arkansas statutes, and it does not allow married persons any remedies.

The issue is that these four sexual assault laws are the only specific sexual assault laws in Arkansas, and all exclude married persons from remedies. It is evident that the statute is meant to prosecute child sexual assault, but if so then the part retaining to the spouse should be excluded. There should be another statute that allows remedies for a victim whose abuse does not meet the statutory elements of rape.

B. Other Sexual Offenses

There are a few other forms of sexual assault that can be prosecuted in marriage but do not fit within the sexual assault statute or rape statute. These are 5-14-113; sexual extortion, 5-16-101; crime of video voyeurism, 5-16-102; voyeurism, and 5-14-123, exposing another person to HIV.

These forms of sexual assault are used as tools of power over the victim. For the crime of voyeurism, the offender uses this as a method of shame, guilt, and control. In sexual extortion the offender is using coercion and manipulation to control the victim and force them to do what the offender wants. And the act of purposely exposing a partner to HIV comes with a plethora of issues, ranging from intentional emotional distress, cost of testing and treatment, physical side effects. In all of these crimes the offender is performing these acts to control the victim and prove their power over the victim.

### C. Sexual Coercion

This form of intimate partner violence is defined as “the act of using pressure, alcohol or drugs, or force to have sexual contact with someone against his or her will” and includes “persistent attempts to have sexual contact with someone who has already refused.”<sup>39</sup> Examples are: refusing to wear a condom when a partner wants to use one, pressuring someone to do sexual things when they don’t want to and threatening to end a relationship if a partner doesn’t have sex.<sup>40</sup>

There are several different forms of sexual coercion within the parameters of a long-term relationship. Some of these examples of sexual coercion have long been accepted as “normal”, and victims have just recently started to question the normality of this abuse.

---

<sup>39</sup> LOVE IS RESPECT, Loveisrespect.org, <https://www.loveisrespect.org/> (last visited Sept. 17, 2018).

<sup>40</sup> Addressing Intimate Partner Violence , Reproductive, and Sexual Coercion, , A Guide for Obstetric, Gynecologic and Reproductive Health Care Settings.

The closest thing that Arkansas has to a sexual coercion statute is 5-14-113, which is sexual extortion. This statute states that (a) A person commits the offense of sexual extortion if:

(1) With the purpose to coerce another person to engage in sexual contact or sexually explicit conduct, the person communicates a threat to: (A) Damage the property or harm the reputation of the other person; or (B) Produce or distribute a recording of the other person engaged in sexually explicit conduct or depicted in a state of nudity;

(2) With the purpose to produce or distribute a recording of a person in a state of nudity or engaged in sexually explicit conduct, the person communicates a threat to: (A) Damage the property or harm the reputation of the other person; or (B) Produce or distribute a recording of the other person engaged in sexually explicit conduct or depicted in a state of nudity; or

(3) The person knowingly causes another person to engage in sexual contact or sexually explicit conduct or to produce or distribute a recording of a person in a state of nudity or engaged in sexually explicitly conduct by communicating a threat to: (A) Damage the property or harm the reputation of the other person; or (B) Produce or distribute a recording of the other person engaged in sexually explicit conduct or depicted in a state of nudity.<sup>41</sup>

But to be clear- this is only a SMALL part of all the possible ways to sexually coerce a person into sexual activity.

Although this statute does start to provide remedies for sexual coercion, it still provides women NO remedy for reproductive coercion. Also, this is a Class B felony, and rape is a Class Y felony— a significant difference in punishment, when there is not that much significance in the crime. For example, back to the Barton case where the woman was threatened with the gun. The defendant was found guilty for rape because the gun was forcible compulsion.

The argument about consent in marriage is that if the woman does not say no, then she is consenting. Although Barton was not a marriage case, the case does bring up a good point about consent to sexual activity. In Barton, the victim did not say no—she did not say anything because of the gun. But what about these women that are being threatened? Maybe their partner does not

---

<sup>41</sup> ARK. CODE ANN. § 5-14-113 (2020).

have a gun held against their head, but other threats to use against them. In situations of intimate partner violence, women are sometimes threatened with actions that to some are far worse than a bullet to the head.

The most documented sub-category of sexual coercion is reproductive coercion. Reproductive coercion involves behaviors that a partner uses to maintain power and control in a relationship that are related to reproductive health, such as explicit attempts to impregnate a partner against her wishes, controlling outcomes of a pregnancy, coercing a partner to have unprotected sex, and interfering with birth control methods. The worst part about reproductive coercion is that everyone involved gets hurt. Women become pregnant with children they either can't afford or may not be able to raise. This hurts the women, and the children that did not ask to be born into this situation. And, at the point that a partner is coercing a spouse in this way, it almost always escalates and puts the child in danger as well.

### III. Attributes of Domestic Violence That Serve as Barriers for Prosecution

#### A. Deciding to Prosecute

Section 43.6 of the National Prosecution Standards states: “[t]he prosecutor should exercise his discretion to file only those charges that he considers to be consistent with the interests of justice.”<sup>42</sup> There are several factors that can be considered when deciding to prosecute a sexual offense, such as probability of a conviction; nature of the offense; characteristics of the offender; possible deterrent value of prosecution to the offender and society in general; likelihood of prosecution by another criminal justice authority; and willingness of the offender to cooperate with law enforcement.<sup>43</sup> By prosecuting intimate partner sexual offenses, offenders are held accountable for

---

<sup>42</sup> Jennifer Gentile Long, *Prosecuting Intimate Partner Sexual Assault* National Center for Domestic and Sexual Violence (2007), <http://www.ncdsv.org/> (last visited Sept. 17, 2018).

<sup>43</sup> *Id.*

their actions and it sends a message to the public that the behavior will not be tolerated. It also gives victims a voice, perhaps for the first time.<sup>44</sup>

#### B. Cycle of Abuse

Part of the problem with prosecuting sexual offenses within marriages is because women either do not disclose the abuse, they cannot go forward with prosecution, or will not go forward. Sexual offenses within intimate partner violence are difficult to handle because of the complexity of issues within the domestic violence.<sup>45</sup> For a long time, it was said that domestic violence has a distinct pattern; a cycle of abuse.<sup>46</sup> The cycle starts with a “honeymoon phase” in which the abuser is sweet, loving, and trying to please the partner. Then, the tension will start to build. The abuser will become easily agitated, tense, and maybe lash out verbally. Then, as the tension builds the abuse will build as well. The abuse will become physical, and sexual. After the abuse occurs, the cycle will start over, and the abuser will become apologetic, nice, and usually promise to never do it again.<sup>47</sup> Now, there are new studies that say that domestic violence can also occur in waves and that there is no honeymoon phase. The tension rises until the offender abuses their partner. Both versions, the cycle, as well as other patterns still affect the victim’s ability to receive help.

#### C. Lack of Effective Representation

For successful prosecution, a victim needs effective representation. There are several barriers to effective representation for the victim, such as a mental defect, mental disability, economic status, fear, etc. Prosecution relies heavily on what has happened to the victim, and if the victim cannot fully cooperate it could lessen the effectiveness of the prosecution. For example, a woman

---

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

that has been severely abused might suffer from post-traumatic stress disorder. Depending on this woman's ability to communicate and get treatment for her mental illness could affect her ability to communicate with prosecutors.

There are also other systemic barriers that can impact effective representation such as public policy concerns, court procedures, and the resources that attorneys have access to use.

For example, in some jurisdictions police have the option of arresting an assailant for violation of a domestic assault personal protection order or bond conditions. Often, they do not. There are also times in which survivors are not explained all of their options, are not told what will happen if they do not continue with the prosecution or will not tell the women court dates. If the women do not show up, the charges can be dropped. Or, if the women ask the prosecutor to drop the charges, the prosecutor can drop the case. This action ignores the possibility that the women is being coerced into dropping the charges or will return to the abuser.

#### D. Low success rate

Another obstacle in the prosecution of sexual offenses is that there is a low success rate. Only about 36% of sexual assaults are reported.<sup>48</sup> What happens when these women come forward, and then the cases are not prosecuted? Or worse—they are prosecuted and then the offender is not convicted? Then you have an abusive spouse that has been accused of a horrendous crime, and almost sent to prison. One of the worst aspects of domestic violence is that it escalates. Abuse that starts with verbal threats can heighten quickly. This violence can become sexual and physical and will keep getting worse until the abused partner gets out or gets killed. These are partners that have done this in the past, they have a history of this behavior, and they now know they can get away with these actions. This cycle— these facts, the horrific deaths of victims, and the low success rate

---

<sup>48</sup> NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, *How do Domestic Violence and Sexual Assault Interact?* (2017), [https://ncadv.org/assets/2497/sexual\\_assault\\_dv.pdf](https://ncadv.org/assets/2497/sexual_assault_dv.pdf).

— that in itself is enough of a reason for a woman to not come forward and ruin any chance of successful prosecution.

#### IV. Other Obstacles for Prosecution of Marital Sexual Offenses

##### A. Statutory Language

The biggest obstacle in prosecuting marital sexual assault (besides the patterns of abuse and socioeconomic factors with abuse) is the statutory language. The Arkansas rape statute has terms “forcible compulsion” and “incapable of consent” in the statute. Both of these terms are hard to prove with evidence.

##### B. Spousal Exemptions

Another obstacle is spousal exemptions in the sexual assault statutes. As analyzed in the sexual assault section, **every** single one of the sexual assault statutes have spousal exemptions. Every single one of the Arkansas statutes for sexual assault have the words “not the person’s spouse” in the statute. This language clearly gives exemption to a spouse. Although the rape statute does not have that wording it still affects the rape statutes. Prosecutors will admit that unless there is forcible compulsion present, they will not prosecute rape charges. In some cases, this leaves victims with sexual assault as the only alternative, and that is not an option given the spousal exemption and the nature of the language in the statute is geared towards child sexual assault.

##### C. Public Policy Issues

There are several policy issues that can come into play when prosecuting sexual violence. One issue would be the profile or position of the offender. There are several cases in which the profile of the offender directly affected the public’s opinion of the offender, and the validity of the accusations. And in marriage these profiles can be even more of a burden. For example, women

that are married in men with powerful positions, or in public service careers. It is hard for a community to believe that men in trusted positions are capable of raping and abusing their wives. Another issue is the difficulty to make change in a community. These statutes need change, but it is difficult to (1) find out what the actual problem is, (2) decipher whether the laws are the problem, or the enforcement of the laws are the problem, (3) identify the changes that could be made, and then finally, (4) design a strategy to make these changes. Changing policy is difficult. Writing a bill is one thing but trying to pass a law and get that law enforced is a completely different hurdle. And these hurdles are what is impacting the prosecution of sexual offenses.

## V. Penalties for Sexual Assault in Marriage

### A. Criminal Penalties

#### 1. Rape<sup>49</sup>

In Arkansas 5-14-103 is a Class Y Felony. Under the Rape Statute if a defendant is convicted of rape, they can face up to 10-40 years in prison, or even life.<sup>50</sup> They can also face up to \$10,000 in fines.<sup>51</sup>

#### 2. Sexual Assault- First Degree<sup>52</sup>

Under this statute this is a Class A Felony, which is 6-30 years in prison and up to \$15,000 fine.<sup>53</sup>

#### 3. Sexual Assault- Second Degree<sup>54</sup>

---

<sup>49</sup> ARK. CODE ANN. § 5-14-103 (2020).

<sup>50</sup> RAINN | RAPE, ABUSE AND INCEST NATIONAL NETWORK, *Sex Crimes: Definitions and Penalties Arkansas*, <https://apps.rainn.org/policy/policy-crime-definitions.cfm?state=Arkansas&group=3> (last visited Sept. 17, 2018).

<sup>51</sup> RAINN, *supra* note 50.

<sup>52</sup> ARK. CODE ANN. § 5-14-124 (2020).

<sup>53</sup> RAINN, *supra* note 50.

<sup>54</sup> ARK. CODE ANN. § 5-14-125 (2020).

Sexual assault in the second degree is a Class B felony. A Class B Felony is up to 5-20 years in prison, and \$15,000 fine. Sexual assault in the second degree is a Class D felony if committed by a *minor* with another person who is: (A) Less than fourteen years of age; and **(B) Not the person's spouse.** <sup>55</sup> Statutory- class D Felony, Maximum of 6 years in prison and a fine of up to \$10,000.

4. Sexual Assault- Third Degree<sup>56</sup>

This crime is a Class C felony, in which the punishment is up to 3-10 years in jail and up to a \$10,000 fine. <sup>57</sup>

5. Sexual Assault-Fourth Degree<sup>58</sup>

If the offender is over twenty and engages in sexual intercourse or deviate sexual activity with victim under sixteen and not offender's spouse then this is a class D felony, with a maximum of six years in prison and a fine of up to \$10,000.

Under subdivision (a)(1)(B) of this section, when an offender engages in sexual contact with victim under sixteen and not offender's spouse, it is a Class A misdemeanor. This is not more than one year; up to \$1,000 fine.

6. Sexual Extortion<sup>59</sup>

This is a Class B felony which is 5-20 years in prison and a \$15,000 fine.

7. Exposing another person to HIV<sup>60</sup>

The charge for exposing another person to HIV is a Class A felony,

---

<sup>55</sup> RAINN, *supra* note 50.

<sup>56</sup> ARK. CODE ANN. § 5-14-126 (2020).

<sup>57</sup> RAINN, *supra* note 50.

<sup>58</sup> ARK. CODE ANN. § 5-14-127 (2020).

<sup>59</sup> ARK. CODE ANN. § 5-14-113 (2017).

<sup>60</sup> ARK. CODE ANN. § 5-14-123 (2020).

## 8. Crime of Video Voyeurism and Voyeurism<sup>61</sup>

Both of these crimes are Class D felonies.

It is important to note that by utilizing the suggested criminal punishment chart,<sup>62</sup> the penalties above may not even happen. The offender may end up receiving a MUCH lighter sentence. By looking at the chart, the only crime that will actually lead to commitment to the Arkansas Department of Corrections<sup>63</sup> is a level 8, 9, or 10. Rape is a level 9 offense, but the rest are a level 7 and below. At 6 and 7 the offender might be sent to ADC but then could get out early. And some crimes of sexual assault in the second degree, as well as all crimes in the third and fourth degree are level FOUR offenses.<sup>64</sup> And none of these sexual assault statutes are “target offenses,” so the offender would only receive alternative sanctions.

## B. Other Legal Options to Protect Victims

Another option when there are sexual offenses within marriage is to obtain other legal forms of protection. There are three ways in which victims can attempt to obtain protection. It is important to note that although these options are available, they are not always readily available, or used.

### 1. Order of Protection

Most of the Arkansas resources for domestic violence list specific instructions on how to complete orders of protection. An Order of Protection is for victims of domestic abuse, and if granted by a judge, the police can arrest the abuser if the abuser violates the order. This costs nothing and does not require an attorney to represent either the victim or the abuser. According to

---

<sup>61</sup> ARK. CODE ANN. §§ 5-16-101 to 5-16-102 (2020).

<sup>62</sup> RAINN, *supra* note 50.

<sup>63</sup> As opposed to the Community Corrections Center or Alternative Sanctions.

<sup>64</sup> Depending on the criminal history of the offender but the base level with no history is 4.

9-15-2017, if an order of protection is violated the offender will be charged with a Class A misdemeanor.

## 2. Restraining Order

A Restraining Order does multiple things. First, it stops parties going through another court action from getting rid of property until the parties or the judge decides what will happen to the property. It also stops the parties from harassing or bothering each other. Once the Restraining Order is granted, the party who believes a violation of the Restraining Order has occurred must request a hearing before the judge. After evidence is presented, the judge will decide if a violation of the Restraining Order has occurred. If the judge finds a violation, the party who has violated the order may be required to pay court costs and fees, attorney's fees and or serve jail time.

## 3. No Contact Order

The No Contact Order is issued in criminal cases. This is issued against an abuser as a condition of bail when the accused is released from jail.

## C. Civil Actions

If the prosecutor does not get a conviction, the victim also has the option of filing a complaint against the offender in civil court. Victims could do this in combination with criminal prosecution, as an alternative, or if the prosecutor decides to not continue with the criminal case. The difference in remedies between the civil and criminal case would be in the civil action, the tort remedies would be monetary. There would not be a conviction for the actual crime committed. A disadvantage to this option is the lack of rape shield laws, and in general, at this point, victims do not usually choose to pursue this path. Also, at this point victims are either still married or in the middle of filing for divorce- making filing a lawsuit even harder to accomplish.

## VI. CONCLUSION

In conclusion, there are nine statutes that can apply to sexual assault within marriage; Rape: 5-14-103, Sexual Extortion: 5-14-113, 5-14-123, Sexual Assault: 5-14-124, 5-14-125, 5-14-126, 5-14-127, 5-16-101, and 5-16-102.

Each year, men and women fall through the cracks of the Arkansas criminal system. In 2015, a total of 2798 domestic violence complaints were filed in Arkansas.<sup>65</sup> Women are silently abused, manipulated, shamed, forced, and guilted into sexual activity, intercourse, and even procreation. Some women suffer in silence and some come forward. When women do come forward only some cases are prosecuted. Intimate partner violence is catastrophic— this is a public health concern, an economic crisis, and unacceptable. The first step to ending this epidemic is to successfully prosecute and convict offenders and show other people that this is NOT acceptable. Educate the community. Show women and young girls that abuse is not acceptable. Show men that these behaviors are not socially acceptable, regardless of what past generations have shown. There are men who have no idea that these behaviors are even abuse, and that in itself is a problem. Prosecution, and education have to be the first steps in ending this epidemic of violence. Because women's issues are not women's issues, they are children's issues, family's issues, and men's issues.

The biggest policy change that would benefit sexual assault victims is to change the statutory language. The language is archaic and outdated. The sexual assault statutes need to allow for more offenses and take out the spousal exception. The statute is geared for child sexual assault, and the language should reflect that. By changing the statutory language to include spouses, and to allow for more offenses would provide the most help and closure for sexual assault victims.

---

<sup>65</sup> RAINN, *supra* note 50.