

**CHAPTER 10: CRIMINAL SEXUAL CONDUCT, ASSAULT AND BATTERY,  
KIDNAPPING AND FALSE IMPRISONMENT**

**INTRODUCTION**

Texas was one of those states that once allowed the death penalty for rape. Although a small number of states authorize capital punishment for certain sex offenses involving children, Texas is not one of these.

The state has adopted a modern sexual assault (rape) statute and also punishes statutory rape. There is no offense of battery in Texas, the conduct is covered in the assault statute.

**SEXUAL ASSAULT**

Like many states, Texas has reconceptualized rape as an assaultive or violent offense rather than a sexual offense. Like these other states, Texas no longer utilizes the term “rape” in its Penal Code. Both types of “rape”, forcible and statutory, are found in TPC sec. 22.01. and are forms of “Sexual Assault.” These are in ch. 22 “Assaultive Offenses” rather than ch. 21 “Sexual Offenses.”

Both are first degree felonies if the offender and victim are closely related. Otherwise the offenses are second degree felonies. First degree felonies are punishable by imprisonment for life or for any term of not more than 99 years nor less than 5 years. In addition, punishment can include a fine of not more than \$10,000. A second degree felony is punishable by imprisonment for not more than 20 years nor less than 2 years, and/or a fine not to exceed \$10,000.

**Sexual Assault (non-consensual)**

The offense that formerly would have been called forcible rape is now found in 22.011 (a) of the TPC.

- § 22.011. SEXUAL ASSAULT. (a) A person commits an offense if the person:
- (1) intentionally or knowingly:
    - (A) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent;
    - (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or
    - (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

Note that unlike the common law definition of rape, this statute is gender-neutral, includes sex acts in addition to vaginal intercourse, and has no exemption for rape of a spouse.

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Without consent is defined in subsec. (b) in 11 different ways:

A sexual assault under Subsection (a)(1) is without the consent of the other person if:

(1) the actor compels the other person to submit or participate by the use of physical force or violence;

This is the classic forcible rape scenario. Prior law required the victim to resist and the force had to be such as would overcome “such earnest resistance as might be reasonably expected under the circumstances.” There is no requirement of any resistance in the current statute.

(2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person, and the other person believes that the actor has the present ability to execute the threat;

(3) the other person has not consented and the actor knows the other person is unconscious or physically unable to resist;

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it;

(5) the other person has not consented and the actor knows the other person is unaware that the sexual assault is occurring;

Drugging the victim is covered in (6) below and, at first glance, it might appear that subsec. 5 is not possible. This portion of the statute is aimed primarily at physicians who exceed the scope of a proper gynecological examination, and the victim is not aware of what is really going on.

(6) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge;

(7) the actor compels the other person to submit or participate by threatening to use force or violence against any person, and the other person believes that the actor has the ability to execute the threat;

The final four subsections deal with the situation where a person has control or unusual influence over the victim and takes advantage of that relationship:

(8) the actor is a public servant who coerces the other person to submit or participate;

(9) the actor is a mental health services provider or a health care services provider who causes the other person, who is a patient or former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor;

(10) the actor is a clergyman who causes the other person to submit or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual adviser; or

(11) the actor is an employee of a facility where the other person is a resident, unless the employee and resident are formally or informally married to each other under Chapter 2, Family Code.

### **Sexual Assault (Statutory Rape)**

Forcible rape was a common law offense. Consensual sex with a child was criminalized by a statute by Parliament, and is thus termed "statutory" rape. The Texas version is found in TPC sec. 21.011 (2). It provides that an actor commits an offense if he or she

- 2) intentionally or knowingly:
  - (A) causes the penetration of the anus or sexual organ of a child by any means;
  - (B) causes the penetration of the mouth of a child by the sexual organ of the actor;
  - (C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
  - (D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
  - (E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

Note that like the forcible rape version, the statute is gender neutral and includes sex acts other than vaginal intercourse. There is no element of lack of consent .

A child is defined as someone younger than 17 years of age who is not the spouse of the actor. Because the acts are consensual, there is, unlike in the forcible rape version, a spousal exception. Persons under 17 are presumed incapable of giving a valid consent, except when married. Age 17 is referred to as the "age of consent,"--the age at which the law assumes a valid consent can be given.

There is a defense of medical care: "(d) It is a defense to prosecution under Subsection (a)(2) that the conduct consisted of medical care for the child and did not include any contact between the anus or sexual organ of the child and the mouth, anus, or sexual organ of the actor or a third party."

There is also a defense if the offender and victim are close in age, are not close relatives, and the offender does not have certain prior convictions for certain sex offenses. In these situations it is less likely that there is some form of improper exploitation of a young victim by an older predator.

- (e) It is an affirmative defense to prosecution under Subsection (a)(2) that:
  - (1) the actor was not more than three years older than the victim and at the time of the offense:
    - (A) was not required under Chapter 62, Code of Criminal Procedure, to register for life as a sex offender; or

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- (B) was not a person who under Chapter 62, Code of Criminal Procedure, had a reportable conviction or adjudication for an offense under this section; and
- (2) the victim:
  - (A) was a child of 14 years of age or older; and
  - (B) was not a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01.

The statute does not say that the defendant must know that the victim is under 17, and Texas courts have not created such a requirement. Thus, (as in a majority of states) mistake of fact about the victim's age is not a defense.

### **AGGRAVATED SEXUAL ASSAULT**

If a sexual assault under sec. 22.011 involves any of the following acts by the offender, the offense is Aggravated Sexual Assault (sec. 22.021 (2):

- (i) causes serious bodily injury or attempts to cause the death of the victim or another person in the course of the same criminal episode;
- (ii) by acts or words places the victim in fear that death, serious bodily injury, or kidnapping will be imminently inflicted on any person;
- (iii) by acts or words occurring in the presence of the victim threatens to cause the death, serious bodily injury, or kidnapping of any person;
- (iv) uses or exhibits a deadly weapon in the course of the same criminal episode;
- (v) acts in concert with another who engages in conduct described by Subdivision (1) directed toward the same victim and occurring during the course of the same criminal episode; or
- (vi) administers or provides flunitrazepam, otherwise known as rohypnol, gamma hydroxybutyrate, or ketamine [so-called "date rape drugs"] to the victim of the offense with the intent of facilitating the commission of the offense;

It is also an aggravated sexual Assault if the victim is under 14 or an elderly or disabled individual. Aggravated Sexual Assault is a felony of the first degree.

### **PROCEDURAL AND EVIDENTIARY REFORM**

Like many states, Texas has eliminated or moderated many procedural and evidentiary rules that had the effect of putting the victim on trial for past sexual behavior and made it difficult to obtain convictions. (See the section on "Rape Shield Laws" in your text)

Most of these reforms are covered in Texas Code of Criminal Procedure art. 38.07, at <http://www.capitol.state.tx.us/statutes/docs/CR/content/htm/cr.001.00.000038.00.htm#38.07.00> art. 38.071 at

<http://www.capitol.state.tx.us/statutes/docs/CR/content/htm/cr.001.00.000038.00.htm#38.071.00>  
and Rule 412 of the Texas Rules of Evidence, at  
<http://www.courts.state.tx.us/publicinfo/TRE/tre-98.htm#RULE412>

Texas has sex-offender registration and mandatory testing of certain sex offenders for AIDS. State law also has special treatment and punishment provisions for sex offenders.

### **TPC CH. 21 “SEXUAL OFFENSES”**

To the extent private, adult consensual, conduct is involved, Texas’ Homosexual Conduct” statute (sec. 21.06) violates the federal constitutional right to privacy. This case is discussed in ch. 2 of your text and this supplement.

Other crimes in TPC ch. 21 are “Public Lewdness” (sec. 21.07) which is a class A misdemeanor, and” Indecent Exposure” (sec. 21.08. which is a class B misdemeanor)

Like all states, Texas protects children from sexual contact short of statutory rape. Like statutory rape, consent is not an issue, the age of consent is 17, and there is an affirmative defense if the two parties are close in age:

- § 21.11. INDECENCY WITH A CHILD. (a) A person commits an offense if, with a child younger than 17 years and not the person's spouse, whether the child is of the same or opposite sex, the person:
- (1) engages in sexual contact [defined below]with the child or causes the child to engage in sexual contact; or
  - (2) with intent to arouse or gratify the sexual desire of any person:
    - (A) exposes the person's anus or any part of the person's genitals, knowing the child is present; or
    - (B) causes the child to expose the child's anus or any part of the child's genitals.
- (b) It is an affirmative defense to prosecution under this section that the actor:
- (1) was not more than three years older than the victim and of the opposite sex;
  - (2) did not use duress, force, or a threat against the victim at the time of the offense; and
  - (3) at the time of the offense:
    - (A) was not required under Chapter 62, Code of Criminal Procedure, to register for life as a sex offender; or
    - (B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under this section.
- (c) In this section, "sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:
- (1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child; or

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(2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

(d) An offense under Subsection (a)(1) is a felony of the second degree and an offense under Subsection (a)(2) is a felony of the third degree.

Compare this with sec. 21.12 discussed below

### TPC CH. 22, NON-SEXUAL ASSAULTIVE OFFENSES

TPC ch. 21 also contains 10 non-sexual assaultive offenses:

sec. 22.01. assault,  
sec. 22.015. coercing, soliciting, or inducing gang membership,  
sec. 22.02. aggravated assault,  
sec. 22.04. injury to a child, elderly individual, or disabled individual,  
sec. 22.041. abandoning or endangering child,  
sec. 22.05. deadly conduct,  
sec. 22.08. aiding suicide,  
sec. 22.09. tampering with consumer product,  
sec. 22.10. leaving a child in a vehicle, and  
sec. 22.11. harassment by persons in certain correctional facilities; harassment of public servant.

In addition, although not found in ch. 22 (“Assaultive Offenses”), Texas also has laws against harassment (sec. 42.07), and stalking (sec. 42.072). Robbery is found in TPC ch. 29.

Texas, like most states, has abolished the distinction between assault and battery. There are 3 basic ways to commit an assault.

§ 22.01. ASSAULT. (a) A person commits an offense if the person:  
(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;  
(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or  
(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

At common law and in many states, an assault could not be committed recklessly as provided for in (a) (1). Depending upon various circumstances or the status of the victim, this offense can range from a class C misdemeanor (fine only) to a felony of the third degree. Third degree felonies are punishable by imprisonment for not more than 10 years nor less than 2 years, and a fine not to exceed \$10,000.

There are two factors that can turn a regular assault under sec. 22.01 into an “Aggravated Assault” (sec. 22.02): “(1) causes serious bodily injury to another, including the person's spouse; or (2) uses or

exhibits a deadly weapon during the commission of the assault” Depending upon the circumstances and/or status of the victim, this offense can be a first or second degree felony.

Under Certain circumstances, consent can be a defense to assault, aggravated assault (and deadly conduct).

§ 22.06. CONSENT AS DEFENSE TO ASSAULTIVE CONDUCT. The victim's effective consent or the actor's reasonable belief that the victim consented to the actor's conduct is a defense to prosecution under Section 22.01 (Assault), 22.02 (Aggravated Assault), or 22.05 (Deadly Conduct) if:

- (1) the conduct did not threaten or inflict serious bodily injury; or
- (2) the victim knew the conduct was a risk of:
  - (A) his occupation; [e.g. professional athlete]
  - (B) recognized medical treatment; or
  - (C) a scientific experiment conducted by recognized methods.

## **KIDNAPPING AND UNLAWFUL RESTRAINT**

Like most states, Texas has kidnapping and aggravated kidnapping statutes. The Texas version of false imprisonment is “Unlawful Restraint.” Kidnapping involves “abduction,” while unlawful restraint involves “restraint.”

§ 20.03. KIDNAPPING. (a) A person commits an offense if he intentionally or knowingly abducts another person.

(b) It is an affirmative defense to prosecution under this section that:

- (1) the abduction was not coupled with intent to use or to threaten to use deadly force;
- (2) the actor was a relative of the person abducted; and
- (3) the actor's sole intent was to assume lawful control of the victim.

(c) An offense under this section is a felony of the third degree .

Under sec. 20.01 “(2) "Abduct" means to restrain a person with intent to prevent his liberation by: (A) secreting or holding him in a place where he is not likely to be found; or (B) using or threatening to use deadly force. Kidnapping is a Felony of the Third Degree.

There is also an offense of Aggravated Kidnapping (sec. 20.04) which involves ordinary kidnappings plus certain aggravating factors such as holding for ransom or reward or using as a shield or hostage. Aggravated Kidnapping is usually a felony of the First Degree.

Unlawful restraint is a Class A misdemeanor or Third Degree Felony:

§ 20.02. UNLAWFUL RESTRAINT. (a) A person commits an offense if he intentionally or knowingly restrains another person.

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- (b) It is an affirmative defense to prosecution under this section that:
  - (1) the person restrained was a child younger than 14 years of age;
  - (2) the actor was a relative of the child; and
  - (3) the actor's sole intent was to assume lawful control of the child.

Under sec. 20.01 (1), "Restrain" means

"to restrict a person's movements without consent, so as to interfere substantially with the person's liberty, by moving the person from one place to another or by confining the person. Restraint is "without consent" if it is accomplished by:

- (A) force, intimidation, or deception; or
- (B) any means, including acquiescence of the victim, if:

- (i) the victim is a child who is less than 14 years of age or an incompetent person and the parent, guardian, or person or institution acting in loco parentis has not acquiesced in the movement or confinement; or
- (ii) the victim is a child who is 14 years of age or older and younger than 17 years of age, the victim is taken outside of the state and outside a 120-mile radius from the victim's residence, and the parent, guardian, or person or institution acting in loco parentis has not acquiesced in the movement.

Further,

- (d) It is no offense to detain or move another under this section when it is for the purpose of effecting a lawful arrest or detaining an individual lawfully arrested.
- (e) It is an affirmative defense to prosecution under this section that:
  - (1) the person restrained was a child who is 14 years of age or older and younger than 17 years of age;
  - (2) the actor does not restrain the child by force, intimidation, or deception; and
  - (3) the actor is not more than three years older than the child.

### EXERCISE

Consider the following sec. from the TPC:

#### § 21.12. IMPROPER RELATIONSHIP BETWEEN EDUCATOR AND STUDENT.

(a) An employee of a public or private primary or secondary school commits an offense if the employee engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works and who is not the employee's spouse.

- (b) An offense under this section is a felony of the second degree.



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Note that there is no age requirement for the student. This is a felony of the second degree (A second degree felony is punishable by imprisonment for not more than 20 years nor less than 2 years, and/or a fine not to exceed \$10,000.)

The statute applies even if the student is an adult (18 or over). The recent case involving a 25 year old female teacher and an 18 year old male student caused some to question the law.

<http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/061106dnmetteacher.7dc8bbc.html>

Some argued that the penalty was too high, some argued it shouldn't be a crime, and others argued that there should have been a requirement that the students be under 17 or at least under 18. Others argued that there should be a requirement of a specific teacher-student relationship, not just the fact that they are both at the same school. Others defended the statute as necessary to protect students and the student-teacher relationship.

Read the statute, consider the alternatives and make your own decision about the law. Would you leave it as is? Would you change anything?

### REVIEW QUESTIONS

1. Texas, like many states have replaced the crime of "forcible rape" with an offense called
  - a. statutory rape.
  - b. forcible sexual conduct.
  - c. forcible sexual assault
  - d. sexual assault
  - e. deviant sexual conduct
2. In Texas, the offense known elsewhere as false imprisonment is termed
  - a. unlawful imprisonment.
  - b. unlawful restraint.
  - c. criminal restraint.
  - d. criminal imprisonment.
  - e. false restraint.
3. In Texas the age of consent for the statutory rape version of sexual assault is
  - a. 14
  - b. 15
  - c. 16
  - d. 17
  - e. 18
4. Under Texas law, which of the following can turn a regular assault into an aggravated assault?
  - a. victim is under 17.
  - b. the offender causes serious bodily injury.
  - c. victim does not give valid consent.
  - d. victim is drugged by defendant.

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- e. victim is mentally ill or retarded
5. Under Texas law, kidnapping involves
- a. restraint.
  - b. abduction.
  - c. transduction.
  - d. possession.
  - e. allocution.
6. Which of the following is not a specifically named offense in the Texas Penal Code?
- a. battery
  - b. unlawful restraint
  - c. indecency with a child
  - d. aggravated assault
  - e. aggravated sexual assault

### REFERENCES AND RESOURCES

Belbow, B. A. (2005). *Guide to Criminal Law for Texas*,. 3<sup>rd</sup> ed. Belmont, CA: Thomson-Wadsworth, ch 10.

Teague, M.O. & Helft, B. P. (2006). *Texas Criminal Practice Guide*. San Francisco: Matthew Bender. ch. 125

Texas Jurisprudence 3rd (2006). *Criminal Law* ,sec. 317-488

**ANSWER KEY - CH 10: CRIMINAL SEXUAL CONDUCT, ASSAULT AND BATTERY,  
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1. d
2. b
3. d
4. b
5. b
6. a