

Statutes Come Up Dry in Addressing Bodily Fluid Assaults

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## Statutes Come Up Dry in Addressing Bodily Fluid Assaults

### Abstract

Cases where people have become the victim of a bodily fluid assault have defied easy categorization and consistent prosecution under current statutes. These cases include police officers being spit on by individuals resisting arrest, correctional officers being attacked with feces or urine by defiant inmates, and people unknowingly consuming bodily fluids placed into their food or beverages. This research explores the laws governing bodily fluid assaults, an area of great disparity among the states. Such assaults include conduct such as throwing or causing another to ingest urine, semen or other bodily secretions. Prosecution of these actions is problematic because a great number of states have no laws on the books at all that specifically deal with assaults that utilize bodily fluids. The vast majority of states that have enacted such laws criminalize bodily fluid assaults only when the victim is a police officer or corrections employee. In addition, crimes involving semen can be particularly frustrating for prosecutors because occasionally these crimes have a clear sexual motivation, yet they cannot be prosecuted as sex offenses because they do not meet the definition of sexual contact in most jurisdictions.

Bodily fluid assaults are offenses in which the contact with, or exposure to, the bodily secretion is not merely incidental to a larger crime such as rape. These are crimes where the offensive contact with the bodily fluid is the object in and of itself. These crimes have different names in different jurisdictions. Some examples are: “Assault by Bodily Fluid”<sup>1</sup>, “Battery by Bodily Waste”<sup>2</sup> and “Throwing or Discharging Bodily Fluids at Public Safety Workers”.<sup>3</sup>

The definition of bodily fluid assaults varies widely from state to state. To begin with, there is little agreement about which secretions should be covered under bodily fluid assault laws. Some jurisdictions define bodily fluids broadly enough to include any

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<sup>1</sup> Mont. Code Ann. §45-5-214 (2005).

<sup>2</sup> Ind. Code § 35-42-2-6 (2004).

<sup>3</sup> Wis. Stat. § 941.375 (2003).

bodily secretion<sup>4</sup>, but many limit the type of secretions to a specifically enumerated list. Such lists usually include semen, blood, urine, and feces.<sup>5</sup> Less common is the inclusion of saliva and vomit<sup>6</sup>, and only one state explicitly includes vaginal fluid.<sup>7</sup> Typical statutory definitions of bodily fluids include: “any bodily secretion, including but not limited to feces, urine, blood, and saliva”<sup>8</sup>; “seminal fluid, blood, urine or feces”<sup>9</sup>; “blood, emesis, excrement, mucus, saliva, semen, vaginal fluid or urine.”<sup>10</sup>

All jurisdictions that have codified bodily fluid assault offenses require a mens rea of specific intent (i.e., one cannot recklessly, negligently or accidentally cause another to be exposed to bodily fluids and be guilty of a crime). Some jurisdictions also make a point of citing mental illness on the part of the perpetrator as an affirmative defense.<sup>11</sup> Other than a requirement for knowing, intentional conduct, there is little agreement as to the particulars of the offense from state to state.

In many jurisdictions, the mere act of throwing, spitting or otherwise propelling bodily fluids at someone is a crime, even if the fluids do not make contact.<sup>12</sup> Examples include: “who knowingly and willfully throws, emits or causes to be used as a projectile,

<sup>4</sup> Colo. Rev. Stat. § 18-3-203 (2002); Del. Code Ann. tit. 11, § chap. 5 601 (2004); Ind. Code § 35-42-2-3 (2004); La. Rev. Stat. Ann. § 14:34.2 (2001); La. Rev. Stat. Ann. § 14:34.5 (1999); Minn. Stat. § 609.2231 (2005); Nev. Rev. Stat. § 616A (1987); N.J. Stat. Ann. § 2C 12-12 (1997) (Def.); N.C. Gen. Stat. § 14-258.4 (2001); S.C. Code Ann. § 24-13-470 (1997); S.D. Codified Laws § 22-18-26 (2002); S.D. Codified Laws § 22-18-26.1 (2005); Wis. Stat. § 941.375 (2003).

<sup>5</sup> Md. Code Ann. Crim. Law § 3-205 (2002); Md. Code Ann. Crim. Law § 3-215 (2004); Mo. Rev. Stat. § 565.092 (1997); N.H. Rev. Stat. Ann. § 642:9 (2001); N.Y. Penal Law § 240.32 (2009); Ore. Rev. Stat. § 163.415 (2009); R.I. Gen. Laws § 11-5-15 (2009); Vt. Stat. Ann. tit. 13, § 1028a (1997); Wyo. Stat. Ann. § 6-2-508 (2004).

<sup>6</sup> Vt. Stat. Ann. tit. 13, § 1028a (1997); Wyo. Stat. Ann. § 6-2-508 (2004).

<sup>7</sup> N.D. Cent. Code §12.1-17-11 (1999).

<sup>8</sup> Mont. Code Ann. §45-5-214 (2005).

<sup>9</sup> Md. Code Ann. Crim. Law § 3-205 (2002); Md. Code Ann. Crim. Law § 3-215 (2004).

<sup>10</sup> N.D. Cent. Code §12.1-17-11 (1999).

<sup>11</sup> N.D. Cent. Code §12.1-17-11 (1999).

<sup>12</sup> Colo. Rev. Stat. § 18-3-203 (2002); La. Rev. Stat. Ann. § 14:34.5 (1999); La. Rev. Stat. Ann. § 14:34.2 (2001); Mo. Rev. Stat. § 565.092 (1997); Nev. Rev. Stat. § 616A (1987); N.C. Gen. Stat. § 14-258.4 (2001); R.I. Gen. Laws § 11-5-15 (2009); S.C. Code Ann. § 24-13-470 (1997); S.D. Codified Laws § 22-18-26 (2002); S.D. Codified Laws § 22-18-26.1 (2005); Wis. Stat. § 941.375 (2003).

bodily fluids or excrement at a person”<sup>13</sup>; “to maliciously cause or attempt to cause another to come into contact with bodily fluid”<sup>14</sup>; and “where a person intentionally throws or otherwise transfers bodily fluids at or onto [another]”.<sup>15</sup>

In other jurisdictions, actual physical contact with the offending secretion is required.<sup>16</sup> Examples include: “with intent to infect, annoy, harass, threaten, alarm harm or injure another, a person causes another to come in contact with bodily fluid”<sup>17</sup>; “intentional propelling or placing, or the causing to be propelled or placed, of any human bodily fluid upon the person of another”<sup>18</sup>; and “knowingly or intentionally in a rude, insolent or angry manner plac[ing] blood, another bodily fluid or waste on [another]”.<sup>19</sup>

In still other jurisdictions, not only is physical contact with the offending secretion required, but the victim must actually ingest the secretion.<sup>20</sup> Maryland’s bodily fluid assault statute, for example, defines the offense as: “Willfully or knowingly causing another to ingest bodily fluid without consent by force or threat of force”.<sup>21</sup>

The problem of bodily fluid assaults comes up most often in correctional settings, where detainees often express anger or disobedience towards guards or arresting officers by tossing semen or feces at them, spitting, etc. In fact, prisoners throwing bodily fluids at their captors is such a recurring problem that twenty-six states have passed laws that specifically criminalize bodily fluid assaults against corrections officers, law enforcement agents, and in some cases, emergency service providers.<sup>22</sup>

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<sup>13</sup> N.C. Gen. Stat. § 14-258.4 (2001).

<sup>14</sup> Mont. Code Ann. §45-5-214 (2005).

<sup>15</sup> Minn. Stat. § 609.2231 (2005).

<sup>16</sup> Cal. Pen. Code § 4501.1 (1998).

<sup>17</sup> Colo. Rev. Stat. § 18-3-203 (2002); Cal. Pen. Code § 4501.1 (1998).

<sup>18</sup> Nev. Rev. Stat. § 616A.035 (1987); Nev. Rev. Stat. § 212.189 (2003).

<sup>19</sup> Ind. Code § 35-42-2-3 (2004).

<sup>20</sup> Md. Code Ann. Crim. Law § 3-215 (2004).

<sup>21</sup> Md. Code Ann. Crim. Law § 3-215 (2004).

<sup>22</sup> Ari. Rev. Stat. §13-1212 (nd); Cal. Pen. Code § 4501.1 (1998); Colo. Rev. Stat. § 18-3-203 (2002); Conn. Pen. Code Ch. 952 § 53a-167c (nd); Del. Code Ann. tit. 11, § 5-601 (2004); Fla. Stat. § 784.078 (nd); Id. Stat. § 18-915b (nd); Ind. Code § 35-42-2-6 (2004); La. Rev. Stat. Ann. § 14:34.5 (1999); La. Rev. Stat. Ann. § 14:34.2 (2001); La. Rev. Stat. Ann. § 15:739 (1997); Md. Code Ann. Crim. Law § 3-205 (2002); Md. Code Ann. Crim. Law § 3-215 (2004); Minn. Stat. § 609.2231 (2005); Mont. Code Ann.

In the twenty-six states that have such laws, prosecution can be straightforward as long as the bodily fluid assault takes place in a correctional setting. In the other thirty states, however, prosecutors face the problem of trying to prosecute these infractions under traditional assault, battery or disorderly conduct statutes where they frequently do not fall within the standard definitions. Assault, battery and disorderly conduct statutes typically require actual bodily harm, intent to cause bodily injury, apprehension of physical harm, or some other element not present in many bodily fluid assaults.<sup>23</sup>

Those states that have codified bodily fluid assault crimes against corrections and law enforcement personnel tend to treat such offenses extremely seriously. The vast majority categorize them as felonies.<sup>24</sup> The harshest is South Carolina's law, which makes bodily fluid assaults punishable by up to fifteen years incarceration, which must be served consecutively from any other sentence being served by the offender.<sup>25</sup> Consequently, these bodily fluid assault statutes are a great boon for prosecutors in the states that have them, because in those states that do not, such offenses can usually only be prosecuted as misdemeanor forms of general assaults, batteries or disorderly conduct.

Even so, there are numerous problems with existing bodily fluid assault laws. First, most are drafted too narrowly because they do not cover similar crimes against the general public. Although police officers and corrections employees are more frequently the victims of bodily fluid assaults, these crimes also happen with some regularity outside

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§45-5-214 (2005); Mo. Rev. Stat. § 565.092 (1997); N.C. Gen. Stat. § 14-258.4 (2001); N.D. Cent. Code §12.1-17-11 (1999); Nev. Rev. Stat. § 616A.035 (1987); Nev. Rev. Stat. § 212.189 (2003); N.H. Rev. Stat. Ann. § 642:9 (2001); N.J. Stat. Ann. § 2C 12-12 (1997); N.J. Stat. Ann. § 2C 12-13 (2002); N.Y. Penal Law § 240.32 (2009); R.I. Gen. Laws § 11-5-15 (2009); S.C. Code Ann. § 24-13-470 (1997); S.D. Codified Laws § 22-18-26 (2002); S.D. Codified Laws § 22-18-26.1 (2005); Vt. Stat. Ann. tit. 13, § 1028a (1997); Wis. Stat. § 941.375 (2003); Wyo. Stat. Ann. § 6-2-508 (2004).

<sup>23</sup> Ala Code § 13A-6-20, Alaska Stat. § 11.41.200

<sup>24</sup> Ari. Rev. Stat. §13-1212 (nd); Cal. Pen. Code § 4501.1 (1998); Colo. Rev. Stat. § 18-3-203 (2002); Conn. Pen. Code Ch. 952 § 53a-167c (nd); Del. Code Ann. tit. 11, § 5-601 (2004); Fla. Stat. § 784.078 (nd); Id. Stat. § 18-915b (nd); Ind. Code § 35-42-2-6 (2004); Minn. Stat. § 609.2231 (2005); N.C. Gen. Stat. § 14-258.4 (2001); N.D. Cent. Code §12.1-17-11 (1999); Nev. Rev. Stat. § 616A.035 (1987); Nev. Rev. Stat. § 212.189 (2003); N.H. Rev. Stat. Ann. § 642:9 (2001); N.Y. Penal Law § 240.32 (2009); S.D. Codified Laws § 22-18-26 (2002); S.D. Codified Laws § 22-18-26.1 (2005); Wis. Stat. § 941.375 (2003).

<sup>25</sup> S.C. Code Ann. § 24-13-470 (1997).

of a custodial setting. No doubt, it is just as offensive for a member of the general public to have semen thrown at them by a stranger as it is for a sheriff's deputy, yet most bodily fluid assault laws would only protect the latter. Indeed, some of these laws are drafted so narrowly that they do not even provide sufficient protection within a correctional setting. For example, most of these statutes would not cover assaults against lawyers, volunteers, visitors or other individuals that have legitimate business in jails and prisons. Rhode Island's bodily fluid assault law is so specific that it only applies if the victim is a "deputy marshal or deputy sheriff".<sup>26</sup> Only a few jurisdictions, such as North Dakota, extend protection for such assaults to anyone in a correctional facility.<sup>27</sup>

At least one issue that prosecutors do not often have to face with bodily fluid assaults in the correctional setting is the dilemma of how to address them as sex crimes. Even when semen is used as the instrumentality of the assault, one simply cannot assume a sexual motivation on the part of an incarcerated person. If given a choice of instrumentalities, an inmate might prefer to assault using a weapon, but they simply have no access. Bodily fluids are a self-renewing, free, natural resource and inmates have very few resources, particularly resources that can serve the purpose of being inherently offensive. One simply cannot compare this to a free man sneaking up behind an anonymous woman in a shopping mall and spraying her with semen for the purpose of sexual gratification. None of the statutes criminalizing bodily fluid assaults against police and corrections officers make them sex crimes—there simply is no justification. Another problem one generally does not encounter in the custodial setting is the intentional causing of another to ingest bodily fluid, because inmates usually do not have access to officers' food.

Outside of the correctional setting, the motivations for bodily fluid assaults may be more complex and the prosecution thereof is more challenging and inconsistent. States handle these offenses in a number of different ways. For example, most states have laws criminalizing intentionally exposing another to HIV, so bodily fluid assaults by AIDS-

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<sup>26</sup> R.I. Gen. Laws § 11-5-15 (2009).

stricken individuals can often be prosecuted under these statutes, which generally classify such exposure as a felony.<sup>27</sup>

However, where the offender is disease-free, prosecution for bodily fluid assaults against members of the general public can be difficult. Only three states have laws that specifically make bodily fluid assaults a crime where the victim is not a police officer, emergency responder, or other individual involved in a correctional setting. Delaware defines the misdemeanor of “offensive touching” if a person “intentionally strike[s] another person with . . . bodily fluid”.<sup>28</sup> Maryland makes it a felony, punishable for up to ten years, to “knowingly or willfully cause another to ingest bodily fluid.”<sup>29</sup> Maryland’s law was passed in response to a high profile case where an employee was secretly depositing urine and semen in the coffee pot at the office for his fellow colleagues to drink, so the statute covers ingestion of bodily fluids but not striking someone with them. Delaware’s law, on the other hand, is just the opposite—it protects against being hit by bodily fluids but not being made to ingest them. Both statutes share the problem of being overly narrow in their application.

The only state that has a broad statute that covers all victims and all types of bodily assaults is South Dakota, which passed a law that went into effect in 2006 making it a misdemeanor to “cause bodily fluid to come into contact with any other person.”<sup>30</sup> This law is inclusive enough to encompass spitting, smearing throwing, causing ingestion, etc. of virtually any bodily secretion.

In the other forty-seven states, bodily fluid assaults against private citizens have to be tried under other categories of existing laws, such as physical assaults, with varying results. An incident in 2010 that involved a female inmate squirting breast milk in an

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<sup>27</sup> Ind. Code § 35-42-2-6 (2004).

<sup>28</sup> Md. Code Ann. Crim. Law § 3-205 (2002); Md. Code Ann. Crim. Law § 3-215 (2004); Ore. Rev. Stat. § 163.415 (2009); Tex. Pen. Code § 22.03 (2009).

<sup>29</sup> Md. Code Ann. Crim. Law § 3-205 (2002); Md. Code Ann. Crim. Law § 3-215 (2004).

<sup>30</sup> S.D. Codified Laws § 22-18-26 (2002); S.D. Codified Laws § 22-18-26.1 (2005).

officer's face resulted in a charge of third degree assault.<sup>31</sup> Prosecutors have had greatest success where the crimes have involved causing people to ingest bodily fluids in a commercial setting, because then they can be charged under product tampering laws. For example, a Florida convenience store clerk was charged with felony tampering with a product for urination in a Mountain Dew that was sold to and consumed by a random customer.<sup>32</sup> In another case, a Dallas, Texas cab driver was charged with felony tampering with consumer products for sprinkling dried feces on baked goods at a grocery store where he had a grievance. The products were sold to customers who complained of the taste.<sup>33</sup> In yet another, an Illinois cook at a Denny's restaurant was charged with product tampering, in this case a form of felony aggravated battery, for mixing his semen into the restaurant's sauce.<sup>34</sup> Some product tampering laws, however, do not apply because they require a harmful or toxic substance to be added. In Idaho, for example, a young man was charged only with disturbing the peace for sending semen-frosted brownies to classmates for Valentine's Day.<sup>35</sup>

By far the most troublesome cases are those involving sexually motivated bodily fluid assaults. For example, in Ohio in 2002, a man was caught picking out and following attractive young women and girls at a shopping mall. He had a small spray bottle filled with his semen, and he would sneak up behind the victims and spray them. On other occasions he carried around his semen in small cups that he would toss onto victims. Eventually he was apprehended and his victims were horrified to learn that Ohio law, like that in most other states, makes no distinction between throwing a cup of semen and throwing a cup of Pepsi. He was convicted only of misdemeanor criminal mischief and

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<sup>31</sup> Inmate squirts breast milk on deputy. Retrieved from <http://www.wkyt.com/wymtnews/headlines/86690622.html>

<sup>32</sup> CourtTv.com. (2006). Prank leaves bad taste in mouth. Retrieved from [http://www.courttv.com/people/scm/092205\\_ctv.html](http://www.courttv.com/people/scm/092205_ctv.html).

<sup>33</sup> Netscape News. (2005), Cabbie accused of tainting food with feces. Retrieved from <http://cnn.netscape.cnn.com/news/story.jsp?idq=/ff/story/0001%2F2005.html>.

<sup>34</sup> CourtTv.com (2004). Denny's cook busted for special ingredients. Retrieved from [http://www.courttv.com/people/scm/061004\\_ctv.html](http://www.courttv.com/people/scm/061004_ctv.html).

<sup>35</sup> CourtTv.com. (2005). Special brownies land teen in trouble. Retrieved from [http://www.courttv.com/people/scm/031705\\_ctv.html](http://www.courttv.com/people/scm/031705_ctv.html).

there was no mechanism in the law to address the sexual implications of the crime.<sup>36</sup> In a remarkably similar case in Maryland in 2010, a man was arrested for spraying bodily fluids on shoppers and then taking pictures of the victims. He was charged with second degree assault for his actions.<sup>37</sup> Similarly, a North Carolina man was charged in 2006 with assault for wiping semen on one woman and using a straw to shoot semen into the hair of another at a department store.<sup>38</sup> Again, the charges do not address the sexual nature of the offense.

Just as alarming are the sexually motivated cases involving health care professionals who secretly expose patients to bodily fluids during medical procedures. In 2006 a Texas doctor left semen on his female patients' faces during procedures performed in his endoscopy room. Although several women reported this type assault to hospital staff, nothing was done by staff and the doctor was never investigated. Finally, one woman woke up from her procedure with semen on her face, and instead of washing it off, went directly to the police department. The doctor claimed that the semen must have accidentally been left on the woman's face during the procedure, however, he was eventually charged and convicted of sexual assault. This case is a rare example of a successful prosecution of a bodily fluid assault as a sex crime, and the conviction resulted from extraordinary action of the part of the victim after previous victims had been ignored.<sup>39</sup>

In another case involving a health care professional, a North Carolina dentist was accused of singling out attractive female patients for assaults. During dental checkups, he squirted samples of his semen into their mouths. He was eventually charged with assaulting the women and received five years probation, but the prosecutor apologized to the victims in open court because he did not feel he could "do justice" under existing law.<sup>40</sup> Despite the sexual implications of this type of case, there is no mechanism in the

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<sup>36</sup> Dick, D. (2001). Niles victim's worry about security. Retrieved from <http://archive.vindy.com/archive>

<sup>37</sup> Second Women Alleges Man Sprayed Her With Bodily Fluids, Retrieved from <http://www.nbcwashington.com/news/local-beat/Second-Victim-Found-in-Bodily-Fluids-Attack-99943469.html>

<sup>38</sup> Ogrish.com. (2006). Man assaults women with bodily fluids. Retrieved from [http://www.ogrish.com/archives/man\\_assaults\\_women\\_with\\_bodily\\_fluids\\_Apr\\_15\\_2006.html](http://www.ogrish.com/archives/man_assaults_women_with_bodily_fluids_Apr_15_2006.html).

law of most states to charge it as a sex crime. This is because sex crime statutes require actual sexual contact, sexual penetration, or at least exposure of the genitals. Sexual contact and/or penetration typically involves anal or vaginal intercourse, cunnilingus, fellatio, touching or intrusion into the genitalia, etc., and bodily fluid assaults simply do not meet these definitions. Consequently these crimes fall under the radar of sexual offender laws.

In order to give prosecutors the tools they need to deal with bodily fluid assaults in a consistent and effective manner, some simple statutory enactments would suffice. States that do not have such laws already could enact provisions specifically criminalizing bodily fluid assaults. Those states that have laws prohibiting bodily fluid assaults against law enforcement and corrections officers should amend them to apply to any victim. And finally, these statutes should contain a provision that would aggravate the crime and categorize it as a sex offense where it involves the use of semen for the purpose of sexual arousal, gratification or abuse.

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<sup>39</sup> Goldstein, S. (2006). Hospital knew of sex allegations on doctor. Dallas Daily News. Retrieved from <http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/092906metchitale.329d63a.html>

<sup>40</sup> CourtTv.com (2004). Dentist accused of injecting semen into patients' mouths closes office. Retrieved from [http://www.courttv.com/people/2004/0818/dentist\\_ap.html](http://www.courttv.com/people/2004/0818/dentist_ap.html).