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The Conundrum of Voluntary Intoxication and Sex

Michal Buchhandler-Raphaelt

INTRODUCTION

On June 1, 2014, R.Z.M., a seventeen-year-old male, and a sixteen-year-old female classmate had been drinking alcohol and smoking marijuana with a group of friends in a Tulsa, Oklahoma park.¹ According to eyewitnesses, when the girl became heavily intoxicated and could not walk, R.Z.M. volunteered to give her a ride home, and two friends carried her to his car.² A boy who briefly rode in that car told police investigators that the girl had been coming in and out of consciousness.³ After the other boy had left the car, R.Z.M. had oral sex with the girl and afterward dropped her off at her grandmother's house. While still unconscious, she was taken to a hospital where her blood test showed a blood alcohol content above .34,⁴ about four times higher than the legal limit for driving.⁵ The victim told police investigators that she did not

† Visiting Assistant Professor of Law, Washington and Lee School of Law. I am grateful to Katharine Baker, Bennett Capers, Nora Demleitner, Joan Shaughnessy, and Deborah Tuerkheimer for their invaluable and thoughtful comments and feedback on earlier drafts and to Timothy MacDonnell for helping me think through many of the issues raised in this article. Finally, I thank the *Brooklyn Law Review* editors, and especially Jessica Schneider, Zack Goldberg, and Valentina Lumaj, for their thorough and thoughtful edits.

¹ See *State v. R.Z.M.*, No. JS 2015-1076 (Okla. Crim. App. Mar. 24, 2016), <http://www.ocdw.com/main/wp-content/uploads/2016/03/State-v.-RZM.pdf> [<https://perma.cc/P7EV-YANY>]; see also Clifton Adcock, *With Court Ruling, Sodomy Law Doesn't Apply When Victim Is Unconscious*, OKLA. WATCH (Apr. 23, 2016), <http://oklahomawatch.org/2016/04/23/appeals-court-sodomy-law-doesnt-apply-to-cases-with-unconscious-victims/> [<https://perma.cc/HTX2-F4FC>] (initial report on the court's decision); Molly Redden, *Oklahoma Court: Oral Sex Is Not Rape if Victim Is Unconscious from Drinking*, GUARDIAN (Apr. 27, 2016), <http://www.theguardian.com/society/2016/apr/27/oral-sex-rape-ruling-tulsa-oklahoma-alcohol-consent> [<https://perma.cc/EK43-RZDP>] (reporting that an Oklahoma court dismissed forcible oral sodomy charges against a defendant who imposed oral sex on an unconscious victim).

² See Redden, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ Adcock, *supra* note 1.

“have any memories after leaving the park.”⁶ After a sexual assault examination found R.Z.M.’s DNA on the victim’s body, he told investigators that she “had consented to performing oral sex” on him.⁷ The prosecution charged R.Z.M. with forcible oral sodomy under Oklahoma law, yet the trial court granted his pretrial motion to dismiss the charge.⁸ Following the state’s appeal, the Oklahoma Court of Criminal Appeals upheld the lower court’s decision, holding that forcible sodomy could not occur where a victim was so intoxicated as to be completely unconscious at the time of the oral sexual act because, while the legislature included intoxication as one of the circumstances for the crime of rape, it was not mentioned among the five alternate requirements delineated in the statute for commission of forcible oral sodomy.⁹ The decision exemplifies an intolerable outcome: Engaging in oral sex with a person whose intoxication rendered him or her unconscious is not a crime under Oklahoma law.

The facts underlying this case are fairly typical for many males and females who were sexually assaulted after consuming an excessive amount of alcohol, drugs, or both (hereinafter, intoxicants).¹⁰ Research shows that a large percentage of sexual assaults involving people who know each other, often called “acquaintance rape,” occurred while victims were heavily intoxicated.¹¹ This problem has recently gained significant public and media attention, mostly in the context of sexual assaults at higher education institutions.¹² Its scope, however, is much

⁶ Redden, *supra* note 1.

⁷ *Id.*

⁸ *Id.*; see OKLA. ST. ANN. tit. 21, § 888 (West 2017) (prohibiting, among other acts, “[s]odomy committed upon a person incapable through mental illness or any unsoundness of mind of giving legal consent regardless of the age of the person committing the crime”).

⁹ State v. R.Z.M., No. JS 2015-1076 (Okla. Crim. App. Mar. 24, 2016) (holding that the prohibition against “sodomy committed [against] a person incapable through mental illness or any unsoundness of mind of giving legal consent” does not include incapacity because of intoxication).

¹⁰ In this article, I use the terms “intoxicants” and “alcohol” interchangeably. While alcohol is the most commonly used intoxicant, the scope of the arguments here extends to impairment due to other intoxicants. Moreover, the article’s arguments equally apply to female and male victims; sexual assault of intoxicated individuals is also committed against male and transgender individuals, despite the low level of reporting these crimes. See generally Bennet Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011) (discussing male rape in various settings and the criminal justice system’s inappropriate response).

¹¹ See generally CHRISTOPHER P. KREBS ET AL., CAMPUS SEXUAL ASSAULT (CSA) STUDY 5-4 Exhibit 5-3 (2007) [hereinafter CSA STUDY] (suggesting that about seventy-seven percent of college sexual assaults occurred when the victim was incapacitated).

¹² See generally Jessie Ford & Paula England, *What Percent of College Women Are Sexually Assaulted in College?*, CONTEXTS (Jan. 12, 2015), <https://contexts.org/blog/what-percent-of-college-women-are-sexually-assaulted-in-college/> [<https://perma.cc/988U-NAHZ>] (noting that eleven percent of students in their fourth year of college reported that

broader than college sexual assaults and also includes assaults committed in additional settings, such as the military, the workplace, bars, clubs, streets, and house parties.¹³

Yet, many sexual assaults do not result in criminal convictions, either because charges are not brought or because courts dismiss the charges or acquit the defendants.¹⁴ Criminal codes in most jurisdictions do contain separate provisions specifically prohibiting sexual intercourse committed against intoxicated victims.¹⁵ But these statutes typically cover cases in which intoxication was *involuntary*, namely, when a perpetrator administered the intoxicants to an unsuspecting victim.¹⁶ Here, imposing criminal liability is mostly uncontroversial; when sexual predators surreptitiously dupe victims to accomplish intercourse, there is little disagreement that criminal charges are warranted, and this article takes no issue with these prohibitions.

Most jurisdictions, however, do not have separate sexual assault statutes directly prohibiting intercourse with a *voluntarily* intoxicated victim, namely, when the victim's impaired state resulted from freely consuming an excessive amount of intoxicants.¹⁷ This article specifically targets the criminal law's treatment of cases involving sexual assault of voluntarily intoxicated victims.¹⁸

While existing laws typically do not directly prohibit sexual assault of voluntarily intoxicated victims, these crimes can and are being prosecuted under general prohibitions that criminalize sexual intercourse with a person who is incapable of consenting to sex due to incapacitation.¹⁹ These prohibitions

someone had sexual intercourse with them that they did not want while they "were drunk, passed out, asleep, drugged or otherwise incapacitated").

¹³ See generally Michal Buchhandler-Raphael, *Breaking the Chain of Command Culture: A Call for an Independent and Impartial Investigative Body to Curb Sexual Assaults in the Military*, 29 WIS. J.L. GENDER & SOC'Y 341, 347, 371 & nn.237–239 (2014) (Excessive alcohol use is prevalent in the military setting and often alcohol use precedes sexual assault. Also, the military justice system often responds by charging victims of sexual assault with intoxication-related offenses.).

¹⁴ See, e.g., *State v. Haddock*, 664 S.E.2d 339, 346 (N.C. Ct. App. 2008) (reversing rape conviction on the theory that the statute was not intended for the protection of victims who had voluntarily ingested intoxicating substances through their own actions).

¹⁵ See *infra* Section II.B.

¹⁶ See *infra* Section II.B.

¹⁷ See CAROL E. TRACEY ET AL., WOMEN'S LAW PROJECT & ÆQUITAS, RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM 16 (2013).

¹⁸ In this article, I focus solely on issues pertaining to imposing criminal liability as opposed to civil or administrative liability. For discussion of noncriminal liability, see generally Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221 (2015) (suggesting that sometimes sexual misconduct is better suited for administrative and civil measures rather than criminal prosecution).

¹⁹ See *infra* Section II.B.2 (discussing the general prohibition against sex with incapacitated individuals, which has been adopted in most jurisdictions).

do not specifically list intoxication as the reason behind the victim's incapacitation, but despite the absence of the intoxication language, courts use a capacity-based standard to determine whether the victim's intoxication rose to a level that rendered him or her incapable of consenting to sex.²⁰ Simply put, the key inquiry under this prevalent test, which this article refers to as "the incapacity-to-consent standard," is how drunk is too drunk to lack the capacity to consent.²¹

These general incapacitation provisions, however, mostly cover cases where victims completely lose consciousness as opposed to cases where victims' intoxication falls short of total incapacitation.²² These statutes fail to protect the many victims who maintained consciousness but whose ability to communicate nonconsent was significantly impaired. Imposing criminal liability in these cases raises vexing questions given several distinct features characterizing drunken sexual encounters. First, intoxicants play a significant role not only in unwanted sexual acts but also in situations involving mutually desired sex, as individuals often consume intoxicants as a mood enhancer, deliberately using it as a welcome means to reduce social and sexual inhibitions.²³ Second, the notion of consent, in itself a notoriously complex standard even where both participants are sober, becomes especially ambiguous in cases where alcohol plays a critical part in the equation. Finally, since in many (though not all) of the cases involving drunken sex both victims and perpetrators are intoxicated, questions arise concerning the equitable allocation of risk between the parties engaging in these encounters. Changing the law in this area therefore requires reconciling between the criminal law's need to protect intoxicated victims, regardless of how their intoxication came about, on the one hand, and affording equitable resolution to both parties involved on the other.

At the heart of the conundrum underlying intoxicated sexual encounters lies the question of how to distinguish intoxicated yet consensual sex—perfectly lawful, even if often regrettable after the fact—from a sex crime. This article aims to answer this question, which has received only scant scholarly

²⁰ See generally Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 134–35 (2002) (discussing the use of the incapacity-to-consent standard under existing statutes).

²¹ See *infra* Section II.A (discussing standards for finding whether sexual intercourse was consensual).

²² See *infra* Section II.B.1.

²³ See *infra* Section I.A.

attention, by making two key arguments.²⁴ First, this article argues that the incapacity-to-consent standard may prove unfit to address the myriad variables and nuanced complexities involved in the sexual assaults of intoxicated victims. Specifically, this standard sometimes proves underinclusive, failing to protect victims whose level of intoxication falls short of what the specific jurisdiction deems incapacitating intoxication. Other times it proves overinclusive, risking unfairness to defendants. Second, it contends that the law should directly prohibit nonconsensual sexual acts with severely intoxicated individuals regardless of whether their intoxication was self-inflicted or caused by another.

Given insurmountable deficiencies in existing laws, this article advocates their amendment to better capture defendants' culpability by identifying predatory features embedded in engaging in nonconsensual sex with intoxicated victims. Such sexually predatory conduct is established when defendants consciously take advantage of a victim's temporal impairment by imposing nonconsensual sex. To be sure, a victim's vulnerability is not limited to debilitating intoxication, and also includes other forms of physical and mental impairments, including sleep and fear. This article, however, focuses solely on vulnerability stemming from intoxication by directly prohibiting recklessly engaging in nonconsensual sexual intercourse with victims whose ability to communicate nonconsent is significantly impaired due to intoxication, whether voluntary or involuntary.

The article proceeds as follows: Part I unfolds the sociological and psychological backdrop concerning the nuanced interplay between sex and alcohol given the reality that the latter plays a critical role both in nonconsensual sexual acts as well as in mutually desired ones. It illustrates how prevalent societal perceptions about voluntarily intoxicated individuals effectively shape prosecutors', juries', and judges' views of sexual assault of intoxicated victims. Part II provides an overview of existing statutes used to prosecute sexual assault of intoxicated victims. It demonstrates that direct prohibitions on intercourse with intoxicated victims cover only cases involving *involuntary* intoxication, failing to protect victims of *voluntary* intoxication. Part III explains why general prohibitions on intercourse with incapacitated individuals are ill-suited to prosecute sexual assault of intoxicated victims. It shows that the incapacity-to-consent standard may result in inequitable resolutions to both defendants and victims. Part IV critiques the American Law

²⁴ See Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1 (2015); Falk, *supra* note 20; TRACEY ET AL., *supra* note 17.

Institute's proposals for revision of the Model Penal Code's sexual assault of intoxicated victims provision. It contends that the proposals fail to offer a complete solution to the problems characterizing sexual assault of intoxicated victims. Part V first revisits the justifications for amending laws to include direct prohibitions against nonconsensual intercourse with voluntarily intoxicated victims. It then proposes a statute that captures a defendant's culpable conduct by prohibiting sexual assault of both voluntarily and involuntarily intoxicated victims. Briefly put, the proposal advocates the adoption of a separate provision that would criminalize recklessly engaging in nonconsensual sexual intercourse with a passive and unresponsive person whose ability to communicate nonconsent was significantly impaired due to intoxication.

I. SOCIETAL PERCEPTIONS ABOUT SEX AND INTOXICATION

Before examining the legal terrain surrounding sexual assault of intoxicated victims, it is essential to set the stage by considering some sociological and psychological aspects as well as societal perceptions concerning the relationship between sex and intoxication. These are closely related to a broader theme concerning American society's love-hate relationship with alcohol, namely, wide acceptance of alcohol's pervasive role in various social settings while acknowledging its potentially harmful effects.

Extensive research shows that a significant number of sexual assault victims were heavily intoxicated at the time of the crime.²⁵ Yet, the interplay between sex and alcohol is more complex than this simple observation because alcohol plays a critical role not only in nonconsensual sexual encounters but also in those that are mutually desired. In the following sections, this article delves into one source of confusion underlying the legal treatment of sexual assault of intoxicated victims by examining alcohol's dual role and the common societal perceptions surrounding its voluntary consumption.

A. *Alcohol Consumption as Pleasurable Activity*

Alcohol is the most commonly used psychoactive substance and its prevalence as an integral part of people's lives cannot be

²⁵ See Falk, *supra* note 20, at 142 (noting that a substantial number of rapes involve intoxicated victims).

overstated.²⁶ A significant number of individuals deliberately seek to get “high,” with the goal of enjoying the pleasurable effects of intoxication.²⁷ Moreover, alcohol is commonly perceived not only as an enjoyable social activity but also as paramount in facilitating social interactions due to its ability in lowering social inhibitions.²⁸

Scientific research shows that moderate and responsible alcohol consumption by adults has a favorable impact on their overall physical and emotional well-being and that drinkers, as a group, share a number of psychological, social, and cognitive benefits over abstainers.²⁹ Specifically, studies demonstrate that alcohol consumption has scientifically proven positive mood-altering effects.³⁰ Scholars note that alcohol consumption also promotes mutually desired and welcome sexual encounters and that intoxicated sexual acts may be perfectly consensual.³¹ Studies that examined whether alcohol consumption was related to consensual sexual activity that occurred before the sexual assault found that a significant majority of individuals had engaged in at least one form of consensual sexual contact prior to the assault.³² These studies also found that people who were intoxicated were more likely to have engaged in consensual sex than sober individuals.³³

Alcohol is widely consumed in a myriad of social settings, including colleges, high schools, the military, bars, and house

²⁶ See Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613, 622–24 (1994) (noting that historical accounts concerning the failure of Prohibition demonstrate that the majority of Americans want to consume alcohol and criminally prohibiting its sale has not only failed to reduce peoples’ social and private consumption, but also resulted in a significant increase in the drinking habits of women).

²⁷ See Emmanuel Kuntsche et al., *Why Do Young People Drink? A Review of Drinking Motives*, 25 CLINICAL PSYCHOL. REV. 841 (2005), <https://pdfs.semanticscholar.org/5f16/e057c9d7f841b6b297b84ff9712709f454b3.pdf> [<https://perma.cc/2ZHX-LC2Z>] (noting that many alcohol drinkers are motivated by social motives including enhancing positive mood or wellbeing and obtaining social rewards).

²⁸ *Id.*

²⁹ See Archie Brodsky & Stanton Peele, *Psychological Benefits of Moderate Alcohol Consumption: Alcohol’s Role in a Broader Conception of Health and Well-Being*, in *ALCOHOL AND PLEASURE: A HEALTH PERSPECTIVE* 187–207 (S. Peele & M. Grant eds., 1999) (noting that epidemiological research has found consistent associations between moderate alcohol consumption and beneficial psychosocial outcomes).

³⁰ *Id.*

³¹ See Elaine Craig, *Capacity to Consent to Sexual Risk*, 17 NEW CRIM. L. REV. 103, 111 (2014) (discussing intoxicated yet mutually desired sexual encounters).

³² See Nicole Turillon Harrington & Harold Leitenberg, *Relationship Between Alcohol Consumption and Victim Behaviors Immediately Preceding Sexual Aggression by an Acquaintance*, 9 VIOLENCE & VICTIMS 315, 315–23 (1994) (noting that seventy-four percent of women had engaged in consensual sexual conduct, such as kissing, petting, or another form of sexual contact prior to the sexual attack, *see id.* 319 tbl.2).

³³ *Id.* at 320.

parties.³⁴ Binge drinking, namely, excessive consumption of alcohol, has become a pervasive part of today's social practices and norms.³⁵ Moreover, heavy alcohol consumption is inextricably intertwined with the prevalent social practice commonly known as the "hookup" culture, that is, engaging in casual, uncommitted sex without the intimacy, romance, or emotional relationship.³⁶ Studies have found a close connection between "hooking up" and alcohol consumption; for example, one study reported that sixty-four percent of uncommitted sexual encounters follow alcohol use, with a median consumption of three alcoholic drinks.³⁷

The high correlation between hookups and excessive alcohol consumption raises serious concerns given the significant increase in the commission of nonconsensual sexual acts that often result from these intoxicated encounters.³⁸ The mere fact that alcohol was heavily consumed prior to a sexual act, however, does not render it nonconsensual, since intoxicated individuals do not lose their right to choose to engage in desired sex.³⁹ Many intoxicated hookups are perfectly consensual, even if some of them are regrettable after the fact and would not have occurred but for the intoxication.⁴⁰

Media reports predominantly portray alcohol's harmful effects and its potential contribution to the commission of sexual assaults.⁴¹ These negative depictions, however, divert society's attention from fully grappling with the reality that for many

³⁴ See U.S. DEPT OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DRINKING IN AMERICA: MYTHS, REALITIES, AND PREVENTION POLICY fig.4 (1999) (noting that eight percent of youths aged fifteen to seventeen and twenty-three percent of youths aged eighteen to twenty reported drinking at least five drinks at one time).

³⁵ See Judith G. McMullen, *Underage Drinking: Does Current Policy Make Sense?*, 10 LEWIS & CLARK L. REV. 333, 348–49 (2006) (discussing underage drinking in college and noting that binge drinking is typically defined as five or more drinks per occasion).

³⁶ See Justin R. Garcia et al., *Sexual Hookup Culture: A Review*, 16 REV. GEN. PSYCHOL. 161, 163 (2012) (explaining that sexual hookup culture refers to sex without intimacy or relationship).

³⁷ See Melissa A. Lewis et al., *Predictors of Hooking Up Sexual Behaviors and Emotional Reactions Among U.S. College Students*, 41 ARCHIVES SEX BEHAV. 1219 (2012) (noting that a study found that nearly sixty-one percent of undergraduate students used alcohol, with an average of 3.3 alcoholic drinks, during their most recent hookup).

³⁸ See *infra* Section II.B.

³⁹ See Craig, *supra* note 31, at 111.

⁴⁰ See Garcia et al., *supra* note 36, at 170–71 (discussing "hookup regret" by noting that both men and women had experienced some sexual regret, but the frequency and intensity of negative reactions appeared to vary by sex, with women more negatively impacted from some hookup experiences, mainly due to stronger feelings of regret because they felt used); see also Lewis et al., *supra* note 37 (noting that men reported lower negative effects resulting from their hookups than women).

⁴¹ See, e.g., Emily Yoffe, *College Women: Stop Getting Drunk*, SLATE (Oct. 15, 2013), http://www.slate.com/articles/double_x/doublex/2013/10/sexual_assault_and_drinking_teach_women_the_connection.html [<https://perma.cc/WK3G-V5H3>].

individuals alcohol consumption is anything but a single-dimensional, mostly negative experience.⁴² Notwithstanding the myriad problems stemming from excessive drinking, alcohol is here to stay as a popular social activity for a significant number of people who drink to achieve its pleasurable, mood-altering effects.

B. *Alcohol Consumption as Harmful Activity*

While the emerging picture concerning the relationship between alcohol and sex is not all bleak, it is certainly neither rosy.⁴³ Alcohol consumption carries a host of adverse effects that often result in significant harm, both to consumers and to others.⁴⁴ The key feature that distinguishes alcohol consumption from being a pleasurable social activity to one that carries negative effects lies within the notion of excess. While moderate drinking is often a positive experience, it is binge drinking—frequently to oblivion—that leads to ample harms, including accidents, addiction, health problems, and failure to perform professional, academic, or personal obligations.⁴⁵

One of the harms of excessive drinking concerns the heightened risk of sexual violation. Studies have established a correlation between intoxication and sexual assault, noting that a significant number of assaults occur after both victims and perpetrators consume a substantial amount of alcohol.⁴⁶ For example, studies have found that becoming intoxicated is a risk factor that significantly increases people's chances for subsequent sexual victimization because their vulnerability makes them easy prey for sexual predators.⁴⁷ While victims of

⁴² See generally PEGGY ORENSTEIN, *GIRLS & SEX: NAVIGATING THE COMPLICATED NEW LANDSCAPE* 185–87 (2016) (discussing the complex role that alcohol consumption plays among teenagers and young adults).

⁴³ See generally *Alcoholism In-Depth Report*, N.Y. TIMES, <http://www.nytimes.com/health/guides/disease/alcoholism/print.html> [<https://perma.cc/9RMC-QWC2>] (describing the host of problems related to excessive alcohol consumption including its contribution to the incidence of crimes such as murder and domestic violence).

⁴⁴ See Antonia Abbey et al., *Alcohol and Dating Risk Factors for Sexual Assault Among College Women*, 20 PSYCHOL. WOMEN Q. 147, 149–50 (1996).

⁴⁵ See Anne F. Brennan et al., *Alcohol Use and Abuse in College Students I: A Review of Individual and Personality Correlates*, 21 INT'L J. ADDICTIONS 449, 467–68 (1986) (noting that studies identified two general types of drinking motives: drinking for emotional escape or coping purposes and drinking for social purposes); see also Anne F. Brennan et al., *Alcohol Use and Abuse in College Students II: Social/Environmental Correlates, Methodological Issues, and Implications for Intervention*, 21 INT'L J. ADDICTIONS 475 (1986).

⁴⁶ See Maria Testa et al., *The Role of Victim and Perpetrator Intoxication on Sexual Assault Outcomes*, 65 J. STUD. ON ALCOHOL 320 (2004) (suggesting that “[a]pproximately half of all sexual assault incidents among college and young adult populations involve the use of alcohol or drugs by the perpetrator, the victim or both”).

⁴⁷ See BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 23 (2000); Meichun Muhler-Kuo et al., *Correlates*

sexual assault include not only women but also men and transgender people, women are disproportionately victimized; they are more adversely affected than men by excessive drinking because of physiological differences.⁴⁸ Scientific studies confirm that women and men process alcohol differently, namely, that men are able to handle excessive alcohol consumption in a way that is less detrimental to their cognitive functioning and that women become intoxicated faster.⁴⁹

Some studies have gone beyond observing the correlation between excessive alcohol consumption and sexual assault, suggesting that there is a causal link between them.⁵⁰ These studies, however, are controversial, mainly because mere correlation between two phenomena does not prove actual causation.⁵¹ While many studies find, as an empirical matter, that alcohol was consumed prior to the sexual assault, such observation does not establish a causal link between the two and there is no evidence that alcohol, in fact, *causes* sexual assault.⁵²

The precise role of alcohol in facilitating sexual assault remains highly contested.⁵³ Scholars reject the argument that excessive drinking causes rape, stressing that sexual predators commit rape, using intoxication as an excuse for sexual aggression.⁵⁴ Studies further demonstrate that sexual assaults are also closely linked with actors' certain personality characteristics, such as impulsivity and low empathy, and their past experiences such as sexual abuse.⁵⁵ These attitudinal and situational factors interact with alcohol consumption, increasing the likelihood of sexual assaults.⁵⁶

Conceding that there is no direct causal connection between alcohol consumption and sexual assault, however, does

of Rape While Intoxicated in a National Sample of College Women, 65 J. STUD. ON ALCOHOL 37, 40, tbl.2 (2004).

⁴⁸ See *Are Women More Vulnerable to Alcohol's Effects?*, ALCOHOL ALERT, Dec. 1999, <https://pubs.niaaa.nih.gov/publications/aa46.htm> [<https://perma.cc/JYT9-8BXS>].

⁴⁹ See *id.* (noting that in light of physiological differences between women's and men's bodies, women absorb and metabolize alcohol faster, when compared to men who consume similar amounts).

⁵⁰ See Leanne R. Brecklin & Sarah E. Ullman, *The Roles of Victim and Offender Substance Use in Sexual Assault Outcomes*, 25 J. INTERPERSONAL VIOLENCE 1503, 1509 (2010).

⁵¹ See Antonia Abbey, *Alcohol Related Sexual Assault: A Common Problem Among College Students*, 14 J. STUD. ON ALCOHOL 118, 119 (2002) (noting that the "fact that alcohol consumption and sexual assault frequently co-occur does not demonstrate" a causal connection between them).

⁵² See *id.*

⁵³ See CSA STUDY, *supra* note 11, at 1–2.

⁵⁴ See Abbey, *supra* note 51, at 119–20.

⁵⁵ *Id.* at 120.

⁵⁶ *Id.* (noting that perpetrators often use alcohol to excuse sexual assault perpetration).

not mean that the two are not closely related; studies show that the fact that the perpetrator, the victim, or both, were heavily intoxicated significantly contributed to the occurrence of sexual assaults and increased its chances.⁵⁷ The explanation behind this increased likelihood is twofold: from the victim's perspective, intoxication affects her ability to successfully resist a perpetrator's predatory conduct given the profound effects that alcohol consumption has on a drinker's functions and perceptions. From the perpetrator's perspective, studies show that excessive alcohol consumption increases a perpetrator's willingness to behave aggressively.⁵⁸

The physical and mental effects of excessive consumption of intoxicants are well documented in the scientific literature, encompassing both cognitive and motor skills abilities.⁵⁹ The level of impairment in motor skills varies, ranging from inability to stand, loss of balance and muscular coordination, inability to perform simple physical tasks,⁶⁰ and culminating in passing out. Decrease in cognitive functions includes the inability to understand, know, think, respond, communicate coherently, exercise judgment, accurately perceive threats, and remember experiences.⁶¹

Excessive consumption of alcohol impairs victims' ability to react to perceived risks because the perception of reality is substantially distorted and judgment is clouded.⁶² Impaired ability to respond to dangerous situations renders intoxicated individuals especially vulnerable to sexual assault. Alcohol's effects on motor skills also render victims incapable of effectively resisting nonconsensual sexual acts that they could have fended off had they been sober.⁶³ Individuals who are incapable of

⁵⁷ See Ford & England, *supra* note 12 (noting that eleven percent of more than 20,000 students surveyed reported being subjected to unwanted sex while they were drunk, passed out, asleep, drugged, or otherwise incapacitated).

⁵⁸ See Abbey, *supra* note 51, at 122.

⁵⁹ See U.S. DEP'T OF HEALTH & HUMAN SERVS., INST. ON ALCOHOL ABUSE & ALCOHOLISM, ALCOHOL'S DAMAGING EFFECTS ON THE BRAIN 1 (2004), <https://pubs.niaaa.nih.gov/publications/aa63/aa63.pdf> [<https://perma.cc/RU7U-5EMB>].

⁶⁰ See Ty Brumbach et al., *Effects of Alcohol on Psychomotor Performance and Perceived Impairment in Heavy Binge Social Drinkers*, 91 DRUG & ALCOHOL DEPENDENCE 10 (2007).

⁶¹ See *id.* at 10–11.

⁶² See Maria Testa & Jennifer A. Livingston, *Qualitative Analysis of Women's Experiences of Sexual Aggression: Focus on the Role of Alcohol*, 23 PSYCHOL. WOMEN Q. 573, 573–89 (1999) (suggesting that victims who were sexually assaulted while they were intoxicated reported that their intoxication made them take risks that they normally would avoid).

⁶³ See Antonia Abbey et al., *Alcohol, Misperception, and Sexual Assault: How and Why Are They Linked?*, in *SEX, POWER, CONFLICT: EVOLUTIONARY AND FEMINIST PERSPECTIVES* 138–56 (David M. Buss. & Neil M. Malamuth eds., 1996).

guarding themselves against perceived risks become easy prey to sexual predators.

C. *Societal Misperceptions About Voluntary Intoxication*

The ambiguity stemming from the dual role that intoxicants play in facilitating both desired and nonconsensual sex is further exacerbated by the prevalence of misperceptions, myths, and stereotypes about the relationship between sex and voluntary intoxication. The fact that a person's intoxication resulted from an autonomous choice to over imbibe proves vital to the way society perceives which sexual encounters are consensual and which are not. In the public's eye, the voluntariness of the intoxication is a key factor that distinguishes welcome sexual encounters from sexual assaults.

A common perception concerning the alleged effects of intoxication on a person's willingness to have sex is the belief that alcohol increases sexual arousal and loosens sexual inhibitions.⁶⁴ Related to that is the perception that people deliberately consume alcohol to achieve that effect—purposely getting intoxicated to have sex.⁶⁵ Research also suggests that alcohol consumption “encourages biased appraisal of a partner's sexual motives” and “enhances misperception of sexual intent.”⁶⁶ Moreover, studies found that alcohol not only has actual disinhibiting effects but also contributes to people's social expectations about these effects, including their tendency to be sexually aggressive.⁶⁷ Many individuals feel more aggressive after drinking alcohol, and these expectations not only become self-fulfilling but also increase the amount of alcohol they drink.⁶⁸

These perceptions are critical to an actor's beliefs regarding whether consent had been given in an intoxicated sexual encounter. One of the pitfalls of the perceived desired effect of voluntary intoxication is the pervasive societal misperception that when people voluntarily binge drink, they

⁶⁴ See Abbey, *supra* note 51, at 121.

⁶⁵ *Id.* (noting that the mere presence of alcohol leads many men to assume the women wanted sex).

⁶⁶ *Id.* at 120, fig.1.

⁶⁷ *Id.* at 121 (noting that the expectations concerning alcohol's effects are independent of alcohol's actual pharmacological effects).

⁶⁸ See generally Mark Snyder & Arthur A. Stukas, Jr., *Interpersonal Processes: The Interplay of Cognitive, Motivational, and Behavioral Activities in Social Interaction*, 50 ANN. REV. PSYCHOL. 273, 274–75 (1999) (noting that individuals' social interactions are sometimes impacted by expectations they perceive through those interactions, often resulting in a “self-fulfilling prophecy”).

make themselves sexually available.⁶⁹ For example, studies show that women who drink alcohol are perceived as being more sexually promiscuous than women who do not, making them easy targets for sexual assault.⁷⁰ Studies further show that a predatory dynamic is often at work in cases involving intoxicated perpetrators as well as intoxicated victims. Both experience the cognitive deficits of the intoxicants, leading perpetrators to feel that being sexually aggressive is acceptable if they believed their partners encouraged their sexual interest and that once led on, they are entitled to sex.⁷¹ These myths prove especially dangerous to intoxicated victims because they imply that voluntary intoxication equals consent to any and all sexual acts, effectively placing them in a state of perpetual willingness to have sex.

These myths and misconceptions not only result in significant perils for voluntarily intoxicated individuals but also hinder the chances of successful prosecutions.⁷² The reason for this impediment is that societal misperceptions in turn effectively shape prosecutors' assessments of whether consent to sex had been given, and therefore influence their decisions whether to pursue criminal charges.

Bringing criminal charges against defendants who sexually assaulted intoxicated victims is impeded by the tremendous amount of discretion given to law enforcement officers and prosecutors in deciding which sexual acts amount to criminal conduct.⁷³ Scholars have long-observed that prosecutorial discretion, rather than legislatively defined statutes, plays a critical role in determining the scope, shape, and form of the criminal justice system.⁷⁴ Scholars are especially concerned with prosecutors' broad discretion to choose which cases warrant prosecution because their discretion is unconfined, unstructured,

⁶⁹ See William H. George & Jeanette Norris, *Alcohol, Disinhibition, Sexual Arousal, and Deviant Sexual Behavior*, 15 ALCOHOL HEALTH & RES. WORLD 133, 133–38 (1991).

⁷⁰ See William H. George et al., *Self-Reported Alcohol Expectancies and Postdrinking Sexual Inferences About Women*, 25 J. APPLIED SOC. PSYCHOL. 164 (1995).

⁷¹ See Abbey, *supra* note 51, at 122.

⁷² See TERESA P. SCALZO, AM. PROSECUTORS RESEARCH INST. & NAT'L DISTRICT ATTORNEYS ASS'N, PROSECUTING ALCOHOL-FACILITATED SEXUAL ASSAULT 1 (2007), http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf [<https://perma.cc/XPY8-R6VA>].

⁷³ See Amy Knight Burns, *Improving Prosecution of Sexual Assault Cases: Can the Justice Department Use 42 U.S.C. § 14141 to Investigate Prosecutors' Offices?*, 67 STAN. L. REV. ONLINE 17, 22–24 (2014).

⁷⁴ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506, 519 (2001) (noting that criminal law is defined by law enforcers, by prosecutors' decisions to prosecute, and police decisions to arrest and that the definition of crimes "empower prosecutors, who are the criminal justice system's real lawmakers").

and unchecked.⁷⁵ One implication of exercising such unregulated prosecutorial discretion concerns the role that extralegal considerations play in prosecutorial policy-based choices about which cases should be prosecuted.⁷⁶ The reason behind a prosecutor's decision not to pursue criminal charges in sexual assault cases involving a victim's voluntary intoxication lies not only with the scope of statutory provisions but also with the pervasive effect of societal misperceptions. These shape police officers' and prosecutors' discretion in a way that often results in a decision to dismiss the complaint as "unfounded" or "unsubstantiated."⁷⁷ In the eyes of many law enforcement officers and prosecutors, sexual assault of a voluntarily intoxicated victim is simply not perceived as "real rape."

Importantly, the criminal justice system is characterized by a deeply embedded perceived dichotomy between a culpable perpetrator and an innocent victim, free of contributory fault or moral blame.⁷⁸ Traditionally, prosecutors have been reluctant to prosecute cases where victims' purportedly unchaste behaviors fail to comport with traditional perceptions about blameless victims falling prey to predators.⁷⁹ While archaic notions about victims' chastity have been officially eliminated from legal considerations, they continuously persist in decision-makers' perceptions about victimhood.⁸⁰ The criminal justice system is often skeptical of victims who are perceived as less than perfect according to prevailing societal norms.⁸¹ Rape law reformers have criticized the practice of taking these considerations into

⁷⁵ See Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 792 (2012) (discussing the unlimited nature of prosecutorial discretion).

⁷⁶ See generally David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 580–81 (1994) (positing that "[e]xtralegal considerations influence police, prosecutors, and especially jurors to allow some acquaintance rapists to go without punishment").

⁷⁷ See generally Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1221–22 (2014) (discussing police officers use of the designation "unfounded" to label rape complaints).

⁷⁸ See generally COLLEEN A. WARD, ATTITUDES TOWARD RAPE: FEMINIST AND SOCIAL PSYCHOLOGICAL PERSPECTIVES 78–82 (1995).

⁷⁹ See generally Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 132 (1992) (noting that law and culture reciprocally influence understanding of what is and is not the crime of rape).

⁸⁰ See Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 657–61 (2010) (discussing negative social attitudes toward rape victims perceived as "unchaste").

⁸¹ See generally Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 389, 469 (1996) (discussing cultural rape narratives in criminal prosecutions).

account, endeavoring to decrease the criminal justice system's tendency to judge and assign blame to rape victims.⁸²

This problem is further exacerbated in cases involving voluntarily intoxicated victims because they typically do not fit the traditional script about victimhood and criminal perpetration.⁸³ Decision-makers' choices concerning which cases should be criminally prosecuted are shaped by the pervasive social misperception that by voluntarily impairing themselves, victims share responsibility for ensuing sexual acts. These victims are viewed as less worthy of the law's protection because, allegedly by choosing to become heavily intoxicated, they put themselves in harm's way, willingly assuming the risks that flow from their free choices.

Societal beliefs about voluntary intoxication and sex affect not only police officers' and prosecutors' decisions but also judges' and juries' perceptions of these cases. Studies show that jurors often view voluntarily intoxicated victims with deep skepticism and are less prone to accept their claims that they did not consent to sex.⁸⁴ Furthermore, another common misperception that shapes judges' and jurors' views is the assumption that voluntarily intoxicated victims had engaged in consensual sexual acts but later regretted them once sober, mischaracterizing regretful sex as sexual assault.⁸⁵

Another manifestation of judges' and juries' misperceptions regarding voluntarily intoxicated victims is an implicit normative judgment that assigns moral blame on people who willingly become intoxicated. Jurors and judges are often influenced by societal attitudes that blame victims for their drinking.⁸⁶ Additionally, the gendered difference between societal perceptions of intoxicated males and females should be

⁸² See generally Lisa Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women*, 41 AKRON L. REV. 865 (2008) (noting that even after years of law reform, courts still judge rape victims harshly, implicitly blaming them for risky behaviors).

⁸³ See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1007–10 (2004) (noting that alcohol-induced campus rapes often do not conform to stereotypical rape accounts).

⁸⁴ See generally JODY RAPHAEL, RAPE IS RAPE: HOW DENIAL, DISTORTION, AND VICTIM BLAMING ARE FUELING A HIDDEN ACQUAINTANCE RAPE CRISIS 53–54, 148–54 (2013) (discussing public perceptions that involve blaming victims and expressing disbelief at victims' characterizing sexual encounters as rape).

⁸⁵ See Cathy Young, *Feminists Want Us to Define These Ugly Sexual Encounters as Rape. Don't Let Them*, WASH. POST (May 20, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/20/feminists-want-us-to-define-these-ugly-sexual-encounters-as-rape-dont-let-them/> [<https://perma.cc/N7ZN-6PXB>].

⁸⁶ See Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 BYU L. REV. 57, 88–89 (2009).

noted; intoxicated females are often deemed more responsible in having brought the situation upon themselves “because their drunkenness constitutes a violation of appropriate behavior for their gender.”⁸⁷

Societal misperceptions also contribute to victims’ reluctance to file complaints with the police. Rape is the most underreported crime, with less than twenty percent of occurrences being reported to law enforcement officers.⁸⁸ Victims who were sexually assaulted while intoxicated often fail to characterize their nonconsensual sexual experience as rape, instead perceiving it as an unfortunate result of their own failing.⁸⁹ For many victims who were sexually attacked while intoxicated, having been that impaired becomes a source of guilt and shame.⁹⁰ Since victims are wary of being judged, anticipating that the criminal justice system will place at least partial blame on them, they are hesitant to rely on this system for recourse. In sum, societal misperceptions affect not only the public’s image about voluntarily intoxicated victims’ behaviors but also shape the legal treatment of sex crimes perpetrated against them. The following parts examine existing criminal prohibitions of sexual assault of intoxicated victims, focusing on their main drawbacks.

II. EXISTING LAWS ON SEXUAL ASSAULT OF INTOXICATED VICTIMS

Prosecuting the sexual assault of intoxicated victims raises inherent difficulties, partly due to existing laws’ understanding of the notion of consent to sex and the circumstances under which sexual acts are deemed nonconsensual, and partly due to the various array of tests used in different jurisdictions to determine the victim’s incapacity to consent to sex.⁹¹ The following sections demonstrate the main problems in existing statutes.

⁸⁷ *Id.* at 76, n.69 (quoting Georgina S. Hammock & Deborah R. Richardson, *Blaming Drunk Victims: Is It Just World or Sex Role Violation?*, 23 J. APPLIED SOC. PSYCHOL. 1574, 1575 (1993)).

⁸⁸ See PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 1–2, 33 (2006) (noting that only twelve percent of male victims report their sexual assaults).

⁸⁹ See ORENSTEIN, *supra* note 42, at 197 (noting that one victim even told her rapist: “Thanks, I had fun”).

⁹⁰ See Abbey, *supra* note 51, at 124 (noting that victims often blame themselves for becoming incapacitated).

⁹¹ See Tuerkheimer, *supra* note 24, at 25–30 (discussing the many problems characterizing the prosecutions of sexual assault of intoxicated victims).

A. *Unsuitability of General Sexual Assault Statutes*

The crime of rape has historically consisted of two elements: use of physical force or the threat to use it, and nonconsensual sex, which was typically proven by showing that the complainant had physically resisted the act to the utmost.⁹² While most jurisdictions have abandoned the stringent physical resistance requirement, the vast majority of statutes still retain a force requirement of some degree, yet many also recognize implied forms of force or coercion.⁹³ Given the relaxation of the force requirement, the nonconsensual nature of the sexual act is the feature that distinguishes a criminal sexual encounter from a lawful one, therefore requiring the adoption of a standard to evaluate the presence or absence of consent in any given case.⁹⁴

In recent years, most jurisdictions have adopted the verbal resistance requirement, commonly known as the “no means no” standard, to determine when consent to sex is absent.⁹⁵ This standard requires proof that the complainant explicitly expressed his or her refusal to engage in the sexual act through either words or conduct.⁹⁶ In contrast, a minority of jurisdictions adopted the affirmative permission standard, under which only an explicit verbal “yes” or a behavior implicitly communicating agreement to the sexual act suffices as consent to sexual intercourse; absent some indication of consent, the complainant is deemed not to have consented.⁹⁷ Jurisdictions that

⁹² See generally STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 3–4 (1998) (discussing traditional rape law’s dual requirement of force and nonconsent).

⁹³ See Tuerkheimer, *supra* note 24, at 15 (noting that a majority of jurisdictions rely on force to define rape); see also John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: *The Failure of the “Non-consent” Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1120–22 (2011) (discussing states’ statutes that criminalize various forms of nonphysical threats and coercion).

⁹⁴ See generally Katharine K. Baker & Michelle Oberman, *Women’s Sexual Agency and the Law of Rape in the 21st Century*, 69 STUD. L. POL. & SOC’Y 63, 64–65 (2016) (noting that the focus of rape laws has shifted in recent years to identifying what standard ought to be used to assess whether consent has been given).

⁹⁵ See, e.g., N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2013) (“[T]he victim clearly expressed that he or she did not consent to engage in [a sexual] act.”); WASH. REV. CODE ANN. § 9A.44.060 (West 2013) (“[T]he victim did not consent . . . and such lack of consent was clearly expressed by the victim’s words or conduct.”).

⁹⁶ See Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO STATE J. CRIM. L. 441, 448 (2016) (noting that in jurisdictions that “require a demonstration of unwillingness to engage in sexual conduct,” “‘without consent’ means without an expression of non-consent”).

⁹⁷ WIS. STAT. ANN. § 940.225(4) (West 2013) (defining consent as “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact”); VT. STAT. ANN. tit. 13,

define consent to require an affirmative gesture of willingness significantly diverge in their treatments of consent; many retain a separate force requirement, others include expressed or implied acquiescence to explain consent's meaning, yet in others the affirmative consent standard applies only to forcible rape charges and does not apply to the lesser crime of sexual contact.⁹⁸ Only three jurisdictions criminalize sexual intercourse without affirmative consent at the felony level and without requiring any additional elements.⁹⁹

While the affirmative consent standard transforms the legal meaning of passivity, under the verbal resistance standard, by contrast, a complainant's irresponsiveness is not deemed as nonconsent.¹⁰⁰ Since the passive acquiescence of a victim to another person's sexual imposition is equated with consent, a sexual act with a person who failed to convey explicit verbal refusal is not criminalized.¹⁰¹ Furthermore, any type of ambiguity with regard to whether consent had been given is resolved in favor of the defendant because the burden rests with the complainant to actively express nonconsent.¹⁰²

Evaluating whether a given sexual encounter was consensual is further compounded in cases where a complainant was significantly impaired due to intoxication. Two major obstacles preclude the prosecution of sexual assault of intoxicated

3251(3) (West 1977) (defining consent to mean "words or actions by a person indicating a voluntary agreement to engage in a sexual act"); *In re M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (New Jersey courts adopted the affirmative consent standard in judicial opinions rather than in a statute, holding that consent requires permission to engage in sexual penetration that must be affirmative and must be given freely.).

⁹⁸ See Tuerkheimer, *supra* note 96, at 450–51 (distinguishing between "diluted" affirmative consent jurisdictions, which supplement the affirmative consent element with an additional force requirement or include acquiescence within the meaning of consent, and "pure" affirmative consent jurisdictions, which criminalize as a felony intercourse without affirmative consent).

⁹⁹ *Id.* at 451 (Wisconsin, Vermont, and New Jersey).

¹⁰⁰ See *id.* (noting that affirmative consent definitions transform the legal meaning of passivity); *cf.* Tuerkheimer, *supra* note 24, at 29 (noting that "utter passivity on the part of the victim is equated with consent to intercourse").

¹⁰¹ See Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1497–98 (2014) (explaining that under many statutes, mere submission to sex or passive acquiescence amounts to consent to sex).

¹⁰² See Baker & Oberman, *supra* note 94, at 71 (observing that the burden of proof in rape cases causes a significant obstacle because the burden rests with the state to prove beyond a reasonable doubt that the victim expressed nonconsent); see also Tuerkheimer, *supra* note 96, at 449, n.34 (noting that "an affirmative consent [standard] does not shift the burden of proof to the defendant," but instead "reflects a legal presumption that, in and of itself, an absence of conduct indicating willingness to engage in sexual activities does not constitute consent"). The most problematic aspect of the verbal refusal standard involves cases where alleged victims remained passive and did not communicate in any way their refusal to the sexual act. Since intoxicated individuals are both physically and mentally impaired, the result of their passivity is that failure to communicate nonconsent deems the sexual act consensual.

victims under general sexual assault prohibitions. First, when a person is heavily intoxicated, almost no amount of force is needed to subdue him or her, making it unnecessary for the defendant to use any force to accomplish intercourse.¹⁰³ Since most jurisdictions still require some degree of force to prove rape, the crime cannot be proven if the defendant did not use any force. Second, heavily intoxicated victims' impaired state often renders them irresponsive, therefore unable to express nonconsent to intercourse. Applying the verbal refusal standard in these cases would result in concluding that the sexual act was consensual, despite the fact that the victim's substantial impairment due to intoxication precluded any conscious decision-making process. Acknowledging that general sexual assault statutes prove inapt when applied to sexual assaults involving heavily intoxicated victims, most jurisdictions adopted specific prohibitions to prosecute these cases. The following section turns to examine their scopes and limits.

B. Separate Prohibitions to Protect Impaired Victims

While different jurisdictions vary significantly in their treatments of sexual intercourse with persons whose impairment precludes them from expressing consent, prohibitions generally fall under two categories: prohibitions that directly criminalize sexual assault of an intoxicated person and prohibitions that generally criminalize intercourse with a person who is incapable of expressing consent or resisting the sexual act, no matter what the reason for such incapacity.¹⁰⁴ The main difference between these categories of statutes is that direct prohibitions on intercourse with intoxicated persons typically cover cases where complainants were involuntary intoxicated, while prohibitions on intercourse with incapacitated persons also cover situations where complainants were voluntarily intoxicated.

1. Direct Prohibitions on Intercourse with Intoxicated Persons

Many jurisdictions adopted separate prohibitions directly criminalizing sexual intercourse with intoxicated persons whose power to appraise or control their conduct has been substantially

¹⁰³ Commonwealth v. Blache, 880 N.E.2d 736, 745 (Mass. 2008) (noting that a finding of complainant's incapacity to consent due to intoxication satisfies the element of lack of consent).

¹⁰⁴ See TRACEY ET AL., *supra* note 17, at 27–28.

impaired.¹⁰⁵ These prohibitions focus on identifying the precise circumstances under which a person is so impaired that he or she is incapable of consenting to sex. They explicitly use the intoxication terminology, listing intoxication due to alcohol or controlled substances. Most jurisdictions criminalize intercourse with a person who is either physically helpless or mentally incapacitated, specifically listing intoxication as one reason for the victim's incapacity.¹⁰⁶ A minority of jurisdictions criminalize intercourse with an intoxicated person as a separate category, targeting only intoxication.¹⁰⁷

The common law has long prohibited intercourse with victims whose permanent or temporary physical conditions including unconsciousness, sleep, or other physical helplessness precluded them from resisting the sexual act.¹⁰⁸ The physical helplessness standard is too narrow, however, covering only the most extreme cases of incapacitation; the standard fails to cover cases where the intoxication fell short of complete loss of consciousness or where the victim of a sexual assault drifted in and out of consciousness.¹⁰⁹

Acknowledging the restrictive nature of the physical incapacity test, most jurisdictions have expanded their statutes to also prohibit intercourse with a mentally incapacitated

¹⁰⁵ See, e.g., COLO. REV. STAT. ANN. § 18-3-402(4)(d) (West 2016); CONN. GEN. STAT. ANN. § 53a-65(5) (West 2016); DEL. CODE ANN. tit. 11, § 761(j)(5) (West 2016); see generally David DeMatteo et al., *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCHOL. PUB. POL'Y & L. 227 (2015) (providing a fifty-state survey of sexual assault statutes that may apply to sexual assaults committed on college campuses, including, among others, those pertaining to intercourse with intoxicated victims).

¹⁰⁶ See, e.g., N.J. STAT. ANN. §§ 2C:14-1(g), (i) (West 2012).

¹⁰⁷ See, e.g., ME. REV. STAT. ANN. tit. 17-a, § 253(2)(A) (West 2016) (prohibiting an actor from engaging in a sexual act with a person if the "actor has substantially impaired the other person's power to appraise or control the other person's sexual acts by furnishing, . . . administering or employing drugs, intoxicants or other similar means"); CAL. PENAL CODE § 261(a)(3) (West 2013) (prohibiting sexual intercourse "[w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused").

¹⁰⁸ See, e.g., *Commonwealth v. Burke*, 105 Mass. 376, 380–81 (1870) (holding "that the crime, which the evidence in this case tends to prove, of a man's having carnal intercourse with a woman, without her consent, while she was, as he knew, wholly insensible so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was rape").

¹⁰⁹ See *People v. Johnson*, 12 N.E.3d 1109, 1110 (N.Y. 2014) (Defendant was charged with rape of a voluntarily intoxicated victim based on the theory that the victim was incapable of consent by reason of being physically helpless. The court acquitted the defendant after the defendant admitted in a plea agreement to raping a mentally intoxicated person, which is a crime in New York only if the defendant administered the intoxicants to the victim. Since the victim was not completely unconscious, the prosecution could not secure a conviction.).

person.¹¹⁰ These prohibitions often list temporary incapacitation due to intoxication as one type of mental incapacity.¹¹¹ For example, a statute that uses this method typically prohibits sexual intercourse if “[t]he victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant.”¹¹² Such a definition is seemingly sufficient to reach cases in which victims suffered from a lesser degree of impairment falling short of unconsciousness.

In the vast majority of jurisdictions, however, the scope of the specific prohibitions targeting the victim’s intoxication is significantly limited because voluntary and involuntary intoxication are treated differently.¹¹³ Notably, in about forty jurisdictions, criminal prohibitions of sexual assault of intoxicated victims cover only cases where the victim was surreptitiously duped after the actor intentionally administered him or her intoxicants, including rape-facilitating drugs, in order to accomplish intercourse.¹¹⁴ But these statutes do not cover cases in which a victim of sexual assault became voluntarily intoxicated after consciously consuming an excessive amount of intoxicants. In fact, only about ten jurisdictions have adopted statutes that do not limit the scope of sexual assault of an intoxicated victim to involuntary intoxication.¹¹⁵

The Minnesota case of *State v. Blevins* provides an example of statutes under which criminalization depends on whether the victim’s intoxication was voluntary or involuntary.¹¹⁶ In this case, the victim, T.W., went out with her friends and voluntarily consumed between ten to twelve alcoholic drinks.¹¹⁷ T.W. testified that she became heavily intoxicated and at some

¹¹⁰ See Falk, *supra* note 20, at 158–59 (noting that the majority of jurisdictions specifically state that mental incapacitation includes one that is due to the influence of a narcotic, anesthetic, or other substance).

¹¹¹ *Id.*

¹¹² See, e.g., ARIZ. REV. STAT. ANN. §§ 13-1401(7)(b), 13-1406 (West 2015); FLA. STAT. § 794.011 (West 2017).

¹¹³ See, e.g., *State v. Haddock*, 664 S.E.2d 339, 346 (N.C. Ct. App. 2008).

¹¹⁴ See, e.g., MASS. GEN. LAWS ANN. ch. 272, § 3 (West 2016) (providing for a separate crime punishable by ten years imprisonment where a person “applies, administers to or causes to be taken by a person any drug, matter or thing with intent to stupefy or overpower such person so as to thereby enable any person to have sexual intercourse or unnatural sexual intercourse with such person”).

¹¹⁵ See TRACEY ET AL., *supra* note 17, at 24–26 & n.133, 27 (listing Arizona, California, Idaho, Kansas, Louisiana, Montana, South Carolina, Washington, and Wisconsin as jurisdictions that specifically include voluntary intoxication within the coverage of their intoxication prohibitions).

¹¹⁶ *State v. Blevins*, 757 N.W.2d 698 (Minn. Ct. App. 2008).

¹¹⁷ *Id.*

point was separated from her friends and could not find her car.¹¹⁸ The defendant approached her and led her to believe that he was going to help her find the car.¹¹⁹ He then “took T.W. to the back-porch area of a house in a residential neighborhood and led her down stairs to a crawl space under the porch,” where he “first performed oral sex on [her] and then had sexual intercourse with her.”¹²⁰ The victim testified about defendant’s advances, saying that “that’s not what [she] wanted,” and that she “told him [she] didn’t want him to, and he just kept telling [her] it would be okay [She] asked him to please not and he said it will be fine.”¹²¹ She further “testified that because she felt stuck, uncomfortable, and afraid, she ‘just let it happen’ and ‘waited for it to be over,’” and that she “did not scream or fight because she was afraid that [the defendant] would harm her in other ways and because she was in an unfamiliar neighborhood.”¹²²

The defendant was charged with two counts of third-degree criminal sexual conduct in violation of the Minnesota statute that prohibits intercourse with a physically helpless person.¹²³ The Minnesota statute defines “[p]hysically helpless” as follows:

[A] person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.¹²⁴

After the jury convicted him, the defendant appealed, claiming that the evidence did not prove that the victim was unable to withhold or to withdraw consent, and thus it was insufficient to establish the charge of intercourse with a physically helpless person. The Minnesota Court of Appeals agreed and reversed the conviction.¹²⁵ The court concluded that the victim’s words to the defendant—that she did not consent to the sexual encounter—proved that she withheld her consent, thus the evidence was insufficient to demonstrate that she was unable to withhold or withdraw her consent.¹²⁶ Therefore, the evidence was insufficient to prove that the victim was “physically helpless” as defined in the above statute. Importantly, this statute covers

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (first alteration in original).

¹²² *Id.*

¹²³ *Id.* at 699; MINN. STAT. ANN. § 609.341(9) (West 2013).

¹²⁴ *State v. Blevins*, 757 N.W.2d 698 (Minn. Ct. App. 2008).

¹²⁵ *Id.* at 701.

¹²⁶ *Id.*

both voluntary and involuntary intoxication, without distinguishing them, provided that there is evidence that the complainant was indeed physically helpless regardless of how such helplessness came about. Since the victim in this case maintained consciousness, however, and was able to express her unwillingness to engage in the sexual act, the result was that the defendant was acquitted of the crime of raping a physically helpless person.¹²⁷

The above acquittal begs the question of whether the defendant could have been charged based on a different statute, which criminalizes nonconsensual sex with an intoxicated complainant without requiring loss of consciousness.¹²⁸ Specifically, in addition to criminalizing intercourse with “physically helpless” individuals, Minnesota law separately criminalizes intercourse with a “mentally incapacitated” person, defined as “a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person’s agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.”¹²⁹ Yet Blevins could not have been charged under this provision because the statute makes explicit that the scope of the “mental incapacity” definition is limited to include only cases where *another* person administered the intoxicants to the victim. The statute therefore precludes bringing criminal charges in cases where victims voluntarily consumed the intoxicants without the defendant’s administering them.¹³⁰

Minnesota’s law is illustrative of most jurisdictions’ disparate statutory scheme in which criminalization is predicated on whether the victim became involuntarily or voluntarily intoxicated;¹³¹ a defendant cannot be convicted of

¹²⁷ For further discussion of the issue involving an intoxicated victim’s expression of nonconsent, see *infra* Section III.B.2.

¹²⁸ It should be noted that under Minnesota law, a person who engages in nonconsensual sexual contact with another may be charged under the crime of criminal sexual contact in the fifth degree. See MINN. STAT. ANN. § 609.3451 (West 2013) (criminal sexual conduct in the fifth degree). While this provision equally applies to both sober and intoxicated complainants, it constitutes only a gross misdemeanor, rather than a felony, and fails to capture the unique wrongdoing that engaging in nonconsensual sex with an intoxicated person represents. For a further explanation on why a general prohibition on sex without consent is unsatisfactory and why a separate prohibition specifically targeting nonconsensual sex with intoxicated individuals is a preferable solution, see *infra* Parts IV, V.

¹²⁹ See MINN. STAT. ANN. § 609.341 subd. 7 (2016).

¹³⁰ Some jurisdictions criminalize physical and mental incapacitation in one provision, for example, ALASKA STAT. § 11.41.470(2) (2016) (combining mental and physical incapacitation in its definition of “incapacitated”), ALASKA STAT. § 11.41.470(2), (4), (8)(b) (2016) (providing definitions of “incapacitated”).

¹³¹ See, e.g., OHIO REV. CODE ANN. § 2907.02(A)(1)(a) (2008) (“For the purpose of preventing resistance, the offender substantially impairs the other person’s judgment or

intercourse with a mentally incapacitated individual because the statute requires that the intoxication be involuntary and precludes liability if it was voluntary. In addition, a defendant cannot be convicted of intercourse with a physically helpless individual if the victim's intoxication fell short of complete unconsciousness. Such a statutory scheme fails to cover victims of voluntary intoxication who are substantially impaired but presumably too sober to lose consciousness.¹³² The fact that victims in these circumstances may remain underprotected demonstrates the underinclusiveness of this statutory framework. This outcome appears especially problematic due to the fact that evidence that the victim did not completely lose her ability to say "no," even though evidence clearly showed that her intoxication rendered her significantly impaired, resulted in the defendant's acquittal. Cases like *Blevins*, therefore, demonstrate existing laws' problematic distinction between voluntary and involuntary intoxication, which may result in victims of voluntary intoxication remaining underprotected.

2. Prohibitions Against Intercourse with Incapacitated Persons

In addition to statutes that directly criminalize intercourse with involuntarily intoxicated people, most jurisdictions have adopted statutes that prohibit intercourse with people who are unable to consent due to incapacitation, regardless of its source or reason.¹³³ In contrast with the statutes discussed above, general incapacitation provisions do not use the intoxication language as part of the definition of the offense.¹³⁴ Instead, these statutes

control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception."); FLA. STAT. § 794.011 (2017) (defining "mentally incapacitated" as "temporarily incapable of appraising or controlling a person's own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered without his or her consent or due to any other act committed upon that person without his or her consent").

¹³² For a similar result, see *State v. Haddock*, 664 S.E.2d 339, 346 (N.C. Ct. App. 2008) (precluding criminal liability where the victim became voluntarily intoxicated, to a level short of unconsciousness or physical helplessness as a result of her own actions, reasoning that the statutory language "due to any act committed upon the victim" does not allow expanding the scope of the prohibition to also cover cases where the victim voluntarily became intoxicated (emphasis omitted)).

¹³³ See TRACEY ET AL., *supra* note 17, at 26–27 (noting that in thirty-eight states out of the forty jurisdictions whose intoxication provisions do not cover voluntary intoxication, prosecution of rapes involving intoxicated victims is possible under general incapacitation prohibitions).

¹³⁴ See, e.g., VA. CODE ANN. § 18.2-61(A) (2013) (prohibiting intercourse "through the use of the complaining witness's mental incapacity or physical helplessness"); 720 ILL. COMP. STAT. ANN. 5/11-1.20(a)(2) (West 2012) (providing that the defendant must know that the victim was "unable to understand the nature of the act or [was] unable to give

describe the typical characteristics of intoxicated victims, namely, incapacitation or inability to appraise or control conduct or communicate their unwillingness to engage in sexual intercourse.¹³⁵ Under incapacity-to-consent statutes, consent to intercourse cannot be obtained if a person lacks the capacity to engage in a decision-making process; therefore a victim's incapacitation negates the element of consent, showing that the intercourse was nonconsensual.¹³⁶

At first glance, it may seem that statutes in both categories, specifically, statutes that directly criminalize intercourse with intoxicated persons and statutes that draw on the incapacitation language, reach a similar result. Both ground criminalization in the incapacity-to-consent standard, albeit by focusing on different features: While statutes that criminalize intercourse with an incapacitated person, without mentioning intoxication, focus on the effects of the victim's inability to appraise the circumstances of an incident—the inability to consent regardless of its cause—statutes that directly criminalize intercourse with an intoxicated person focus on the cause of a victim's inability to express consent, that is, intoxication.¹³⁷

One important feature, however, separates the two categories of statutes. While prohibitions that directly criminalize sexual intercourse with an intoxicated person mostly exclude voluntary intoxication from their coverage, prohibitions that criminalize intercourse with an incapacitated person do not distinguish between voluntary and involuntary intoxication since intoxication is not specifically listed as the reason for the incapacitation. Importantly, the general prohibition against intercourse with an incapacitated person equally applies not only in cases where the victim was duped into incapacitation but also in cases where he or she voluntarily became heavily intoxicated.

Arguably, the problem of excluding sexual assault of voluntarily intoxicated victims from the scope of the laws' protection appears to be solved if criminal charges could be brought under the general incapacitation statutes. In fact, this is precisely what is currently being done as prosecutors use

knowing consent"); ALA. CODE 1975 § 13A-6-70(c) (1975) (proscribing that a person is "deemed incapable of consent" if he is mentally incapacitated); IOWA CODE § 709.4 (2015) ("A person commits sexual abuse in the third degree when the person performs a sex act The other person is suffering from a mental defect or incapacity which precludes giving consent.").

¹³⁵ See TRACEY ET AL., *supra* note 17, at 25.

¹³⁶ See Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1209 (2015) (defining mental incapacity as lacking the "requisite psychological abilities to engage in autonomous decision-making").

¹³⁷ See TRACEY ET AL., *supra* note 17, at 25.

incapacity-to-consent statutes to bring criminal charges in cases involving sexual assaults of voluntarily intoxicated victims.¹³⁸ Despite the fact that intoxication is not specifically mentioned, these statutes are used to prosecute sexual assault of intoxicated victims on the theory that intercourse with an incapacitated person is prohibited regardless of how the incapacitation occurred.¹³⁹

The fact that the above prosecutions are not rare might lead to the conclusion that there is no need to amend existing law by directly prohibiting the sexual assault of voluntarily intoxicated victims. Conceivably, a statutory change is seemingly unnecessary if the current law already covers these cases. This conclusion, however, is wrong because prosecuting sexual assault of severely intoxicated victims based on general incapacity-to-consent statutes raises significant problems of its own. The difficulties mainly stem from the vague and ambiguous concept of “incapacity to consent,” and the fact that there is no consensus among courts on how to define such incapacity. The following part explains how a critical difficulty concerns the incapacity-to-consent standard’s shortcomings when applied to cases involving intoxicated victims. Therefore, even if these statutes allegedly protect victims of voluntary intoxication, applying the incapacity-to-consent standard is fraught with problems.

III. CRITIQUE OF THE INCAPACITY-TO-CONSENT STANDARD

In most jurisdictions, the prevalent legal construct that allows the prosecution of sexual assault of voluntarily intoxicated victims draws on provisions that prohibit sexual intercourse with incapacitated individuals.¹⁴⁰ While these provisions do not distinguish between voluntary and involuntary intoxication, their applications raise other sets of problems due to the vague concept of “incapacity to consent.” Jurisdictions vary in the specific formulations used to capture the essence of the victim’s incapacitated state; some statutes prohibit sexual penetration when the actor knows that the victim is unable to understand the nature of the act or is unable to give knowing consent.¹⁴¹ Other statutes define incapacity as either complete

¹³⁸ See, e.g., *People v. Mercado*, 2016 IL App (1st) 140303-U, ¶ 28 (affirming the defendant’s conviction for criminal sexual assault of a voluntarily intoxicated victim).

¹³⁹ See, e.g., *Molina v. Commonwealth*, 636 S.E.2d 470, 473 (Va. 2006) (defining mental incapacity to cover intoxication).

¹⁴⁰ See *supra* Section II.B.2.

¹⁴¹ See, e.g., 720 ILL. COMP. STAT. 5/11-1.20(a)(2) (West 2012) (stating that defendant must know the victim was “unable to understand the nature of the act or [was] unable to give knowing consent”).

inability to appraise or control behavior or substantial impairment in such ability.¹⁴² Some prohibit subjecting “another person to sexual contact when that person is incapacitated, incapable of consent, or lacks the capacity to consent.”¹⁴³ Yet others only criminalize intercourse when “the complainant is unconscious or the person knows that the complainant is unaware that the penetration is occurring.”¹⁴⁴ The discussion below collectively refers to these various formulations of incapacity to consent standards as ITCS.

The various definitions given by courts to the notion of incapacity and the perplexing array of tests adopted to determine the circumstances that amount to incapacity to consent to sexual intercourse result in ample ambiguity in their application. Notably, there is no consensus among the jurisdictions regarding the definition of “incapacity,” with some jurisdictions defining incapacity as victim’s inability to understand the nature of the sexual act and others defining incapacity as victim’s inability to appraise or control his conduct.¹⁴⁵

Additionally, formulations that draw on the ITCS prove particularly problematic in cases where the victim’s intoxication did not render him or her completely unconscious, yet did result in a significant impairment in the ability to communicate nonconsent. Consumption of intoxicants may undermine the complainant’s ability to express refusal to the sexual act, without rendering him or her completely incapable of understanding the nature of the sexual act altogether. In these cases, victims may not be protected because the level of their intoxication fell short of complete incapacity to appraise the nature of the sexual act. The result is that the cases that are prosecuted are mainly those where the victim completely lost consciousness.¹⁴⁶ Allegations involving victims whose abilities to

¹⁴² See DeMatteo et al., *supra* note 105, at 235 (discussing statutes that cover victims’ temporary incapacity to consent to intercourse, including, among others, due to voluntary intoxication).

¹⁴³ See MO. REV. STAT. § 566.100 (2016) (prohibiting subjecting “another person to sexual contact when that person is incapacitated, incapable of consent, or lacks the capacity to consent”).

¹⁴⁴ See, e.g., 18 PA. CONS. STAT. § 3125(a)(4).

¹⁴⁵ See, e.g., DEL. CODE ANN. tit. 11, § 761(j)(3) (2015) (defining “without consent” among others, to mean: “The defendant knew that the victim suffered from a cognitive disability, mental illness or mental defect which rendered the victim incapable of appraising the nature of the sexual conduct or incapable of consenting.”); VA. CODE ANN. § 18.2-67.10(3) (1970) (defining “mental incapacity” to mean: “[T]hat condition of the complaining witness existing at the time of an offense under this article which prevents the complaining witness from understanding the nature or consequences of the sexual act involved in such offense and about which the accused knew or should have known.”).

¹⁴⁶ See *State v. Rogers*, 772 So. 2d 960, 962, 965 (La. Ct. App. 2000) (upholding conviction of the defendant of raping a voluntarily intoxicated victim who lost

communicate refusal to intercourse are significantly impaired due to intoxicants, but did not lose consciousness, and were considered legally capable of consenting, are rarely prosecuted.¹⁴⁷

The following sections demonstrate the ways in which the ITCS provides only a partial and incomplete solution to the complex problem of sexual assault of intoxicated victims.¹⁴⁸ The ITCS suffers from two types of drawbacks. The first concerns the inherent difficulty of demarcating the line between intoxication that is sufficiently severe to significantly impair one's physical and mental abilities, and complete incapacitation. The second concerns the vague, ambiguous, and indeterminate formulations used by courts to define incapacitation, which sometime result in overinclusiveness but other times in underinclusiveness.

A. *The Blurry Line Between Intoxication and Incapacitation*

Courts have long noted that “there are many levels of intoxication, and the fact of intoxication, by itself, does not necessarily mean that the individual in question is incapable of deciding whether to assent to a sexual encounter.”¹⁴⁹ Courts have further emphasized that the line between intoxication, or mere drunkenness, and actual impairment in mental and physical capabilities is fuzzy and is therefore unable to provide a clear guideline for evaluating the validity of the victim's consent.¹⁵⁰

An inquiry into an intoxicated person's capabilities rests on the premise that incapacitation is a debilitating state that goes above and beyond mere intoxication. But articulating the operational boundary between intoxication and incapacitation proves elusive, with the line between these situations often becoming blurred. Considerable ambiguity stems from the fact that incapacitation is not a term that easily lends itself to a bright-line rule but instead is determined by applying a more flexible standard.¹⁵¹ Likewise, incapacitation cannot always be traced to a specifically defined moment; accurately discerning a precise point in time in which a person becomes completely incapacitated, rather than merely intoxicated, is not a feasible

consciousness); see also Tuerkheimer, *supra* note 96, at 456–57 (discussing prosecutions involving total impairment resulting in unconsciousness).

¹⁴⁷ See Tuerkheimer, *supra* note 96, at 457 & n.98.

¹⁴⁸ See *infra* Section III.B (criticizing the application of the incapacity-to-consent standard).

¹⁴⁹ Commonwealth v. Blache, 880 N.E.2d 736, 742 (Mass. 2008) (citing the court's 1870 decision in *Commonwealth v. Burke*, 105 Mass. 376 (1870)).

¹⁵⁰ State v. Hatten, 927 N.E.2d 632, 638–39 (Ohio Ct. App. 2010) (noting that “there can be a fine, fuzzy, and subjective line between intoxication and impairment”).

¹⁵¹ People v. Giardino, 98 Cal. Rptr. 2d 315, 322 (Cal. Ct. App. 2000).

task. Instead, incapacitation lies on a spectrum that ranges from total incapacitation—amounting to complete unconsciousness—to substantial impairment in cognitive and mental functioning while still maintaining consciousness.¹⁵² Additionally, there is a difference between passing out to the point of unconsciousness and “blacking out,” which may result in temporary loss of some memories but does not lead to complete unconsciousness.¹⁵³

The concept of physical and mental impairment plays a critical role in understanding the range of conditions that intoxication may lead to;¹⁵⁴ in its most extreme form, the level of a victim’s impairment rises to total incapacitation, which is captured in the state of complete unconsciousness. But the more complicated situations involve cases where the severity and level of a person’s impairment result in significant deterioration in cognitive and motor abilities yet fall short of total incapacitation.¹⁵⁵ In these cases, a victim’s ability to communicate nonconsent to sexual intercourse is significantly undermined by his or her impaired mental and physical state, even if not completely destroyed.¹⁵⁶ Yet, under the ITCS, significant impairment, as opposed to full incapacitation, may not suffice to render the victim legally incapable of consenting.¹⁵⁷

Furthermore, determining in hindsight whether the victim’s intoxication at the time the sexual act occurred rose above the level of heavy intoxication to actual incapacitation involves much speculation. In contrast with driving under the influence charges, in which scientific tests are used to quantify a defendant’s blood alcohol content at the time of driving, a sexual assault victim’s precise level of intoxication at the time of intercourse typically cannot be accurately measured given the

¹⁵² See Tuerkheimer, *supra* note 96, at 456–57 (noting that “intoxication cases range between total incapacitation and impairment that is severe, but not complete”).

¹⁵³ See Aaron M. White, *What Happened? Alcohol, Memory Blackouts, and the Brain*, NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm> [<https://perma.cc/3UZG-Y99N>].

¹⁵⁴ See *infra* Section V.B.1 (elaborating further on the concept of significant impairment and incorporating it into the proposed statute).

¹⁵⁵ See *Commonwealth v. Urban*, 880 N.E.2d 753 (Mass. 2008).

¹⁵⁶ *Id.* at 756 (The defendant engaged in sexual intercourse with a victim who was conscious. She testified that she was “really drunk,” had no energy, felt physically paralyzed, said nothing because she was scared, could not move, and was unable to push him away. The court reversed the conviction because the trial court failed to instruct the jury that an extreme degree of intoxication was necessary for finding that the victim lacked the capacity to consent.).

¹⁵⁷ *Id.* at 757 (positing that the incapacity-to-consent construct obscures the key question of whether the victim actually consented and recognizes only full impairment as legal incapacity).

lapse of time between intercourse and medical exams.¹⁵⁸ Therefore, juries do not have a quantifiable measure to assess the precise degree of the victim's intoxication at the time of the offense.

Given this uncertainty, determining whether the victim's level of intoxication exceeded mere drunkenness and amounted to incapacitation cannot be guided by a bright-line rule that clearly demarcates the point at which intoxication becomes incapacitation. Instead, assessing the victim's mental capabilities involves a totality of the circumstances, open-ended evaluation, which may result in unpredictable determinations.¹⁵⁹

B. Vague Formulations for Determining Incapacitation

Any legal standard that draws on the ITCS to demarcate the boundary between lawful intercourse and a sex crime must incorporate "a test for determining when [the victim's] intoxication reaches a level that should be considered incapacitating."¹⁶⁰ Under statutes that make incapacity an independent element of the crime of sexual assault, the prosecution must prove that the level of the victim's intoxication was so severe that it rendered him or her incapable of consenting to intercourse.¹⁶¹ The problem with the ITCS, however, is that it is unable to offer practical guidelines for assessing the point at which a person's impairment amounts to incapacitating intoxication. While various tests are used by the states in an attempt to determine when intoxication becomes incapacitation,¹⁶² their application proves problematic, as the sections below will demonstrate.

Case law demonstrates that the ITCS is ill-suited for prosecutions of sexual assault of intoxicated victims because it leads to inequitable resolutions from both victims' and defendants' perspectives. The standard often proves overinclusive,

¹⁵⁸ See Sharon Cowan, *The Trouble with Drink: Intoxication, (In)capacity, and Evaporation of Consent to Sex*, 41 AKRON L. REV. 899, 902 (2008) (arguing that it is difficult to assess incapacity because alcohol effects wear off).

¹⁵⁹ *People v. Giardino*, 98 Cal. Rptr. 2d 315, 318–19 (Cal. Ct. App. 2000) (reversing defendant's conviction because there was sufficient evidence that the victim's level of intoxication did not prevent her from consenting to the sexual acts).

¹⁶⁰ MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3, cmt. 4, at 63 (AM. LAW INST., Discussion Draft No. 2, 2015), <https://www.ali.org/publications/show/sexual-assault-and-related-offenses/#drafts>.

¹⁶¹ *Commonwealth v. Urban*, 880 N.E.2d 753, 757–58 (Mass. 2008) (holding that where the Commonwealth seeks to satisfy the element of lack of consent by proof that the complainant lacked the capacity to consent, the jury must find not just that she was intoxicated, but that her degree of intoxication was such that it rendered her incapable of consenting to intercourse).

¹⁶² See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3, cmt. 4, at 63–64 (AM. LAW INST., Discussion Draft No. 2, 2015).

potentially allowing criminalization where culpability seems ambiguous, but other times proves underinclusive, precluding criminal sanctions in cases where wrongdoing is unequivocal.¹⁶³ The following sections demonstrate the ways in which applying this standard fails to reach just resolutions for both parties.

1. Overinclusiveness of the ITCS

One of the ITCS's shortcomings is its potential for overinclusiveness. Viewed through a defendant's lens, applying this standard may lead to unpredictable decisions and overcriminalize sexual encounters falling short of culpable conduct. The following reasons explain why the guideless standard results in ample ambiguity for defendants whose criminal responsibility hinges on whether they were aware that their sexual partners' intoxication levels rose to that of actual incapacitation.

a. Lack of a Determinative Test for Assessing Incapacitation

The ITCS, standing alone, is unhelpful in providing factfinders with workable guidelines, as it begs the question of how to determine incapacity. This standard therefore calls for adopting a separate test to determine at which point the victim's intoxication rises to the level of actual incapacitation.¹⁶⁴ However, some courts, such as the Kansas Supreme Court in its decision in *State v. Chaney*, declined to adopt a dispositive test.¹⁶⁵ In *Chaney*, the defendant was charged with two counts of rape.¹⁶⁶ First, he was charged with intercourse with a victim who was "incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender" (rape by intoxication).¹⁶⁷ He was also charged with rape by force or fear, but the jury acquitted him on this count, convicting him only of rape by intoxication.¹⁶⁸ On appeal, Chaney argued that

¹⁶³ See *infra* Sections III.B.1.b, III.B.2.b (discussing the *Giardino* case that illustrates the overinclusiveness of the incapacity-to-consent standard and the *Urban* case that illustrates the underinclusiveness of this standard).

¹⁶⁴ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3, cmt. 5, at 58 (AM. LAW INST., Tentative Draft No. 1, 2014), <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/>.

¹⁶⁵ *State v. Chaney*, 5 P.3d 492, 498 (Kan. 2000).

¹⁶⁶ *Id.* at 492, 494–95.

¹⁶⁷ KAN. STAT. ANN. § 21-3502 (repealed 2011) (criminalizing intercourse with an intoxicated person, whether voluntary or involuntary); *Chaney*, 5 P.3d at 494–95.

¹⁶⁸ *Chaney*, 5 P.3d at 495, 502.

he could not be convicted of the rape by intoxication charge because of the fact that the victim said “no” and called out for help, shows that she was both sober enough to refuse sex and sober enough to consent to sex.”¹⁶⁹ The court of appeals agreed and reversed the conviction.¹⁷⁰ Following the state’s appeal to the Kansas Supreme Court, the conviction was reinstated based on the conclusion that given the victim’s substantial impairment due to alcohol, she was incapable of consenting.¹⁷¹

The facts of this case are particularly disturbing because the eighteen-year-old defendant raped the fourteen-year-old victim while she was in the care of a babysitter who invited the defendant to the victim’s home.¹⁷² The defendant brought beer with him, which the victim voluntarily consumed until she became very intoxicated and went to her bedroom.¹⁷³ Defendant followed her.¹⁷⁴ Despite her intoxication, the victim repeatedly said “no” and tried to call out to the babysitter for help.¹⁷⁵

To be clear, my analysis below neither suggests that the conclusion reached by the Kansas Supreme Court is mistaken, nor that Chaney’s conviction given the egregious facts above was unjustified. Instead, my critique of the court’s decision rests merely on the court’s treatment of the ITCS and particularly on its refusal to provide a definitive test that would guide juries’ discretion in future cases.

While the court rejected the defendant’s position that a person is only incapable of giving consent due to the effects of alcohol if that person is so intoxicated as to be near the point of either passing out or blacking out, it refused to clarify when intoxication becomes incapacitation. Noting that “incapacity to consent is a highly subjective concept,” and that “[i]t is not one which lends itself to definition as a matter of law,” the court did not define the degree of intoxication required to sustain a rape conviction under this statute.¹⁷⁶ The court noted that “[l]ay persons are familiar with the effects of alcohol. If the jury concluded [the victim] was drunk enough to be unable to consent to sex, we should give great deference to that finding.”¹⁷⁷

The problem with courts’ refusal to adopt a definitive test for determining victims’ incapacity to consent is that juries

¹⁶⁹ *Id.* at 493.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 493–94, 499.

¹⁷² *Id.* at 493.

¹⁷³ *Id.*

¹⁷⁴ *See id.*

¹⁷⁵ *Id.* at 493–94, 496.

¹⁷⁶ *Id.* at 498.

¹⁷⁷ *Id.*

are left with no clear guidelines for evaluating incapacitation. Equally troubling is the fact that potential defendants are also not provided with any substantive direction that would help shape future sexual behavior. While clearly this was not a concern in *Chaney* itself, given the defendant's awareness of the victim's nonconsent, the court's refusal to elaborate on the proper test for incapacity poses a concern for future cases. The *Chaney* court opted for an open-ended "we know it when we see" inquiry, which is, in essence, a guideless totality of the circumstances test. Under this test, the victim's testimony regarding both how much alcohol he or she consumed and his or her level of impairment, as well as witnesses' testimonies regarding the victim's visible signs of impairment, play a critical role.¹⁷⁸ But the court's refusal to further elaborate on the precise test for determining incapacity to consent leaves to the jury the task of inferring the circumstances under which a victim was too intoxicated to consent to sex. It requires them to assess the victim's capabilities based on roughly estimating his or her precise level of intoxication at the time of the event. In sum, the refusal to provide a dispositive test for when a victim is incapable of consenting might not only leave juries without direction but also result in inconsistencies in applying the ITCS.

b. Expanding Incapacity Beyond Cognitive Impairment

While some courts refuse to articulate a definitive test that would provide some structure to the indeterminate ITCS, others acknowledge the need to better constrain juries' discretion by offering some guidelines concerning what features are incorporated into the incapacity inquiry. None of the criteria developed by courts, however, provide clear guidelines on how to determine when a victim's intoxication has reached the level that renders him or her incapacitated.¹⁷⁹

The prevalent criteria adopted by most jurisdictions are vague and unhelpful. At one end of the spectrum lie tests that opt for a narrow reading of what capacity to consent means.¹⁸⁰

¹⁷⁸ *Id.* at 498–99 (detailing the victim's testimony as well as the babysitter's who witnessed the victim's intoxication). One of the problems characterizing the prosecution of sexual assault of intoxicated victims is that unlike charges involving driving under the influence where scientific evidence about the defendant's blood alcohol content is readily available, scientifically measuring the victim's BAC is often inaccurate or even impossible given the fact that it is not measured at the time of the sexual act itself. See Cowan, *supra* note 158, at 907–08.

¹⁷⁹ See TRACEY ET AL., *supra* note 17, at 27 (noting that none of the prohibitions "set forth clear guidelines or specific factors to determine whether a victim's level of intoxication precludes consent").

¹⁸⁰ See Boni-Saenz, *supra* note 136, at 1217–21.

Under these tests, the inquiry focuses on evaluating a victim's cognitive abilities "to understand the nature and consequences" of the sexual act.¹⁸¹ Cognitive capacity only incorporates the victim's ability to understand the physical aspects of the sexual activity, namely, that the conduct is sexual in nature, as well as its physical consequences—mainly the risks of pregnancy and sexually transmitted diseases.¹⁸²

Other jurisdictions, however, have broadened the incapacity inquiry by also asking whether the intoxication negates or substantially impairs the ability of the victim to control or appraise his or her conduct.¹⁸³ It remains unclear, however, precisely what elements this phrase encompasses.¹⁸⁴ Arguably, the ability to "appraise conduct" requires that the victim also understand the additional consequences of the sexual act, including its nonphysical aspects, such as the psychological and emotional ramifications as well as its moral nature.¹⁸⁵ Therefore, a victim may be deemed incapable of consenting if he or she lacks the capacity to evaluate the broader social implications of the sexual encounter, which are inherently subjective in nature.

The decision of the California Court of Appeals in *People v. Giardino* provides an example of the expansion of the scope of the incapacity inquiry to include additional aspects of impairment beyond cognitive ones.¹⁸⁶ In this case, the defendant was convicted of rape by intoxication.¹⁸⁷ The complexity of this case stemmed from the fact that the complainant did not merely passively acquiesce to the sexual acts but seemingly actively participated in them.¹⁸⁸ On appeal, the defendant argued that the trial court erred by failing to instruct the jury on the meaning of the term "prevented from resisting" and on lack of

¹⁸¹ *Id.*

¹⁸² *Id.* at 1218.

¹⁸³ *See, e.g.*, ME. REV. STAT. tit. 17-A, § 253(2)(A) (2016) (prohibiting gross sexual assault when the actor engages in a sexual act with a person who is unable to appraise or control conduct).

¹⁸⁴ *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3, cmt. 4, at 64 (AM. LAW INST., Tentative Draft No. 1, 2014).

¹⁸⁵ *See, e.g.*, *Kansas v. Chaney*, 5 P.3d 492, 498 (Kan. 2000) (noting that the victim "exhibited little indicia of rational decision-making" and that she "was both psychologically and physiologically impaired").

¹⁸⁶ *People v. Giardino*, 98 Cal. Rptr. 2d 315, 324 (Cal. Ct. App. 2000).

¹⁸⁷ *Id.* at 319; *see* CAL. PENAL CODE ANN. § 261(a)(3) (2013) (defining rape to include "[w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused").

¹⁸⁸ *Giardino*, 98 Cal. Rptr. 2d at 325–26 (describing the victim volunteering to take off her clothes and masturbate).

consent as an element of the crime.¹⁸⁹ The court accepted the defendant's former argument but rejected the latter.¹⁹⁰

The court held that the element "prevented from resisting" refers to the effects of the intoxicants on the victim's powers of judgment and ability to give legal consent.¹⁹¹ It further held that the incapacity sufficient to support conviction could be established by showing that the victim was either "unable to make a reasonable judgment as to the nature or harmfulness of the conduct" or would not have engaged in intercourse with the defendant had she not been under the influence of the intoxicants.¹⁹² The court further interpreted the "reasonable judgment" element as the ability "to understand and weigh not only the physical nature of the act, but also its moral character and probable consequences."¹⁹³

The *Giardino* court's two alternative bases for determining incapacity are disconcerting because of their potentially overbroad scope. The court's ambiguous test neither clarifies what "harmfulness of the conduct" means nor what the victim's grasping of the moral implications of engaging in the sexual act entails. Expanding the victim's ability to exercise "reasonable judgment" as to the *moral* character of a sexual act allows jurors and judges to pass judgment on the sexual encounter at issue. Inviting factfinders to incorporate vague moral considerations into the incapacity inquiry is dangerous because moral intuitions are measured against societal perceptions and are highly subjective in nature.¹⁹⁴ Introducing the notion of morality into the inquiry runs the risk that juries and judges will incorporate their own normative judgments concerning the moral implications of the sexual act.¹⁹⁵ Since case law does not provide any guidelines on how the inability to appraise the moral harmfulness of the sexual act is interpreted, juries and judges remain free to apply their own understandings of what features this test encompasses.

Likewise, the requirement that the victim is able to make a "*reasonable judgment*" is also troubling. Incorporating

¹⁸⁹ *Id.* at 319.

¹⁹⁰ *Id.* at 324 (holding that the trial court failed to correctly instruct the jury); *id.* at 328 (holding that defendant's belief in the victim's consent was irrelevant).

¹⁹¹ *Id.* at 321.

¹⁹² *Id.* at 321–22 (quoting MODEL PENAL CODE § 2.11(3)(b) (AM. LAW INST., Proposed Official Draft 1962) (citing *People v. Ing*, 65 Cal. 2d 603, 604 (1965) for the proposition that the victim would not have engaged in intercourse had she not been under the influence of intoxicants)).

¹⁹³ *Id.* at 324.

¹⁹⁴ See *Boni-Saenez*, *supra* note 136, at 1221–22.

¹⁹⁵ *Id.* (noting that putting judges in charge of sexual judgments risks the chance that they will prohibit certain forms of nontraditional sexual expression).

the reasonableness language into the incapacity-to-consent test does not provide any substantive criterion because it remains unclear what reasonableness entails in the context of the choice to engage in sexual acts and why such choice has to be reasonable at all.

Furthermore, the test's second basis, which requires a "but-for" causal connection between the intoxication and the sexual act, is also problematic. Admittedly, many sexual encounters that are perfectly consensual would not have occurred but for the consumption of intoxicants. The "but-for" requirement risks turning every case of regrettable intoxicated sex into a sex crime. It is a moralistic standard that does not comport with prevailing social practices and is therefore impermissible.¹⁹⁶

c. Invalidating Consent

Another problem in the ITCS concerns its treatment of cases involving seemingly tangible but intoxicated consent. In the *Giardino* case, the complainant appeared to communicate positive willingness to engage in the sexual act, yet her extreme state of intoxication raised concerns that her consent was invalid.¹⁹⁷ Rejecting the defendant's argument that the trial court erred by failing to instruct the jury that lack of consent was an element of the offense, the *Giardino* court held that nonconsent was not an element of the crime of rape by intoxication.¹⁹⁸ It further clarified that the issue was not whether the victim actually consented, but whether he or she was capable of exercising the degree of judgment a person must have in order to give "legally cognizable consent."¹⁹⁹

Applying this holding to the facts of the *Giardino* case itself has led the court to conclude that the victim's level of intoxication did not preclude her from expressing valid consent.²⁰⁰ Application of the same standard in future cases might lead to invalidating a complainant's affirmative and clearly communicated consent, however, based on the theory that it was tainted due to the victim's intoxication. The result would be unjustly convicting defendants of sexual offenses even where explicit permission to the sexual act had been verbally given.

¹⁹⁶ See *supra* Part I (discussing the prevalence of alcohol consumption as part of today's "hookup" culture).

¹⁹⁷ *Giardino*, 98 Cal. Rptr. 2d at 326–27; see also Goodman, *supra* note 86, at 88–89 (discussing cases involving "explicit but inebriated consent").

¹⁹⁸ *Giardino*, 98 Cal. Rptr. 2d at 321.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 327–28 (noting that there was ample evidence that the victim consented to sex).

Expanding the incapacity-to-consent inquiry to cover cases where actual consent is expressed is unwarranted. Invalidating an intoxicated person's unequivocal communication of willingness to engage in a sexual act extends above and beyond the goals of statutes aimed at protecting victims whose ability to communicate nonconsent was significantly impaired due to their intoxication. Negating consent may not only result in criminalizing innocuous behaviors, when an actor relies on a partner's express assent to sex, but it is also notably paternalistic, raising concerns that the law impermissibly interferes with this partner's sexual behavior in circumstances where the partner might be making less than prudent decisions that would not have made had the partner's judgment not been clouded by intoxication.

2. Underinclusiveness of the ITCS

While applying the ITCS may result in inequitable resolution from the defendants' perspective, other times it may prove unfair when viewed through the victims' lens. Therefore, the standard is also underinclusive, leading to undercriminalization of sexual acts that warrant criminal sanction, as illustrated below.

a. Focusing on Victims' Capacities Rather than on Nonconsent

A key drawback in the ITCS is that in overemphasizing the victim's mental capabilities at the time of the sexual act, it wrongly diverts attention away from the act's nonconsensual nature. Professor Deborah Tuerkheimer argued that under the incapacity standard, the analysis is improperly shifted from inquiring into the victim's consent to the intercourse to examining whether he or she was incapable of consenting, excessively emphasizing the level of intoxication.²⁰¹ In doing so, continues Tuerkheimer, juries and judges fail to inquire into whether the victim actually consented, which is what courts should be looking at in these cases.²⁰²

Dubious outcomes may occur in cases where despite their heavily intoxicated state, victims were still able to verbally refuse the sexual act. The risk is that the victim's explicit verbal refusal would be understood as an indication that he or she was

²⁰¹ See Tuerkheimer, *supra* note 24, at 25–29 (noting that the inquiry into the victim's consent is replaced by fixating on the level of intoxication).

²⁰² *Id.*

capable of consenting. In these cases, applying the ITCS might lead courts and juries to the conclusion that the victim was not incapacitated and therefore no sexual assault had occurred.²⁰³

The decision of the Kansas Court of Appeals in *State v. Chaney*, mentioned earlier, is an example of the conflation of the victim's verbal refusal to sex with her capacity to consent.²⁰⁴ As previously noted, the victim testified that while she was "very well intoxicated," she did, in fact, say "no," explicitly refusing the sexual act.²⁰⁵ The court of appeals reversed the conviction on the theory that the victim's ability to express nonconsent shows that she was not legally incapable of giving consent.²⁰⁶ Specifically, the court of appeals observed that:

While there was an abundance of evidence that K.G. may have been intoxicated or drunk, there is no evidence that she was unable to consent to sexual relations as a result of the intoxicating liquor. . . . "Consent is a two-edged sword; on the one side is consent and on the other is refusal to consent. If the victim can do one, he or she can do either. . . . An individual who has the ability to say no and refuse to consent to sex can also say yes and consent to the act."²⁰⁷

The Kansas Supreme Court disagreed with the court of appeals' construction of the incapacity provision and reinstated the defendant's conviction.²⁰⁸ The court stressed that "[i]t [was] not outside the realm of reason to think that a victim can be too drunk to provide valid consent to sex yet remain capable, on some level, of rejecting unwanted aggression."²⁰⁹ It concluded that "[t]here was sufficient evidence that [the victim] was both psychologically and physiologically impaired due to the effects of alcohol," even if she was able to say "no."²¹⁰ The court further observed that the victim's saying "no" could have been "an instinctual response rather than the result of rational decision-making," and that the victim here "did not have the clarity of thought [that] the Court of Appeals attributed to her," thus the

²⁰³ The problem here rests with most laws' insistence on proof of force, where there is no sufficient evidence of full incapacitation. Most jurisdictions still define rape by requiring a force element in addition to nonconsent, unless the victim is completely incapacitated, therefore making the force requirement unnecessary. *Id.* at 15–16 (observing that most jurisdictions include a force element in their definitions of rape).

²⁰⁴ The court of appeals' decision is unpublished but is cited in the decision of the Supreme Court of Kansas in *State v. Chaney*, 5 P.3d 492, 493 (Kan. 2000).

²⁰⁵ *Id.* at 498.

²⁰⁶ *Id.* at 493.

²⁰⁷ *Id.* at 493, 496, 500.

²⁰⁸ *Id.* at 496–98.

²⁰⁹ *Id.* at 496.

²¹⁰ *Id.* at 498.

conviction on the theory of being “unable to consent because of the effects of alcohol [was] supported by the evidence.”²¹¹

The dissenting judge, however, agreed with the court of appeals’ interpretation of the statute, observing that the ITCS was irrelevant in this case because the victim clearly expressed her nonconsent to the defendant.²¹² The dissenting judge further opined that while there was no evidence to support the rape conviction based on the incapacity-to-consent theory, there was sufficient evidence to convict the defendant based on the alternative theory, which was rape by force or fear.²¹³

While in *Chaney* itself, Kansas’s high court eventually cured the absurd outcome that acquittal of the defendant would have entailed, the opinions of the court of appeals and the dissenting judge in the Kansas Supreme Court demonstrate the potentially dangerous implications of focusing on the capacity to consent rather than on the nonconsensual nature of the sexual act. Arguably, given less egregious facts, a jury would have concluded that the intercourse was consensual because the evidence did not prove that the victim’s condition amounted to incapacitation.

b. Setting a High Threshold

The ITCS sets a high threshold for determining when an impaired victim could not have consented to a sexual act due to intoxication. Linguistically, the word “incapacitation” denotes a total loss of mental and physical capacities, even if temporarily.²¹⁴ Defining incapacity in terms of lack of capabilities precludes conditions where capabilities were significantly impaired but not completely lacking from the scope of coverage. This intuitive understanding supports the position that intoxicated victims might be considered incapacitated only when their cognitive and physical impairment reached or neared complete loss or lack of any capabilities. The ITCS, therefore, captures the most extreme forms of incapacitation, specifically, cases where victims completely lost consciousness. But it may

²¹¹ *Id.* at 498–99.

²¹² *Id.* at 499–500.

²¹³ *Id.* at 494–95, 499–500, 502 (observing that “it was unfortunate the jury acquitted the defendant of rape by force or fear” and that “why the jury did not convict him of that offense is a mystery”). Just to clarify, Kansas’s law also defined the crime of rape to include nonconsensual sexual intercourse when the victim was overcome by force or fear. While the state charged rape based both on the force or fear option and the incapacity-to-consent construct, the jury rejected the former option.

²¹⁴ See the definition of incapacity in *Black’s Law Dictionary*: “1. Lack of physical or mental capabilities. 2. Lack of ability to have certain legal consequences attach to one’s actions.” *Incapacity*, BLACK’S LAW DICTIONARY (10th ed. 2014).

not cover cases where the victim was too sober to completely lose consciousness yet impaired enough to compromise her ability to communicate opposition to the sexual act.²¹⁵

Scholars have long criticized the ITCS, arguing that it fails to adequately protect voluntarily intoxicated victims.²¹⁶ Scholars also note that while in cases where the complainant had lost consciousness it is assumed that she did not have the capacity to consent, in cases where victims are “drunk short of the point of unconsciousness” complex problems arise in the prosecution, particularly given the fact that evaluating the precise level of intoxication is hard to measure after the fact where there are “no other witnesses[.]” accounts.”²¹⁷

The Massachusetts Supreme Judicial Court’s decision in *Commonwealth v. Urban* exemplifies the high threshold used to determine incapacitation.²¹⁸ In this case, the defendant and the victim had been drinking together at a bar, eventually arriving at the defendant’s apartment where the victim fell asleep.²¹⁹ The defendant volunteered to drive her home and she fell asleep in the car, awakening only after he began kissing her.²²⁰ The victim testified that the defendant had oral and vaginal sex with her in the parked car, and that she was “‘really drunk,’ had no energy, felt physically paralyzed, said nothing because she was scared, could not move, and was unable to push [defendant] off.”²²¹ After the jury convicted the defendant of rape, he appealed, challenging the jury’s instructions on the evidence needed to establish that the victim lacked the capacity to consent.²²² The Massachusetts Supreme

²¹⁵ See Tuerkheimer, *supra* note 96, at 457 (discussing the different treatment of cases involving complete unconsciousness and those involving significant impairment in communicative capacities falling short of unconsciousness).

²¹⁶ See Falk, *supra* note 20, at 191 (noting that many existing statutes create ambiguity, as it is unclear whether voluntary intoxicated victims are protected), *id.* 197–201 (discussing the drawbacks in statutes that focus on victim’s incapacity to resist sexual intercourse); see also Boni-Saenz, *supra* note 136, at 1219 & n.95 (noting that tests that focus on inability to understand the nature of the sexual act may leave intoxicated victims underprotected particularly where both parties were voluntarily intoxicated).

²¹⁷ See Cowan, *supra* note 158, at 917–18 (noting that where the complainant has experienced symptoms like “periods of unconsciousness,” it may be assumed that she did not have the capacity to consent, but where victim’s intoxication is short of unconsciousness, there is broad room “for the defendant and the victim to disagree about the degree of intoxication and incapacity”).

²¹⁸ *Commonwealth v. Urban*, 880 N.E.2d 753 (Mass. 2008).

²¹⁹ *Id.* at 755–56.

²²⁰ *Id.* at 756.

²²¹ *Id.*

²²² *Id.* at 757. The defendant was charged under MASS. GEN. LAWS ch. 265, § 22(b) which is a general rape statute requiring proof of both force and nonconsent. The incapacity-to-consent standard was incorporated into the judge’s instruction to the jury. *Urban*, 880 N.E.2d at 754, 757.

Judicial Court reversed defendant's conviction because the trial court's charge failed to clarify to the jury that an extreme degree of intoxication was required to support the rape conviction before the incapacity rule could apply.²²³

The *Urban* court did not further clarify how to determine the point at which intoxication becomes sufficiently extreme to satisfy the ITCS. Importantly, in this case, the victim was conscious during the sexual intercourse, thus not completely incapacitated.²²⁴ Yet, her testimony clearly demonstrated that her ability to communicate nonconsent to the intercourse was significantly impaired.²²⁵ The court did not provide any guidelines on whether such impairment would satisfy the "incapacity-to-consent" requirement. But the court's construction of the ITCS, requiring that the victim's level of intoxication be extreme, adopted a narrow basis for evaluating the victim's impairment. The case illustrates the ways in which courts struggle to identify the threshold for incapacity short of complete unresponsiveness in cases involving highly intoxicated yet not fully unconscious complainants.

Because of the rigidity of the ITCS, courts tend to construe the standard as covering only cases where victims were in a condition in which they were at least nearing a state of full unconsciousness.²²⁶ The ITCS may, therefore, lead to juries and judges wrongly concluding that victims' intoxication did not reach the point of legal incapacitation in cases where they did not lose consciousness. Additionally, it may also lead to prosecutors' unwillingness to bring criminal charges in cases where the victim's intoxication did not result in complete unconsciousness. Indeed, review of the case law suggests that most prosecutions of sexual assault of intoxicated victims involve complainants who actually lost consciousness or drifted in and out of consciousness.²²⁷

In sum, application of the ITCS may leave victims of voluntary intoxication beyond the scope of sexual assault laws' protection, particularly in cases falling short of complete unconsciousness, where intoxication was sufficiently severe to significantly impair their communication abilities and preclude them from effectively opposing sexual intercourse.

²²³ *Id.* at 758–59.

²²⁴ *See id.* at 756.

²²⁵ *Id.*

²²⁶ *See, e.g.*, *State v. Jones*, 804 N.W.2d 409, 414 (S.D. 2011) (noting that the line should be drawn "between conscious intoxication and incapacitating intoxication").

²²⁷ *See, e.g.*, *State v. Snow*, 70 A.3d 971, 971–72 (Vt. 2013); *State v. Valanos*, No. 03-01-0052, 2010 WL 272592, at *2, *4 (N.J. 2010).

c. Judging Victims and Placing Blame

The ITCS embraces a victim-oriented, rather than a perpetrator-oriented inquiry.²²⁸ By defining the crime as intercourse with an incapacitated person, rather than nonconsensual intercourse with an intoxicated person, criminal wrongdoing is defined solely by reference to the victim's condition.²²⁹ Making the victim's incapacitation the focal point of the crime results in diverting the focus away from the perpetrator's culpable conduct, which is engaging in nonconsensual sex with a person whose ability to verbally or physically consent to it was significantly impaired.

In general, rape prohibitions are anomalous compared to other offenses in the sense that they are defined by reference to the victim's response to the offending conduct rather than by identifying the perpetrator's culpable conduct.²³⁰ Assessing and implicitly judging victims' choices and behaviors is a unique feature of sexual assault statutes.²³¹ The ITCS further contributes to shifting the focus of the inquiry in a criminal trial from the defendant's culpable conduct towards judging victims and placing blame on them due to their decisions to render themselves incapacitated.

Additionally, the ITCS shapes police officers', prosecutors', judges', and juries' perceptions of the case.²³² Instead of focusing on scrutinizing the defendant's conduct, the victim and her precise level of intoxication become the center of decision-maker's attention. The courts treat a victim's incapacity

²²⁸ See Janine Benedet, *The Sexual Assault of Intoxicated Women*, 22 CANADIAN J. WOMEN & L. 435, 444 (2010) (observing that while considering the question of the victim's incapacity to consent, courts often focus on the victim's fault in becoming intoxicated, and "judging how blameless she is").

²²⁹ Most jurisdictions still retain a force requirement in addition to proving the victim's nonconsent, therefore making it difficult for prosecutors to bring rape charges under general rape laws. See Tuerkheimer, *supra* note 24, at 15. In some jurisdictions, prosecutors may charge defendant with the lesser offense of nonconsensual sexual contact, which does not contain a force requirement, but this crime is typically criminalized at the level of a misdemeanor rather than as rape and therefore fails to capture the severity of the conduct. See, e.g., COLO. REV. STAT. ANN. § 18-3-404 (West 2013) (prohibiting unlawful sexual contact); MINN. STAT. ANN. § 609.341 subd. 11 (West 2013) (prohibiting nonconsensual sexual contact).

²³⁰ David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 372 & n.209 (2000).

²³¹ Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 115 (1994) (noting that "if the victim was drunk, it increases her culpability" in the eyes of the jury).

²³² See, e.g., Emily Finch & Vanessa E. Munro, *Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants*, 45 BRIT. J. CRIMINOLOGY 25 (2005); see also Benedet, *supra* note 228; Chambers Goodman, *supra* note 86, at 88-89; Tuerkheimer, *supra* note 24, at 27-30.

differently when intoxication was voluntary; in cases of involuntary intoxication, impaired judgment suffices to render the complainant incapable of consent.²³³ But in cases of voluntary intoxication, courts are not willing to be so generous and have been reluctant to apply a threshold other than near unconsciousness. Furthermore, courts are influenced by the “fault” of the complainant and, at some level, judge how blameless she is.²³⁴ Making victims’ incapacitation the cornerstone of the crime involves various considerations that implicitly incorporate judges’ and juries’ subjective moral and normative judgments about voluntarily intoxicated victims, including their own responsibility and contribution to the sexual act.

The North Carolina case of *State v. Haddock* illustrates one example where normative judgments shape not only the judge’s rhetoric but also the decision.²³⁵ The evidence in this case established that the defendant engaged in sexual intercourse with an extremely intoxicated victim who passed out and fell asleep on defendant’s bed.²³⁶ The court strictly construed the mental incapacitation prong of the rape statute, holding that the words “due to an act committed upon the victim,” in reference to the victim’s intoxicated state, connote an action done by someone other than the victim and do not include a voluntary act by the victim herself.²³⁷ Refusing to adopt the state’s reading to also include the victim’s own acts, the court “conclude[d] that the protection of the statute does not serve to negate the consent of a person who voluntarily and as a result of her own actions becomes intoxicated to a level short of unconsciousness.”²³⁸ This result is not only deeply disconcerting but also infused with moralistic judgment.

This article has so far identified one key source for the difficulties surrounding the prosecutions of sexual assault of voluntarily intoxicated victims. It demonstrated that the application of the ITCS results in ample problems that mainly leave intoxicated victims of sexual assault underprotected by existing sexual assault laws, but its ambiguous and uncertain nature also creates a potential risk of overbroad enforcement for some defendants. The following parts move to consider proposals that are aimed at ameliorating the drawbacks in existing laws, beginning in Part IV with the American Law

²³³ See Falk, *supra* note 20, at 187–88.

²³⁴ See *id.*

²³⁵ 664 S.E.2d 339 (N.C. Ct. App. 2008).

²³⁶ *Id.* at 341.

²³⁷ *Id.* at 341, 345–47.

²³⁸ *Id.* at 346–47.

Institute's project and its shortcomings and moving in Part V to propose an alternative framework.

IV. THE AMERICAN LAW INSTITUTE'S PROJECT AND ITS DRAWBACKS

A consensus exists that the Model Penal Code's (MPC or the Code) dated sexual assault provisions fail to capture the contemporary understanding that the essence of the crime of rape is sex without consent and that these provisions should be amended to reflect current sexual norms and evolving societal perceptions about sexual practices.²³⁹ The American Law Institute's (ALI) ongoing project titled Sexual Assault and Related Offenses, commenced in 2012, aims to offer a comprehensive overhaul of the Code's outmoded rape provisions including, among others, the provision against sexual assault of an intoxicated person.²⁴⁰ The definitions of the proposed offenses are deeply contested among ALI members, however, and there is tremendous controversy concerning the proper legal norms that govern intimate sexual relations.²⁴¹ This profound disagreement is reflected in the fact that over the past years, ALI members have considered multiple drafts, authored by the project's reporters, and to date, have failed to reach an agreed upon position.²⁴² Importantly, while ALI members have not yet

²³⁹ See generally Tuerkheimer, *supra* note 101, at 1475–78 (discussing the way sexual consent has become the touchstone of the antirape movement). For existing MPC provisions, see MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.4 (AM. LAW INST., Official Draft & Revised Comments, 1980) (prohibiting the following: “A person who has sexual contact with another not his spouse, or causes such other to have sexual contact with him, is guilty of sexual assault, a misdemeanor, if: . . . he has substantially impaired the other person’s power to appraise or control his or her conduct, by administering or employing without the other’s knowledge drugs, intoxicants or other means for the purpose of preventing resistance,” *id.* § 213.4(5)).

²⁴⁰ For publicly available drafts authored by the American Law Institute, see MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW INST., Tentative Draft No. 1, 2014); MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW INST., Discussion Draft No. 2, 2015); MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW INST., Preliminary Draft No. 5, 2015); MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW INST., Tentative Draft No. 2, 2016); MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW INST., Tentative Draft No. 3, 2017). Publicly available drafts are available at <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/>. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW INST., Preliminary Draft No. 5, 2015) is available on HeinOnline at <http://heinonline.org/HOL/LandingPage?handle=hein.ali/mpc2276&div=1&src=home>.

²⁴¹ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES reporters’ memorandum, at 15 (AM. LAW INST., Tentative Draft No. 2, 2016) (noting that the treatment of consent and associated offenses in earlier drafts “provoked great controversy” at ALI meetings).

²⁴² Professors Stephen Schulhofer and Erin Murphy are the project’s reporters. See *supra* note 240 for the publicly available drafts.

voted on any draft in its entirety, they have voted and approved a proposed definition of consent, which will be addressed below.

Before turning to examine the ALI's proposed revisions, a few critical clarifications are warranted. First, the ALI's project is still underway and maintains its ongoing status as this article goes to press. Second, while only five drafts are *publicly* available to date, other drafts have been circulated among ALI members, yet these are not available to the public and, therefore, cannot be addressed here.²⁴³ Third, the project's multiple drafts proposed different standards for evaluating the victim's level of incapacitation for the purpose of the prohibition against sexual assault of intoxicated victims, making any discussion of these provisions tentative and incomplete. The most recent draft, however, dated April, 2017, does not address the specific provision prohibiting Rape or Sexual Assault of a Vulnerable Person.²⁴⁴ Given these limitations, the following discussion focuses mainly on Preliminary Draft 5 and Tentative Draft 3, except when referring to features common to all drafts (MPC drafts).²⁴⁵

A. *Key Features of the MPC Drafts*

A main point of controversy among ALI members was what should the standard to determine consent to sex be: an explicit manifestation of refusal, either physically or verbally (expression of the word "no"), or instead, an affirmative consent to engage in a sexual act. The disagreement was further compounded given the fact that affirmative consent formulations significantly vary, ranging from requiring a person seeking intercourse to stop and explicitly ask permission to a specific sexual act, to demanding clear agreement specific to, and contemporaneous with, a particular sexual act, with some

²⁴³ See *supra* note 240.

²⁴⁴ Model Penal Code: Sexual Assault and Related Offenses (AM. LAW INST., Tentative Draft No. 3, 2017) (stating that Section 213.2 is "Reserved").

²⁴⁵ The most recent ALI Annual Meeting took place on May 22–24, 2017, resulting in the publication of Tentative Draft 3, which is now publicly available, see *supra* note 240 and accompanying text. The ALI's provisions discussed in this article are all tentative as the project will continue after this article goes to press. Since the most recent draft does not address the Rape and Sexual Assault of a Vulnerable Person provision, this article discusses previous proposals, mostly Preliminary Draft 5, that do address the specific provision regarding intoxicated victims.

formulations going as far as demanding that permission must be specific to every stage of the sexual proceeding.²⁴⁶

The MPC's earlier drafts purported to propose some formulation of an affirmative consent standard as the governing standard for the proposed sexual offenses.²⁴⁷ ALI members have mostly rejected this standard, however, expressing concern that it fails to reflect common sexual practices, therefore increasing the risk that innocent actors would be convicted.²⁴⁸ In May 2016, ALI members approved an amended definition of consent, providing in pertinent part the following:

Section 213.0. Definitions

(3) "Consent"

(a) "Consent" . . . means a person's willingness to engage in a specific act of sexual penetration or sexual contact.

(b) Consent may be expressed or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.

(c) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining there was consent.

(d) Notwithstanding subsection (3)(b) of this Section, consent is ineffective when it occurs in circumstances described in Sections [reserved].

(e) Consent may be revoked or withdrawn any time before or during the act of sexual penetration or sexual contact. A clear verbal refusal—such as "No," "Stop," or "Don't"—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of

²⁴⁶ See Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 431–40 (2016) (elaborating on the various formulations advocated by criminal statutes, scholars, and universities).

²⁴⁷ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.2, at 60–61 (AM. LAW INST., Tentative Draft No. 1, 2014) (The proposed provision against Sexual Intercourse Without Consent imposes criminal liability "whenever an actor has sexual intercourse with a person who has not given affirmative consent." Such provision is premised on the assumption that the law should not treat ambiguous behavior, including silence and passivity as equivalent to consent, whether or not the complainant is intoxicated or not.)

²⁴⁸ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW INST., Tentative Draft No. 2, 2016) (proposing a new standard titled "contextual consent," under which consent is assessed under the totality of the circumstances); see *also id.* reporters memorandum, at 16 (noting that the recommendation to adopt the affirmative consent standard generated controversy among ALI members who worried that the innocent would be convicted).

consent or revocation or withdrawal of consent may be overridden by subsequent consent.²⁴⁹

The above definition adopts what the ALI Reporters call “contextual consent.”²⁵⁰ The contextual consent standard, sometimes referred to as “expressive consent,” requires behavioral or verbal manifestation of willingness to engage in sexual intercourse.²⁵¹ Under this standard, when a person verbally refuses a sexual act, nonconsent is presumed regardless of the overall context. However, this standard acknowledges that many types of external manifestations can, in certain contexts, amount to evidence of giving consent.²⁵² Importantly, “silence and passivity [may] sometimes communicate consent.”²⁵³ The latter feature makes the contextual consent standard markedly different from all formulations of affirmative consent; while the affirmative consent standard insists on explicit expressions of positive permission to engage in a sexual act, the contextual consent standard concedes that even a complainant’s lack of any indication of a positive response to the actor’s sexual advances may, in certain contexts, manifest such permission.

Regarding the substantive sexual assault prohibitions, the MPC drafts generally adopt a grading structure that distinguishes between Forcible Rape, a felony in the first or second degree, depending on the presence of aggravating circumstances, the offense of Sexual Penetration of a Vulnerable Person, a felony in the third degree, and the offense of Sexual Penetration or Oral Sex Without Consent, a felony in the fourth degree if the act occurs in disregard of the other person’s expressed unwillingness, or is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs, and a felony of the fifth degree if these circumstances are not present.²⁵⁴

²⁴⁹ See *Updated “Consent” Definition*, AM. LAW INST. (Dec. 21, 2016), <https://www.ali.org/news/articles/updated-consent-definition/> [<https://perma.cc/825F-MD64>] (providing the definition of consent as approved by ALI members).

²⁵⁰ See Stephen J. Schulhofer, *Consent: What It Means and Why It’s Time to Require It*, 47 U. PAC. L. REV. 665, 669 (2016) (noting that under the expressive consent standard, consent may be explicit or it may be inferred from the totality of circumstances). In this article, I use the phrases “consent definition” and “contextual consent standard” interchangeably.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ See Gruber, *supra* note 246, at 437–38 (distinguishing contextual consent formulations from affirmative consent ones and stressing that under the ALI proposal, silence and passivity can sometimes communicate consent).

²⁵⁴ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.1 and § 213.4 app. A, at 49–50 (AM. LAW INST., Tentative Draft No. 3, 2017).

The offense of Sexual Penetration or Oral Sex Without Consent, Section 213.4 provides:

An actor is guilty of Sexual Penetration or Oral Sex Without Consent if he or she knowingly or recklessly engages in an act of sexual penetration or oral sex without the consent of the other person.²⁵⁵

The offense of Sexual Penetration of a Vulnerable Person, Section 213.3 (2) (c) provides:

An actor is guilty of Sexual Penetration of a Vulnerable Person if he or she engages in an act of sexual penetration, and knows or recklessly disregards that the other person, at the time of such act:

(c) is passing in and out of consciousness or is in a state of mental torpor as a result of intoxication, whether voluntary or involuntary and regardless of the identity of the person who administered the intoxicants.²⁵⁶

The discussion below mainly focuses on the separate prohibition of sexual assault of a vulnerable person. Addressing the proposed general prohibition against Sexual Penetration or Oral Sex Without Consent in its entirety raises various issues, some of them exceeding the scope of this article. Therefore, it addresses this provision only to the extent pertinent to prosecuting sexual assault of intoxicated victims in situations that are not covered by the separate provision against sexual penetration of a vulnerable person. Specifically, it focuses on the drawbacks of applying the contextual consent standard in cases involving nonconsensual penetration of an intoxicated victim.

B. Strengths of the MPC Drafts

In general, the ALI project is a laudable endeavor to offer comprehensive treatment to the numerous complexities underlying sexual offenses. In particular, the MPC drafts' specific provision prohibiting sexual assault of intoxicated persons carries some important advantages compared to existing statutes. Its main strength lies in acknowledging that sexual assault of intoxicated victims warrants a separate criminal provision; the Sexual Penetration of a Vulnerable Person provision equally applies where the victim rendered himself or herself impaired after voluntarily consuming an excessive amount of intoxicants.²⁵⁷ This position clearly departs from the Code's

²⁵⁵ *Id.* § 213.4, at 50.

²⁵⁶ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3 (2), at 74 (AM. LAW INST., Preliminary Draft No. 5, 2015).

²⁵⁷ *Id.*

existing prohibition, which criminalizes only the sexual assault of involuntarily intoxicated victims, leaving voluntarily intoxicated victims outside the scope of protection.²⁵⁸ For example, the *Blevins* case, discussed in Part II *infra*, demonstrates the shortcomings of a statutory scheme that is modeled after the existing MPC prohibition.²⁵⁹

Recognizing that voluntarily intoxicated victims deserve the law's protection sends an important message that individuals do not waive their right to bodily autonomy merely because they chose to render themselves impaired. By adopting a position that unequivocally proclaims that the decision to become intoxicated should not be equated with consent to sex, the MPC's drafts contribute to dispelling a prevalent societal misconception that by becoming voluntarily intoxicated, individuals place themselves in a perpetual state of willingness to engage in sex, thus waiving their rights to the law's protection against sexual violation.²⁶⁰

Furthermore, the MPC drafts' grading framework aptly recognizes that sexual assault of an impaired complainant due to intoxication is a more serious form of sex offense than nonconsensual sex alone because the defendant's taking advantage of an intoxicated victim's vulnerability is an aggravating factor. The MPC drafts embrace the position that this more egregious behavior should be punished more severely and graded at a higher level compared to the general offense of sexual penetration without consent.

In addition, the MPC drafts aim at punishing only culpable defendants, predicating liability on the defendant's recklessness as the necessary *mens rea*. Specifically, to convict the defendant, the prosecution would have to prove that he or she was aware of a substantial and unjustifiable risk that the complainant did not consent to sexual intercourse and consciously disregarded that risk.²⁶¹ Requiring recklessness as the *mens rea* necessary for conviction therefore addresses concerns about unfairness to defendants by requiring proof that the defendant was consciously aware of the complainant's incapacity to express consent.

²⁵⁸ See *supra* note 239 (providing the MPC's current prohibition under Section 213.4(5)).

²⁵⁹ See *supra* Section II.B.1.

²⁶⁰ See *supra* Section I.C (discussing prevalent misconceptions about sex and alcohol).

²⁶¹ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.4, *comment*, *illus.* 8–9, at 36–37, § 213.3, at 24 (AM. LAW INST., Tentative Draft No. 3, 2017) (stating that the required *mens rea* under the proposed sexual assault provisions is recklessness).

C. *Drawbacks of the MPC Drafts*

To reiterate an earlier point, the ALI reporters' extensive work carefully crafting nuanced provisions is praiseworthy. Without diminishing the MPC drafts' contribution to protecting voluntarily intoxicated victims, they suffer from several shortcomings.

To begin with, the Sexual Penetration of a Vulnerable Person provision, requiring either passing in and out of consciousness or a state of mental torpor, adopts a restrictive standard for evaluating a victim's impairing intoxication. While the consciousness language provides some clarity because it rests on a bright-line rule, its main shortcoming lies in its narrow purview. By limiting the scope of the complainant's impairing intoxication to cover only cases rising to the level of complete incapacitation, the prohibition sets a notably high bar for evaluating a victim's impaired ability to communicate nonconsent.²⁶² It rejects all other observable signs of significantly impairing intoxication that fall short of complete incapacitation as sufficient for the offense of sexual penetration of a vulnerable person. There may be situations where the complainant is conscious and is not in a state of torpor but is nonetheless sufficiently impaired that he or she is unable to communicate nonconsent, for example, when the complainant is vomiting, moaning, and curling into a ball but not passing out.²⁶³ Making complete incapacity a precondition for applying the Sexual Assault of a Vulnerable Person prohibition is inadequate because it is bound to raise some of the same problems that characterize existing incapacity-to-consent standards, particularly those concerning underinclusiveness.²⁶⁴

In fact, the proposed framework may prove even narrower than existing definitions of incapacitation used in many jurisdictions today, under which incapacity due to intoxication also extends to reach impaired conditions that do not amount to absolute unconsciousness.²⁶⁵ In a series of decisions, courts have

²⁶² See Aya Gruber, *Not Affirmative Consent*, 47 U. PAC. L. REV. 683, 698 (2016) (noting that Professor Schulhofer, the ALI reporter, implies that the proposed standard might be underinclusive, envisioning "situations 'where the complainant is conscious and not in a state of torpor, but is nonetheless intoxicated enough that s/he does not or cannot meaningfully' agree to sex, for example, when the complainant is vomiting, moaning and curling into a ball, but not passing out").

²⁶³ *Id.* (addressing Professor Schulhofer's concern that there are additional situations in which a complainant is unable to communicate nonconsent beyond unconsciousness).

²⁶⁴ See *supra* Part III.

²⁶⁵ The ALI reporters explain in the Commentary that the proposal offers "bright-line" rules. See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES

clarified that the term “incapacitation” covers not only complete unconsciousness but also situations where a victim’s mental condition was so impaired that it prevented him or her from verbally communicating refusal to sexual intercourse.²⁶⁶

In addition, the use of the mental torpor language raises special concerns.²⁶⁷ The ALI reporters explain the standard in the commentary by reference to dictionary definitions, such as: “[a]bsence or suspension of motive power, activity or feeling,” “a state of mental and motor inactivity with partial or total insensibility,”²⁶⁸ and “a state of lowered physiological activity.”²⁶⁹ The reporters add that the term “mental torpor” also corresponds to the level of intoxication that some refer to as “stupor,” in which a person loses significant response time, has trouble moving, vomits, and may lapse in and out of consciousness.²⁷⁰ The reporters explain that these conditions are meant to capture an extreme point of intoxication at which consent becomes highly unlikely, and at which any passivity or nonresponsiveness on the part of the other person should presumptively be deemed due to intoxicants, rather than a signal of consent. Put differently, the inquiry focuses on whether the degree of intoxication was so extreme as to effectively preclude the expression of unwillingness.²⁷¹

The problem with the “mental torpor” test is that it rests on an extremely vague notion whose precise meaning is unclear to the layperson. On one hand, this type of uncertainty raises a risk that potential defendants would have difficulties determining whether the complainant’s intoxication met that

§ 213.3, cmt. 4, at 83–85 (AM. LAW INST., Preliminary Draft No. 5, 2015) (discussing mental torpor and loss of consciousness rules).

²⁶⁶ See, e.g., *Commonwealth v. Blache*, 880 N.E.2d 736, 742–43 (Mass. 2008) (rejecting the defendant’s argument that the complainant should be considered incapable of consenting only when she was rendered unconscious or nearly so and holding that a jury instruction concerning capacity to consent should be given in cases where, because of the consumption of alcohol, the complainant was so impaired as to be incapable of consenting to intercourse); *People v. Giardino*, 98 Cal. Rptr. 2d 315, 321–22 (Cal. Ct. App. 2000) (rejecting the view that incapacitation requires “absolute unconsciousness”).

²⁶⁷ See Gruber, *supra* note 262, at 698 (positing that MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3, cmt. 4, at 85 (AM. LAW INST., Preliminary Draft No. 5, 2015) defines a state of “torpor,” as “laps[ing] in and out of consciousness”).

²⁶⁸ *Torpor*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/203613?redirectedFrom=torpor#eid> [<https://perma.cc/J9E5-HBKB>].

²⁶⁹ *Torpor*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/torpor?utm_campaign=sd&utm_medium=serp&utm_source=jsonld [<https://perma.cc/LDB7-V64C>].

²⁷⁰ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3, cmt. 4, at 85 (AM. LAW INST., Preliminary Draft No. 5, 2015).

²⁷¹ See Kevin Cole, *Sex and the Single Malt Girl: How Voluntary Intoxication Affects Consent*, 78 MONT. L. REV. 155, 179–81 (2017) (citing MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW INST., Preliminary Draft No. 5, 2015)).

level. On the other hand, the proposed language also fails to protect victims whose level of intoxication was sufficiently severe to significantly impair their ability to communicate nonconsent, yet did not amount to the total loss of consciousness or lapsing in and out of consciousness. The proposed “mental torpor” test is therefore likely to result in similar drawbacks that characterize the ITCS; it is similarly underinclusive—providing too narrow a standard to evaluate the victim’s level of impairment.²⁷²

Another drawback of the MPC drafts concerns the relationship between the separate prohibition on Sexual Penetration of a Vulnerable Person and the general prohibition against Sexual Penetration or Oral Sex Without Consent. The drafts provide a differentiated treatment to impaired victims due to intoxication, depending on the victim’s level of intoxication. The Sexual Penetration of a Vulnerable Person prohibition, meant to specifically address the sexual assault of intoxicated victims, only covers the most extreme forms of intoxication, in which the victim was either passing in and out of consciousness or was in a state of mental torpor as a result of intoxication.²⁷³ In contrast, Sexual Penetration or Oral Sex Without Consent is a general prohibition that does not target sexual assault of intoxicated victims but may nonetheless be used to prosecute cases where the victim’s impairment was insufficient to amount to total incapacitation.²⁷⁴

This differentiated treatment of sexual assault of impaired victims due to intoxication is unwarranted because it might leave severely impaired victims underprotected in situations where their condition is not deemed sufficiently incapacitating. The problem is exemplified in a scenario used in the commentary accompanying the proposed Sexual Penetration or Oral Sex Without Consent prohibition. Notably, the commentary explicitly concedes that the separate prohibition against Sexual Penetration of a Vulnerable Person only applies when the complainant was legally incapacitated.²⁷⁵ Attempting to address cases that fall outside the scope of the separate prohibition because the complainant’s intoxication did not satisfy the loss of consciousness and mental torpor standard, the

²⁷² See *supra* Section III.B.2.b (discussing the drawbacks in the ITCS).

²⁷³ *Id.*

²⁷⁴ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.4, *illus.* 9, at 36–37 (AM. LAW INST., Tentative Draft No. 3, 2017) (providing commentary to the sexual penetration or oral sex without consent provision and giving an example involving an intoxicated complainant).

²⁷⁵ *Id.* at 37 (noting that in cases like illustration 9, in which the complainant’s intoxication is insufficient to trigger liability under Section 213.2, actors may be prosecuted under the Sexual Penetration or Oral Sex Without Consent provision).

Commentary stresses that cases where the complainant's level of intoxication fell short of complete incapacitation may still be prosecuted under the general offense of Sexual Penetration or Oral Sex Without Consent.²⁷⁶ In one specific illustration discussed in the commentary to MPC Tentative Draft 3, the accused and the complainant meet each other for the first time at a party. Over several hours they flirt while drinking heavily. Late at night, the complainant steps away from the accused and nearly falls to the floor from inebriation. Accused helps complainant lie in a back room. Complainant babbles incoherently, and throws up but does not lose consciousness. Accused removes complainant's boxer shorts and engages in an act of penetration. The Commentary explains that even though there is no evidence that the complainant physically or verbally resisted or that he or she was so incapacitated as to trigger liability under the Sexual Penetration of a Vulnerable Person Provision, that testimony is legally sufficient to support finding that Complainant did not consent, if the trier of fact credits complainant's testimony that he or she was not willing at the time.²⁷⁷

The proposed solution is unsatisfactory for several reasons. First, the normative basis for the differentiated treatment of cases involving complainant's total incapacitation and those involving significant impairment in physical and mental capabilities remains obscure. Despite acknowledging in the above illustration, that the complainant's impairment due to intoxication was substantial, MPC Tentative Draft 3 posits that this case would not be covered by the specific prohibition against sexual assault of intoxicated victims because the impairment had not reached the requisite level of legal incapacitation, namely, unconsciousness or mental torpor.²⁷⁸ A statutory framework that distinguishes between intoxicated victims of sexual assault based on whether they were completely incapacitated or significantly impaired to the extent that they were unable to communicate opposition is arbitrary and unjustified. It might leave underprotected significantly impaired victims whose intoxication fell short of what the proposal deems sufficiently incapacitating intoxication.²⁷⁹ It is not apparent why a defendant who takes advantage of a victim whose level of intoxication fell short of unconsciousness yet was

²⁷⁶ See *id.* at 11–12 (discussing the sexual assault of an intoxicated complainant whose level of intoxication did not reach incapacitation).

²⁷⁷ See *id.*

²⁷⁸ *Id.* (noting that this case might still be prosecuted under the general provision prohibiting sexual penetration or oral sex without consent).

²⁷⁹ See Gruber, *supra* note 262.

sufficiently severe to impair his or her ability to communicate nonconsent is less culpable than one who takes advantage of an unconscious victim to impose nonconsensual sex.

Second, falling back on the alternative route to prosecution rather than directly using the specialized intoxication provision is prone to be especially problematic in cases involving heavily intoxicated victims because it rests on the contextual consent standard. A key problem in relying on this standard to prohibit the sexual assault of severely impaired victims is that its application may leave some significantly impaired victims beyond the scope of the law's protection. This standard is especially problematic in cases involving intoxicated victims given two features embodied in the amended definition of consent: the idea that consent may be inferred not only from action but also from inactivity, and that lack of physical or verbal resistance may be considered in context of all the circumstances in determining whether the person has consented.²⁸⁰

The above features capture the key difference between the affirmative consent and the contextual consent standards: the former explicitly rejects passivity, inaction, and silence as expression of consent, whereas the latter leaves room for considering silence and passivity, in certain circumstances, in evaluating whether a complainant's conduct communicates consent.²⁸¹ The MPC's contextual consent standard under which consent to sex may, in some circumstances, be inferred from a person's passivity, silence, and inactiveness is untenable. First, it runs counter to one of the most fundamental arguments rape law reformers make, that passivity and unresponsiveness to a sexual act should never be construed as an expression of consent.²⁸² This definition of consent rejects the affirmative consent standard as the test for determining whether consent had been given.²⁸³ Second, inferring consent from a person's inactivity is especially indefensible when it concerns intoxicated individuals since a

²⁸⁰ See Schulhofer, *supra* note 250, at 669; see also *supra* note 248 (providing the newly adopted Section § 213.0(3) (Consent), under which consent may also be inferred from passivity and inaction under certain circumstances).

²⁸¹ See Schulhofer, *supra* note 250, at 669 (stressing that "while silence and passivity cannot by themselves be treated as consent, they are forms of *conduct*, and all of a person's conduct should be taken into account").

²⁸² See generally Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 484–85 (2005) (noting that it is "crucial that silence be eliminated as an indicator of consent").

²⁸³ See Gruber, *supra* note 262, at 699–700 (positing that the MPC draft does not "fill a passivity-silence gap when it allows omissions, in context, to count as consent" and that the "expressive consent standard does not resolve difficulties in interpreting passivity and silence").

much greater possibility exists that the lack of opposition stems from the victim's impairment rather than from actual willingness. These victims are unresponsive precisely due to their severe intoxication, which significantly impairs their ability to communicate nonconsent.²⁸⁴ By retaining the prospect that the utter passivity of a significantly intoxicated person may still be viewed as an expression of consent, the proposal perpetuates current laws' problematic commitment to the idea that mere acquiescence equals consent.

To be clear, certainly the intent of the ALI reporters is to expand the scope of criminal liability by covering situations where the victim was not completely unconscious yet sufficiently impaired to render him or her unable to give consent.²⁸⁵ The contextual consent standard calls for a fact-bound inquiry, which depends on the totality of the circumstances, allowing the jury to conclude that when a complainant was significantly impaired due to intoxication, his or her passivity may not qualify as an expression of consent. Yet, allowing the jury to infer consent from passivity casts doubts on whether the ALI's intent could, in fact, be fully attained. A standard permitting an inference of consent even from utter passivity should be viewed with skepticism because it creates the risk that a jury might wrongly conclude that a significantly impaired victim who did not overtly communicate nonconsent was nonetheless consenting.

Finally, grounding criminalization of sexual assault of significantly impaired yet still conscious victims on the general Sexual Penetration or Oral Sex Without Consent provision fails to capture the severity of the defendant's behavior and culpability. Engaging in nonconsensual sexual intercourse with a complainant whose ability to communicate nonconsent was significantly impaired due to intoxication should be an aggravating circumstance that elevates the severity of engaging in sexual intercourse without consent with a sober complainant. The general prohibition of Sexual Penetration or Oral Sex Without Consent does not specifically address the distinct features and unique harm characterizing consciously engaging in nonconsensual intercourse with significantly impaired victims.

²⁸⁴ See generally Tuerkheimer, *supra* note 96, at 457 (noting that “[w]here intoxication does not render a complainant unconscious, but nevertheless results in significant impairment,” unresponsiveness may not count as consent under the affirmative consent standard).

²⁸⁵ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3, cmt. 4, at 83 (AM. LAW INST., Preliminary Draft No. 5, 2015) (noting that “some safeguard is imperative for victims who are too sober to lose consciousness but too intoxicated to communicate” nonconsent).

In sum, the MPC drafts' separate prohibition designed to target sexual assault of intoxicated victims covers only the most severe situations involving mainly complete incapacitation, either total loss of consciousness, or coming close to this condition, potentially leaving victims whose impairment fell short of that high threshold underprotected. In turn, the general prohibition on Sexual Penetration or Oral Sex Without Consent is unable to adequately supplement it because it does not capture the distinct features characterizing significantly impaired victims. The MPC drafts therefore offer only a partial solution to the problems this article has identified in previous parts. The following part proposes a statute that would prohibit sexual assault not only in cases where complainants' level of intoxication rendered them completely incapacitated but also when intoxication significantly impaired their ability to communicate nonconsent.

V. A PROPOSAL FOR REFORM

The previous parts addressed the problems characterizing both existing statutes against sexual assault of voluntarily intoxicated victims and the MPC drafts for reforming these statutes. The main challenge for any legal reform in this area is to draft sufficiently broad prohibitions to protect voluntarily intoxicated victims from nonconsensual sex on the one hand, but to preclude criminal liability in cases falling short of defendants' culpable conduct on the other. The following sections first delve into the reasons for imposing criminal liability in cases involving voluntary intoxication. Next, the article offers an alternative framework that would replace existing standards with a test that provides that consent cannot be expressed when a victim's communication abilities are significantly impaired.

A. *Justifications for Criminalizing Voluntarily Intoxicated Sex*

Any proposal to expand the scope of criminal prohibitions on sexual assault of voluntarily intoxicated victims must first consider whether such amendment is justified from a normative standpoint. For some people, proposals like this are met with deep skepticism, mostly stemming from the misconceptions discussed earlier, particularly the assumption that individuals

who became voluntarily intoxicated assume the risks that result from their free choice to become intoxicated.²⁸⁶

A societal debate about the justifications for placing criminal blame, especially when both the perpetrator and the victim were voluntarily intoxicated, began in the early 1990s, in response to media reports suggesting that there was an “epidemic,” mainly in colleges, of what was dubbed the “date rape crisis.”²⁸⁷ Journalist Robin Warshaw, for example, argued that while intoxicated women are responsible for the consequences of their actions if they cause harm to others, they are not responsible for being raped or “deserve” to be raped just because they became voluntarily intoxicated.²⁸⁸

The controversy was fueled by Katie Roiphe’s book, suggesting that in many sexual assault cases alleged victims are at least partially responsible for voluntarily becoming drunk.²⁸⁹ Roiphe contended that agency principles demand that women be responsible for their own intake of intoxicants, and if they had sex while their judgment was impaired, it is neither always the man’s fault nor is it necessarily rape.²⁹⁰ This provocative position elicited mostly condemnation from critics who worried that making sexual assault victims partially responsible for crimes perpetrated against them jeopardized feminists’ efforts to eliminate gender-based violence.²⁹¹

A recent increase in sexual misconduct allegations has reignited the debate over the proper legal response to sexual acts committed against voluntarily intoxicated individuals.²⁹²

²⁸⁶ See *supra* Section I.C.

²⁸⁷ See Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 YALE L.J. 1533, 1534 (1994) (reviewing KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* (1993)).

²⁸⁸ See ROBIN WARSHAW, *I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE*, at xxiv, 22, 44 (2d ed. 1994).

²⁸⁹ See ROIPHE, *supra* note 287, at 53–54.

²⁹⁰ *Id.* (noting that women should be responsible for their decisions when they choose to consume alcohol and they can have sex when they are intoxicated without that act constituting rape).

²⁹¹ See, e.g., Christopher Lehmann-Haupt, *Books of the Times: Divergent Views of Rape as Violence and Sex*, N.Y. TIMES (Sept. 16, 1993), <http://www.nytimes.com/1993/09/16/books/books-of-the-times-divergent-views-of-rape-as-violence-and-sex.html> [<https://perma.cc/7L7E-LCNQ>]; Katha Pollitt, *Not Just Bad Sex*, NEW YORKER, Oct. 4, 1993, at 220–24.

²⁹² See Yoffe, *supra* note 41 (suggesting that girls should be warned that heavy drinking increases their vulnerability to sexual violence); see also Amanda Hess, *To Prevent Rape on College Campuses, Focus on the Rapists, Not the Victims*, SLATE (Oct. 16, 2013), http://www.slate.com/blogs/xx_factor/2013/10/16/it_s_the_rapists_not_the_drinking_to_prevent_sexual_assault_on_college_campuses.html [<https://perma.cc/2LVN-V3VY>] (rejecting Yoffe’s position that focuses on educating women not to drink by positing that it is a counter-productive approach and arguing that most campus rapes can be prevented by endeavoring to find and punish perpetrators rather than warning potential victims to skip out on drinking).

For example, *Wall Street Journal* editor James Taranto argued in a 2014 editorial that intoxicated females are at least partially responsible for intoxicated sexual encounters, contending that when both parties are voluntarily intoxicated, females should be equally responsible for raping intoxicated males.²⁹³

Why, then, should the law impose criminal sanctions in cases where people willingly chose to become intoxicated, consciously diminishing their abilities to protect themselves against harm? This question becomes especially poignant when both parties are intoxicated, raising the contentious issue of whether the law should allocate between them the responsibility for ensuing harm.

From a normative perspective, imposing criminal liability for sexually assaulting voluntarily intoxicated victims is both legally and morally justified. A number of policy reasons support the argument that the law should not make liability dependent on whether the victim's intoxication was voluntary or not. Succinctly put, people do not deserve less legal protection just because they willingly became temporarily impaired.

First, the harm principle provides a paramount justification for criminalizing nonconsensual sex with voluntarily intoxicated victims, including cases where both parties were intoxicated.²⁹⁴ Causing harm to others has long served as the primary justification for criminalization, and this principle retains its force when it comes to sexual assault of voluntarily intoxicated victims.²⁹⁵ When both parties are intoxicated, a critical difference sets them apart: the perpetrator imposes nonconsensual sex on the victim; the victim suffers significant injury as a direct result of the perpetrator's culpable actions. While sexual assault causes serious mental and psychological harm to victims, discussion of its full extent exceeds the scope of this article.²⁹⁶ Suffice it to say, that while every adult has an autonomous right to become intoxicated, this freedom is limited, ending at the moment he or she injures another. While people

²⁹³ See James Taranto, *Drunkenness and Double Standards*, WALL ST. J. (Feb. 10, 2014), <http://www.wsj.com/articles/SB10001424052702304558804579374844067975558> (“[W]hen two drunken college students ‘collide,’ the male one is almost always presumed to be at fault. His diminished capacity owing to alcohol is not a mitigating factor, but *her* diminished capacity is an aggravating factor for *him*.”).

²⁹⁴ See generally JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., 2003) (1859) (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”).

²⁹⁵ See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 131 (1999) (discussing the role of the harm principle as justifying criminal sanctions).

²⁹⁶ See generally ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 102–18 (2003) (providing an elaborate discussion of the ample harms of nonconsensual sex).

may engage in behaviors that harm themselves, no one has a right to cause harm to others. From a normative standpoint, prohibiting intoxicated perpetrators from harming others is more justified than holding intoxicated victims responsible for what perpetrators did to them.²⁹⁷

Second, criminalizing the sexual assault of voluntarily intoxicated victims is justified because the sex at issue is nonconsensual. The key inquiry underlying sexual assault cases where intoxication is not a factor is whether sex was consensual or not. This inquiry should not change in cases involving sexual assault of intoxicated victims, whether intoxication was voluntary or not. The distinct feature characterizing the latter cases is that the reason for the failure to express nonconsent rests with significant impairment in communication abilities due to intoxication. This feature does not depend on how the intoxication came about. The voluntariness of the intoxication is simply irrelevant for the purpose of considering whether sexual intercourse was nonconsensual.

Third, an individual's choice to become intoxicated should not be equated with giving unlimited and perpetual consent to all sexual acts perpetrated against this person. Such conflation preserves the myth that an individual's voluntary consumption of intoxicants implies a *cart blanche* agreement to any harm inflicted on him or her while intoxicated, including violation of the right to sexual autonomy. An individual's choice to expose oneself to the potential harm that might ensue from becoming intoxicated does not indicate consent to additional harm resulting from nonconsensual sex.

Fourth, considering analogous situations in which victims' preceding behavior somehow contributed to facilitating offenses committed against them further supports the conclusion that intoxicated victims should not lose the law's protection for failure to better protect their interests.²⁹⁸ Professor Alan Wertheimer noted that in other areas of law outside the context of sex offenses, such as theft crimes, victims' partial responsibility for bringing harm upon themselves is never at issue and victims are never blamed even if their behavior appears to be somehow careless.²⁹⁹

²⁹⁷ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.2, at 58 (AM. LAW INST., Tentative Draft No. 1, 2014).

²⁹⁸ See generally JESSICA VALENTI, *THE PURITY MYTH: HOW AMERICA'S OBSESSION WITH VIRGINITY IS HURTING YOUNG WOMEN* (2010) (noting that while women should be treated as independent agents, being responsible has nothing to do with being raped and that women do not get raped because they were not careful but because someone raped them).

²⁹⁹ See WERTHEIMER, *supra* note 296, at 244–45.

Lastly, engaging in sexual penetration with people whose ability to communicate nonconsent was significantly impaired due to intoxication exemplifies the exploitation of others by taking advantage of their vulnerability. Focusing on perpetrators' exploitative behavior encapsulates the essence of their culpable conduct, therefore justifying the imposition of criminal sanctions. Stressing the nature of the perpetrators' behavior also explains why their culpability does not depend on whether victims became voluntarily or involuntarily intoxicated. Once a culpable behavior is identified, the question of how the victim's intoxication came about is irrelevant because it has no bearing on the perpetrator's blameworthiness.

B. Defining the Elements of the Crime

The sections below propose an alternative framework to protect intoxicated individuals against sexual violation while responding to the concerns stemming from existing standards. The proposed statute aims to strike a balance between safeguarding intoxicated people from nonconsensual sex while avoiding overbroad criminal liability for nonculpable conduct. The mechanism for accomplishing this dual goal rests on a trade-off that expands the definition of the actus reus of the crime on the one hand, but contracts the mens rea element by requiring proof of the defendant's conscious awareness of the victim's significant impairment in communication abilities on the other.

This article's proposed Sexual Assault of an Intoxicated Person provides:

An actor is guilty of sexual assault of an intoxicated person when he or she recklessly engages in sexual penetration or oral sex by direct contact of any body part or by any object, with a passive, silent, or otherwise unresponsive person who has not consented to the act and whose ability to communicate unwillingness was significantly impaired due to intoxication, whether voluntary or involuntary.

The offense is a felony in the third degree. The offense is aggravated to a felony in the second degree if the actor administered the intoxicants and did so without the person's knowledge.³⁰⁰

³⁰⁰ Cf. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3, at 3, 56 (AM. LAW INST., Discussion Draft No. 2, 2015) (Section 213.3 (2) proposes an offense of Sexual Penetration of a Vulnerable Person, proscribing the following: "An actor is guilty of Sexual Penetration of a Vulnerable Person, a felony of the third degree, if he or she knowingly or recklessly engages in an act of sexual penetration with a person who, at the time of the act . . . (c) has not expressly refused to consent to such act, but is unable to express by words or actions his or her refusal to engage in such act, because of intoxication, whether voluntary or involuntary, and regardless of the identity of the person who administered the intoxication."). While the ALI Reporters proposed the "inability to communicate unwillingness" standard in MPC Discussion Draft 2, they later

While the statute applies equally to both voluntary and involuntary intoxication, distinguishing between them is accomplished by adopting a different grading structure that punishes involuntary intoxication more harshly because surreptitiously administering intoxicants to another aggravates the severity of the offense.³⁰¹

1. Actus Reus

To establish the actus reus of the crime, the prosecution would have to prove that the sexual penetration or oral sex was nonconsensual and that the victim's ability to communicate nonconsent was significantly impaired due to intoxication. The proposal rests on two key features that capture the distinct condition of extremely intoxicated persons: acknowledgment that severely intoxicated persons' passivity and unresponsiveness cannot be treated as consent to sexual penetration or oral sex and the notion of significant impairment in communication abilities.

As noted earlier, under the verbal refusal standard, which is the predominant standard in the majority of jurisdictions for determining whether the sexual act was nonconsensual, passivity, silence, or any other form of unresponsive or ambiguous behavior falling short of expressly opposing sexual intercourse, are treated as consent.³⁰² Applying this standard in cases involving heavily intoxicated victims, albeit not completely incapacitated, is untenable because when such person is not responding to sexual advances, the reason for such passivity rests with his or her impaired condition. While the passivity of a sober person might be ambiguous, requiring further interpretation, there is no such ambiguity when an intoxicated person is concerned because the impaired condition precludes an expression of unwillingness. The proposed statute explicitly rejects the possibility that passivity, silence, and unresponsiveness of a significantly impaired person would be treated as consent. Instead, it makes clear that the inaction of such person is presumed to express nonconsent to

revised this standard due to concerns that it was too vague, opting instead for what they defined as bright-line rule: the loss of consciousness and mental torpor standard, which is adopted in MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3, at 85 (AM. LAW INST., Preliminary Draft No. 5, 2015) (explaining the advantage of adopting a bright-line rule).

³⁰¹ Addressing the sentencing aspects related to sexual assaults exceeds the scope of this article. Suffice it to say that states' sentencing schemes may also support this grading structure by listing the surreptitious administration of intoxicants as a sentencing enhancer.

³⁰² See *supra* Section II.A; see also MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3, cmt. 4, at 83 (AM. LAW INST., Preliminary Draft No. 5, 2015) (noting that under existing laws, passivity and unresponsiveness can be treated as consent).

sexual penetration or oral sex, even when his or her condition falls short of total loss of consciousness or nears such state.

In positing that an extremely intoxicated person's passivity will not be equated with consent, the proposed statute does not take a position with respect to what ought to be the general standard for evaluating the presence of consent in contexts not involving intoxicated victims. Specifically, it leaves open the question of whether an affirmative consent standard should be adopted when impairing intoxication is not at issue, including the applicable standard for the purpose of the general prohibition against sexual penetration or oral sex without consent. This article further concedes that many of the problems concerning the standard to evaluate whether sexual penetration or oral sex was nonconsensual theoretically could have been avoided had an affirmative consent standard been uniformly adopted. Under an affirmative consent standard, when complainants have not clearly expressed consent (verbally or physically), the sexual act is nonconsensual, "regardless of how much alcohol, if any, the [complainant] ha[d] consumed."³⁰³ Indeed, espousing a general affirmative consent standard applicable to all sexual assault prohibitions theoretically could have accomplished a similar result to the one that this article advocates.

Yet, the proposed statute opts for carving out a separate standard applicable only when significant impairment due to intoxication is involved, without calling for generally embracing an affirmative consent standard in all other contexts. A specialized prohibition targeting the distinct features characterizing the impaired condition of heavily intoxicated victims offers a better solution to the problems identified in this article, due to both practical and normative reasons. From a practical standpoint, adopting the affirmative consent standard is not currently feasible given the lack of consensus among legal scholars about its desirability.³⁰⁴ Voluminous scholarship thoroughly considers this standard, and fully examining it exceeds the scope of this article.³⁰⁵ For the purposes of the argument here, the possibility of all jurisdictions adopting this standard at this time does not appear to be a viable one.³⁰⁶ As

³⁰³ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.2, cmt. 5, at 61 (AM. LAW INST., Tentative Draft No. 1, 2014).

³⁰⁴ See Kevin Cole, *Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of "Affirmative Consent" in the ALI's Draft Sexual Assault Provisions*, 53 SAN DIEGO L. REV. 507, 510, 576 (2016) (observing that the MPC draft proposes an affirmative consent standard and rejecting it as an inappropriate standard).

³⁰⁵ For more thorough treatment of this standard, see Tuerkheimer, *supra* note 96.

³⁰⁶ See Judith Shulevitz, *Regulating Sex*, N.Y. TIMES (June 27, 2015), https://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html?_r=0

discussed earlier, the ALI has approved a contextual understanding of consent, which not only rejects an affirmative consent standard but also allows factfinders to infer consent from passivity in certain circumstances.³⁰⁷ While in theory this article does not reject affirmative consent as a proper standard able to accomplish equitable resolutions in cases involving sexual assault of intoxicated victims, the contentious dispute over the appropriateness of this standard shows that the proposed standard is currently a more attainable goal.

Additionally, from a normative standpoint, a separate prohibition on nonconsensual sex with intoxicated victims whose ability to express nonconsent was significantly impaired is warranted because perpetrators in such cases are especially morally blameworthy given the additional aggravating factor of taking advantage of the victim's special vulnerability. Designating such separate prohibition properly differentiates between offenders based on their specific level of culpability.

Another key feature embedded in the proposed statute is proof that at the time of the sexual penetration the victim was significantly impaired in the ability to communicate verbal or physical opposition due to severe intoxication. In opting for a "significant impairment in the ability to communicate" standard, the proposal rejects a formulation that requires complete inability to communicate unwillingness.³⁰⁸ The problem with the latter standard is that it invites factfinder's uncertainty and confusion about whether a victim completely lacked any communication abilities, rather than experienced substantial deterioration in the ability to communicate nonconsent. A standard that requires total loss of communication abilities is too limiting because it fails to acknowledge that there might be situations in which victims maintain some degree of communication ability, yet overall, their ability to effectively communicate refusal is significantly

[<https://perma.cc/WX4Q-7UPZ>] (noting that more than 4000 law professors, judges, and lawyers are thinking about the proper standard for consent to sex and are unable to reach an agreement).

³⁰⁷ See *supra* note 249 and accompanying text (providing consent definition as already approved by ALI members); see also Gruber, *supra* note 246, at 438 (noting that the ALI "standard acknowledges that silence and passivity can sometimes communicate consent").

³⁰⁸ It should be noted that the ALI reporters once proposed an "inability to express refusal" standard in their 2015 Discussion Draft 2, but later revised it, substituting it with the loss of consciousness and mental torpor formulation, which they believed provided a bright-line rule instead of vaguer standard. Compare MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3 (AM. LAW INST., Discussion Draft No. 2, 2015), with MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.1 (AM. LAW INST., Preliminary Draft No. 5, 2015).

diminished.³⁰⁹ By incorporating the concept of “significant impairment” in lieu of “complete inability,” the proposed statute recognizes that communication abilities may be significantly undermined without amounting to complete loss.

Additionally, the proposed statute opts for a fact-specific standard for guiding the jury’s assessment of the victim’s debilitating condition, rather than an inflexible, bright-line rule.³¹⁰ A “significant impairment in communication abilities” inquiry offers a functional standard, allowing the jury to evaluate the victim’s condition given the totality of the circumstances. These evaluations mainly include evidence about the victim’s visible signs of mental and physical impairment, such as vomiting and inability to walk straight. The adoption of a “significant impairment in communication abilities” standard is predicated on acknowledgment that crafting bright-line rules to define the victim’s precise level of intoxication may result in underprotecting intoxicated victims because significant impairment in communication abilities lies on a broad spectrum, extending over and above definitive formulations such as loss of consciousness.³¹¹

2. Mens Rea

One of the goals of the proposed statute is to ensure that criminal liability is imposed only on culpable defendants whose behavior demonstrates moral wrongdoing.³¹² Redefining the actus reus of the crime by requiring a significant impairment in the complainant’s ability to communicate nonconsent is merely the first step in the inquiry concerning whether the sexual intercourse or oral sex amounts to criminal conduct. It is the second step in that inquiry, namely, proving the defendant’s mens rea, that does most of the important work of identifying only culpable actors.

To accomplish this goal, the proposal requires proof of the defendant’s actual recklessness because the main feature distinguishing culpable from nonculpable actors is the conscious awareness of the victim’s nonconsent. Demanding that the

³⁰⁹ See *State v. Chaney*, 5 P.3d 492, 498–99 (Kan. 2000) (noting that it is possible that a victim is able to instinctively utter the word “no” yet be “psychologically and physiologically impaired”).

³¹⁰ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3, cmt. 4, at 84–85 (AM. LAW INST., Preliminary Draft No. 5, 2015) for an attempt to define two bright-line rules for victim’s debilitating conditions: passing in and out of consciousness and mental torpor. For critique of this position, see *supra* Section IV.C.

³¹¹ See *supra* Section III.B.2.b.

³¹² See generally MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 193 (1997) (noting that culpability is both necessary and sufficient as a basis for criminal punishment).

prosecution prove the defendant's recklessness ensures that criminal liability is imposed only based on personal blameworthiness, as opposed to mere negligence. In order to hold defendants criminally liable for engaging in nonconsensual intercourse or oral sex with intoxicated victims, a prosecutor would have to prove that the defendant was subjectively aware of the risk that the complainant's ability to communicate nonconsent was significantly impaired.

As mentioned earlier, a recurring problem characterizing the prosecution of sexual assault where intoxication is at issue is that often both victim and defendant are intoxicated, raising concerns that the latter's ability to evaluate risks are also clouded by the effects of intoxicants.³¹³ In these cases, defendants typically claim that being heavily intoxicated at the time of the sexual encounter had rendered them unaware that their sexual partner did not consent to sex.³¹⁴

The criminal law has traditionally rejected a defendant's voluntary intoxication as a defense to a crime.³¹⁵ While some jurisdictions recognize intoxication as a defense to specific intent crimes, or crimes requiring a mens rea of knowledge or purpose, they mostly preclude it as a defense to a general intent crime or to a crime requiring recklessness.³¹⁶ Moreover, jurisdictions following the Model Penal Code's position adopt a specific provision, under which if an intoxicated defendant was unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.³¹⁷ Under such provisions, an intoxicated person's awareness of a risk is measured against the standard of a sober actor, resulting in holding that person criminally responsible if he or she were negligent with respect to the risk that a material element exists. Additionally, many court decisions have held that self-induced

³¹³ See *supra* Section V.A (discussing the scenario in which both parties are intoxicated).

³¹⁴ Commonwealth v. Mountry, 972 N.E.2d 438, 443 (Mass. 2012) (involving an intoxicated defendant claiming that he was unaware of the victim's state of intoxication).

³¹⁵ See, e.g., MONT. CODE ANN. § 45-2-203 (2015) (providing that an intoxicated person "is criminally responsible" and "an intoxicated condition is not a defense to any offense"); 18 PA. CONS. STAT. § 308 (2014) (providing that "[n]either voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge").

³¹⁶ See, e.g., People v. Garcia, 58 Cal. Rptr. 186, 188-90 (Cal. Ct. App. 1967) (holding that an intoxicated defendant who was unaware that the man he was assaulting was a police officer was guilty of a crime requiring recklessness).

³¹⁷ See MODEL PENAL CODE AND COMMENTARIES § 2.08(2), at 349 (AM. LAW INST., Official Draft and Revised Comments 1985) (providing that if a person "due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such awareness is immaterial").

intoxication is considered in itself a reckless conduct.³¹⁸ Given common knowledge of the risks of heavy intoxication, when a person consciously chooses to impair his or her powers of perceptions, judgment, and control, that person is held to be aware of the risk that he or she might inflict harm on other individuals.³¹⁹

Scholars have criticized this position, arguing that awareness of the risks of becoming intoxicated should not be equated with conscious awareness of a risk that another crime would be committed and inflict specific harm that the statute prohibits.³²⁰ Furthermore, displacing actual awareness with mere negligence deviates from modern criminal law's general culpability structure, which opts for recklessness as the default mens rea for most crimes.³²¹ Additionally, holding an actor criminally responsible when actual awareness of the risk that a person did not consent to sex, results in disproportionate punishment for nonculpable conduct.³²² As noted earlier, the MPC drafts accept this criticism, advocating that criminal liability for the crime of Sexual Penetration of a Vulnerable Person is predicated on a mens rea of recklessness, rejecting the application of the general rule for intoxication, which holds an intoxicated defendant to a sober person's negligence standard.³²³

Given the proposed statute's emphasis on placing criminal liability only when subjective culpability is established, this article joins the MPC drafts' call to abandon the general rule that an intoxicated defendant would be judged against a sober defendant's standard, at least for the purpose of the specific prohibition on nonconsensual sexual intercourse with intoxicated victims.³²⁴

Rejecting the idea that criminal liability for the proposed crime may be based on a mens rea of negligence is justified given

³¹⁸ See *People v. Register*, 457 N.E.2d 704, 709 (N.Y. 1983), *overruled on other grounds* by *People v. Feingold*, 852 N.E.2d 1163 (N.Y. 2006).

³¹⁹ See generally Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 549–50 (2012) (discussing the Intoxication Recklessness Principle).

³²⁰ See generally Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 254 (1998) (noting that the equation is often preposterous).

³²¹ *Id.*; see also Yaffe, *supra* note 319, at 547 & n.3 (positing that the intoxication recklessness principle authorizes the use of legal fiction because the actor is not actually aware of the risks that he disregards).

³²² See Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 604, 609–10 (2001) (positing that substituting the harm the reckless actor has foreseen for the actual harm that results punishes actors disproportionately to their culpability).

³²³ See *supra* Section IV.B.

³²⁴ See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0, at 32 (AM. LAW INST., Preliminary Draft No. 5, 2015) (stating that “[r]ecklessly” shall carry only the meaning designated in Model Penal Code Section 2.02(2)(c); the provisions of Model Penal Code Section 2.08(2) shall not apply to” sexual offenses).

the unique nature of the prohibition at issue. Since the crime of sexual assault is different from all other crimes because the act—sexual intercourse or oral sex—is in itself permissible, the absence of consent is the key feature that distinguishes between legal and prohibited conduct. The defendant's subjective awareness of the victim's nonconsent becomes especially critical given the ambiguity that often characterizes sexual encounters and the possibility of misperception of the fact that the sexual act is nonconsensual. The proposed statute therefore advocates the suspension of the current MPC's normal rule regarding intoxicated defendants, requiring instead proof of the defendant's actual awareness of the risk that the victim's ability to communicate nonconsent was significantly impaired due to intoxication.

To be clear, the broader implications of the current MPC's special recklessness rule with regard to intoxicated defendants charged with nonsexual offenses raise complex issues, exceeding the scope of this article. I leave for future scholarship the idea of rejecting this rule altogether and the question of its continued desirability as a general rule applicable to other crimes. Instead, this article proposes only that the MPC general rule would be suspended with respect to the sexual assault of intoxicated victims statute.

Requiring the prosecution to prove subjective recklessness would allow defendants to introduce evidence that as a result of their own intoxication, they were unaware of the risk that the victim's ability to communicate nonconsent was significantly impaired. Demanding proof of actual recklessness is justified because it ensures that criminal sanctions are only imposed on culpable defendants. Defendants act with a blameworthy state of mind if they consciously ignore a substantial and unjustifiable risk that consent is absent by proceeding with the sexual act anyway.

Providing defendants with the opportunity to introduce evidence of their own intoxication, however, would not necessarily lead to absolving intoxicated defendants from criminal responsibility. For example, in the Massachusetts case of *Commonwealth v. Mountry*, a defendant convicted of raping an intoxicated victim claimed on appeal that the trial court erred in failing to instruct the jury that they may consider evidence of his own mental incapacity due to intoxication.³²⁵ The Supreme Judicial Court of Massachusetts held that the defendant was entitled to have the jury instructed that they

³²⁵ *Commonwealth v. Mountry*, 972 N.E.2d 438, 440 (Mass. 2012).

may consider evidence of his mental incapacity by intoxication when deciding whether the government had met its burden of proof as to his knowledge of the victim's incapacity.³²⁶ Applying this holding to the specific facts of the case, however, the court concluded that the trial court made no prejudicial error because there was no evidence of the defendant's debilitating intoxication; therefore, he was not entitled to an instruction on his voluntary intoxication.³²⁷

Similarly, under the proposed statute, establishing some level of the defendant's own intoxication would not automatically suffice to prove lack of actual awareness of the risk that a material element of the offense exists. The prosecution might still be able to show that the defendant's intoxication was not sufficiently severe to reach a degree that rendered him or her unaware of the victim's significant impairment in the ability to communicate nonconsent. Only evidence of sufficiently debilitating intoxication should satisfy the bar of proving the defendant's lack of subjective awareness.

The recent public outcry following the lenient sentence imposed in the "Stanford rape case" on Brock Allen Turner exemplifies another illustration of the law's treatment of cases involving both the victim and the defendant's intoxication.³²⁸ On January 18, 2015, two Stanford University graduate students found Turner on top of an unconscious woman behind the dumpster outside of a campus fraternity party.³²⁹ The twenty-three-year-old victim was partially clothed and had a blood alcohol level three times the legal limit.³³⁰ While the victim did not remember anything about the incident, the two witnesses said they saw Turner "thrusting" on top of her while she lied motionless.³³¹ Turner was arrested and later convicted by a jury of three felony counts: assault with intent to commit rape of an intoxicated woman, sexually penetrating an unconscious person

³²⁶ *Id.* at 448.

³²⁷ *Id.* at 449.

³²⁸ See Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), <http://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html> [<https://perma.cc/42ZB-WBT9>].

³²⁹ See People's Sentencing Memorandum at 1–4, *People v. Turner*, No. B1577162 (Cal. Super. Ct. May 27, 2016), <https://assets.documentcloud.org/documents/2858504/Brock-Turner-Sentencing-Memo.pdf> [<https://perma.cc/P48T-BPPS>]; see also Press Release, Santa Clara Cty. Dist. Attorney Office, Former Stanford Student Sentenced to Six Months in Jail for Sex Assault (June 2, 2016), <https://www.sccgov.org/sites/da/newsroom/newsreleases/Pages/NRA2016/Turner-Sentencing.aspx> [<https://perma.cc/2XXS-LS37>].

³³⁰ People's Sentencing Memorandum, *supra* note 329, at 4–5; see Stack, *supra* note 328.

³³¹ See People's Sentencing Memorandum, *supra* note 329, at 6.

with a foreign object, and sexually penetrating an intoxicated person with a foreign object.³³² While the conviction could have resulted in a maximum penalty of fourteen years in prison, a Santa Clara Superior Court judge sentenced Turner to six months in county jail and probation.³³³

The outrage over the disproportionately light sentence has diverted the public's attention from a couple of critical facts, mainly pertaining to the conviction itself and its implications. First, the defendant was found guilty of three serious felonies including sexual penetration with foreign objects of an unconscious and intoxicated person, a conviction that carries a host of collateral consequences including registering as a sex offender for the rest of his life.³³⁴ Second, the defendant's intoxication has not provided him with a defense to the rape charge. Instead, its role was limited to one mitigating factor in a myriad of other factors used by the judge in the sentencing phase. Presumably, the jury convicted Turner based on the theory that despite being intoxicated to a certain extent, his intoxication did not rise to a degree that precluded subjective awareness of the victim's unconsciousness, and that he had known, or reasonably should have known, of the victim's being prevented from resisting due to her severe intoxication.³³⁵

To be clear, the critique concerning Turner's sentence is justified given the utterly disproportionate relationship between the severity of the crime and the lenient punishment. The problem with the sentence lies with striking an inappropriate balance between mitigating and aggravating circumstances by assigning excessive weight to the defendant's intoxication, privileging it over all other relevant circumstances, including the ample harm inflicted on the victim.

The proposed statute, however, espouses the distinction embedded in Turner's conviction between the role of the

³³² CAL. PENAL CODE § 220 (a)(1) (West 2010) (prohibiting assault with intent to commit rape); *id.* § 289(d) (prohibiting sexual penetration with a foreign object of an unconscious person); *id.* § 289(e) (prohibiting sexual penetration with a foreign object of a person who was prevented from resisting by intoxicating substance when the actor knew or should have known of the complainant's situation); *see also* Sentencing Memo, *supra* note 328, at 14.

³³³ *See* Sentencing Memo, *supra* note 329, at 25 (prosecutor noting that the defendant's maximum penalty is fourteen years in prison).

³³⁴ *Id.* at 2.

³³⁵ *Id.* at 25 (noting that the defendant "testified that he was not so drunk that he did not know what he was doing"). It should be noted that the mens rea required for conviction of the above offenses is knowledge or alternatively, "should have known," CAL. PENAL CODE § 289(e) (West 2013) (prohibiting "[a]ny person who commits an act of sexual penetration when the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused").

defendant's intoxication in imposing criminal liability and its role as a mitigating factor during sentencing. For the purpose of imposing criminal liability, requiring proof of the defendant's actual awareness will not necessarily result in acquitting an intoxicated defendant for sexually assaulting an intoxicated victim when the defendant's intoxication does not reach a sufficiently debilitating level. Put differently, proof that the defendant was intoxicated does not preclude conviction because an intoxicated defendant may still form intent and mere intoxication does not automatically negate awareness of the victim's condition. The defendant might be heavily intoxicated, yet his or her impairment would not be sufficient to render him or her unaware of the risk that the victim does not consent to sexual intercourse. Yet, the defendant's intoxication might be taken into account when considering a host of aggravating and mitigating circumstances at the sentencing phase.

3. Factors Whose Presence Might Support a Finding of Culpability

To accomplish the goal of prohibiting only culpable conduct, the proposal identifies a couple of factors supporting a finding that a defendant is a sexual predator who recklessly took advantage of a victim's significant impairment in the ability to communicate nonconsent to sexual penetration. Grounding criminal liability in the defendant's exploitative behavior is critical to identifying the cases that should be criminally prosecuted, distinguishing them from those involving permissible intoxicated sexual encounters. While these factors are by no means conclusive, their presence strongly suggests that an actor is criminally culpable.

a. Preparatory Actions That Facilitate the Sexual Assault

One circumstance that is typically present in cases involving sexual assault of intoxicated victims is when perpetrators engage in preparatory actions that facilitate the sexual assault. These acts of preliminary planning make the perpetration of the sexual assault easier by gaining control and trust over victims. For example, these steps often include purportedly offering to help impaired victims, taking charge of escorting or driving victims home, ostensibly worrying for their safety, or luring victims to secluded areas by suggesting that they lay down in another room after noticing symptoms of

impairing intoxication, or otherwise taking actions to isolate victims from others who might help them avoid harm.³³⁶

An example of such facilitation is illustrated in *Kansas v. Smith* in which the defendant, after noticing that the victim passed out in his car, indicated that it was not safe for her to drive and offered his bedroom, promising to sleep on the couch, but later took advantage of her intoxicated condition to impose a nonconsensual sexual act.³³⁷ In circumstances such as these, defendants deliberately take preliminary steps to further the sexual assault by preventing intoxicated victims from calling out for help.

b. Victim's Visible Signs of Intoxication

The proposed statute requires proof that the defendant was subjectively aware of the victim's significant mental and physical impairment. Of course, a defendant is not expected to have the medical knowledge that would enable him or her to assess the precise level of a victim's intoxication. Severely impairing intoxication is clearly visible, however, and any layperson can easily identify its common symptoms. Such observable symptoms include vomiting, incontinence, slurred speech, unsteady gait, combative behavior, and the inability to know and understand what is happening.³³⁸ A conviction would be possible if the prosecution is able to prove that the defendant's own intoxication did not preclude such awareness, and that he or she was at least reckless with respect to the victim's significant impairment in the ability to communicate nonconsent yet consciously disregarded the substantial and unjustifiable risk that consent was lacking. Proof of the defendant's awareness of the victim's symptoms may be further

³³⁶ See generally *Commonwealth v. Blache*, 880 N.E.2d 736, 739, 745–46 (Mass. 2008) (A case where a police officer who was summoned to help with a belligerent victim, who had exhibited visible signs of extreme intoxication, volunteered to give her a ride home and then allegedly sexually assaulted her in the police cruiser. The Supreme Judicial Court of Massachusetts held that a jury instruction concerning a complainant's capacity to consent to intercourse should be given if the evidence presented at trial demonstrates that the complainant was so impaired due to excessive consumption of alcohol that she was incapable of consenting. The court further held that the prosecution must prove that defendant knew or reasonably should have known that the complainant's condition rendered her incapable of consenting. The court remanded for a new trial because the trial court's instructions to the jury failed to explain fully or with sufficient clarity the above legal standards.).

³³⁷ *State v. Smith*, 178 P.3d 672, 676 (Kan. 2008).

³³⁸ Just to clarify, the proposal would only allow conviction of defendants who were consciously aware of the victim's significant impairment given visible signs. When the defendant is also significantly intoxicated, there may be situations in which his or her impairment is sufficiently severe to render him or her unaware of these symptoms.

supported if other witnesses who also observed these symptoms testify about the circumstances, indicating that the defendant had to be aware of them too.³³⁹

C. *The Proposed Statute's Advantages*

The proposed statute offers several advantages compared both to existing prohibitions on sexual assault of intoxicated victims and the ALI's proposals discussed earlier.³⁴⁰ First, it replaces the problematic ITCS with a test that focuses on victims' significant impairment in the ability to communicate nonconsent due to intoxication.³⁴¹ This alternative test for drawing the line between criminal and legal intoxicated sex shifts the focus away from evaluating the victim's incapacity to exercise judgment and toward impairment in communication abilities. As previously discussed, the notion of exercising judgment is subjective and ambiguous.³⁴² In contrast, impairment in communication abilities is a much more objective standard since it is observable and thus more easily determined by a defendant. Importantly, the proposed standard makes nonconsensual sex, rather than the victim's physical and mental capabilities to exercise judgment, the cornerstone of the crime.

Second, the proposed standard acknowledges that diminished ability to express nonconsent to sex due to intoxication extends beyond situations where the victim was completely unconscious or nearing such condition. By relocating the line between permissible and prohibited sexual intercourse from complete incapacity toward significant impairment, the statute provides the necessary protection against sexual violation for victims whose intoxication was sufficiently severe to significantly impair their ability to communicate refusal to sex, including cases falling short of loss of consciousness.

³³⁹ *Blache*, 880 N.E.2d at 739, 746–47 (An example of a case in which the defendant was clearly aware of the victim's symptoms of intoxication, yet consciously took advantage of her vulnerable condition. The defendant was an on duty police officer who was summoned by the victim's acquaintances for what they described as "need[ing] assistance with an unwanted and very intoxicated female guest." The defendant personally witnessed the victim's signs of impairing intoxication, including belligerent behavior, slurred speech, urinating on the street, and driving her truck into a fence and a house. The Supreme Judicial Court of Massachusetts held that the state should not only prove that as a result of alcohol and drugs the victim's physical or mental condition was so impaired that she could not consent to sex, but also that the defendant knew or should have known of the victim's incapacitation.).

³⁴⁰ See *supra* Section IV.C (discussing the drawbacks in the Model Penal Code's various drafts).

³⁴¹ See *supra* Section III.B (elaborating on the difficulties stemming from the incapacity-to-consent standard).

³⁴² See *supra* Section III.B.1.

Third, the proposed statute's mens rea requirement of subjective awareness of the victim's lack of consent ensures that criminal liability is imposed only on morally culpable actors. The recklessness requirement distinguishes dangerous sexual predators who consciously take advantage of intoxicated victims' vulnerability from merely negligent actors whose behavior falls short of criminal culpability. Aiming to catch only sexual predators within its net, the proposed statute implies that actors who engaged in sexual misconduct but were not subjectively aware that the victim's ability to communicate nonconsent was significantly impaired, might be subject to civil or administrative liability, but not to criminal sanctions.³⁴³

Finally, the proposed statute rejects criminal liability in cases where intoxicated people have expressed consent to sexual acts but their level of intoxication casts doubts on whether their consent was genuine. As mentioned earlier, the *Giardino* court's holding may result in imposing criminal liability even if affirmative consent had been given on the theory that the intoxicated person was unable to make a reasonable judgment or would have refrained from the sexual act had he or she not been intoxicated.³⁴⁴ In contrast, the proposed statute is premised on the idea that the law should refrain from prohibiting individuals from engaging in intoxicated yet fully consensual sex. Sexual autonomy requires that the law recognize individuals' right to express consent to sex when they are intoxicated, even if they would not have consented had they been sober.³⁴⁵ Even assuming that it was the state of intoxication that contributed to the choice to have sex, being intoxicated does not negate an individual's right to consent per se. A legal standard that prevents an intoxicated individual from consenting to sex is

³⁴³ Under tort law, a negligent actor might be liable for inflicting harm on a victim of sexual misconduct. Also, Title IX of the Civil Rights Act of 1964, prohibiting discrimination on the basis of sex, requires higher education institutions receiving federal funds to adopt policies and procedures to investigate and adjudicate sexual misconduct allegations. An actor might be liable for violating these policies. See Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 U. KAN. L. REV. 963, 970–72 (2016) (positing that tort law may provide an additional source of redress to victims of campus sexual assault); Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1971–78 (2016) (describing the endeavors of the Office for Civil Rights at the Department of Education to enforce the prohibition against discrimination based on sex in higher education institutions).

³⁴⁴ See *People v. Giardino*, 98 Cal. Rptr. 2d 315, 321–23 (Cal. Ct. App. 2000) (reversing the conviction for improper jury instruction but remanding the case and holding that under the incapacity-to-consent standard, a conviction might be possible if the jury found that the victim was unable to make a reasonable judgment or would have refrained had she not been intoxicated); see *supra* Section III.B.1.d.

³⁴⁵ See WERTHEIMER, *supra* note 296, at 232–33, 237, 251–52.

overly paternalistic and cannot be justified in a legal regime that makes consent the essence of permissible sexual encounters.

The proposed statute responds to potential criticism and objections to expanding criminal liability to cover sexual assault of voluntarily intoxicated victims. One objection is that such expansion would contribute to the overcriminalization phenomenon, which is a general problem in the criminal justice system, carrying ample collateral consequences for convicted defendants and disproportionately affecting racial and ethnic minorities.³⁴⁶ Relatedly, scholars might express concerns that revising sexual assault statutes would further contribute to the problems of severe punishment policies and overincarceration.³⁴⁷ Professor Aya Gruber, for example, suggested that the problem of sexual assaults may also be addressed through alternative noncriminal methods and that revising criminal laws is not necessarily beneficial to promote gender equality.³⁴⁸ Second, critics might also argue that the proposal is unjust to defendants because when both the victim and the alleged perpetrator voluntarily imbibe, it is unfair to place the risk of harsh criminal sanctions only on one party.³⁴⁹ Proper risk allocation demands that both parties bear the responsibility for voluntarily rendering themselves impaired.

Regarding overcriminalization concerns, I have written elsewhere about other aspects of the overcriminalization phenomenon and I concede that in some areas, too many criminal statutes and heavy enforcement create significant problems.³⁵⁰ In the specific area of sexual assault of intoxicated victims, however, an opposite problem of undercriminalization and underenforcement exists, rather than overcriminalization

³⁴⁶ See generally Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716–18 (2005) (discussing various aspects of the overcriminalization problem and elaborating on its ample consequences including, among others, unlimited law enforcement discretion, disproportionate effects on racial minorities, and waste of resources).

³⁴⁷ See, e.g., Carol Steiker, *Introduction to Symposium, Mass Incarceration: Causes, Consequences, and Exit Strategies*, 9 OHIO ST. J. CRIM. L. 1, 1 (2011) (noting that the “American rate of incarceration has increased more than fivefold since 1972” and that the “current rate is more than 700 per 100,000”); see also Capers, *supra* note 10, at 1294–95 (noting that “black men are disproportionately represented in prisons,” but there is no discussion about the “sexual punishments collaterally inflicted on black men”).

³⁴⁸ See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 657–58 (2009) (noting that while date rape should not be decriminalized, reformers should investigate noncriminal methods to address this problem).

³⁴⁹ See Taranto, *supra* note 293 (arguing that both parties should be equally responsible for intoxicated sex).

³⁵⁰ See generally Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1670 (2015) (discussing the problem of overcriminalization).

and overenforcement.³⁵¹ Conceding that the criminal law is a stringent weapon and that its use should be extremely cautious and strictly limited to egregious cases of sexual imposition, the proposed statute attempts to find a middle ground between imposing overbroad criminal liability and underinclusive sexual assault statutes. As Professor Schulhofer aptly observed, “sexual [assault] policy is neither a cause of the problem [of overincarceration] nor a means to alleviate it,” given the fact that the problem is mostly attributable to drug enforcement policies.³⁵²

Regarding unfairness to defendants concerns, this article acknowledges that given the ambiguities that often surround intoxicated sexual encounters, this risk is not insubstantial. However, the proposed statute attempts to reduce this risk by ensuring that the legal boundary between criminal and noncriminal conduct is more properly drawn. Under the proposal, consciously taking advantage of a voluntarily intoxicated individual to impose nonconsensual sex warrants criminal sanction, while engaging in sexual acts with an intoxicated individual under circumstances falling short of exploitation of vulnerability remains beyond the realm of the criminal law. The offense’s elements are sufficiently narrow to encompass only circumstances indicating taking advantage of the victim’s significant impairment in the ability to express nonconsent. The statute offers an equitable resolution by ensuring that several requirements are met prior to labeling drunken sex a sex crime, thus alleviating the risk of unfairness to defendants.

D. *Application of the Proposed Statute*

In the case discussed in the Introduction, the defendant’s having oral sex with a victim who was coming in and out of consciousness throughout the sexual encounter constituted no crime under existing law.³⁵³ Revisiting this case offers an opportunity to test the operation of the proposal in order to predict whether the case might have come out differently had the proposed statute been applied.³⁵⁴

³⁵¹ See Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1289–91, 1294 (2016) (noting that rape law is largely underenforced, with police often failing to properly investigate rape complaints).

³⁵² See Schulhofer, *supra* note 250, at 677–78.

³⁵³ See *supra* Introduction.

³⁵⁴ See *supra* Introduction.

In contrast to existing Oklahoma law, the proposed statute covers nonconsensual oral, vaginal, and anal intercourse perpetrated against intoxicated victims, whether voluntarily or involuntarily intoxicated. The prosecution will likely be able to prove the actus reus of the offense, namely, that the sexual act was nonconsensual because the victim's ability to communicate nonconsent was significantly impaired due to extreme intoxication. Since the victim passed out at various points throughout the sexual encounter, the jury will likely find that her ability to effectively communicate unwillingness was significantly impaired given her severely intoxicated condition. Importantly, the proposed statute would cover situations such as this, in which the victim was consciousness during some portions of the sexual act (otherwise she would not have been able to perform oral sex on the defendant).

The prosecution would also likely be able to establish the defendant's mens rea of recklessness. There was evidence to prove that the victim exhibited visible signs of debilitating intoxication, including inability to walk and coming in and out of consciousness as well as evidence that the defendant had personally seen such easily observable symptoms, including her inability to stand straight, her being carried to his car by others, and her passing out inside his car.³⁵⁵ Given these visible symptoms, the defendant must have been subjectively aware that the victim's ability to oppose the sexual act was significantly impaired. While the defendant was also intoxicated, there was no evidence to suggest that his impairment was debilitating enough to reach a level that precluded his subjective awareness of the risk that the victim was significantly impaired to the extent that precluded her from communicating nonconsent. The defendant's conduct preceding the sexual assault could further support the finding that he consciously took steps to facilitate it by taking a victim who was unable to walk into his car, exercising complete control over her and isolating her from other people in the public space who might have helped her.

In sum, in contrast to the outcome under existing Oklahoma law, the defendant would probably have been found guilty under the proposed statute had it been applied. Imposing criminal liability on the defendant, in this case, is normatively justified given the underlying circumstances demonstrating his culpability in consciously taking advantage of a victim's significantly impaired condition to impose nonconsensual sex.

³⁵⁵ See Redden, *supra* note 1.

CONCLUSION

The criminal regulation of nonconsensual sexual acts perpetrated against voluntarily intoxicated individuals raises not only difficult doctrinal questions but also contentious normative and policy-based considerations. One area of debate in criminal law in general, and in rape law in particular, concerns the proper relationship between legal and social change. Should changes in social norms and sexual mores precede legal changes, with the law reflecting prevailing social perceptions rather than imposing them on society through the use of the coercive criminal justice system, or alternatively, should the law actively foster changes in existing societal norms where their injurious consequences suggest that immediate change is much needed to prevent future harm?

This article favors the latter position, arguing that the criminal law should be used here as an educational vehicle with the goal of a continued effort to promote changes in prevailing societal perceptions as many societal attitudes about nonconsensual sex have already shifted and will continue to do so.³⁵⁶ Criminal law's expressive function is especially critical in prosecutions of sexual assaults because it sends a clear message to potential perpetrators that intercourse with extremely intoxicated individuals whose ability to communicate nonconsent is significantly impaired is criminally prohibited.

The article acknowledges the tradeoffs embedded in this position: protecting voluntarily intoxicated victims by adopting criminal statutes that might precede changes in societal perceptions, which are currently still in a state of flux, might result in potentially harsh consequences for some defendants. There are, however, various mechanisms in place to ameliorate this risk by ensuring that sanctions are imposed only on culpable defendants and in proportion to their level of culpability. Sexual assault statutes may adopt a grading structure that distinguishes between different defendants based on their respective degree of culpability; the offense of sexually assaulting involuntarily intoxicated victim should be graded higher than the offense of sexually assaulting a voluntarily intoxicated individual. Moreover, sexually assaulting an involuntarily intoxicated victim may serve as a sentence enhancement because surreptitiously administering

³⁵⁶ See Tuerkheimer, *supra* note 24, at 6–7 (noting that many shifts in societal perceptions are already taking place including the acknowledgement that passivity does not signify consent to intercourse).

intoxicants is an aggravating circumstance. But sexual assault statutes should not make criminal liability itself dependent on whether the victim's intoxication was voluntary or involuntary.