THE CONUNDRUM OF VOLUNTARY INTOXICAITON AND SEX

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INTRODUCTION

On June 1, 2014, R.Z.M a 17-year-old boy and a 16-year-old female classmate had been drinking alcohol and smoking marijuana with a group of friends in a Tulsa, Oklahoma park. 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 had carried her into his car. A boy who rode in that car had told police investigators that the girl had been coming in and out of consciousness. R.Z.M then had oral sex with the unconscious girl, and later brought her to her grandmother’s house. She was taken to a hospital while still unconscious, and a blood test showed her blood alcohol content at above .34, about 4 times higher than the legal limit for driving. The victim had told police investigators that she didn’t have any memories after leaving the park. After a sexual assault examination found R.Z.M’s DNA on the victim’s body, he had told investigators that the girl had consented to performing oral sex on him. The prosecution charged R.Z.M with the crime of forcible oral sodomy under Oklahoma law. After R.Z.M filed a pre-trial motion to dismiss the charge, the trial court granted his motion. 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 specifically included intoxication as one of the circumstances for the crime of rape, it was not mentioned among the five specific requirements for commission of the

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2 Id.

3 Id.

4 Id.

5 Id.

6 21 O.S 2011, §888 (prohibiting, among others, sodomy 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).

crime of forcible oral sodomy.\textsuperscript{8} Put differently, engaging in oral sex with a person whose intoxication rendered him or her unconscious and incapable of giving consent 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 their combination (hereinafter: intoxicants).\textsuperscript{9} Research shows that a large percentage of sexual assaults involving people who know each other, often called ‘acquaintance rape’, occur while victims were heavily intoxicated.\textsuperscript{10} This problem has recently gained significant public and media attention, mostly in the context of sexual assaults in higher education institutions.\textsuperscript{11} However, the scope of the problem is much 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.\textsuperscript{12}

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.\textsuperscript{13} Criminal codes in most jurisdictions do contain separate provisions specifically prohibiting sexual intercourse committed against intoxicated victims.\textsuperscript{14} But these statutes

\textsuperscript{8} State of Oklahoma v. R.Z.M, No. JS 2015-1076 (March 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).

\textsuperscript{9} In this Article I use the terms ‘intoxicants’ and ‘alcohol’ interchangeably. While alcohol is the most commonly used intoxicant, the scope of my 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 California L. Rev. 1259 (2011) (discussing male rape in various settings and the criminal justice system’s inappropriate response).

\textsuperscript{10} See, generally, Christopher P. Krebs, Christine H. Lindquist, Tara D. Warner, Bonnie S. Fisher, Sandra L. Martin, Campus Sexual Assault Study (CSA) (2007) (Hereinafter: CSA Study) (suggesting that about 80 percent of college sexual assaults occur when the parties are intoxicated).

\textsuperscript{11} See infra Part V.B.2; see, generally, Jessie Ford and Paula England, What Percent of College Women Are Sexually Assaulted in College? Online College Social Life Survey (noting that 11 percent of students reported that someone had sexual intercourse with them than they did not want when they while they were drunk, passed out, asleep, drugged or otherwise incapacitated. Available at: https://contexts.org/blog/what-percent-of-college-women-are-sexually-assaulted-in-college/

\textsuperscript{12} 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, & Society 341, 368 and accompanying footnotes (2014) (describing a military culture of excessive drinking that included forcing victims to become intoxicated after which they were sexually assaulted).

\textsuperscript{13} See, e.g., State v. Haddock, 664 S.E. 2d 339, 346 (N.C. App. 2008) (reversing rape conviction on the theory that the statute was not intended for the protection of victims who have voluntarily ingested intoxicating substances through their own actions).

\textsuperscript{14} See, e.g., Ohio §2907.02 ((A)(1) (prohibiting sexual conduct, among others, when: (a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by
typically cover cases in which intoxication was *involuntary*, namely, when a perpetrator administered the intoxicants to an unsuspecting victim.\(^\text{15}\) Criminal liability in these cases is mostly uncontroversial, since 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 free willingly consuming an excessive amount of intoxicants.\(^\text{16}\) This Article specifically targets the criminal law’s treatment of cases involving sexual assault of voluntarily intoxicated victims.\(^\text{17}\)

While existing laws typically do not directly address the problem of sexual assault of voluntarily intoxicated victims, these crimes can and are being prosecuted under general prohibitions adopted in most jurisdictions, which criminalize sexual intercourse with a person who is incapable of consenting to sex.\(^\text{18}\) These prohibitions, however, do not specifically target the distinct features of sexual assault of intoxicated victims, and do not list intoxication as the reason behind the victim’s incapacitation. Yet, 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 the sexual act.\(^\text{19}\) Simply put, the key inquiry under this prevalent test, which I refer to here as ‘the incapacity to consent standard’, is how drunk is too drunk to render an individual unable to say ‘no’ to sex.

\(^{15}\) Id.
\(^{16}\) See Carol E. Tracey & Terry L. Fromson, Rape and Sexual Assault in the Legal System, at 24 (2012).
\(^{17}\) In this Article, I focus solely on issues pertaining to imposing criminal liability as opposed to civil or administrative liability. For discussion of non-criminal liability see, generally, Catherine Baker, *Why Rape Should Not (Always) be a Crime*, 100 Minn. L. Rev. 221 (2015) (suggesting that sometimes sexual misconducts are better suited for treatment under administrative and civil measures rather than criminally prosecuted).
\(^{18}\) See infra Part I.B.2. (discussing general prohibitions against sex with incapacitated people).
However, general incapacitation provisions provide only a partial and incomplete solution to the treatment of sexual assault of voluntarily intoxicated victims; they typically cover cases in which victims’ degree of intoxication rendered them entirely helpless to the point of passing out completely.\(^{20}\) But they often fail to protect intoxicated victims who were sufficiently sober not to pass out, yet their impairment was significant enough to a point that precluded them from expressing refusal to sexual intercourse.\(^{21}\)

Criminal law’s inability to protect many intoxicated victims demonstrates that existing statutes are lacking. Yet, amending criminal prohibitions on sexual assault of voluntarily intoxicated victims raises vexing questions concerning the circumstances under which holding actors criminally responsible is appropriate. Changing the law requires reconciling between two conflicting considerations; On the one hand, the criminal law must provide adequate protection to victims of sexual assault whose impairment prevented them from expressing refusal to sexual acts, regardless of how their intoxication came about. On the other hand, the law needs to afford equitable resolution to both parties involved, and in particular, due process of law requires just and fair consequences to alleged perpetrators.

Imposing criminal liability in these cases is further compounded 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. Individuals often consume intoxicants as a mood enhancer, deliberately using it as a welcome means to reduce social and sexual inhibitions.\(^{22}\) The law must respect individuals’ free choice to engage in drunken sex, as long as it is consensual. Drawing the line between intoxication that merely lowers inhibitions and one that significantly impairs an individual’s ability to refuse nonconsensual sex is therefore fraught with difficulties. 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 most drunken sexual encounters occur when both victims and perpetrators are intoxicated, significant

\(^{20}\) See infra Part I. B. 1.
\(^{21}\) Id.
\(^{22}\) See infra Part IV. A.
questions arise concerning the equitable allocation between the parties of the risks of engaging in these encounters.

At the heart of the conundrum underlying intoxicated sexual encounters lies the question of how to distinguish intoxicated yet consensual sex -- perfectly legitimate even if often regrettable after the fact -- from a sex crime? This Article aims to answer this question, which has received only scant scholarly attention, by making two key arguments. First, it argues that the incapacity to consent standard is unfit to address the unique nature of sexual assault of intoxicated victims. Second, it contends that the law should directly prohibit sexual acts with individuals who did not consent to them but were unable to do so due to their intoxication, regardless of whether the intoxication was self inflicted or caused by another.

The Article first demonstrates that the incapacity to consent standard is misguided because it is both overinclusive and underinclusive, therefore resulting in unfairness, sometimes to defendants but other times to victims. From the victims’ perspective, relying on their capacity to manifest consent as demarcating the line between criminal and legal intercourse is problematic because it often fails to protect victims whose level of intoxication fell short of what the specific jurisdiction deems incapacitating intoxication. From the defendants’ perspective, the incapacity to consent standard is equally disconcerting. Evaluating at what point precisely the victim’s intoxication rises from some impairment in judgment to complete incapacity to consent calls for detecting a fine line, which is not only an extremely difficult task, but also one which risks inequitable results. Applying the incapacity to consent standard may therefore lead to undercriminalization of some sex crimes but to overcriminalization of some drunken sexual encounters in others.

Given the insurmountable difficulties characterizing the incapacity to consent standard, the Article advocates a paradigm shift that would divert attention away from evaluating a victim’s precise level of intoxication towards identifying a defendant’s sexually predatory conduct. Such conduct is demonstrated when a defendant takes advantage of a victim’s vulnerability by imposing nonconsensual sexual acts. The Article

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23 See Deborah Tuerkheimer, Rape on and off Campus, 65 Emory L. J 1 (2015); Falk, supra note 19; Tracey & Fromson, supra note 16.
proposes the amendment of sexual assault statutes to prohibit recklessly engaging in sexual intercourse with an unresponsive victim who did not refuse the act and was unable to do so due to his or her intoxication, whether voluntary or involuntary. This prohibition accomplishes an equitable allocation of the risks of intoxicated sexual encounters by ensuring that while criminal statutes are expanded to include cases where a victim was sexually assaulted after he or she became voluntarily intoxicated, they only prohibit predatory sexual acts where the evidence establishes the defendant’s culpability.

The Article proceeds as follows: Part I provides an overview of existing statutes used to prosecute sexual assault of intoxicated victims. It demonstrates that most prohibitions on intercourse with intoxicated victims cover only cases involving involuntary intoxication, failing to protect victims of voluntary intoxication. Part II explains why general prohibitions on intercourse with incapacitated individuals are ill suited when used to prosecute sexual assault of intoxicated victims. It shows that the incapacity to consent standard results in inequitable resolutions to both defendants and victims. Part III critiques the American Law Institute’s proposal for revision of the Model Penal Code’s sexual assault of intoxicated victims provisions. It contends that the proposal fails to cure the incapacity to consent standard’s shortcomings. Part IV unfolds the nuanced interplay between sex and intoxicants given the reality that the latter play 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 V first examines the justifications for imposing criminal liability for sexual acts committed upon voluntarily intoxicated victims. It then proposes a statute that criminalizes sexual assault of both voluntarily and involuntarily intoxicated victims, and identifies the circumstances that demonstrate a defendant’s culpable conduct.

I. EXISTING LAWS ON SEXUAL ASSAULT OF INTOXICATED VICTIMS

Prosecuting the sexual assault of intoxicated victims raises inherent difficulties, partly due to existing law’s 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. The following sections demonstrate the main problems in existing statutes.

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 proved by showing that the complainant had physically resisted the act, even to the utmost. 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. Given the relaxation in the force requirement, the nonconsensual nature of the sexual act is the feature that distinguishes a lawful from a criminal sexual encounter, therefore requiring the adoption of a standard to evaluate the presence or absence of consent in any given case.

In recent years, most jurisdictions have moved to use the verbal resistance requirement, commonly known as the ‘no means no’ standard to determine when consent to sex is absent. This standard requires proof that the complainant explicitly expressed his or her refusal to engage in the sexual act, through either words or conduct. In contrast, only a handful of jurisdictions have adopted the affirmative permission standard, under which only a verbal ‘yes’ or a behavior expressly communicating agreement to the sexual act, as the controlling standard to determine whether consent has been given.

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24 Id. at 25-30 (discussing the many problems characterizing the prosecutions of sexual assault of intoxicated victims).
26 See Tuerkheimer, supra note 23 at 15 (noting that a majority of jurisdictions rely on force to define rape).
28 See, e.g. N.Y. PENAL LAW § 130.05(2)(d) (West 2013) (“the 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) (“the victim did not consent. . . and such lack of consent was clearly expressed by the victim’s words or conduct).”
Under the verbal resistance standard, however, the law does not deem a complainant’s irresponsiveness as nonconsent.\textsuperscript{30} 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.\textsuperscript{31} Moreover, 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.\textsuperscript{32}

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 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.\textsuperscript{33} 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 irresponsible, therefore unable to express nonconsent to intercourse. Applying the verbal refusal standard in these cases would have resulted 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 in sexual assaults involving heavily intoxicated victims, most jurisdictions adopted specific prohibitions to prosecute these cases. The following section turns to examine their scope and limits.

\textbf{B. Separate Prohibitions To Protect Impaired Victims}

While different jurisdictions significantly vary in their treatment of sexual intercourse with persons whose impairment precludes them from expressing consent,

\textsuperscript{30} See Tuerkheimer, \textit{supra note} 23 at 29 (noting that utter passivity on the part of the victim is equated with consent to intercourse).
\textsuperscript{31} Id.
\textsuperscript{32} See Baker and Oberman, \textit{supra note} 27, at 72 (discussing the difference between a verbal refusal and an affirmative permission standard and noting the difficulties stemming from placing the burden of proof on the complainant).
\textsuperscript{33} Commonwealth v. Blache, 450 Mass. 583, 880 N.E. 2d 736, at 745 (noting that a finding of complainant’s incapacity to consent due to intoxication, satisfies the element of lack of 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.  

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 impaired. 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, among several other reasons. A minority of jurisdictions criminalizes intercourse with an intoxicated person as a separate category, targeting only intoxication rather than list intoxication as one reason for the victim’s incapacitation, among others.

The common law has long prohibited intercourse with victims whose permanent or temporary physical conditions, including unconsciousness, sleep or otherwise physical helplessness precluded them from resisting the sexual act. However, the physical helplessness standard is too narrow, covering only the most extreme cases of incapacitation, mainly only those amounting to actual unconsciousness. It fails to cover

34 See Tracey & Fromson, supra note 16 at 24
35 See e.g. COLO. REV. STAT. ANN § 18-3-402 (4) (d) (West, 2016); CONN. GEN. STAT. ANN. § 53 A-65 (5) (West 2016); DEL. CODE. ANN. TIT. 11 § 761 (j) (5)
36 See. e.g. N.J. STAT. ANN § 2C: 14-1(i)
37 See, e.g. Maine 17-A M.R.S.A. § 253 (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 of similar means); CA. PENAL §261 (3) (prohibiting sexual intercourse “where 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”).
38 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 knowledge 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”).
cases where the intoxication fell short of actual loss of consciousness, or where the victim of a sexual assault drifted in and out of consciousness.

Acknowledging the restrictive nature of the physical incapacity test, most jurisdictions have expanded their statutes to also prohibit intercourse with a mentally incapacitated person.\(^\text{39}\) These prohibitions typically list temporary incapacitation due to intoxication as one type of mental incapacity.\(^\text{40}\) For example, a statute that uses this method typically prohibits sexual intercourse if “the 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”.\(^\text{41}\) Such definition is seemingly sufficiently expansive to reach cases in which victims suffered from a lesser degree of impairment falling short of unconsciousness.

However, in the vast majority of jurisdictions, the scope of the ‘incapacitation due to intoxication’ prohibitions is significantly limited because voluntary and involuntary intoxication are treated differently.\(^\text{42}\) Notably, in about 40 jurisdictions, criminal prohibitions on sexual assault of intoxicated victims cover only cases where the victim was surreptitiously duped after the actor intentionally administered him or her with intoxicants, including rape-facilitating drugs, in order to accomplish intercourse.\(^\text{43}\) 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 10 jurisdictions have adopted statutes that do not limit the scope of sexual assault of an intoxicated victim to involuntary intoxication.\(^\text{44}\)

The Minnesota case of \textit{State v. Blevins} provides an example of statutes under which criminalization depends on whether the victim’s intoxication was voluntary or

\(^\text{39}\) See Falk, \textit{supra note} 19 at 158-159 (noting that the majority of jurisdictions specifically state that the mental incapacitation includes one that is due to the influence of a narcotic, anesthetic or other substance).

\(^\text{40}\) Id.

\(^\text{41}\) Id. See, \textit{e.g.}, Arizona: A.R.S. §§ 13-1401, 13-1406; Florida §794.011.

\(^\text{42}\) Haddock, 664 S.E 2d at 346

\(^\text{43}\) See, \textit{e.g.}, Massachusetts law, M.G.L.A. 272 § 3 (providing for a separate crime punishable by 10 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”).

\(^\text{44}\) See Tracey & Fromson, \textit{supra note} 16 at 24-27 (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).
involuntary. In this case, the victim T.W. went out with her friends and voluntarily consumed between ten to twelve alcoholic drinks. T.W testified that she became heavily intoxicated and at some point was separated from her friends and could not find her car. The defendant approached her, and led her to believe that he was going to help her find the car. 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. The victim testified about defendant’s advances, saying that “that's not what [she] wanted”, and that “I told him I didn't want him to, and he just kept telling me it would be okay.... I asked him to please not and he said it will be fine...” 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.

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. The Minnesota statute defines “Physically 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.”

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. 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. Therefore, the

45 757 N.W. 2d 698 (2008)
46 Id. at 699
47 Id.
48 MINN. STAT. ANN §609.341 (West, 2013)
49 §609.341 subdivision 9
50 757 N.W. 2d at 701
51 Id.
evidence was insufficient to prove that the victim was “physically helpless” as defined in the statute. Since the victim maintained consciousness and was able to express her unwillingness to engage in the sexual act, the result was that the defendant was acquitted of the offense.

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”. However, 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 administering them.

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; a defendant cannot be convicted of intercourse with a mentally incapacitated individual, because the statute requires that the intoxication be involuntary, precluding liability if it was voluntary. In addition, a defendant also cannot be convicted of intercourse with physically helpless individual if the victim’s intoxication fell short of complete unconsciousness. The result is that victims who are presumably too sober to lose consciousness but are too intoxicated to communicate refusal to intercourse are not protected under the above statutes.

52 See M.S.A §609.341 subdivision 7
53 Some jurisdictions criminalize physical and mental incapacitation in one provision, for example, Alaska Stat. §11.41.470(2) (combining mental and physical incapacitation in its definition of “incapacitated” Alaska Stat. §§11.41.470(2), (4), (8)(b) (providing definitions of incapacitated).
54 See. e.g, Ohio § 2907.02 (for the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception); Florida, §794.011 (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).
55 For similar results see Haddock, 664 S.E. 2d 339, 346 (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
2. Prohibitions Against Intercourse with Incapacitated Persons

In addition to statutes that directly criminalize intercourse with involuntarily intoxicated people, many jurisdictions adopted statutes that prohibit intercourse with people who are unable to consent due to incapacitation, regardless of its source or reason. In contrast with the statutes discussed above, general incapacitation provisions do not use the intoxication language as part of the definition of the offense. Yet, despite the fact that intoxication is not specifically mentioned, these statutes may be 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.

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. 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. Other statutes define incapacity as either complete inability to appraise or control behavior or substantial impairment in such ability. Others allow expanding the scope of the prohibition to also cover cases where the victim voluntarily became intoxicated; see, also, New York v. Sharmelle Johnson 23 N.Y. 3d 973, 975-6 (2013) (vacating a plea bargain and remitting the case to the trial court for further proceedings after holding that the statute aims only at situations involving involuntary intoxication, namely, “rapists who use “date-rape” drugs, where the defendant administered the intoxicants to the victim. The court further noted that the statutorily language defines mental incapacity to require that another individual administer intoxicants to the victim of the sexual assault, without his or her consent. Since in this case there was no indication that this victim was incapacitated by anything other than voluntary intoxication, the prohibition that covers sexual assault of a mentally incapacitated person did not apply).

56 See Tracey & Fromson, supra note 16 at 24 (noting that in 38 states out of the 40 jurisdictions whose intoxication provisions do not cover voluntary intoxication, prosecution of rapes involving intoxicated victims is possible under general incapacitation prohibitions).
57 See. e.g. Virginia Code §18.2-61 (A) (prohibiting intercourse through the use of the complaining witness’s mental incapacity or physical helplessness).
59 See, generally, Alexander A. Boni-Saenz, Sexuality and Incapacity, 76 Ohio St. L. J. 1201, 1209 (defining mental incapacity as lacking the requisite psychological abilities to engage in autonomous decision making).
60 See, e.g. Illinois § 11-1.20 720 ILCS 5/111.20(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).
61 See David DeMatteo, Meghan Galloway, Shelby Arnold, Unnati Patel, SEXUAL ASSAULT ON COLLEGE CAMPUSES: A 50-STATE SURVEY OF CRIMINAL SEXUAL ASSAULT STATUTES
prohibit subjecting “another person to sexual contact when that person is incapacitated, incapable of consent, or lacks the capacity to consent”.

Yet others only criminalize intercourse when “the complainant is unconscious or the person knows that the complainant is unaware that the penetration is occurring”. The various definitions given to the notion of incapacity, and the perplexing array of tests adopted to determine the circumstances that amount to incapacity to consent due to intoxication result in ample ambiguity in their application, as Part II will demonstrate.

3. Incapacitation Statutes’ Partial and Incomplete Solution

Comparing and contrasting the above categories of statutes that may be used to prosecute sexual assault of intoxicated victims demonstrate that both draw on the notion of incapacity to consent to demarcate the boundary between a sex crime and lawful intercourse. In prosecutions under both categories, the state does not need to separately prove the victim’s lack of consent to sex. Instead, the inquiry focuses on identifying the circumstances under which a person becomes incapacitated and therefore unable to consent. Intercourse with an incapacitated person is criminalized if there is evidence that the defendant knew or reasonably should have known about the victim’s incapacitation.

At first glance, it may seem that statutes in both categories reach a similar result, that grounds 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, that is, 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, namely, intoxication.

However, one important feature separates between the two categories of statutes; while prohibitions that directly criminalize sexual intercourse with an intoxicated person

AND THEIR RELEVANCE TO CAMPUS SEXUAL ASSAULT, 21 Psychol. Pub. Pol'y & L. 227 (providing a 50 states survey of sexual assault of intoxicated victims)

See R.S. Mo 566.100 (prohibiting subjecting “another person to sexual contact when that person is incapacitated, incapable of consent, or lacks the capacity to consent”).

See Pennsylvania § 3125 (4) (prohibiting aggravated indecent assault when the complainant is unconscious or the person knows that the complainant is unaware that the penetration is occurring).

See Part II.B (criticizing the application of the incapacity to consent standard).

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See Tracey& Fromson, supra note 16 at 25
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 beyond 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 the 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 ‘incapacity to consent statutes’ to bring criminal charges in cases involving sexual assaults of voluntarily intoxicated victims. The fact that such prosecutions are not rare may suggest that there is no need to amend existing law by directly prohibiting the sexual assault of voluntarily intoxicated victims. A statutory change is seemingly unnecessary if current law already covers these cases.

This conclusion, however, is wrong. Failing to separately criminalize intercourse with intoxicated victims, whether voluntarily or involuntarily, not only misconceives the distinct features characterizing the prosecution of these cases, but also does not capture the difficulties stemming from applying the incapacity to consent standard. Moreover, the different legal treatment provided to voluntarily and involuntarily intoxicated victims only partially accounts for the broader problems characterizing the prosecution of sexual assault of intoxicated victims. Including voluntarily intoxicated victims within the scope of ‘incapacity to consent prohibitions’ addresses only some of the concerns raised by existing law, thus providing an incomplete solution to the distinct problems underlying these cases. A critical difficulty concerns the incapacity to consent standard’s shortcomings when applied in cases involving intoxicated victims. Therefore, even in jurisdictions that do not exclude voluntary intoxication from the scope of their sexual assault prohibitions, applying the incapacity to consent standard is fraught with problems, as the following part demonstrates.
II. CRITIQUE OF THE INCAPACITY TO CONSENT STANDARD

The incapacity to consent standard suffers from two types of drawbacks; the first concerns the inherent difficulty of demarcating the line between severe intoxication and actual incapacitation, the second concerns the vague, ambiguous and indeterminate formulations used by courts to define incapacitation, which sometimes result in overinclusiveness but other times in underinclusiveness.

A. The Fuzzy Line Between Intoxication and Incapacitation

Courts have long noted that “consumption, or even intoxication by itself is not the issue. It is a matter of common knowledge 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”.67 Courts have further emphasized that the line between intoxication or mere drunkenness and actual incapacitation is fuzzy, and thus unable to offer a clear guideline for evaluating the validity of the victim’s consent.68

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 getting 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 more flexible standard.69

Moreover, incapacitation cannot always be traced to a specifically defined moment and accurately discerning a precise point in time in which a person becomes incapacitated, rather than merely intoxicated, is not a feasible task. Instead, incapacitation lies on a spectrum that ranges from substantial impairment in cognitive and mental functioning while still maintaining consciousness to passing out and complete unconsciousness. Put differently, the severity and level of a person’s impairment ranges

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67 Blache, 880 N.E. 2d at 742 (citing the court’s 1870 decision in Burke).
from complete incapacity to some deterioration in cognitive and motor abilities. Moreover, studies have shown that 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.\footnote{See Aaron N. White, What Happened? Alcohol, Memory Blackouts and the Brain, National Institute on Alcohol Abuse and Alcoholism, Available at: \url{http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm}}

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 lapse of time between intercourse and medical exams and the fact that the intoxicants’ effects wear off.\footnote{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)} 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.\footnote{Giardino, 82 Cal. App. 4th at 459 (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).}

B. Vague Formulations For Determining Incapacitation

Any legal standard that draws on the incapacity to consent standard 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.\footnote{Model Penal Code: Sexual Assault and Related Offenses, Discussion Draft No. 2 (April 2015) at 63, (hereinafter: Current Draft) available at: \url{https://www.ali.org/publications/show/sexual-assault-and-related-offenses/#drafts}} Under statutes that make incapacity an independent element of the crime
of sexual assault, the prosecution must prove the precise level of the victim’s intoxication in order to show that he or she were incapable of consenting to intercourse. However, the problem with the incapacity to consent standard 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, their application proves problematic.\footnote{Id. at 63-64}

Case law demonstrates that the incapacity to consent standard 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, potentially allowing criminalization where culpability seems ambiguous, but other times proves underinclusive, precluding criminal sanctions in cases where wrongdoing is unequivocal.\footnote{See infra sections 1-2 (discussing examples from the case law)} Put differently, current laws sometimes result in underenforcement of sexual assault prohibitions while other times in their overenforcement.\footnote{See Alexandra Natapoff, Underenforcement, 75 Fordham L. Rev. 1715, 1716-17 (explaining the notion of underenforcement zones in the criminal justices system)} The following subsections demonstrate the ways in which applying this standard fails to reach just resolutions for both parties.

1. **Overinclusiveness**

One of the incapacity to consent standard’s shortcomings is its potential for overinclusiveness. Viewed through a defendant’s lens, applying this standard may lead to unpredictable decisions, overcriminalizing 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 able to successfully ascertain whether their sexual partner’s intoxication rose to the level of actual incapacitation.

2. **Lack of a Determinative Test for Assessing Incapacitation**

The incapacity to consent standard, 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.\(^\text{77}\) However, some courts, for example, the Kansas Supreme Court in its decision in \textit{State v. Chaney}, decline to adopt a dispositive test.\(^\text{78}\) In this case, the defendant was charged with rape of an incapacitated victim under a state’s statute, prohibiting intercourse with a victim who was incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or any other substance, which condition was known by the offender or was reasonably apparent to the offender.\(^\text{79}\)

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 “it 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.\(^\text{80}\) The court noted that, “lay 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”.\(^\text{81}\)

The problem with courts’ refusal to adopt a definitive test for determining victims’ incapacity to consent is that juries are left with no clear guidelines for evaluating incapacitation. Equally troubling is the fact that defendants are also not provided with any substantive direction that would help shape future sexual behavior. Instead, the \textit{Chaney} court opted for an open-ended “we know it when we see” inquiry, which is in essence a guideless totality of circumstances test. This position leaves to the jury the task of inferring the circumstances under which the victim was too intoxicated to consent to sex. It requires them to assess the victim’s capabilities based on roughly estimating what was his or her precise level of intoxication at the time of the event.

\(^{77}\) See Model Penal Code: Sexual Assault and Related Offenses Tentative Draft No. 1 (April 2014) at 58  
\(^{79}\) K.S.A. § 21-3502 (criminalizing intercourse with an intoxicated person, whether voluntary or involuntary).  
\(^{80}\) 269 Kan. 10 at 20  
\(^{81}\) Id.
b. Expanding Incapacity Beyond Cognitive Impairment

While some courts refuse to articulate a definitive test that would provide some structure to the indeterminate incapacity to consent standard, others acknowledge the need to better constrain juries’ discretion by offering some guidelines concerning what features are incorporated into the incapacity inquiry. However, none of the criteria developed by courts provide clear guidelines on how to determine when a victim’s intoxication has reached the level that renders him or her incapacitated.82

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.83 Under these tests, the inquiry focuses on evaluating a victim’s cognitive abilities to understand the nature and the consequences of the sexual act.84 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 or sexually transmitted diseases.85

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.86 It remains unclear, however, precisely what elements this phrase encompasses.87 Arguably, ability to “appraise conduct” requires that the victim also understands the additional consequences of the sexual act, including its nonphysical aspects such as the psychological and emotional ramifications as well as its moral nature.88 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

82 See Fromson supra note 16 at 27 (noting that none of the prohibitions “sets forth clear guidelines or specific factors to determine whether the victim’s level of intoxication precludes consent”).
83 See Boni-Saenz, supra note 59 1217-1221 (2015)
84 Id.
85 Id. at 1218
86 See, e.g. ME. REV. STAT. ANN. Tit. 17-A (expanding the incapacity inquiry to include inability to control or appraise conduct).
87 See Current Draft, supra note 73 at 64
88 269 Kan. 10 at 21 (noting that the victim “exhibited little indicia of rational decision making” and that she was both psychologically and physiologically impaired”).
aspects of impairment beyond cognitive ones. In this case, the defendant was convicted of rape by intoxication. The complexity of this case stemmed from the fact that the complainant did not merely passively acquiesced in the sexual acts but seemingly actively participated in them. On appeal, the defendant argued that the trial court erred by failing to instruct the jury on the meaning of the term “prevented from resistance” and on lack of consent as an element of the crime. The court accepted the defendant’s former argument but rejected the latter.

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. 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. 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.

The Giardino court’s two alternative bases for determining incapacity are disconcerting because of their potentially overbroad scope. The Giardino court’s ambiguous test does neither clarify 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

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89 82 Cal. App. 4th 454 (2000)
90 Ann. Cal. Penal Code § 261 (a) (3) (defining rape to include “Where 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.”)
91 82 Cal. App. 4th. at 468 (describing the victim volunteering to take off her clothes and masturbate).
92 Id. at 459
93 Id. at 466 (holding that the trial court failed to correctly instruct the jury); at 471 (holding that defendant’s belief in the victim’s consent was irrelevant).
94 Id. at 462. See infra II.B. 1. c. for the reason for rejecting the defendant’s second argument.
95 Id. at 462-63 (citing People v. Ing, 65 Cal. 2d 603 (1965) for the proposition that the victim would not have engaged in intercourse had she not been under the influence of intoxicants)
96 Id. at 466
perceptions and are highly subjective in nature.\textsuperscript{97} 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.\textsuperscript{98} 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 understanding of what features this test encompasses.

Moreover, the requirement that the victim is able to make “reasonable judgment” is also troubling. Incorporating 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 which 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, which does not comport with prevailing social practices and is therefore impermissible.\textsuperscript{99}

c. Invalidating Consent

Another problem in the incapacity to consent standard concerns its treatment of cases involving seemingly actual, but intoxicated consent. In the \textit{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.\textsuperscript{100} 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 \textit{Giardino} court held that nonconsent was not an element of the crime of rape by intoxication, and that the issue was not whether the victim actually consented, but whether he or she was capable of

\textsuperscript{97} See Boni-Saenez \textit{supra} note 59 at 1222
\textsuperscript{98} \textit{Id.} (noting that putting judges in charge of sexual judgments risks the chance that they will prohibit certain forms of non traditional sexual expression).
\textsuperscript{99} See \textit{infra} Part IV (discussing the prevalence of alcohol consumption as part of today’s ‘hookup’ culture)
\textsuperscript{100} See \textit{generally}, Christine Chambers Goodman, \textit{Protecting the party Girl} 2009 B.Y.U. at 88-89 (discussing cases involving explicit but inebriated consent)
exercising the degree of judgment a person must have in order to give legally cognizable consent.\textsuperscript{101}

Applying this holding to the facts of the \textit{Giardino} case itself has led the court to conclude that the victim’s level of intoxication did not preclude her from expressing valid consent.\textsuperscript{102} However, application of the same standard in future cases might lead to invalidating complainants’ affirmative and clearly communicated consent, 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.

Expanding the incapacity to consent inquiry to also 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 passive victims who were unable to refuse consent 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, precluding a person from expressing an autonomous choice.

2. \textbf{Underinclusiveness}

While applying the incapacity to consent standard 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.

\textit{a. Focusing on Victims’ Capacities Rather Than on Nonconsent}

A key drawback in the incapacity to consent standard 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 argues that under the incapacity standard the inquiry is shifted to examining whether the victim was capable of exercising the degree of judgment a person must have in order to give legally

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{101} 82 Cal. App. 4\textsuperscript{th} at 462
\item \textsuperscript{102} \textit{Id.} at 470-71 (noting that there was ample evidence that the victim consented to sex).
\end{itemize}
\end{footnotesize}
cognizable consent. In doing so, continues Tuerkheimer, factfinders fail to inquire into whether the victim actually expressed nonconsent to sexual intercourse, which is the general applicable standard in rape cases not involving the victim’s intoxication.

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 were capable of consenting. In these cases, applying the incapacity to consent standard might lead juries to the conclusion that the victim was not incapacitated and therefore no sexual assault had occurred.

The court’s decision 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. In this case, the defendant was convicted of rape by intoxication under a statute that prohibited intercourse with a person who is incapable of giving consent because of the effect of alcohol. The victim testified that while she was “very well intoxicated”, she did in fact say “no”, explicitly refusing the sexual act. On appeal, the defendant argued that there was insufficient evidence to prove that the victim was so intoxicated that she was unable to give valid consent. He reasoned that despite being intoxicated, she was still capable of refusing sexual intercourse and did so. The court of appeals agreed and reversed the conviction, observing 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.”

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103 See Tuerkheimer, supra note 23 at 27-30
104 Id.
105 269 Kan. 10
106 K.S.A. 21-3502 (a) (1) (A)
107 Chaney, 269 Kan. at 21
108 Id. at 10-11
The Kansas Supreme Court disagreed with the lower court’s construction of the incapacity provision, and reinstated the defendant’s conviction.\textsuperscript{109} The court stressed that it 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 instinctively rejecting unwanted aggression.\textsuperscript{110} It concluded that there was sufficient evidence that the victim was both psychologically and physiologically impaired due to the effects of alcohol.\textsuperscript{111} While in this specific case, the high court eventually cured the problem, the lower court’s analysis demonstrates the potential dangerous implications of focusing on the capacity to consent rather than on the nonconsensual nature of the sexual act.

\textit{b. Setting a High Threshold}

Courts have stressed that the “line between that extreme level of intoxication and absolute unconsciousness is very thin” and therefore the incapacity test mainly applies to severely incapacitated victims.\textsuperscript{112} The incapacity to consent standard sets a high threshold for determining when an impaired victim could not have consented to a sexual act. It may not allow criminal convictions in cases where the victim was too sober to completely lose consciousness but too intoxicated to communicate opposition to the sexual act.

Scholars have long criticized the incapacity to consent standard, arguing that it fails to adequately protect voluntarily intoxicated victims.\textsuperscript{113} Scholars also argue that when intoxication is voluntary, courts often define capacity as a minimal threshold.\textsuperscript{114} Moreover, they stress, where the victim is intoxicated but not unconscious, courts struggle to identify the threshold for incapacity short of complete unresponsiveness.\textsuperscript{115} Moreover, linguistically, the word “incapacitation” denotes a total loss of ability, supporting the position that victims would be considered incapacitated only where their impairment reaches or nears complete loss of capabilities.

\textsuperscript{109} \textit{Id.}
\textsuperscript{110} Chaney 269 Kan. at 17
\textsuperscript{111} 269 Kan. at 20
\textsuperscript{112} Giardino, 82 Cal. App. 4th at 463
\textsuperscript{113} See Falk \textit{supra note} 19 at 197-201
\textsuperscript{114} See Boni- Saenz \textit{supra note} 59 at 1216-1219 and accompanying notes
\textsuperscript{115} \textit{Id.}
The Massachusetts Supreme Judicial Court’s decision in Commonwealth v. Urban exemplifies the high threshold used to determine incapacitation.\(^{116}\) 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.\(^{117}\) The defendant volunteered to drive her home and she fell asleep in the car, awakening only after he began kissing her.\(^{118}\) 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 and said nothing because she was scared, could not move and was unable to push defendant off.”\(^{119}\) After the jury convicted the defendant, he appealed, challenging the jury’s instructions on the evidence needed to establish that the victim lacked the capacity to consent.\(^{120}\) The Massachusetts Supreme 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.\(^{121}\)

Because of the rigidity of the incapacity to consent standard, courts tend to construe it as covering only cases where victims were in a condition in which they were at least nearing a state of full unconsciousness.\(^{122}\) The victim in the Urban case did not pass out at any point, despite being heavily intoxicated. Yet her testimony suggests that being impaired prevented her from opposing the sexual acts. The court’s construction of the incapacity standard requiring that the victim’s level of intoxication be extreme adopts a narrow basis for evaluating incapacitation. Since incapacitation is a matter of degree, the inflexible nature of the incapacity to consent standard may lead juries to wrongly conclude that victims’ intoxication did not reach the point of complete incapacitation in cases where they did not lose consciousness.

\textit{c. Judging Victims and Placing Blame}

\(^{116}\) 880 N.E. 2d 753 (2008)  
\(^{117}\) Id. at 755  
\(^{118}\) Id.  
\(^{119}\) Id.  
\(^{120}\) Id. at 757  
\(^{121}\) Id. at 758-59  
\(^{122}\) See State of South Dakota v. Christopher Jones, 804 N.W 2d 409, 414 (2011) (noting that the line should be drawn between conscious intoxication and incapacitating intoxication).
The incapacity to consent standard embraces a victim-oriented, rather than a perpetrator-oriented inquiry. By defining the crime as intercourse with an incapacitated person, rather than as an aggravated case of nonconsensual intercourse, criminal wrongdoing is defined solely by reference to the victim’s condition. 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 who is unable to explicitly refuse it.

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. Assessing, and implicitly judging, victims’ choices and behaviors is a unique feature of sexual assault statutes. The incapacity to consent standard 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 decision to render themselves incapacitated.

Moreover, the incapacity to consent standard shapes police officers’, prosecutors’, judges’ and juries’ perceptions of the case. Instead of focusing on scrutinizing the defendant’s conduct, the victim and her precise level of intoxication become the center of decisionmakers’ attention. Scholars note that courts treat victims’ incapacity differently when intoxication was voluntary; in cases of involuntary intoxication, impaired judgment suffices to render the complainant incapable of consent. 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, the argument continues, courts are influenced by the “fault” of the complainant and at some level judge how blameless she is. Making victims’ incapacitation the cornerstone of the crime involves various considerations that implicitly incorporate judges and juries’ subjective moral and

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125 See 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)
127 See Falk *supra note* 19 at 187-88
128 Id.
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 its decision.\textsuperscript{129} 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.\textsuperscript{130} The
court strictly construed the mental incapacitation prong of the rape statute, holding that
the words ‘due to an act committed upon the victim’ connote an action done by someone
other than the victim and do not include a voluntary act by the victim herself.\textsuperscript{131} Refusing
to adopt the state’s reading to also include the victim’s own acts, the court concludes 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”.\textsuperscript{132} This result is not only deeply disconcerting but also infused with
moralistic judgment.

III. THE AMERICAN LAW INSTITUTE’S PROPOSAL

The American Law Institute’s (ALI) recent project titled Sexual Assault and
Related Offenses aims to offer a comprehensive overhaul of the Model Penal Code’s
dated rape provisions.\textsuperscript{133} A consensus exists that the Code’s dated 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 sex.\textsuperscript{134} However, the substantive
definitions of the proposed offenses are deeply contested, and there is tremendous
disagreement concerning the proper legal norms that govern intimate sexual relations.\textsuperscript{135}

\textsuperscript{129} 664 S.E. 2d 339
\textsuperscript{130} Id. at 341
\textsuperscript{131} Id. at 343
\textsuperscript{132} Id. at 346-47
\textsuperscript{133} Model Penal Code: Sexual Assault and Related Offenses, available at:
\url{https://www.ali.org/projects/show/sexual-assault-and-related-offenses/}
\textsuperscript{134} See, generally, Deborah Tuerkheimer, Slutwalking in the Shadow of the Law, 98 Minn L. Rev. 1453,
1475-78 (2014) (discussing the way sexual consent has become the touchstone of anti rape movement).
\textsuperscript{135} See Model Penal Code Sexual Assault and Related Offenses, Tentative No. 1, supra note 77; Current
Draft, supra note 73.
A main point of controversy centers around the question of what should be the standard to determine consent to sex; whether an explicit manifestation of refusal, either physically or verbally (expression of the word “no”), or instead, an affirmative permission to a specific sexual act, requiring communication of consent either through an express verbal “yes” or through behavior manifesting active cooperation.136 Initially, the ALI’s earlier drafts advocated the adoption of the latter position as the governing standard for the proposed sexual offenses.137 However, ALI members have mostly rejected this standard, expressing concerns that it fails to reflect common sexual practices, therefore increasing the risk that innocent actors would be convicted.138 In May 2016 ALI members voted on an amended definition of consent, which is a modified variation of the verbal refusal standard, and provides in pertinent part the following.139

A. 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. Consent may be expressed or it may be inferred from behavior, including words and conduct—both action and inaction—in the context of all the circumstances.
(b) Notwithstanding subsection (3)(a) of this Section, behavior does not constitute consent when it is the result of conduct specifically prohibited...
(c) Neither verbal nor physical resistance is required to establish the absence of consent, but lack of physical or verbal resistance may be considered, in the context of all the circumstances, in determining whether the person has consented.
(d) Consent may be revoked or withdrawn any time before or during the act of sexual penetration or sexual contact. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent.
(e) A clear verbal refusal—such as “No,” “Stop,” or “Don’t”—suffices to establish the lack of consent or the revocation or withdrawal of previous consent.

To date, ALI members have considered several drafts, but have not yet voted on any of them in their entirety. In what follows, I analyze only the most recent draft, Titled

136 See, generally, Tuerkheimer, supra note 23 at 9-12 (discussing the notion of consent as an affirmative expression).
137 See Current Draft, supra note 73 (proposing a new standard titled “contextual consent”, under which consent is assessed under the totality of the circumstances.
138 Id. Reporters Memorandum at XV (noting that the recommendation to adopt the affirmative consent standard generated controversy among ALI members who worried that the innocent would be convicted).
Tentative Draft 2 (hereinafter: Current Draft).\textsuperscript{140} Fully addressing the implications of rejecting affirmative consent as the governing standard for all sexual assault offenses exceeds the scope of this Article. Instead, the discussion below concentrates on the Current Draft’s specific prohibition on sexual assault of intoxicated victims, and on the implications of applying the amended definition of consent in prosecutions of sexual assault of intoxicated victims that are not covered by that provision.

Generally, the Current Draft adopts a grading structure that distinguishes between forcible rape, a felony of the second degree and the lesser offense of Sexual Penetration without Consent, a felony of the fourth degree.\textsuperscript{141} The latter provides the following:

\begin{quote}
An actor is guilty of Sexual Penetration Without Consent if he or she engages in an act of sexual penetration without the consent of the other person, and the actor knows that, or is reckless with respect to whether, the act was without consent.
\end{quote}

In addition, the Current Draft proposes a separate prohibition against sexual assault of intoxicated victims, whether voluntarily or involuntarily.\textsuperscript{142} It departs from the Code’s existing prohibition, which criminalizes only the sexual assault of involuntarily intoxicated victims, leaving voluntarily intoxicated victims outside the scope of protection.\textsuperscript{143} Proposed Section 213.3 (2) defines the offense of Sexual Penetration of a Vulnerable Person, a felony of the third degree as follows:

\begin{quote}
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.\textsuperscript{144}
\end{quote}

\textbf{A. Benefits}

\begin{flushleft}
\textsuperscript{140} See supra note 73
\textsuperscript{141} Id. at 23 (defining forcible rape to include use of physical force or implied or express threat of physical force the offense of sexual penetration without consent as “engages in an act of sexual penetration without the consent of the other person, and the actor knows that, or is reckless with respect to whether, the act was without consent.”)
\textsuperscript{142} Id.
\textsuperscript{143} Section 213.4 of the Model Penal Code provides: a person who has sexual contact with another person...is guilty of sexual assault, a misdemeanor, if...(5) 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”).
\textsuperscript{144} See Current Draft, supra note 73 at 23
\end{flushleft}
The Current Draft carries some important advantages compared to existing statutes. Its main strengths lie in acknowledging that sexual assault of intoxicated victims warrants a separate criminal provision, and in refusing to make criminal liability dependent on whether the intoxication was voluntary or not. 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.

Recognizing that voluntarily intoxicated victims deserve the law’s protection sends an important expressive 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 Current Draft contributes 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 right to the law’s protection against sexual violation.145

Moreover, by abandoning the incapacitation language, the Current Draft acknowledges the inherent difficulties embedded in the incapacity to consent standard. Furthermore, the Current Draft’s grading framework aptly recognizes that sexual assault of an intoxicated victim 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 proposal therefore correctly posits that this more egregious crime should be graded at the higher level of a felony of the third degree, compared to the general sex without consent provision, which is graded as a felony of the fourth degree.

B. Drawbacks

Without diminishing the Current Draft’s contribution to protecting voluntarily intoxicated victims, it suffers from significant shortcomings. Begin with the Sexual Penetration of a Vulnerable Person provision. The Current Draft provides a differentiated treatment to intoxicated victims, depending on the victim’s level of intoxication. This prohibition 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

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145 See infra Part IV. C (discussing prevalent misconceptions about sex and alcohol).
intoxication. But it does not cover other sexual assaults of intoxicated victims, whose level of intoxication fell short of unconsciousness or near that condition. While these cases may be prosecuted under the less serious prohibition against Sexual Penetration Without Consent, this general provision does not specifically address the distinct features characterizing intercourse with intoxicated victims.

The main problem with the Sexual Assault of a Vulnerable Person provision is that it adopts a very narrow standard for determining under which circumstances an intoxicated victim could not have refused a sexual act. By requiring that intoxication rise to the level of actual state of unconsciousness or mental torpor, the prohibition sets a notably high bar for evaluating a victim’s impairment. It rejects any other observable signs of extreme intoxication falling short of these debilitating conditions as sufficient impairment that might be covered under the specific provision.

Moreover, the proposed standard is even narrower that existing definitions of incapacitation used in many jurisdictions today, under which incapacity due to intoxication extends above and beyond absolute unconsciousness. In a series of decisions, courts have clarified that the term incapacitation covers not only complete unconsciousness but also situations where victims’ mental condition was so impaired that it prevented them from consenting to sex.

Furthermore, the Current Draft’s measure of debilitating intoxication is inadequate because it is bound to raise the exact same problems that characterize existing incapacity to consent standard. Both existing and proposed standards require an actor to evaluate the victim’s precise degree of intoxication in order to determine whether it precludes consent to a sexual act. The proposed standard requires the actor to know, or at least be reckless to the possibility, that the victim was in a state of mental torpor. But the latter is a vague medical term whose precise meaning is unclear to the layperson, therefore raising the risk that many individuals would fail to recognize its presence. The core problem characterizing the incapacity to consent test, namely, how to evaluate the victim’s degree of intoxication, remains intact under the proposal. Because the Current

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146 See §6213.3 (2)
147 Id.
148 See, e.g., Blache, 880 N.E. 2d at 739; Giardino, 82 Cal. App. 4th at 462-63 (rejecting the view that incapacitation requires absolute unconsciousness)
149 See Current Draft, supra note 73
Draft fails to provide any clear guidance on how to make this assessment, it is prone to create the same problems underlying existing incapacity to consent standard. In addition, similarly to the incapacity to consent standard, the ‘mental torpor’ test also wrongly focuses on the victim’s condition, rather than on the defendant’s culpable behavior.

Adopting the above stringent standard for impairment due to intoxication might lead to wrongly characterizing clearly nonconsensual sexual acts as consensual. Take for example, one scenario discussed in the Current Draft, in which the perpetrator and the victim had been drinking at a party, and at one point the victim had become so intoxicated that he or she had fallen to the floor.\(^{150}\) After helping the victim lie down in a back room, the perpetrator then engages in intercourse. During the act, the victim remained entirely passive and failed to express opposition. Despite the fact that the victim’s impairment was substantial, rendering him or her completely unresponsive, the Current Draft posits that this case would not be covered by the specific prohibition against sexual assault of intoxicated victims because the victim’s impairment had not reached the requisite level of unconsciousness or mental torpor.\(^{151}\) A statutory framework that distinguishes between intoxicated victims of sexual assault based on their precise level of intoxication is arbitrary and unjustified. It leaves unprotected significantly impaired victims whose intoxication fell short of the proposal’s narrow standard.

In an attempt to alleviate this questionable position, the Commentary stresses that cases like the above hypothetical, may still be prosecuted under the general offense of Penetration Without Consent under Section 213.2.\(^ {152}\) However, the problem with resorting to this alternative route to prosecution in cases involving heavily intoxicated victims is that it necessarily incorporates the Current Draft’s amended definition of consent, which, in itself suffers from major drawbacks. It is especially ill suited when applied in cases where victims’ intoxication renders them unresponsive and thus unable to effectively refuse a sexual act.

Two features embodied in the Current Draft’s definition of consent are especially disconcerting due to their far-reaching implications for cases involving sexual assault of

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\(^{150}\) Id. at 18 (illustration 7).

\(^{151}\) Id. (noting that this case might still be prosecuted under the general provision prohibiting sexual penetration without consent).

\(^{152}\) Id.
intoxicated victims; first, the definition provides that consent may be inferred not only from action but also from inactivity, and second, the definition further provides that lack of physical or verbal resistance may be considered in context of all the circumstances in determining whether the person has consented.\footnote{153}{See §213.0. DEFINITIONS (3) “Consent”}

A position under which consent to sex may be inferred from a person’s 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.\footnote{154}{See, generally, Ilene Seidman & Susan Vickers, The Second Wave: An Agenda for the Next 30 Years of Rape Law Reform, 38 Suffolk U.L. Rev. 467, 484-85 (noting that it is crucial that silence be eliminated as an indicator of consent).} Second, inferring consent from a person’s inactivity is especially indefensible when it concerns intoxicated individuals. These victims are completely unresponsive precisely due to their severe intoxication, which precludes them from expressing explicit refusal to sex through words or action.\footnote{155}{See, generally, Tuerkheimer, supra note 23, at 29 (noting one feature of rape law under which utter passivity on the part of a victim is equated with consent to sexual intercourse)}

Moreover, the Current Draft’s position that lack of verbal resistance may be construed as an expression of consent is equally troubling. It not only rejects the affirmative consent standard as the test for determining whether consent had been given, but also concedes that in some circumstances, a person’s absolute unresponsiveness might be viewed as consent to sex. It is especially disturbing that this position holds not only in cases involving intercourse without consent when intoxication is not a factor but also in those involving intoxicated individuals where a much greater possibility exists that the lack of opposition stems from the victim’s impairment rather than from actual agreement. 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.

One might counter that the words “in the context of all the circumstances” found in the Draft’s amended definition of consent arguably leave open an argument that intoxication is one such circumstance, therefore an intoxicated victim’s inactiveness would not be construed as consent.\footnote{156}{See Current Draft, supra note 73 at 13-14} While in theory, this seems like a plausible
reading, in practice it is highly unlikely that an actor would be convicted of raping an unresponsive intoxicated individual under the “Sexual Penetration Without Consent” provision, given the fact that the victim’s intoxication was not deemed sufficiently impairing to fall under the prohibition against intercourse with vulnerable persons.

IV: SOCIAL PERCEPTIONS ABOUT SEX AND INTOXICATION

Before turning to elaborate on an alternative proposal to amend prohibitions against sexual assault of intoxicated victims, let me pause to delve into the source of the confusion surrounding the legal treatment of these offenses. Extensive research shows that a significant number of sexual assault victims were heavily intoxicated at the time of the crime. Yet the interplay between sex and alcohol consumption 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, I take a detour to examine 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 overstated. A significant number of individuals deliberately seek to get “high”, with the goal of enjoying the pleasurable effects of intoxication. Moreover, alcohol is commonly perceived not only as an enjoyable social activity but also as paramount in facilitating social interactions due to its lowering social inhibitions effects.

157 See Falk, supra note 19 at 142 (noting that a substantial number of rapes involve intoxicated victims).
158 See, Nora V. Demleitner, Organized Crime and Prohibition: What Difference Does Legalization Make? 15 Whittier L. Rev. 613, 622-24 (2015) (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 one specific group; women who had never frequented saloons started to drink in speakeasies and other public spaces).
160 Id.
Scientific research shows that moderate and responsible alcohol consumption by adults has 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. Specifically, studies demonstrate that alcohol consumption has scientifically proven positive mood altering effects. Scholars note that alcohol consumption also promotes mutually desired and welcome sexual encounters and that intoxicated sexual acts may be perfectly consensual. Studies that examined whether alcohol consumption was related to consensual sexual activity that occurred prior to 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 and that people who were intoxicated were more likely to have engaged in consensual sex than sober individuals.

Alcohol is widely consumed in myriad social interactions, including colleges, high schools, the military as well as bars and house parties. Binge drinking, namely, excessive consumption of alcohol, has become a pervasive part of today’s social practices and norms. Moreover, heavy alcohol consumption is inextricably intertwined with the prevalent social practice commonly known as the ‘hook up’ culture, that is, engaging in casual, uncommitted sex without the intimacy, romance or emotional relationships. Studies have found a close connection between ‘hooking up’ and alcohol consumption;

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161 See Archie Brodsky & Stanton Peel, Psychological Benefits of Moderate Alcohol Consumption, in: S. Peele & M. Grant (Eds.), Alcohol and pleasure: A health perspective, at 187-207 (1999) (noting that epidemiological research has found consistent associations between moderate alcohol consumption and beneficial psychosocial outcomes).

162 Id.


164 See Harrington N.T. and Leitenberg H. Relationship Between Alcohol Consumption and Victim Behaviors Immediately Preceding Sexual Aggression by an Acquaintance, Viol. Vict. 9; 315-324 (1994) (noting that 74% of women had engaged in consensual sexual conduct prior to the sexual attack).

165 See Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Drinking in America: Myths, Realities, and Prevention Policy (2005) (noting that nearly a third of 12th graders binge drink, reporting drinking at least five drinks at one time).

166 See Judith G. McMullen, Underage Drinking: Does Current Policy Make Sense? 10 Lewis & Clark L. Rev. 333, 348-49 (discussing underage drinking in college and noting that binge drinking is typically defined as five or more drinks per occasion).

For example, one study reported that 64% of uncommitted sexual encounters follow alcohol use, with a median consumption of 3 alcoholic drinks.\textsuperscript{168}

The high correlation between ‘hookups’ and excessive alcohol consumption raises serious concerns given a significant increase in the commission of nonconsensual sexual acts that often result from these intoxicated encounters.\textsuperscript{169} However, the mere fact that alcohol was heavily consumed prior to a sexual act does not render it nonconsensual, since intoxicated individuals do not lose their right to choose to engage in desired sex.\textsuperscript{170} 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.\textsuperscript{171}

Media reports predominantly portray alcohol’s harmful effects and its potential contribution to the commission of sexual assaults.\textsuperscript{172} These negative depictions, however, divert society’s attention from fully grappling with the reality that for many individuals alcohol consumption is anything but a single dimensional, mostly negative experience.\textsuperscript{173} Notwithstanding the myriad problems stemming from excessive drinking, alcohol is here to stay as a hugely popular social activity for a significant number of people who drink to achieve its pleasurable mood altering effects.

\textbf{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.\textsuperscript{174} Alcohol consumption carries a host of

\begin{footnotesize}
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\item See Lewis MA, Granato H, Blayney JA, Lostutter TW, Kilmer JR, \textit{Sex Behav. Predictors of hooking up sexual behaviors and emotional reactions among U.S. college students}, 2012 Oct; 41(5):1219-1229 (noting that a study found that nearly 61% of undergraduate students used alcohol, with an average of 3.3 alcoholic drinks, during their most recent hookup).
\item See infra section I. B.
\item See Craig, supra note 163
\item See Garcia, supra note 167 at ‘hookup regret’ (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).
\item See Emily Yoffe, College Women: Stop Getting Drunk, Slate Double X, October 15, 2014 Available at: http://www.slate.com/articles/double_x/doublex/2013/10/sexual_assault_and_drinking_teach_women_the_connection.html
\item See, generally, Peggy Orenstein, GIRLS & SEX 185-87 (Harper Collins Publishers, 2016) (2015) (discussing the complex role that alcohol consumption plays among teenagers and young adults).
\end{enumerate}
\end{footnotesize}
adverse effects that often result in significant harm, both to consumers and to others.\textsuperscript{175} The key feature that distinguishes alcohol consumption from being a pleasurable social activity to one that carries negative effects lies with the notion of excess. While moderate drinking is often positively experienced, it is binge drinking, frequently to oblivion that leads to ample harms, including accidents, addiction, health problems and failure to perform work, academic and personal obligations.\textsuperscript{176}

One of the harms of excessive drinking concerns the heightened risk of sexual violation. Studies have established 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.\textsuperscript{177} For example, studies have found that becoming intoxicated is a risk factor that significantly increases people’s chances for subsequent sexual victimization.\textsuperscript{178} While victims of 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.\textsuperscript{179} Scientific studies confirm that women and men process alcohol differently, namely, that men are able to handle excessive alcohol consumption better and that women become intoxicated faster.\textsuperscript{180}

Some studies have gone beyond observing the correlation between excessive alcohol consumption and sexual aggression, suggesting that there is a causal link between

\textsuperscript{175} See Abbey A, Ross LT, McDuffie D, McAuslan P., Alcohol and dating risk factors for sexual assault among college women, Psychology of Women Quarterly. 1996; 20:147–169
\textsuperscript{176} See Brennan, A.F., Walfish, S. and Aubuchon, P., Alcohol use and abuse in college students: II. social/environmental correlates, methodological issues, and implications for intervention. Int. J. Addict. 21: 449-474, 475-493 (1986) (noting that studies that studies identified two general types of drinking motives; drinking for emotional escape or coping purposes and drinking for social purposes).
\textsuperscript{177} See Maria Testa et al, The Role of Victim and Perpetrator Intoxication on Sexual Assault Outcomes, 65 (3) J. STUDIES ON ALCOHOL, 320, 321 (2004) (suggesting that approximately half of all sexual assault incidents among college and youth aged populations involve the use of alcohol or drugs by the perpetrator, the victim or both).
\textsuperscript{179} See National Institute on Alcohol Abuse and Alcoholism, available at: http://pubs.niaaa.nih.gov/publications/aa46.htm
\textsuperscript{180} See Why do Women Process Alcohol Differently? Health Status http://pubs.niaaa.nih.gov/publications/aa46.htm (noting that several physiological explanations account for this difference; men’s bodies are equipped to dilute alcohol more efficiently, women’s capacity to metabolize alcohol is slower, hormonal changes affect the rate at which women’s bodies process alcohol and alcohol content remains highly concentrated in women’s blood stream).
these studies, however, are controversial, mainly because mere correlation between two phenomena does not prove actual causation. 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.

The precise role of alcohol in facilitating sexual assault remains highly contested. Scholars reject the argument that excessive drinking causes rape, stressing that sexual predators commit rape, using intoxication as an excuse for sexual aggression. 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. These attitudinal and situational factors interact with alcohol consumption, increasing the likelihood of sexual assaults.

However, conceding that there is no direct causal connection between alcohol consumption and sexual assault does 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 raised its chances. The explanation behind this increased likelihood rests with the effects that intoxication has on a victim’s ability to successfully resist a perpetrator’s predatory conduct given the profound effects that alcohol consumption has on a drinker’s functions and perceptions.

The physical and mental effects of excessive consumption of intoxicants are well documented in the scientific literature, encompassing both cognitive and motoric capabilities. The level of impairment in motor skills varies, ranging from inability to

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182 See Antonia Abbey, Alcohol Related Sexual Assault: A Common Problem Among College Students, Journal of Studies on Alcohol/Supp. No. 14, 2002 118-128 at 119 (noting that the fact that alcohol consumption and sexual assault co-occur does not demonstrate a causal connection between them)
183 Id.
184 Id. (noting that perpetrators often use alcohol to excuse sexual assault perpetration).
185 See Ford and England, supra note 11 (noting that 11 percent of more than 20,000 students surveyed reported being subjected to unwanted sex while incapacitated from alcohol).
stand, loss of balance and muscular coordination, inability to perform simple physical tasks 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.

Excessive consumption of alcohol impairs victims’ ability to react to perceived risks because the perception of reality is substantially distorted and judgment is clouded. 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. Individuals who are incapable of 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 assault.

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. Related to that is the perception that people deliberately consume alcohol to achieve that effect, purposely getting intoxicated to have sex. Research also

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191 Id.
192 See Testa M. and Livingston J.A., *Qualitative Analysis of Women’s Experiences of Sexual Aggression: Focus on the Role of Alcohol*, Psych. Women Q. 23: 573-589 (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)
194 See Abbey, *supra note* 182 at 121
195 Id. (noting that the mere presence of alcohol leads many men to assume the women wanted sex)
suggests that alcohol consumption encourages biased appraisal of a partner’s sexual motives and enhances misperception of sexual intent.\textsuperscript{196} 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.\textsuperscript{197} Many individuals feel more aggressive after drinking alcohol, and these expectations not only become self-fulfilling but also increase their drinking.\textsuperscript{198}

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 make themselves sexually available.\textsuperscript{199} For example, studies show that women who drink alcohol are perceived as being more sexually promiscuous than women who don’t, making them easy targets for sexual assault.\textsuperscript{200} This myth proves especially dangerous to intoxicated people because it implies that voluntary intoxication equals consent to any and all sexual acts, effectively placing them in a state of perpetual willingness to have sex.

The above myths and misconceptions not only result in significant perils for voluntarily intoxicated individuals but also hinder the chances of successful prosecutions.\textsuperscript{201} The reason for this impediment is that the above societal misperceptions in turn effectively shape decisionmakers’ assessment of whether consent to sex had been given and therefore influence their decision whether to pursue criminal charges.

Bringing criminal charges against defendants who sexually assaulted intoxicated victims is impeded by law enforcement officers’ and prosecutors’ tremendous amount of

\textsuperscript{196} Id. at 120
\textsuperscript{197} Id. (noting that the expectations concerning alcohol’s effects are independent of alcohol’s actual pharmacological effects)
discretion in deciding which sexual acts amount to criminal conduct.\textsuperscript{202} 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.\textsuperscript{203} Scholars are especially concerned with prosecutors’ broad discretion to choose which cases warrant prosecution because their discretion is unconfined, unstructured and unchecked.\textsuperscript{204} 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.\textsuperscript{205} The reason behind a prosecutor’s decision not to pursue criminal charges in sexual assault cases involving victims’ voluntary intoxication lie 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”.\textsuperscript{206} In the eyes of many law enforcement officers and prosecutors, sexual assault of a voluntarily intoxicated victim is simply not perceived as ‘real rape’.

Moreover, the criminal justice system is characterized by deeply embedded perceived dichotomy between a culpable perpetrator and an innocent victim, free of contributory fault or moral blame.\textsuperscript{207} Traditionally, prosecutors have been reluctant to prosecute cases where victims’ purportedly unchaste behaviors fail to comport with

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\item See, generally, Jon Krakauer, Missoula Rape and the Justice System in a College Town, at 367 (2015); Amy Knight Burns, Improving Prosecution of Sexual Assault Cases, 67 Stanford L. Rev. Online 17 (2014)
\item See, generally, William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 506, 519 (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).
\item See, generally, Kate Stith, The Arc of the Pendulum: Judges, Prosecutors and the Exercise of Discretion, 117 Yale L. J. 1420, 1422-23 (2010) (discussing the range of prosecutorial discretion not to prosecute and the authority to prosecute); see Krakauer, supra note 202, at 250-51 (finding that out of 114 sexual assault reports referred to Missoula police between 2008-2012, the prosecution filed criminal charges only in 14 cases, noting insufficient evidence or insufficient corroboration as the reason behind declining to prosecute).
\item See, generally, Corey Rayburn Yung, How to Lie with Rape Statistics: America’s Hidden Rape Crisis, 99 Iowa L. Rev. 1221-22 (2014) (discussing police officers use of the designation “unfounded” to label rape complaints).
\end{enumerate}
traditional perceptions about blameless victims falling prey to predators. While archaic notions about victims’ chastity have been officially eliminated from legal considerations, they continuously persist in decisionmakers’ perceptions about victimhood. Scholars note that the criminal justice is often skeptical of victims who are perceived as less than perfect, according to prevailing societal norms. Rape law reformers have criticized the practice of taking these considerations into account, endeavoring to decrease the criminal justice system’s tendency to judge and assign blame on rape victims.

This problem is further exacerbated in cases involving voluntarily intoxicated victims because they typically do not fit the traditional prosecutorial script about victimhood and criminal perpetration. Decisionmakers’ choices concerning what 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 effect not only police officers and prosecutors’ 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 claim that they did not consent to sex. Furthermore, another common misperception that shapes judges and jurors’ views is the assumption that

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209 See Michelle J. Anderson, *Distinguishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 New Crim. L. Rev. 644, 657-61 (discussing negative social attitudes toward rape victims perceived as ‘unchaste’).


212 See Krakauer, supra note 202 at 45-48 (discussing police officers and prosecutors’ views about an intoxicated victim’s account).

voluntarily intoxicated victims had engaged in consensual sexual acts, but later regretted them once they sobered up, wrongly labeling regretful sex as sexual assault.  

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. Scholars note that jurors and judges often succumb to a “blame the victim mentality.” Scholars further note the gendered difference between societal perceptions of intoxicated males and females; 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.

Societal misperceptions also contribute to victims’ reluctance to file complaints with the police. Studies find that rape is the most underreported crime, with less than 20 percent of occurrences being reported to law enforcement officers. 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. Scholars note that for many victims who were sexually attacked while intoxicated, having been that impaired becomes a source of guilt and shame. Since victims are wary of being judged, anticipating that the criminal justice system will judge and place at least partial blame on them, they are hesitant to rely on this system for recourse.

In sum, societal misperceptions effect not only the public’s image about voluntarily intoxicated victims’ behaviors, but also shape the legal treatment of sex crimes perpetrated against them. In an endeavor to change these misconceptions as well as address the drawbacks in existing prohibitions on sexual assault of intoxicated victims, as elaborated in Parts I-II, the following part proposes an alternative test for determining when a sexual act perpetrated against an intoxicated victim amounts to criminal conduct.

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214 See, Cathy Young. Feminists Want Us to Define These Ugly Sexual Encounters as Rape. Don’t let them. https://www.washingtonpost.com/posteverything/wp/2015/05/20/feminists-want-us-to-define-these-ugly-sexual-encounters-as-rape-dont-let-them/

215 See Goodman, supra note 100 at 76-77

216 Id. at 76 and accompanying notes.


218 See Orenstein, supra note 173 at 197 (2015) (noting that one victim even told her rapist: “thanks, I had fun”).

219 See Abbey supra note 182 at 121 (noting that victims often blame themselves for becoming incapacitated)
The problems characterizing existing statutes against sexual assault of voluntarily intoxicated victims call for considering specific criminal prohibitions that respond to the distinct concerns underlying these cases. The main challenge for any legal reform in this area is to draft provisions that will be sufficiently expansive to protect voluntarily intoxicated victims from nonconsensual sexual acts on one hand, but will preclude criminal liability in cases falling short of culpable conduct on the other. The following sections first delve into the reasons for imposing criminal liability in cases involving voluntary intoxication. Next, I offer an alternative framework that would replace the existing ‘incapacity to consent’ standard with an ‘inability to express nonconsent’ test.

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 ensue from their free choices.220

A societal debate about the justifications for placing criminal blame, especially when both the perpetrator and the victim were voluntarily intoxicated was first sparked in the early 1990s, in response to media reports suggesting that there was an “epidemic”, mainly in colleges, of what was dubbed “date rape crisis”.221 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.222

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

220 See supra Part IV.C
221 See Kathryn Abrams, Songs of Innocence and Experience, Dominance Feminism in the University, 113 Yale. L. J. 1533, 1534 (1994)
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. 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.

A recent increase in sexual misconduct allegations has reignited the debate over the proper legal response to sexual acts committed against voluntarily intoxicated individuals. For example, Wall Street Editor James Taranto argued in a 2014 Op-Ed 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.

Why then should the law impose criminal sanctions in cases where people free willingly choose to become intoxicated and diminish their abilities to protect themselves against harmful situations? 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 criminal liability dependent on whether the victim’s intoxication was voluntary or not. Most importantly, people do not deserve less legal protection just because they free willingly became impaired.

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223 See Katie Roiphe, THE MORNING AFTER: FEAR, SEX AND FEMINISM ON CAMPUS (1993)
224 Id. at 53-54 (noting that women should be responsible for their decisions when they choose to consume alcohol and they can have sex when they intoxicated without that act constituting rape).
226 See Yoffee, supra note 172 (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 (rejecting Yoffee’s position by contending it is ‘victim blaming’).
227 See James Taranto, Drunkenness and Double Standards, WSJ February 10, 2014, available at: http://www.wsj.com/articles/SB10001424052702304555804579374844067975558 (noting that “when 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 facto”).
First, the harm principle provides a paramount justification for criminalizing nonconsensual sex with voluntarily intoxicated victims, including cases where both parties were intoxicated.\textsuperscript{228} 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.\textsuperscript{229} When both parties are intoxicated, a critical difference sets them apart; the perpetrator imposes nonconsensual sex on the victim, inflicting harm, while the victim suffers significant injury as a direct result of the perpetrator’s actions. Sexual assault causes serious mental and psychological harm to victims, and discussion of its full extent exceeds the scope of this Article.\textsuperscript{230} Suffice it to say that while every adult has an autonomous right to become intoxicated, this freedom is limited and ends at the moment it also injures another. While people may engage in behaviors that harm themselves, no one has a right to cause harm to others. Holding individuals criminally responsible for harms they inflict on others while intoxicated is generally more appropriate than holding intoxicated victims accountable for what intoxicated defendants did to them.\textsuperscript{231}

Second, a related justification for criminalization lies with the principle of endangerment.\textsuperscript{232} The law has long recognized that engaging in behaviors that place others at risk of harm warrants criminal sanction, with the offense of reckless endangerment being the paradigm example.\textsuperscript{233} All jurisdictions have prohibitions against public intoxication, with some states requiring that the defendant pose a risk of danger to the public and others criminalizing the mere appearance of a person who is under the influence of intoxicants in a place open to the general public.\textsuperscript{234} These statutes are

\textsuperscript{228} See John Stuart Mill, ON LIBERTY (1859) (“the 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”).


\textsuperscript{230} See, generally Alan Wertheimer, CONSENT TO SEXUAL RELATIONS 102-18 (2003) (providing an elaborate discussion of the ample harms of nonconsensual sex).

\textsuperscript{231} See supra note 77 at 58


preemptive measures used to prevent future harm to others. The same principle applies when an intoxicated perpetrator sexually assaults an intoxicated victim; consciously consuming excessive amounts of intoxicants while interacting with others places people at risk of being sexually assaulted, thus justifying criminalization once that risk had materialized into actual harm.

Third, criminalizing the sexual assault of voluntarily intoxicated victims is justified because the sexual acts at issue are 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 behind the victim’s inability to manifest refusal to sex is attributed to intoxication. This inability does not depend on how the intoxication came about. The question of the voluntariness of the intoxication is simply irrelevant for the purpose of considering whether the sexual act was nonconsensual.

Fourth, 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 individuals’ voluntary consumption of intoxicants implies a cart blanche agreement to any harm inflicted on them while intoxicated, including violation of their right to sexual autonomy. An individual’s choice to expose oneself to potential harm that might ensue from becoming intoxicated does not indicate consent to additional harm resulting from nonconsensual sex.

Fifth, 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. Professor Alan Wertheimer for example, notes that in other areas of law outside the context of sex offenses, such as theft crimes, victims’

\[\text{See, generally, Jessica Valenti, THE PURITY MYTH: HOW AMERICA’S OBSESSION WITH VIRGINITY IS HURTING YOUNG WOMEN (2009) (noting that while women should be treated as independent agents, being responsible has nothing to do with being raped and that women don't get raped because they were not careful but because someone raped them)}\]
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.\textsuperscript{236}

Lastly, engaging in sexual acts with a people who were unable to oppose them due to their 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 sanction. 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.

\textbf{B. Defining the Elements of the Crime}

The subsection below considers an alternative framework to protect intoxicated individuals against sexual violation, while responding to the concerns stemming from existing incapacity to consent standard. The proposed statute is aimed at striking a balance between safeguarding intoxicated people from nonconsensual sexual acts perpetrated against them while avoiding overbroad criminal liability for non-culpable conduct. 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 increases the severity of the offense.\textsuperscript{237} The proposed \textit{Sexual Imposition Against a Vulnerable Person} provision provides the following:

\textit{An actor is guilty of sexual imposition against a vulnerable person when he or she recklessly engages in sexual penetration, by direct contact of any body part or by any object, of a passive, silent or otherwise unresponsive person who has not expressly physically or verbally refused to the act but was unable to effectively communicate such opposition due to his or her intoxication, whether voluntary or involuntary.}

\textsuperscript{236}See Wertheimer, supra note 230 at 244
\textsuperscript{237}Addressing the sentencing aspects related to sexual assaults exceeds the scope of this Article. Suffice it so say that states’ sentencing schemes may also support this grading structure by listing the surreptitious administration of intoxicants as a sentencing enhancer.
The offense is a felony of the second degree if the actor administered the intoxicants without the person’s knowledge, and a felony of the third degree if intoxication was voluntary. 238

1. Actus Reus

To establish the actus reus of the crime the prosecution would have to prove two elements; first, that the victim did not explicitly express effective verbal or physical opposition to the sexual act. Normally, when a victim is sober, the verbal refusal standard requires that nonconsent be expressly communicated through words or behavior because consent to sex is defined as observable behavior that communicates willingness, rather than a subjective thought or feeling. 239 The problem is that under this standard, passivity, silence or any other ambiguous behavior falling short of refusing sexual acts are treated by most sexual assault laws as consent to sex. 240 If that standard had been applied in cases involving unresponsive intoxicated victims, their passivity would be considered consent to sex. Yet, when an intoxicated person is not responding to sexual advances, there is a significant risk that this person is not consenting. Under the proposed statute, the prosecution would have to prove that the sexual act was nonconsensual despite the fact that the victim failed to express refusal.

Second, to overcome the problem stemming from applying the verbal refusal standard on cases involving intoxicated victims, the statute also requires the prosecution to prove that the reason for the victim’s failure to express opposition to the sexual act is inability to do so because of intoxication. Requiring a heavily intoxicated victim to effectively communicate refusal is unfeasible because inactiveness and lack of response

238 Cf. Model Penal Code: Sexual Assault and Related Offenses Current Draft, supra note 73 at 56 (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 this version was one of several proposals submitted by the ALI Reporter, it was ultimately rejected in Discussion Draft 2. The statute I discuss in this part draws on the ALI’s earlier proposal.
239 See Bryden, supra note 124 at 376 (noting that a subjective standard is ambiguous and requiring objective behavior reduces the danger of erroneous conviction).
240 See Schulhoffer, supra note 25 at 74 (noting that the verbal refusal standard does not fill the gaps in existing laws).
are direct adverse effects of excessive consumption of intoxicants. Intoxicated victims are
often unable to manifest opposition to nonconsensual sex precisely because their
debilitating condition precludes them from doing that.\footnote{Id. at 14-15 (noting that a woman too drunk to stand up should not be expected to resist physically or protest explicitly--even if she downed all the drinks of her own accord).} Under the proposed statute, when individuals are so impaired due to intoxication that they are unable to communicate opposition to sexual acts, passivity, silence or any other form of unresponsiveness or ambiguous behavior are treated as nonconsent.

In submitting that an intoxicated person’s lack of response is not equated with consent to sex, the proposed statute does not take a position with respect to what should be the standard for evaluating the presence of consent for the purpose of the general offense of sexual penetration without consent. Specifically, it leaves open the question of whether express verbal refusal or rather an affirmative expression of permission is required when debilitating intoxication is not at issue. Instead, the proposed statute carves out a distinct standard for evaluating consent that would be applied only in cases where the victim was unable to manifest opposition to the sexual acts due to intoxication.

This separate treatment rests on acknowledging that there is a critical difference between a sober person’s passive response to a sexual act and a heavily intoxicated person’s irresponsiveness. A sober person who remains inactive might be reasonably required to expressly communicate nonconsent to engage in a sexual act, in order to clarify the ambiguity stemming from the passive response. However, such requirement is neither plausible nor feasible when a heavily intoxicated person is concerned because the state of impairment precludes that person from engaging in any thought process, including contemplating whether to have sex.\footnote{See Goodman, supra note 100 at 94-97 (noting that silence should never constitute consent in intoxicated sexual encounters).} Given the fundamental difference between the meaning of a sober person’s inactivity and that of an intoxicated person, the proposed statute does not necessitate the adoption of an affirmative permission standard as the generally applicable standard for evaluating the presence of consent in other contexts not involving victims’ impairment due to intoxication.
2. Mens Rea

As mentioned earlier, a recurrent 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 powers of judgment and ability to evaluate risks are also clouded by the effects of intoxicants.\(^{243}\) In these cases, defendants typically claim that being heavily intoxicated at the time of the sexual encounter had rendered them unconscious of the risk that their sexual partner did not consent to sex.\(^{244}\)

The criminal law has traditionally rejected a defendant’s voluntary intoxication as a defense to a crime.\(^ {245}\) 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.\(^ {246}\) 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.\(^ {247}\) Under such provisions, an intoxicated person’s awareness of a risk is measured against a 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. Moreover, many court decisions have held that self-induced intoxication is considered in itself a reckless conduct.\(^ {248}\) Given individuals’ common knowledge of the risks of heavy intoxication, when a person consciously chooses to impair his or her powers of perceptions, judgment

\(^{243}\) See supra Part V.A (discussing the scenario in which both parties are intoxicated).
\(^{244}\) Commonwealth v. Somdeth Mountry, 972 N.E. 2d 438, 443 (Mass. 2012) (an intoxicated defendant claiming that he was unaware of the victim’s state of intoxication).
\(^{245}\) See, e.g. 18 Pa. Const. Stat. Section 308 (2012) (providing that neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge; Mont. Code Ann. 45-2-203 (2012) (providing that an intoxicated person is criminally responsible and an intoxicated condition is not a defense to any offense).
\(^{246}\) See, e.g. People v. Garcia, 250 Cal. App. 2d 15 (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).
\(^{247}\) See Model Penal Code Section 2.08 (2) and accompanying American Law Institute Commentary at 359 (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”).
\(^{248}\) See People v. Register, 457 N.E. 2d 704, 709 (N.Y. 1983) (overruled on other grounds);
and control, that person is held to be aware of the risk that he or she might inflict harm on other individuals.\(^\text{249}\)

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.\(^\text{250}\) Moreover, the argument continues, 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.\(^\text{251}\) Furthermore, holding an actor criminally responsible when actual awareness of the risk that a person did not consent to sex, results in disproportionate punishment for non-culpable conduct.\(^\text{252}\)

Acknowledging the strengths of this critique, the proposed statute requires proof of the defendant’s actual awareness of the risk that the victim was unable to refuse the sexual act due to intoxication. Placing the burden on 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 was unable to oppose the sexual act. Defendants act with a blameworthy state of mind if they consciously ignore a substantial and unjustifiable risk that consent is missing by proceeding with the sexual act anyway. Demanding proof of actual recklessness is justified because it ensures that criminal sanctions are only imposed on culpable defendants. This goal may be accomplished only by rejecting mere negligence as sufficient basis for criminal liability.

However, providing defendants with the opportunity to introduce evidence of their own intoxication, would not necessarily lead to absolving intoxicated defendants from criminal responsibility. For example, in the Massachusetts case of Commonwealth v Somdeth Mountry, a defendant who was 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.\(^\text{253}\) The Supreme Judicial Court of Massachusetts held that a defendant was entitled to have a jury

\(^{250}\) See, generally, Stephen J. Morse, Fear of Danger, Flight from Culpability, 4 PSCYCHOL. PUB. POLY’Y & L. 250, 254 (1998) (noting that the equation is often preposterous).
\(^{251}\) See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 173 (Preliminary Draft No. 5, September 2015)
\(^{252}\) Id.
\(^{253}\) Mountry, 972 N.E. 2d at 440
instructed that they 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.254 However, applying this holding on the specific facts of the case, 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.255

Similarly, under the proposed statute, some degree of impairment in the defendant’s mental capabilities 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 risk of the victim’s inability to refuse the sexual act. Only evidence of debilitating intoxication should satisfy the high bar of proving the defendant’s lack of subjective awareness.

The recent public outcry following the lenient sentence imposed in the infamous “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.256 On Jan 18, 2015, two Stanford University graduate students found Turner lying on top of an unconscious woman behind the dumpster outside of a campus fraternity party.257 The 23-year-old victim was partially clothed and had a blood alcohol level three times the legal limit. While the victim didn’t remember anything about the incident, the two witnesses said they saw Turner “thrusting” on top of her while she lied motionless. Turner was arrested and later convicted by a jury of 3 felony counts: assault with intent to commit rape of an intoxicated woman, sexually penetrating an intoxicated person with a foreign object, and sexually penetrating an unconscious person with a foreign object.258 While the

254 Id. at 448
255 Id. at 449
258 See supra note 90 (providing California’s definition of rape by intoxication under CA PENAL §261 (3). California is one of ten jurisdictions whose statutes criminalize sexual intercourse with an intoxicated person, whether voluntary or involuntary).
conviction could have resulted in a maximum penalty of 14 years in prison, a Santa Clara Superior Court judge sentenced Turner to six months in county jail and probation.\textsuperscript{259}

The outrage over the disproportionately light sentence has diverted the public’s attention from a couple of critical facts; first, the defendant was found guilty of the crime of rape of an intoxicated person, a conviction that carries a host of collateral consequences including registering as a sex offender for the rest of his life.\textsuperscript{260} Second, the defendant’s intoxication has not served as a defense to the rape. Instead, it served as one mitigating factor in a myriad of other factors used by the judge in the sentencing phase. The defendant’s conviction rests on the theory that while he was intoxicated, his intoxication did not rise to a degree that precluded subjective awareness of the victim’s unconsciousness. Despite being intoxicated, the defendant had known of the victim’s inability to refuse the sexual act.

While the critique concerning Turner’s sentence is justified given the utterly disproportionate relationship between the severity of the crime and the lenient punishment, the distinction between the role of defendant’s intoxication in imposing criminal liability and its role as a mitigating factor during sentencing is a valuable one. Under the proposed statute, for the purpose of imposing criminal liability, requiring proof of the defendant’s actual awareness will not necessarily result in acquitting intoxicated defendants for sexually assaulting intoxicated victims when their intoxication does not reach the debilitating level. Mere intoxication does not equal incapacitation. Moreover, proof that the defendant was intoxicated does not automatically negate awareness of a material element of the crime since an intoxicated defendant may still form intent. Yet, the defendant’s intoxication might be taken into account when considering a host of aggravating and mitigating circumstances at the sentencing phase, along with other relevant factors. The problem with Turner’s sentence lies with striking an inappropriate balance between these 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.

\textsuperscript{259} See Press Release supra note 257
\textsuperscript{260} Id.
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 current Draft discussed earlier. First, it replaces the flawed incapacity to consent standard with a test that focuses on victims’ nonconsent to sex and proof that the reason for the inability to express nonconsent was intoxication. The new test shifts the focus away from evaluating the victim’s capabilities and precise level of intoxication toward the imposition of nonconsensual sex on a vulnerable person who was unable to communicate refusal. In doing this, the proposed standard makes nonconsensual sex rather than victim’s physical and mental capabilities the cornerstone of the crime. By diverting attention away from the victim’s incapacitation, the standard better comports with the essence of the crime of sexual assault, which is imposition of nonconsensual sex.

Second, the proposed standard acknowledges that inability to refuse sex due to intoxication extends above and beyond situations where the victim was completely unconscious or nearing such condition. It provides necessary protection against sexual violation for victims whose intoxication was sufficiently impairing to render them unable to communicate refusal to sex, including in cases falling short of losing consciousness.

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 of the risk that the victim was unable to refuse sex because of intoxication might be subject to civil or administrative liability, but not to criminal one.

261 See supra Part II.B (discussing the drawbacks in the Model Penal Code various drafts).
262 See supra Part II.B (elaborating on the difficulties stemming from the incapacity to consent standard).
263 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.
Finally, the proposed statute rejects criminal liability in cases where intoxicated people have expressed consent to sexual acts, but their level of impairment 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. 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 sexual encounters. 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. Even assuming that it was the state of intoxication that contributed to the choice to have sex, being intoxicated pre se does not negate an individual’s right to consent. A legal standard that prevents an intoxicated individual from consenting to sex is 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 effecting racial and ethnic minorities. Moreover, 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 sanction only on one party. 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

264 See supra Part II, 1.d.; 82 Cal. App. 4th 454, 462-63 (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).
265 See Wertheimer, supra note 230 at 232-238
267 See Taranto, supra note 227 (arguing that both parties should be equally responsible for intoxicated sex).
many criminal statutes and heavy enforcement create significant problems.\textsuperscript{268} However, in the specific area of sexual assault of intoxicated victims, an opposite problem of undercriminalization and underenforcement exists, rather than overcriminalization and overenforcement.\textsuperscript{269} 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 at finding a middle ground between imposing overbroad criminal liability and under inclusive sexual assault statutes.

Regarding unfairness to defendants concerns, the proposed statute reduces this risk by ensuring that the legal boundary between criminal and non-criminal conduct is clearly drawn. Under the proposal, sexually 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. Moreover, the offense’s actus reus is sufficiently narrow to encompass only circumstances indicating taking advantage of the victim’s inability to express refusal of sexual penetration. The statute therefore offers equitable resolution of these complex cases by ensuring that several requirements are met prior to labeling drunken sex a sex crime, thus alleviating the risk of unfairness to defendants. The following subsection articulates some guidelines to help draw the line between culpable and non-culpable conduct.

\textbf{D. Factors Whose Presence Might Support a Finding of Culpability}

The premise underlying the proposed framework is that criminal sanctions are warranted only if a defendant’s conduct demonstrates culpability.\textsuperscript{270} Such culpability may be found when a defendant consciously takes advantage of a victim’s inability to manifest refusal to sex due to intoxication. Grounding criminal liability in defining the defendant’s exploitative behavior is critical to identifying the cases that should be


\textsuperscript{270} See, generally, Michael S. Moore, \textit{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).
criminally prosecuted, distinguishing them from those involving permissible intoxicated sexual encounters. To accomplish the goal of criminalizing only culpable conduct, the proposal identifies a couple of factors to support a finding that a defendant is a sexual predator who recklessly took advantage of a victim’s inability to refuse sexual penetration. While these factors are by no means conclusive, their presence strongly suggests that an actor is criminally culpable.

1. 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 worried 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 any harm.  

An example of such facilitation is illustrated in *State of 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, later took advantage of her intoxicated condition to impose a nonconsensual sexual act.

2. Awareness of the Victim’s Visible Signs of Intoxication

The proposed statute requires proof that the defendant was subjectively aware of the victim’s impairing intoxication. Of course, defendants are not expected to have the medical knowledge that would enable them to assess the precise level of victims’ intoxication. However, debilitating intoxication is clearly visible and any layperson can easily identify its common symptoms. Such observable symptoms include vomiting, incontinence, slurred speech, unsteady gout, combative behavior and inability to know

271 Blache, 880 N.E. 2d at 739 (a police officer who was summoned to help with a belligerent intoxicated victim then volunteered to give her a ride home and sexually assaulted her in the police cruiser).

and understand what is happening. If the prosecution is able to prove that the defendant personally witnessed the victim experiencing one or more of these symptoms, it might be able to establish that the defendant was at least was reckless with respect to the victim’s inability to refuse sexual acts due to intoxication yet consciously disregarded the substantial and unjustifiable risk that consent was lacking. Moreover, proof of defendant’s awareness of victim’s symptoms is further supported in cases where other witnesses who also observed these symptoms testify about the circumstances indicating that the defendant had to be aware of them too.

The facts underlying the court’s decision in Commonwealth v. Blache present a paradigm example of a defendant who was clearly aware of the victim’s symptoms of intoxication yet had consciously taken advantage of her vulnerable condition to impose on her nonconsensual sex.273 The defendant, an on duty police officer was summoned by the victim’s acquaintances for what they described as “needing assistance with an unwanted and very intoxicated female guest”.274 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.275 The Supreme Judicial Court of Massachusetts held that the state may prove the lack of consent element by introducing evidence 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 that it should also prove that the defendant knew or should have known of the victim’s incapacitation.276

E. Application of the Proposed Statute

Recall, that in the case discussed in the Introduction, the defendant’s having oral sex with an unconscious victim constituted no crime under existing law.277 Revisiting this case offers an opportunity to test the operation of the proposal in order to predict whether

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274 Id.
275 Id. at 739
276 Id. at 746-47 (holding that the trial court’s instructions to the jury were not sufficiently clear and articulating what the prosecution needs to prove).
277 Id.
the case might have come out differently had the proposed statute been applied.\textsuperscript{278} As a thought experiment, let’s hypothesize that it is applied to the facts of this case.

In contrast to existing Oklahoma law, the proposed statute covers nonconsensual oral, vaginal and anal intercourse perpetrated against intoxicated victims, whether voluntary or involuntary. The prosecution will likely be able to prove the actus reus of the offense, namely, that the victim did not communicate to the defendant her opposition to engage in the sexual act and that the reason beyond her inability to do so was an extreme state of intoxication. Since the victim remained completely unresponsive throughout the act of oral sex, coming in and out of consciousness, the jury will likely find that she could not have refused the act given that condition.

The prosecution will also likely 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 and 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. Given these visible symptoms, the defendant must have been subjectively aware that the victim could not have opposed the sexual act due to her debilitating intoxication. Moreover, 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 contrast to the outcome under existing Oklahoma law, the defendant would probably have been found guilty of the proposed offense of sexual imposition of a vulnerable person, had it been applied. Imposing criminal liability on the defendant in this case is normatively justified given the underlying circumstances demonstrating his culpability. Consciously taking advantage of a victim’s debilitating condition to impose nonconsensual sex exemplifies the essence of a person’s blameworthy conduct. Moreover, while the defendant was also intoxicated, there was no evidence to suggest that his impairment was debilitating, reaching a level that precluded his subjective awareness of the risk that the victim was unable to refuse the sexual act.

\textsuperscript{278} See supra Introduction
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 eventually promoting changes in prevailing societal perceptions. Furthermore, criminal law’s expressive function is especially critical in prosecutions of sexual assaults because of the different audiences sexual assault statutes speak to, which include not only potential criminal offenders but also individuals engaging in excessive drinking while risking the well being of others. The message to the latter group is that intercourse with unresponsive individuals whose intoxication renders them unable to refuse it is criminally prohibited.

The Article acknowledges the tradeoffs embedded in this position; protecting voluntarily intoxicated victims by adopting criminal statutes that precede changes in societal perceptions might result in potentially harsh consequences for some defendants. However, there are 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 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.