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OUT OF THE HAZE:
A CLEARER PATH FOR PROSECUTION OF ALCOHOL-FACILITATED SEXUAL ASSAULT

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INTRODUCTION

“The language of rape culture exists in everyday conversation,” say bloggers on the Huffington Post.¹

“The Rape ‘Epidemic’ Doesn’t Actually Exist,” counters a U.S. News columnist.²

“Rape culture exists because we don’t believe it does,” explains The Nation. “[W]e accept the degradation of women and posit uncontrollable hyper-sexuality of men as the norm.”³

No, says Reason.com; the “rape culture crusade” is a radical feminist effort that “stigmatizes assertive male sexuality and promotes a sexual norm in which every act must be negotiated

¹ Julia Kacmarek & Elizabeth Geffre, Rape Culture Is: Know It When You See It, Huffington Post, The Blog (June 1, 2013, 10:16 PM), http://www.huffingtonpost.com/julia-kacmarek/rape-culture-is_b_3368577.html.
in advance and undertaken with a completely rational, literally sober mind.\textsuperscript{4}

Popular media is awash with the rape culture wars, in which feminists and traditionalists\textsuperscript{5} accuse each other of misunderstanding the problem and even debate whether there is a problem at all. The discourse, unilluminating as it often is, reflects a new social interest in examining our collective morality concerning non-consensual sex—particularly alcohol-facilitated sexual assault—which raises important legal issues such as capacity to consent and where to allocate responsibility for the risk of misunderstandings. There is a growing recognition that although rape sometimes means a stranger with a weapon jumping out of the shadows, it more often does not.

So-called acquaintance rape\textsuperscript{6} oftentimes transpires without outward manifestations of violence, yet is being prosecuted in a statutory framework created for one of the most violent crimes that exists. When non-consensual sex does not fit into a traditional rape framework, victims may not be believed and charges may be dropped or not brought at all. Prosecutors, the “invisible guardian[s] of our rights,”\textsuperscript{7} are asked to vet and charge these cases and, in many jurisdictions, work with police in investigating them.

A particularly fraught area concerns alcohol-facilitated sexual assault.\textsuperscript{8} Through several decades of activism, the “no means no” principle has very much taken root in our collective consciousness.


\textsuperscript{5} This term is used for lack of a better one to refer to those opposed to the feminist rape law reform movement, notwithstanding that they may not be aligned on all issues.

\textsuperscript{6} Generally speaking, stranger rape refers to a crime between individuals with absolutely no prior contact. Acquaintance rape encompasses a much broader spectrum of relationships, from intimates and family to ex-lovers to individuals who meet at a party or bar the same night as the assault. From 2005 to 2010, seventy-eight percent of sexual violence involved an offender who was a family member, intimate partner, friend, or acquaintance of the victim. \textit{Michael Planyt et al., U.S. Dept of Justice, Bureau of Justice Statistics, Special Report: Female Victims of Sexual Violence, 1994–2010}, 1 (2013).


\textsuperscript{8} Throughout, this Note uses the term “alcohol-facilitated sexual assault,” mainly because the law is less developed in this area than in the area of drug-facilitated sexual assault. However, unless otherwise specified, “alcohol-facilitated sexual assault” is not intended to express the exclusion of drug-facilitated assault. Likewise, the term “intoxicated” means under the influence of alcohol, recreational drugs, medical drugs, and other substances.
and it is not uncommon for teens and college students to be taught that an intoxicated person cannot consent to sexual activity. But these sentiments express moral or social constructs; legally speaking, in most states sexual contact with an intoxicated person is not a crime, provided the person willingly chose to drink or use drugs and did not lose consciousness. Hence the Internet outrage: the law has fallen behind morality for many people where alcohol-facilitated sexual assault is concerned.

This Note makes a legal and ethical case for prosecuting sexual assault of voluntarily intoxicated persons. It advocates changes to black-letter law so that such assaults are addressed specifically by the criminal code rather than prosecuted under a legal framework intended for forcible, violent rape. And because the history of rape law reform demonstrates that statutory fixes alone can be insufficient to change case outcomes, this Note makes suggestions for police and prosecutor practices to improve victim experiences and conviction rates. Certain presumptions about criminal law underlie the main arguments: that a primary objective of criminal law should be to protect members of society from violence, hurt, and exploitation; that vulnerable victims are particularly deserving of such protection; that non-consensual sex is harmful; and that criminal law can and should shape social mores rather than being merely reactive to them.

Part I makes the case for criminalization of alcohol-facilitated sexual assault by examining the problems that arise in jurisdictions that criminalize non-consensual sex with a severely intoxicated person only when the perpetrator also administered an intoxicant for the purpose of vitiating the need for the victim’s consent. Part II discusses the laws in those minority jurisdictions that specifically address alcohol-facilitated sexual assault. This section uses a few exam-


10. Criminal law typically treats “voluntary intoxication”—meaning that the victim freely and knowingly consumed a substance he or she knew to be alcohol or drugs—overwhelmingly differently than a situation in which the defendant deliberately slipped his victim an intoxicant without her knowledge or consent (i.e., used a date-rape drug) or otherwise injected or administered an intoxicant for the purpose of vitiating resistance or escape. Compare infra Part I with Part II.
plar states to illustrate statutory language in action, particularly in how states deal with the most difficult interpretive question: how drunk is too drunk to consent to sex? Part III acknowledges counter-arguments to legal protection of the voluntarily intoxicated and makes suggestions for how statutes can criminalize alcohol-facilitated sexual assault while still safeguarding defendants’ rights. Part IV argues that prosecutors have an ethical obligation to bring charges and try cases involving alcohol-facilitated sexual assault because of the magnitude of the problem and because perpetrators of alcohol-facilitated sexual assault may well be serial offenders who will go on to harm additional victims. Part V addresses obstacles to successful prosecution of alcohol-facilitated sexual assault and compiles practice-oriented suggestions for prosecutors to overcome these obstacles and make convictions more likely.

I. 
THE LEGAL SYSTEM FAILS THE VOLUNTARILY INTOXICATED

There is an overwhelming correlation between alcohol use and non-consensual sex. Alcohol is involved in approximately half of all sexual assaults and a significant majority of acquaintance sexual assaults. Alcohol’s presence often facilitates the crime in several ways. Alcohol can make men more sexually aggressive and simultaneously less aware whether the woman has consented. Multiple studies have confirmed that the degree of aggressor intoxication is among the most important factors in determining whether an acquaintance rape will occur. As such, alcohol-facilitated sexual assault should not be considered a sub-topic or niche specialty within


12. For acquaintance rape, about 75% of men and 55% of women consumed alcohol prior to the incident. Id. at 411 n. 34.


14. E.g., Vernon R. Wiehe & Ann L. Richards, Intimate Betrayal: Understanding and Responding to the Trauma of Acquaintance Rape 20 (1995) (In a study of 236 perpetrators, 60 to 66% were using drugs or alcohol at the time of the assault.); Andrea Parrot & Laurie Bechhofer, What Is Acquaintance Rape, in Acquaintance Rape 9, 23 (Andrea Parrot & Laurie Bechhofer eds., 1991) (calling male intoxication the "single most important factor" in acquaintance rape); Charlene L. Muehlenhard & Melaney A. Linton, Date Rape and Sexual Aggression in Dating Situations: Incidence and Risk Factors, 34 J. Counseling Psychol. 186, 187 (1987) (Alcohol "reduces men’s inhibitions against violence, including sexual vio-
rape law. Some states, discussed infra Part II, have begun treating alcohol- and drug-facilitated sexual assault distinctly, with separate statutory provisions and separate lines of case law interpreting those statutes. However, the majority of states continue to provide no separate criminal sanction for sexual contact with the voluntarily intoxicated, meaning that victims claiming non-consent will have no criminal recourse if they cannot show the statutory force or resistance requirements—elements that are often vitiated by severe intoxication.

This section will examine some of the problems with failing to treat alcohol-facilitated sexual assault as a separate and serious kind of sexual predation. Part I.A briefly outlines the evolution of rape law from its common law origins to the most common legal treatment of sexual assault: the requirement that the defendant deliberately administer an intoxicant for liability to ensue. Part I.B examines a few cases from these jurisdictions to illustrate the morally culpable conduct not captured by those states’ criminal codes. Part I.C discusses how that legal framework can exacerbate evidentiary problems associated with date-rape drugs.

A. From Force and Resistance to Deliberate Administration

Today, there is a roughly widespread consensus that rape is not only a crime of violence but also a violation of sexual autonomy and bodily integrity—in other words, rape results in a harm aside from or in addition to that caused by any physical injuries.15 Modern statutes often reflect this sentiment by using language such as “nonconsensual sexual penetration” to describe the act and by establishing enhanced culpability for crimes committed against vulnerable victims such as children or the physically or mentally impaired, irrespective of the degree of physical injury.16 This moral and legal conception of sexual assault is a relatively recent innovation and the product of extensive and highly publicized reform efforts during

15. See, e.g., Ryan, supra note 11, at 409.
16. See, e.g., 3 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 280 (15th ed. 1995) (summarizing the use of “without consent” and similar phrases in state rape statutes); N.Y. PENAL LAW § 130.35 (McKinney 2015) (First-degree rape includes rape of a physically helpless victim and rape of a child under the age of eleven.) Rape that includes serious physical injury often results in enhanced punishment. E.g., COLO. REV. STAT. ANN. § 18-3-402(5)(a)(II) (West 2015) (upgrading rape to a class 2 felony where the victim suffers serious bodily injury).
the 1970s and 1980s—a period sometimes referred to as the “first wave” of rape law reform.\textsuperscript{17}

At common law rape was defined as carnal knowledge of a woman\textsuperscript{18} not one’s wife, forcibly and against her will.\textsuperscript{19} To this narrow definition American courts and legislatures added additional interpretive and evidentiary glosses, including resistance,\textsuperscript{20} corroboration,\textsuperscript{21} and prompt complaint requirements;\textsuperscript{22} allowed extensive

\begin{itemize}
\item \textsuperscript{17} E.g., Richard Klein, \textit{An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness}, 41 Akron L. Rev. 981, 1030 (2008).
\item \textsuperscript{18} This Note generally uses gender-neutral pronouns. Male rape is an epidemic problem in this country. The exact rates are hard to establish, as commentators routinely ignore rape committed inside prison in discussions of the prevalence of rape, which this author believes has the unfortunate effect of suggesting that rape is somehow less culpable in this context. Nonetheless, even outside of prisons one in thirty-three men has experienced a completed or attempted rape. Patricia Tjaden & Nancy Thoennes, U.S. Dep’t of Justice, Nat’l Institute of Justice, \textit{Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women}, 13 (2000), https://www.ncjrs.gov/pdffiles1/nij/183781.pdf. However, where gendered pronouns appear in quotations, they are largely left as-is. And, when discussing historical trends in rape law, this Note uses female pronouns for victims, as common-law rape did not protect men.
\item \textsuperscript{19} 4 William Blackstone, \textit{Commentaries *210} (1769).
\item \textsuperscript{20} The common law definition does not criminalize merely non-consensual sex, only forcible non-consensual sex. To determine whether a defendant used force sufficient for felony liability, courts and legislatures required proof of the victim’s resistance. 2 Wayne R. LaFave, \textit{Substantive Criminal Law} § 17.4(a), Westlaw (2d ed. database updated 2015). This requirement established two conditions for female behavior: First, she must resist a rapist to the utmost of her physical capacity, and second, she must not cease resisting to the utmost until after penetration, even if further resistance appeared futile or dangerous. If a victim failed to meet both conditions, there was no rape. Michelle J. Anderson, \textit{Reviving Resistance in Rape Law}, 1998 U. Ill. L. Rev. 953, 963 (1998) [hereinafter Anderson, \textit{Resistance}]. Resistance was thought to be probative of the elements of force and non-consent, although it also served a “gatekeeping function” to distinguish “good women” who would guard their chastity with their very life from “bad women” who were less deserving of the law’s protection. I. Bennett Capers, \textit{Real Women, Real Rape}, 60 UCLA L. Rev. 826, 834 (2013).
\item \textsuperscript{21} The corroboration requirement reflected the widely held assumption that women frequently invent stories of rape. E.g., Note, \textit{Corroborating Charges of Rape}, 67 Colum. L. Rev. 1137, 1138 (1967) (“A woman may accuse an innocent man of raping her because she is mentally sick and given to delusions; or because, having consented to intercourse, she is ashamed of herself and bitter at her partner; or because she is pregnant, and prefers a false explanation to the true one; or simply because she hates the man whom she accuses.”).
\item \textsuperscript{22} The prompt complaint requirement was based on the view that delaying reporting of a crime increases the likelihood of fabrication. However, most rape victims do not report the crime at all, Shannon M. Catalano, U.S. Dep’t of Justice, \textit{Criminal Victimization}, 2004 10 (2005), and studies show that reporting rates are affected by victim demographics and assault characteristics, as well as vic-
examination of the victim’s consensual sexual history; and gave jurors cautionary instructions about a woman’s penchant for lying. These statutory and procedural elements often had the combined effect of making rape prosecutions traumatizing for the victims and ineffective at holding perpetrators accountable.

Even traditional rape law offered some protection to intoxicated victims who were unconscious. While the common law definition of rape did not explicitly account for a situation where force is unnecessary because the woman is unconscious, English courts generally considered intercourse with an unconscious woman to be rape. Some American jurisdictions expanded protection to a woman who was asleep or physically powerless. Technically, women who passed out from excessive alcohol or drug use could take advantage of these interpretations. Practically speaking, the likelihood of a successful prosecution on these facts was fairly low: as with all rape prosecutions at common law, the character of the victim effectively would be on trial, and a woman who drank to excess was less likely to be considered the sort of “good woman” the law was aimed at protecting.

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tims’ fear, shame, confusion, and self-blame. Amy M. Cohn et al., Correlates of Reasons for Not Reporting Rape to Police: Results from a National Telephone Household Probability Sample of Women With Forcible or Drug-or-Alcohol Facilitated/Incapacitated Rape, 28 J. INTERPERSONAL VIOLENCE 455, 456 (2013); Golden Millar et al., Immediate and Delayed Treatment Seeking Among Adult Sexual Assault Victims, 35 WOMEN & HEALTH 53 (2002).

23. A woman’s previous sexual history was thought to be probative both of her consent in the case in question and of her character for honesty generally. See, e.g., Joshua Dressler, Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform, 46 CLEV. ST. L. REV. 409, 416 (1998).

24. Courts frequently quoted to jurors verbatim a warning by the seventeenth-century English jurist Sir Matthew Hale that rape “is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.” Michelle J. Anderson, The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault, 84 B.U. L. REV. 945, 948 (2004), [hereinafter Anderson, Legacy] (quoting 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 635 (1971)). For examples of the Hale instruction incorporated by U.S. judges, see Vivian Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1, 10 (1977).

25. See Commonwealth v. Burke, 105 Mass. 376, 379 (1870) (citing half a dozen English cases holding that intercourse with an unconscious woman is rape, even if the defendant did not bring about her state of unconsciousness).

26. LAFAYE, supra note 20, at § 17.4(b).

27. Ilene Seidman & Susan Vickers, The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform, 38 SUFFOLK U. L. REV. 467, 485 (2005) (“Courts view women who drink, especially those who drank with their assailants, as more likely to be sexually available and contributorily negligent in the subsequent assault.”).
During the 1970s and 1980s, sexual assault laws were overhauled in every state.\textsuperscript{28} Seeking to increase conviction rates while making rape prosecutions less painful and humiliating for victims, feminists partnered with tough-on-crime political conservatives to change statutory provisions and evidentiary practices and to educate judges, prosecutors, and police.\textsuperscript{29} After the reform movement, more courts were willing to take an expansive view of "unconsciousness" to include situations where the victim is fading in and out of consciousness, as is common after heavy drinking.\textsuperscript{30} State statutes now explicitly protect similar conditions such as being asleep, physically powerless, or physically incapacitated.\textsuperscript{31} Reforms also included a recognition of the special danger imposed by intoxicants when used to render a woman unconscious or incapable of resisting her attacker: date-rape drugs.\textsuperscript{32}

Today, almost all jurisdictions explicitly recognize a situation where the defendant administered a drug or an intoxicant to a victim without her knowledge or consent as meeting the elements of the state’s rape or sexual assault statute.\textsuperscript{33} The victim need not be fully unconscious to be protected in these cases where she was drugged against her will. Some jurisdictions also have enhanced

\textsuperscript{28} See, e.g., Anderson, Legacy, supra note 24, at 964; Allison Menkes, Rape and Sexual Assault, 7 GEO. J. GENDER & L. 847, 848 n.5 (2006) (discussing the various state sexual assault statutes).

\textsuperscript{29} See, e.g., Capers, supra note 20, at 840–41; Dressler, supra note 23, at 412 ("Strange bedfellows like this can produce unwanted offspring."); Virginia Blomer Nordby, Reforming Rape Laws—The Michigan Experience, in RAPE LAW REFORM 3, 5 (Jocelynne A. Scutt ed., 1980) (discussing, inter alia, the need to train police and educate the public).

\textsuperscript{30} E.g., Commonwealth v. Erney, 698 A.2d 56, 59 (Pa. 1997) ("Because . . . the victim was intermittently unconscious throughout the assault and was at all relevant times in such impaired physical and mental condition so as to be unable to knowingly consent, her submission to intercourse was involuntary.").

\textsuperscript{31} LAFAVE, supra note 20 at § 17.4(b).

\textsuperscript{32} E.g., TEX. PENAL CODE ANN. § 22.021(a)(2)(vi) (West 2015) (codifying as aggravated sexual assault providing or administering "flunitrazepam, otherwise known as rohypnol, gamma hydroxybutyrate, or ketamine to the victim of the offense with the intent of facilitating the commission of the offense"). See also The Hilary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, H.R. 2130, 106th Cong, 2d Sess. (codified as Pub. L. No. 106-172 (2000)) (making gamma hydroxybutyric acid, a date-rape drug, a Schedule I narcotic).

\textsuperscript{33} See Patricia J. Falk, Rape by Drugs: A Statutory Overview and Proposals for Reform, 44 ARIZ. L. REV. 131, 173 (2002) (Falk includes American territories, federal law, and military law in her jurisdictional count. By her reckoning forty-seven of fifty-six jurisdictions include provisions for intoxicated or drugged victims in sexual assault statutes.). Accounting for updates in the law and excluding territories, this author determined that forty-two states and the District of Columbia explicitly mention intoxicants or substances.
penalties for assaults effectuated by the administration of drugs—even naming specific date-rape drugs in their statutes—or separately criminalize drugging another person for non-medical or non-therapeutic purposes.\textsuperscript{34}

More than half the states continue to follow a rule similar to the Model Penal Code, which holds that the defendant is culpable if he "substantially impaired [the victim’s] power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance."\textsuperscript{35} These states plus the District of Columbia provide that the victim’s intoxication supplies the force, non-consent, or resistance elements of sexual assault only if the intoxicant was administered without the victim’s knowledge or consent.\textsuperscript{36} These jurisdictions are referred to throughout this Note as “deliberate administration jurisdictions.”

Deliberate administration statutes are insufficient for several reasons. First, while deliberate administration of intoxicants is a particularly heinous crime deserving of heightened penalty, drawing the line between rape and sex at deliberate administration fails to account for a significant number of non-consensual sexual encounters. When the victim is severely inebriated (but not yet unconscious), taking advantage of his or her inability to protest meaningfully is a vicious and depraved act that should be punished by criminal law. Second, the same properties that make drugs effective at debilitating victims also raise serious evidentiary problems for prosecutors. Screening for date-rape drugs must take place soon after administration, but many drugs have amnesiac effects that make timely reporting of the assault less likely. States that require proof of deliberate administration as an element of the offense may fail to protect the very victims at whom the statute was aimed, because the best evidence—the presence of drugs—is quickly lost.

\textsuperscript{34} Id. at 178, 183, 186.

\textsuperscript{35} \textit{Model Penal Code} § 213.1(b) (1962). The author has reviewed the statutory language in all fifty states. \textit{See also} Falk, \textit{supra} note 33, at 173.

\textsuperscript{36} \textit{See}, e.g., \textit{Conn. Gen. Stat. Ann.} §§ 53a-65, 53a-70 (West 2015) (defining mental incapacitation as referring to “a person who temporarily cannot appraise or control his conduct because of the influence of some narcotic or intoxicating substance, or some act (such as hypnosis), administered to him without his consent” and separately criminalizing sex with an incapacitated person); \textit{18 Pa. Stat. and Cons. Stat. Ann.} § 3121(a)(4) (West 2015) (defining rape as an offense “[w]here the person has substantially impaired the complainant’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance”).
siac effect of the drugs prevents some victims from seeking medical attention until after the drugs have dissipated from their bodies. The following two subsections will explain why the deliberate administration regimes offer insufficient protections by analyzing cases from those jurisdictions.

B. Deficient Justice in Deliberate Administration Jurisdictions

There is no doubt that the defendant who drugs an unwitting victim for the purpose of exploiting the ensuing incapacitation or inebriation should be subject to higher sanctions than the one who merely comes across a drunk individual and takes advantage. Administering an intoxicant can be considered a battery in its own right, often involves fraud or deception, definitively verifies victim non-consent, and requires planning or premeditation that might not otherwise be present.37

Still, the fact that deliberate administration is deserving of heightened punishment does not mean that it should be the only conduct punishable. Laws that only protect victims to whom substances were administered without their knowledge effectively "assign the risk of rape to the woman when she is voluntarily intoxicated."38 "In retributive terms, treating [intoxicated] consent as valid may not fit the crime of being intoxicated."39 The following cases illustrate both the type of morally culpable conduct not captured by criminal law in these jurisdictions, and also the "problems associated with trying to fit drug-induced sexual conduct into categories such as physical helplessness, rather than dealing more straightforwardly with the problem of reduced capacity to consent based on intoxication."40

A North Carolina court in State v. Haddock overturned a defendant’s conviction on the grounds that the jury had not been properly instructed on mental incapacity.41 After a night of heavy drinking, the victim went home with the defendant, who had served as designated driver for the evening.42 “S.B. testified at trial that she did not know where she was when she arrived at defendant’s apartment and that she soon passed out from excessive drinking, falling asleep on defendant’s bed. Defendant put on a condom and had

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37. Falk, supra note 33, at 136.
38. Ryan, supra note 11, at 418.
40. Falk, supra note 33, at 148.
42. Id. at 341.
intercourse with S.B. at around 6:00 a.m."

Afterwards, the victim went down to the lobby of the apartment building, "where she sprawled out on the floor in a 'very intoxicated' state." Police officers were summoned, and they smelled alcohol as soon as they entered the lobby. The victim was taken by ambulance to a hospital, where she was evaluated for possible injuries arising from excessive alcohol consumption. The defendant asserted the intercourse was consensual.

After a unanimous jury found the defendant guilty of second-degree rape, an appellate court overturned the conviction. The appellate court found the jury instruction regarding mental incapacitation fatally deficient, despite the fact that the jury could have returned a guilty verdict upon finding either that the victim was mentally incapacitated or that she was physically helpless. The victim was so drunk she was sprawling on the floor of an apartment building lobby and emanating a smell of alcohol palpable to those entering the lobby doors. Yet, without considering whether the victim physically could resist sex in this condition, the court found that "the evidence essentially boils down to a 'he said/she said' version of the event."

*Haddock* raises questions about how physical helplessness could ever be established. For how long must she resist? How capably?

43. Id.
44. Id. at 342.
45. Id.
46. Id.
47. *Haddock*, 664 S.E.2d at 342.
48. The appellate court held that the instruction was deficient because it should have included the words "due to any act committed upon the victim" to make clear that voluntary intoxication is not protected under the statute. *Id.* at 347.
49. *Id.* at 343. The court also could have deemed the error in the mental incapacitation harmless if it had found there was not a reasonable probability of a different result had a clearer instruction been given. *Id.* at 344. Additionally, the defendant failed to object to the jury instruction at trial. *Id.* at 343. The court allowed the appeal on the theory that it fit into an exception to the general rule that unpreserved errors may not be raised on appeal because the defective instruction violated the defendant's constitutional right to a unanimous jury verdict. This unusual procedural maneuver raises the inference that perhaps the court wanted to have an opportunity to hear this appeal.
50. *Haddock*, 664 S.E.2d at 347.
51. Physical helplessness is defined under North Carolina law as "(i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act." N.C. GEN. STAT. ANN. § 14-27.1(3) (West 2015).
How cogent must her communication of unwillingness be? Is anything more required to trigger a “he said, she said” case than the defendant’s assertion that the act was consensual? These questions illustrate the difficulties of fitting alcohol-facilitated sexual assault into a statutory framework intended for a crime of violence.

In a case from Florida, which requires that the intoxicant be administered without the victim’s knowledge, an appellate court overturned a conviction because the prosecutor failed to prove the victim was physically helpless. Florida law defines “physically helpless” as when “a person is unconscious, asleep, or for any reason physically unable to communicate unwillingness to an act.” The situation involved a young girl who had initially consented to using drugs, to engaging in sex acts, and to being tied to a bed for the purpose of sex. While there seems to be some dispute in the case as to which facts the court was permitted to consider, the dissent cited evidence that the victim did not consent to certain acts, that she passed in and out of consciousness, and that she remained tied to a bed dirtied with blood and feces while her assailants held a plate of cocaine under her nose. In an ironic step, the majority found damming the fact that the victim was able to describe the sexual acts committed against her: “Obviously she would not be able to describe the sexual acts charged in the information if she had been unconscious or asleep during them.”

These two cases illustrate that in deliberate administration jurisdictions, predatory conduct inflicted on severely intoxicated individuals is extremely difficult to prosecute. The statutory provisions most states have criminalizing sexual contact with mentally incapacitated or physically helpless individuals are simply inadequate to protect victims who are incapacitated and helpless because of the voluntary consumption of drugs or alcohol. Further, these two cases offer only a snapshot of the problem of appellate courts overturning jury convictions. An even greater problem is that prosecutors,

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53. Id. at 1020 (quoting Fla. Stat. § 794.01(1)(e) (1989)).
54. Id.
55. Id. at 1025–27 (Gersten, J., dissenting).
56. Id. at 1020.
57. See also, e.g., State v. Galati, 365 N.W.2d 575 (S.D. 1985) (overturning jury conviction because statute does not protect persons incapable of consenting to an act of sexual penetration because of an intoxicant unless the intoxicant was administered by or with the privity of the accused); State v. Hatten, 927 N.E.2d 632 (Ohio Ct. App.) (overturning jury conviction, finding insufficient evidence that the defendant knew or had reasonable cause to believe that the victim was substantially impaired where the 120-pound victim had consumed seven shots and multiple
aware of judicial hostility to voluntarily intoxicated victims, may be shying away from bringing charges at all.\footnote{\textit{\textsuperscript{58}}}

However, when protection for the voluntarily intoxicated is part of a gradated rape statute that criminalizes several different means of effectuating non-consensual sex, conviction is more likely even if there actually was deliberate administration. Prosecutors can ask jurors to consider alternative arguments even where evidence supports a theory that the defendant drugged the victim without the victim’s knowledge or consent. The facts of \textit{State v. Quasim},\footnote{No. 65859–0–I, 2012 WL 2086961 (Wash. Ct. App. June 11, 2012) (unpublished).} a case from a state that does criminalize intercourse with the voluntarily intoxicated, illustrate this point. The victim in \textit{Quasim} testified that she voluntarily smoked marijuana and drank two to three small juice glasses of tequila—an amount she testified would normally have given her only a little buzz.\footnote{Quasim v. Glebe, 2014 WL 3696021, No. C14–296–MJP, at *2 (W.D. Wash. July 23, 2014) (denial of habeas relief) (reciting factual history from Washington appellate court).} She woke up feeling as though she had been “really drugged” with no memory of the previous evening other than watching TV with the defendant.\footnote{\textit{Id.}} The defendant “was prosecuted for rape in the second degree by forcible compulsion, and on the alternative theory that A.M. was incapable of consent due to being physically helpless or mentally incapable of resisting.”\footnote{\textit{Id.}} The jury’s verdict convicted the defendant on both grounds.\footnote{\textit{Id.}}

If the case arose in a jurisdiction holding that only the deliberate administration of an intoxicant without the victim’s knowledge or consent is criminal, the same facts would begin to look less persuasive. With the victim’s memory lost and in the absence of a toxicology screen identifying a substance other than marijuana and alcohol in the victim’s bloodstream, the prosecutor might not be able to prove beyond a reasonable doubt the element of deliberate administration. The case begins to look more like “he said, she said.” Particularly if marijuana plus three glasses of tequila seems excessive to members of the jury not themselves accustomed to con-
assuming such quantities of intoxicants, they might not credit the victim’s testimony that she would ordinarily only feel a small buzz and find reasonable doubt that she had been drugged. In sum, even if the victim almost certainly was drugged, the case gets harder to prove in a deliberate administration state.\textsuperscript{64}

\textbf{C. The Drug-Induced Haze and Problems of Proof}

It is crucial to emphasize the importance of timely reporting in jurisdictions that only criminalize intercourse after deliberate administration of intoxicants. For victims who delay reporting, these statutes are hardly more than a dead letter, because the evidence of the drug will have already left their system. GHB,\textsuperscript{65} for instance, remains detectable in the system for only twelve hours.\textsuperscript{66} Additionally, many drugs commonly used for date rape have an amnesiac effect, such that victims may never fully piece together what happened to them and delay reporting until other clues or their friends put them on notice of what may have happened.

There is a reason certain drugs are used for date rape. Rohypnol and GHB, for example, rarely cause loss of consciousness.\textsuperscript{67} Instead, the victim’s brain rationalizes the memory void created by the drugs’ amnesiac effects as a period of unconsciousness.\textsuperscript{68} To an observer, the victim will appear to “be inebriated but able to act under her own volition. . . .” Rohypnol and GHB lower anxiety, alertness and inhibition whilst inducing euphoria, passivity and a sense of relaxation, thus increasing the likelihood that the victim will engage in intercourse, even if such behaviour would usually be uncharacteristic.”\textsuperscript{69}

\textsuperscript{64} Quasim is perhaps an easier case for other reasons: the victim was a lesbian who did not have sex with men, and she suffered significant physical injuries during the attack. Notwithstanding that a case lacking similar facts may present more difficulties to successful prosecution under any regime, Quasim still illustrates the basic point that a gradated statute offers prosecutors more opportunities to persuade a jury that criminal wrongdoing occurred.


\textsuperscript{67} Emily Finch & Vanessa E. Munro, Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study, 45 Brit. J. Criminology 25, 27 (2005).

\textsuperscript{68} Id.

\textsuperscript{69} Id. (citation omitted).
Lack of direct proof of deliberate administration is not insurmountable if substantial other evidence is available. In one case of alleged rape using drugs, the appellate court found sufficient evidence that the victim was incapable of giving consent because of drugs or an intoxicating substance administered to her without her consent and that the defendant was aware of this incapacity, despite an apparent lack of evidence in the record of the presence of, or even testing for, intoxicants in the victim’s bloodstream. That case contained several other pieces of evidence favorable to the prosecution. Most significantly, the defendant had previously told a friend that he “wanted to take [the victim] out and gang bang her” and that “he had an idea about drugging the girl.” Evidence supported the victim’s testimony that she had consumed only 7-Up that evening, yet experienced extreme “[d]izziness, failure of memory and weakness.” Such damning statements by the defendant will not always be available, and in cases where the victim has been voluntarily drinking alcohol, the fact-finder may be skeptical of her testimony that the effects of the alcohol must have surely been augmented by another intoxicant if a toxicology report is unavailable or inconclusive. In another case, a serial rapist was caught when his ex-wife found a bottle labeled “Rohypnol” and a videotape documenting his assaults of three different women who had all suffered memory loss. Most cases will lack this type of corroboration.

The examples in Part I illustrate injustices that arise in jurisdictions that only criminalize deliberate administration. The cases analyzed generally are not “borderline” cases or particularly close calls—they do not describe miscommunications between lovers or regret borne of hindsight, but deliberate, calculated assaults on vulnerable victims. Yet the legal structures in these jurisdictions make it extremely difficult for prosecutors to hold perpetrators accountable for their crimes, even in instances where the defendant did indeed deliberately drug his victim. The following section will examine case law in states that protect the voluntarily intoxicated.

70. Rapetti v. James, 784 F.2d 85, 86 (2d Cir. 1986).
71. Id. at 86–89.
72. Id. at 90.
73. Id. at 90–91.
74. See infra Part V.C.2 for a discussion of the effect of expert toxicology testimony on juror decision-making.
II. CRIMINAL SANCTIONS FOR SEXUAL ASSAULT OF THE VOLUNTARILY INTOXICATED

Though the majority of states still decline to criminalize conduct in which the victim was intoxicated due to drugs and alcohol she voluntarily consumed,76 nearly half have taken steps to protect the voluntarily intoxicated against unwanted sex. These jurisdictions fall into three basic categories.

In the “definitional” model, discussed infra Part II.A, voluntary intoxication is addressed in the statute’s definition section, typically by defining intoxication as a form of mental incapacitation. Each definitional jurisdiction then separately criminalizes sexual contact with persons who are mentally incapacitated. In the “enumeration” model, discussed infra Part II.B, states created a separate provision in their main rape statutes for sexual assault of intoxicated persons. Intoxication or incapacity is just one of several enumerated ways that a person can be found guilty of rape in those jurisdictions. A few states, discussed infra Part II.C, lack any statutory provision mentioning intoxicants. Protection for the voluntarily intoxicated is entirely judge-made in these jurisdictions.

The objective of this Part is to present the universe of states that criminalize sexual intercourse with a voluntarily intoxicated victim. To illustrate the operation of the statutory language, each of the models, including the non-statutory model, is represented by an exemplar state. The development of case law in the three exemplar states demonstrates approaches for addressing the thorniest interpretive issue for these jurisdictions: how to quantify the degree of victim intoxication necessary to separate criminally liable activity from mere drunk sex. Part II also highlights two of the most significant normative considerations any jurisdiction moving to a voluntary intoxication regime will have to address: what the prosecution should have to prove with respect to the defendant’s mental state, and how severely sexual assault of the voluntarily intoxicated (absent other aggravating factors) should be graded relative to other kinds of sexual assault. Variations within each model are also noted.

Despite the different statutory approaches, the following subsections will show that the definitional and enumeration models work very similarly in practice. A rigorous study examining case outcomes in different jurisdictions could suggest that one is more helpful from a prosecutorial standpoint. But previous studies examining the effect of specific statutory reforms in other aspects of rape law

76. See supra notes 35-36 and accompanying text.
have concluded that black-letter law only has a partial effect on case outcomes; equally significant are the judgments and informal norms of actors in the criminal justice system. It seems likely that a study of the models, controlling for other factors, would reach a similar conclusion.

Still, this Note takes the position that codification of protections for the voluntarily intoxicated is preferable to reliance on judicially created law. While all statutes require interpretation and are thus susceptible to misapplication by prosecutors or jurors, judicially created law is more vulnerable to confusion and multiple interpretations and makes a prosecutor’s job more difficult. Further recommendations for codification of alcohol-facilitated sexual assault follow in Part III.

A. Definitional Model

Five states use a two-part statutory structure defining voluntary intoxication as a form of mental incapacitation and then criminalizing sexual contact with mentally incapacitated persons. The focus of these statutes is on the ability of the intoxicated person to monitor his or her own behavior at the time in question—typical language is “incapable of appraising or controlling the person’s own conduct.” The strength of this definitional statutory framework is that it puts the legal focus on the victim’s mental state at the time of the assault. One difficulty is that “mental incapacitation” requires interpretation, specifically line drawing. Another weakness is that mental incapacitation due to intoxication is often sited in the same or similar sub-sections as those dealing with mental and developmental disabilities. Because incapacitation due to the effects of


78. IOWA CODE ANN. § 709.1A.1 (West 2015); MD. CODE ANN., CRIM. LAW § 3-301(c) (West 2015); OR. REV. STAT. ANN. § 163.305(4), 163.375(1)(d) (West 2015); S.C. CODE ANN. §§ 16-3-651(f), 651(1)(b) (2014); WASH. REV. CODE ANN. § 9A.44.010(4) (West 2015). Iowa actually also has a separate provision criminalizing a sexual act performed while the victim is under the influence of a controlled substance, making it a state utilizing both the definitional and enumeration models. See IOWA CODE ANN. § 709.4(1)(c) (West 2015).

79. See OR. REV. STAT. ANN. § 163.305(4) (West 2015); S.C. CODE ANN. § 16-3-651(f) (2014). Iowa’s statute reads, “temporarily incapable of apprising or controlling the person’s own conduct,” but this is almost certainly a scrivener’s error. IOWA CODE ANN. § 709.1A.1 (West 2015) (emphasis added).

80. E.g., WASH. REV. CODE ANN. § 9A.44.010(4) (West 2015) (“Mental incapacity’ is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse
alcohol is not particularly similar to the mental state of a person with more permanent cognitive impairments, this grouping introduces unnecessary confusion.\textsuperscript{81}

The five states exhibit slight variations in the way they define mental capacity to engage in sexual activity. Maryland holds that a mentally incapacitated individual may be one substantially incapable of appraising the nature of that individual's conduct or substantially incapable of resisting intercourse, a sexual act, or sexual conduct.\textsuperscript{82} Washington provides that mental incapacity "prevents a person from understanding the nature or consequences of the act of sexual intercourse."\textsuperscript{83} Iowa and Maryland provide that the incapacitation may be caused by an "intoxicating substance," while South Carolina and Washington mention only a "substance."\textsuperscript{84} Oregon makes no mention of possible causes of mental incapacitation, but in 2009 amended its law by deleting "because of the influence of a controlled or other intoxicating substance administered to the person without the consent of the person or because of any other act committed upon the person without the consent of the person."\textsuperscript{85} The reason for the change was to allow for harsher punishment for sexual assault of the voluntarily intoxicated.\textsuperscript{86}

\textit{whether that condition is produced by illness, defect, the influence of a substance or from some other cause."

\textsuperscript{81} For example, it is not immediately clear whether case law interpreting the definition of mental incapacity in a case involving a person with a low IQ should have precedential effect for a case involving a voluntarily intoxicated person, notwithstanding that the two cases would require interpretation of the same definition in the same statute.

\textsuperscript{82} Md. Code Ann., Crim. Law § 3-301(c) (West 2015).

\textsuperscript{83} Wash. Rev. Code Ann. § 9A.44.010(4) (West 2015).

\textsuperscript{84} See statutes cited supra note 78.


\textsuperscript{86} Staff of Joint Comm. on Ways & Means, 75th Legis. Assemb., H.B. 2324-A Measure Summary (Or. 2009) (prepared by Tim Walker). The committee stated:

This change would allow for possible prosecution for Rape in the first degree, Sex Abuse in the first degree, etc. in the following scenarios: A victim becomes incapable of granting consent as a result of his or her own actions, such as drinking to the point of incoherence, or due to some unforeseen factor such as illness, and then a person subjects the victim to sexual contact or intercourse. Under the current law, the person would only be charged with sex abuse in the second degree, not Rape in the first degree or Sex Abuse in the first degree. Sex Abuse 2 is a 7 on the Sentencing Guidelines Grid and a person prosecuted under this statute may receive a presumptive probation sentence, depending on their criminal history.

\textit{Id.}
Arizona and Montana represent a subcategory within the definitional approach: their provisions related to intoxication or mental incapacitation are contained within their definitions of “without consent” rather than in a separate incapacitation definition.\textsuperscript{87} Practically speaking, this minor adjustment does not seem to express different legislative intent, and the statutory regime as a whole might be slightly clearer.\textsuperscript{88} All told, seven states utilize the definitional model.

1. Degree of Intoxication

The biggest interpretive issue with the definitional model statutes is determining how impaired the victim’s appraisal or understanding needs to be before liability is triggered. The exemplar definitional model state will be Washington, which has slightly more specific statutory language than the other states. An analysis of Washington case law will show how the statute operates in specific cases.

Washington defines mental incapacity as “that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse.”\textsuperscript{89} When a defendant engages in sexual intercourse with a victim incapable of consent by reason of mental incapacity, the defendant is guilty of second-degree rape.\textsuperscript{90} While “nature or consequences of the act of sexual intercourse” is more specific than the other states’ “appraising one’s conduct,” there is still a range of possible interpretations that such language might suggest. Does it mean physical consequences, such as pregnancy or disease? If metaphysical consequences are included, what separates the operation

\textsuperscript{87} Arizona Rev. Stat. Ann. § 13-1401(5)(b) (2015) (“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. For purposes of this subdivision, ‘mental defect’ means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.”); Montana Code Ann. § 45-5-501(1)(a)(ii)(A) (West 2015) (defining without consent to include a victim incapable of consent because she is mentally incapacitated). Montana then defines “mentally incapacitated” elsewhere in its criminal code, in a section setting forth general principles of liability. Montana Code Ann. § 45-2-101(41) (West 2015).

\textsuperscript{88} Compare to Washington’s nearly identical provisions, discussed infra notes 89-90.


of this criminal law from ordinary regret that might often accompany one’s actions with the benefit of hindsight. \(^{91}\)

Washington begins to address these gray areas through pattern jury instructions that explain the provision’s operability. \(^{92}\) They specify that a superficial understanding of intercourse is not sufficient. \(^{93}\) Rather, liability “is appropriate where the jury finds the victim had a condition which prevented him or her from meaningfully understanding the nature or consequences of sexual intercourse.” \(^{94}\)

Court decisions give further guidance on how to interpret “meaningful understanding.” In *State v. Ortega-Martinez*, the Washington Supreme Court held that meaningful understanding encompasses more than the “physical mechanics” of sexual intercourse; it also includes factors such as the development of emotional intimacy between sexual partners, the fact that intercourse can result in a disruption in established relationships, and its association with pregnancy, disease, and in rare occasions even death. \(^{95}\) While none of these indicia of understanding are explicitly required, they are important for the “trier of fact to bear in mind.” \(^{96}\) *Ortega-Martinez* concerned a victim with an IQ in the forties who lived in a facility with twenty-four-hour staff support, which illustrates one of the biggest flaws with the definitional model. Though it is better to have a statutory provision addressing victim incapacity than to try to treat the condition within the force or resistance requirements of traditional rape law, it makes little sense to situate these provisions in the same or similar sub-sections as those dealing with mental and developmental disabilities. It is not at all self-evident that the mental incapacity resulting from extreme intoxication is similar to that resulting from a more permanent state of impaired intellectual

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\(^{91}\) A widely held rape myth, see infra note 235, is that women “cry rape” when they experience “buyer’s remorse” about their own bad decisions. Feminist readers should not interpret my question as endorsing the view that “some girls rape easy.” See Amanda Terkel, Roger Rivard Loses Reelection to Wisconsin Assembly After Saying ‘Some Girls Rape Easy’, HUFFINGTON POST (Nov. 7, 2012, 4:26 PM), http://www.huffingtonpost.com/2012/11/07/roger-rivard-reelection-wisconsin-assembly_n_2089654.html. Rather, a person can fail to understand the nature and consequences of any number of decisions, such as attending a particular college or accepting a particular job offer. For criminal law to have legitimacy, it must clearly separate such ordinary consequences from consequences that trigger criminal liability.


\(^{93}\) Id.

\(^{94}\) Id.

\(^{95}\) Id.

\(^{96}\) Id.
and adaptive functioning. Maryland has separate definitions for “mentally defective” individuals who suffer from mental retardation or a mental disorder and “mentally incapacitated” individuals who are under the influence of an intoxicating substance. But the language for the two definitions is virtually identical, so the separation may have little practical effect.

Significantly, Washington has applied the holding of Ortega-Martinez to cases of intoxicated victims. In State v. Al-Hamdani, an appellate court quoted extensively from Ortega-Martinez in upholding the conviction of a defendant who argued that the severely intoxicated victim was aware of the nature and consequences of sexual intercourse because she was an adult and a mother. He also asserted that his own expert’s testimony about short-term memory loss caused by alcohol consumption showed that the victim could have been conscious and consented to intercourse but have no memory of her consent later. The court held that the jury could have reasonably concluded based on the testimony “that she was debilitatingly intoxicated at the time of sexual intercourse” and accordingly incapable of meaningful understanding. The victim estimated she had consumed at least ten alcoholic drinks; expert testimony placed her estimated blood alcohol level between 0.1375 and 0.21 at the time of the assault. A witness corroborated the victim’s testimony that prior to the assault she was “stumbling, vomiting, and passing in and out of consciousness.”

The evidence that the victim in the Al-Hamdani case was unconscious for part of the assault makes the case easier than it would otherwise have been. A significantly more difficult case for a jury to evaluate would require a determination of whether a victim was “debilitatingly intoxicated” without having ever lost consciousness. In an unpublished opinion with no precedential effect under Washington practice rules, an appellate court upheld a conviction in a case that lacked evidence of the victim’s blood alcohol level and in which the victim could not estimate the number of drinks she consumed.

99. *Id.*
100. *Id.* at 1108.
101. *Id.* For context, this BAC range is nearly two to three times the legal limit for adult drivers in Washington. See Wash. State Dept. of Licensing, DUI (Driving Under the Influence), http://www.dol.wa.gov/driverslicense/dui.html (last visited Mar. 18, 2015).
102. Al-Hamdani, 36 P.3d at 1108.
sumed. But again in that case, the victim’s description of her level of intoxication included passing in and out of consciousness.\textsuperscript{104}

The dearth of cases interpreting Washington’s mental incapacity statute where the victim was intoxicated but not to the point of passing in and out of consciousness could be explained by several factors. It may be that prosecutors are bringing such cases and jurors are acquitting defendants, suggesting a loose consensus that that level of intoxication sufficient for mental incapacity is that hovering at or near the loss of consciousness. It may also be that prosecutors are not bringing such cases, either out of their own belief that such a level of intoxication is not high enough to trigger the statute or out of a concern that jurors would not convict. Another possibility is that individuals are not reporting such experiences as crimes. A study examining details from crime reports in Washington, along with an analysis of attrition of such crimes through the criminal justice system, could begin to answer questions about what is happening.

What should be happening is another matter. Where the statute does not specify that unconsciousness is required, prosecutors and jurors should not read it in as an additional element of the crime, particularly as Washington has a separate definitional provision covering people who are unconscious.\textsuperscript{105}

2. Mens Rea

Under Washington law the defendant’s knowledge that the victim was mentally incapacitated such that the person was prevented from understanding the nature or consequences of the act of sexual intercourse is not an element of the offense. Rather, the defendant may prove by a “preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless” as an affirmative defense.\textsuperscript{106} At least one state court has rejected a defendant’s argument that the state should have to prove the defendant’s knowledge of the victim’s incapacity as recently as 2013.\textsuperscript{107}


3. Seriousness of Offense

Sexual intercourse with a person who is incapable of consent by way of mental incapacitation due to intoxication is second-degree rape in Washington, a Class A felony.108 This is the same level of culpability as that of crimes of forcible rape, which means "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped."109 First-degree rape is reserved for offenses committed with a deadly weapon or by feloniously entering the building or vehicle where the victim is located or that include kidnapping or serious physical injury.110 Compared to the other states in the definitional category, Washington is about average in how seriously it treats alcohol-facilitated sexual assault.111

B. Enumeration Model

Seven states—California, Iowa, Idaho, Kansas, Louisiana, South Dakota, and Wisconsin—created a separately enumerated provision for sexual assault of intoxicated persons.112 Almost all the enumeration model statutes contain gradations in levels of seriousness of the offense, and it is more common for those gradations to be contained within a general subsection, such as "Rape Defined" or "Sexual Assault," than in smaller and more specific subsections. The enumeration model solves one of the weaknesses of the definitional model in that it does not lump alcohol-facilitated sexual assault in with the dissimilar offense of rape of the mentally and developmentally disabled.113 Just as it makes little sense to prose-

113. See discussion of interpretations of "mental incapacity," in Part II.A.1, supra, noting that the mental incapacity resulting from extreme intoxication is not cognitively similar to that resulting from developmental disabilities.
cute alcohol-facilitated sexual assault within statutory language directed at violent and forcible rape, equating the mental incapacity that results from drunkenness with the mental functioning of the developmentally disabled is likely to generate confusion in how to apply legal standards and poorly serve both sets of victims. Further, it is simpler and more straightforward to organize a statute with one provision articulating different forms of rape, rather than to cross-reference to a definitional section to determine liability.

However, the enumeration states face the same interpretive difficulties as the definitional states. For both groups, the question remains how prosecutors and courts should judge the effect of the intoxicant on the victim’s capacity to consent meaningfully to sexual activity. In the enumeration model, there are two different ways of articulating that standard. In three states, sexual intercourse with an intoxicated person is a crime if the person was prevented from resisting by the intoxicant. In the remaining four, it is a crime if the intoxicant rendered the victim incapable of giving consent. As the following analysis using California as the exemplar state shows, the two standards are not actually different in practical effect—both are simply attempts to quantify the effect the intoxicant must have on the victim to meet the elements of the crime.

114. See supra notes 6–10 and accompanying text.
115. The British Psychological Society, among others, cautions against oversimplified attempts to equate impaired intellectual functioning, as from disability, with developmental scales designed for other purposes. The British Psychological Society, Learning Disability: Definitions and Contexts 9 (2000), http://www.bps.org.uk/system/files/documents/ppb_learning.pdf (“[A]ttempts to derive extrapolated IQ scores from the use of developmental scales or child intelligence tests constitutes extremely dubious practice and is not recommended. Likewise, the practice of referring to ‘mental age’ when reporting on the level of intellectual or social functioning of adults should be avoided.”). Additionally, there is at least one case of an appellate court overturning a conviction in a case involving a drugged victim because the statutory category “mentally incapable” was limited to mentally retarded or defective persons, not those who are drugged. See Falk, supra note 33, at 190.
117. Iowa, Kansas, South Dakota, and Wisconsin use consent language. See § 709.4(1)(c), § 21-5503(a)(2), § 22-22-1(4), § 940.225(2)(cm), supra note 112.
1. Degree of Intoxication

California uses the language “prevented from resisting by any intoxicating or anesthetic substance.”\textsuperscript{118} The use of resistance language evokes an earlier era in rape law when culpability required the victim to resist to the utmost, even at risk of her life.\textsuperscript{119} However, California courts have explained that this provision does not require active resistance; rather, the element is met if the victim is “robbed of judgment by intoxicants.”\textsuperscript{120} At issue is not the victim’s actual consent, but her ability to give legal consent.\textsuperscript{121} This liberal interpretation is supported in part by the fact that even before California’s rape statute was revised, the state’s resistance requirement did not require the victim to exert physical force; verbal resistance was sufficient.\textsuperscript{122} Accordingly, in California the “prevented from resisting” requirement is simply a way of characterizing the victim’s capacity to give consent, which is determined by the effect of alcohol on her judgment.\textsuperscript{123}

The standard of being “robbed of judgment due to the effect of intoxicants” is akin to the definitional model standard of prevention of “meaningful understanding.” And, it suffers from a similar line drawing problem: how is the fact-finder to determine the degree to which a victim must be robbed of judgment before finding the defendant guilty of rape? California courts have offered several interpretations. The \textit{Giardino} court explained that “[l]egal capacity is the ability to exercise reasonable judgment, i.e., to understand and weigh not only the physical nature of the act, but also its moral character and probable consequences.”\textsuperscript{124} The fact-finder should consider the victim’s age and maturity.\textsuperscript{125} “It is not enough that the victim was intoxicated to some degree, or that the intoxication re-

\textsuperscript{118} \textit{Cal. Penal Code} § 261(a)(3) (West 2015).
\textsuperscript{119} See supra note 20 and accompanying text.
\textsuperscript{120} People v. Giardino, 82 Cal. App. 4th 454, 461 (2000).
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 462 (citing People v. Peckham, 232 Cal. App. 2d 163, 165-68 (1965); People v. Austin, 198 Cal. App. 2d 669, 673-75 (1961); People v. Cook, 10 Cal. App. 2d 511, 512-16 (1935)).
\textsuperscript{123} Compare Louisiana’s interpretation of its resistance language: “A defendant may be convicted of simple rape when the victim’s capacity to resist was negated by an abnormal condition or state of mind produced by alcohol consumption. In the present case, there was evidence of alcohol consumption by the victim and of an \textit{alcohol-influenced state of mind.”} State v. Porter, 93-1106, p. 7-9 (La. 7/5/94); 639 So.2d 1137, 1143 (emphasis added).
\textsuperscript{124} \textit{Giardino}, 82 Cal. App. 4th at 466. Compare this language to the Washington courts’ interpretation, discussed supra, text accompanying notes 89–96.
\textsuperscript{125} \textit{Giardino}, 82 Cal. App. 4th at 466.
duced the victim’s sexual inhibitions[,]” as not all levels of intoxication prevent the exercise of reasonable judgment.\footnote{126} This instruction does still require application and interpretation by the jury, but it is likely no more difficult for a juror to interpret than the many other areas in the law referring to “reasonableness,” such as reference to the reasonable man in the duty of care context or proof beyond a reasonable doubt in criminal prosecutions.

The Giardino court also noted with skepticism that the day after the alleged assault, the alleged victim “amicably associated with [the defendant] without indicating in any fashion that she would have made different decisions the night before had she not been under the influence of alcohol.”\footnote{127} While evidence that the victim subjectively believes that her own judgment was severely impaired by the effect of intoxicants would seem to be a necessary condition to prosecution under this statute, courts should be wary of putting too much weight on evidence that but-for the intoxicant she would have made different choices, simply because this evidence is virtually never available to a factual certainty. Sometimes a victim may be able to give convincing testimony that she would not have engaged in intercourse absent the influence of intoxicants, such as if she is a lesbian\footnote{128} or if a subsequent medical exam recovers a tampon painfully lodged inside her and she testifies that she would not have had intercourse while menstruating or would not have had intercourse without removing a tampon.\footnote{129} But most of the time, such clear and simple explanations will be lacking.

In another California appellate court case, the defendant objected to the following jury instruction as insufficient for failing to distinguish between affirmative exercise of poor judgment and inability to exercise reasonable judgment:\footnote{130}

A person is prevented from resisting if she is so intoxicated that she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable

\footnotesize{\begin{itemize}
\item \footnote{126} Id.
\item \footnote{127} Id. at 470.
\item \footnote{129} Because direct evidence of non-consent will so often be lacking, prosecutors should be comprehensive in interviewing victims about their sexual habits to elicit ways in which the night of the assault might have differed from their usual behavior. For additional recommendations on prosecuting sexual assault, see infra Part V.
\item \footnote{130} People v. Smith, 191 Cal. App. 4th 199, 204 (2010).
\end{itemize}}
consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved.\footnote{Id.}

The appellate court held that the instruction adequately distinguished between poor judgment and the legal standard of reasonable judgment, observing: “[E]ven a poor judgment is a reasonable judgment so long as the woman is 'able to understand and weigh the physical nature of the act, its moral character, and probable consequences.'”\footnote{Id. at 205.} California practice guidelines further explain that the statute expresses terms and ideas jurors are capable of interpreting based on their common understanding: “There are commonly recognizable indications of a person’s intoxication, including an odor of alcohol and slurring of speech and unsteadiness, that enable one to reasonably determine if another no longer has the ability to resist.”\footnote{Id.}

2. Mens Rea

As is common in the enumeration category, California stipulates the mens rea requirement in the text of the statute. The victim’s condition must have been “known, or reasonably should have been known by the accused.”\footnote{C AL. PENAL C ODE § 261(a)(3) (West 2015).} California courts have held that jurors are capable of applying this standard to determine whether the victim was too intoxicated to resist.\footnote{See, e.g., People v. Linwood, 105 Cal. Rptr. 2d 73, 79 (2003) (quoting People v. Rodriguez, 726 P.2d 113, 147 (Cal. 1986)) (“[T]he average juror has the ability to cull from everyday experience a standard by which to assess the ability of a defendant to know the status of his or her victim.”).} The “knew or should have known” standard is common in the enumeration category; Iowa and Louisiana also have this requirement, and Kansas has the very similar “known or reasonably apparent” standard.\footnote{IOWA C ODE ANN. § 709.4(1)(c) (West 2015); LA. REV. STAT. ANN. § 14:43(A)(1) (2015); KAN. STAT. ANN. § 21-5503(a)(2) (West 2015).} Wisconsin has a much more stringent mens rea requirement. Culpability follows
only where “the defendant has actual knowledge that the person is incapable of giving consent and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.”

3. Seriousness of Offense

In California, rape of an adult is punishable by imprisonment of three, six, or eight years. The California rape statute makes no facial distinction among forcible rape, rape of the physically disabled, rape of the voluntarily intoxicated, and so forth. Rather, whether a defendant gets sentenced to the lower, middle, or upper range depends on the aggravating or mitigating factors of the offender or of the offense, such as criminal history or whether a weapon was involved. California’s system may be unique, but the other states in the enumeration category similarly offer a range of gradations and punishments.

C. Judicially Constructed Protections

Only a few states in the country entirely omit any mention of intoxicants from their rape law provisions. Courts in those states are faced with the decision of whether to protect the voluntarily intoxicated through broad interpretations of other elements of the state’s rape law. North Carolina courts have expressly declined to do so, adopting a strict construction of the North Carolina provision on mental incapacity. Massachusetts and Nebraska courts have both

140. See Falk, supra note 33.
141. State v. Haddock, 664 S.E.2d 339, 346 (N.C. Ct. App. 2008); see also supra notes 41–50 and accompanying text.
construed their statutes broadly to include criminal liability for intercourse with intoxicated persons.142

Georgia represents the confusion that can arise when legislatures defer to courts the responsibility of addressing intoxicants and rape. In dicta, Georgia’s highest court interpreted the rape statute’s force requirement as fulfilled by “constructive force,” when the victim is intoxicated, meaning “the use of force as is necessary to effect the penetration made by the defendant.”143 The constructive force doctrine has not been uniformly applied in subsequent cases,144 and a separate line of Georgia cases criminalizes intercourse with a woman “whose will is temporarily lost from intoxication.”145 Lack of legislative direction leading to disjointed judicial interpretation can make a prosecutor’s job more difficult.146 Massachusetts will serve as the exemplar state for the judicial construction category, as its case law is the most developed.


143. Drake v. State, 236 S.E.2d 748, 751 (Ga. 1977), superseded by statute on other grounds, Ga. Code Ann. § 16-6-1(a)(2), as recognized in State v. Lyons, 568 S.E.2d 533, 535 (Ga. 2002). Drake concerned the appeal of a man convicted of forcibly raping his nine-year-old daughter. The court raised the intoxication issue to distinguish cases where lack of consent imputes force, as when the victim is intoxicated, drugged, or mentally incompetent, from statutory rape cases, in which non-consent is not an element of the crime. Id. at 750.

144. Compare Demetrios v. State, 541 S.E.2d 83, 86 (Ga. Ct. App. 2000) (evidence sufficient to supply the element of constructive force in a case where the defendant injected the victim with an unknown drug and argued on appeal that she was not so drugged as to be incapable of attempting to prevent him from having intercourse with her), and Baise v. State, 502 S.E.2d 492, 496 (Ga. Ct. App. 1998) (constructive force doctrine applied to a case involving a mentally incompetent victim), with Melton v. State, 639 S.E.2d 411, 419 (Ga. Ct. App. 2006) (declining to apply constructive force doctrine to aggravated sodomy because nonconsensual but unforced sodomy is covered by a sodomy statute).

145. Paul v. State, 240 S.E.2d 600, 602 (Ga. Ct. App. 1977) (finding evidence sufficient to sustain the jury’s verdict of rape when expert testimony indicated the victim’s blood alcohol content was 0.23%).

146. Professor Falk cites Georgia and Massachusetts cases in which the judge or prosecutor misstated established case law. In Georgia, the prosecutor ignored the established “constructive force” doctrine and argued that the drugged and assaulted victim was mentally incapable. The convictions were overturned on appeal because Georgia’s provision for mental incapability was limited to mentally retarded or defective people. In the Massachusetts case, Commonwealth v. Tatro, 676 N.E.2d 843 (1997), the court, according to Professor Falk, gave “an erroneous and non-responsive answer” to a jury query whether Massachusetts law included intoxication or inability to consent as an element of force. See Falk, supra note 33, at 189-90.
In 1870, the Massachusetts Supreme Court in Commonwealth v. Burke defined rape as carnal intercourse with a woman the defendant knew to be “wholly insensible so as to be incapable of consenting.”\footnote{147} The court specifically mentioned drugs and alcohol:

If it were otherwise, any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take even by the defendant himself, would be unprotected from personal dishonor. The law is not open to such a reproach.\footnote{148}

Burke is good law and continues to be cited by Massachusetts courts.\footnote{149} Even more so than “meaningful understanding”\footnote{150} or “prevented from resisting,”\footnote{151} the meaning of “wholly insensible” under Massachusetts law requires explication. Because the phrase is “archaic and confusing,” jury instructions must be given concerning capacity to consent.\footnote{152} The instruction should “communicate to the jury that intoxication must be extreme before it can render a complainant incapable of consenting to intercourse.”\footnote{153} But “[t]he law does not require that the complainant have been rendered ‘unconscious or nearly so’ before she may be deemed past the point of consent.”\footnote{154} Evidence such as that the victim was visibly physically impaired, that her legs were giving out, that she felt confused, that she suffered memory loss, or that she was unable physically to resist or move can support a finding that she was “wholly insensible so as to be incapable of consenting.”\footnote{155}

The mens rea requirement in Massachusetts is knowledge: the defendant must have known that the victim was incapable of consenting.\footnote{156} The judicial construction categorizes intercourse with an intoxicated victim under Mass. Gen. Laws Ann. ch. 265, § 22(b),\footnote{157} which is the less serious of two statutory provisions ad-

\begin{footnotes}
\item[147] Commonwealth v. Burke, 105 Mass. 376, 380 (1870).
\item[148] Id. at 381.
\item[149] E.g., Commonwealth v. Urban, 853 N.E.2d 594, 598 (Mass. App. Ct. 2006) (holding the trial judge’s instructions were deficient “[f]inally, and perhaps most important[ly]” because they “lacked any reference to the ‘wholly insensible’ language derived from Burke”).
\item[153] Id. at 743 n.14.
\item[154] Id. at 742–43.
\item[156] Commonwealth v. Burke, 105 Mass. 376, 380 (1870); Blache, 880 N.E.2d at 744.
\item[157] See, e.g., Blache, 880 N.E.2d at 738.
\end{footnotes}
dressing rape of adult victims. The offense carries no minimum or maximum sentence, unless committed with a weapon, in which case there is a mandatory minimum of ten years for a first-time offense.

Georgia’s two disjointed lines of cases and Massachusetts’s vague “wholly insensible” language illustrate problems associated with criminalizing alcohol-facilitated sexual assault in the absence of a specific statute. Though all statutes require interpretation and any criminalization of alcohol-facilitated sexual assault will present line-drawing problems for jurors to solve, both the definitional and enumeration models are preferable to statutory silence, given the magnitude of the problem. The following section presents additional recommendations for jurisdictions considering drafting an alcohol-facilitated sexual assault statute.

III. THE CASE FOR SPECIFIC STATUTORY TREATMENT OF ALCOHOL-FACILITATED SEXUAL ASSAULT

The American legal system has moved far beyond its common law roots. The criminal law is codified, and because alcohol-facilitated sexual assault is a significant portion of the number of sexual assaults, it should be addressed in specific, individualized statutory provisions aimed at protecting the voluntarily intoxicated. Trying to fit alcohol-facilitated sexual assault into statutory provisions meant for other types of rape causes confusion and raises unnecessary barriers to successful prosecution.

There are two central objections to legal protections for the voluntarily intoxicated, elaborated upon in Part III.A, infra. One argument is that criminalization of alcohol-facilitated sexual assault is unfair to men who were also extremely drunk during the encounter. Why, the argument goes, should men bear all the responsibility for staying sober? The second argument is even broader, touching on the role of criminal law in a free society: criminalization of alcohol-facilitated sexual assault will make illegal a great deal of mutu-

158. Compare Mass. Gen. Laws Ann. ch. 265, § 22 (West 2015) (“[T]he offense described in subsection (b) shall be a lesser included offense to that described in subsection (a).”).
160. See supra notes 143–155.
161. See Ryan, supra note 11, at 411 (“The prevalence of acquaintance rape must be understood in context of the close relationship between alcohol and sexual assault.”).
162. See supra Section I.B.
ally desired sexual activity between adults. On a philosophical level, criminalization of private sexual activity between consenting adults is repugnant to many. Practical concerns include that criminalization of activities widely engaged in leads to net-widening and the threat of abuse that comes with the discretion to prosecute such cases. These counterarguments to this Note’s position raise important considerations, and will be treated carefully. However, in the end, these considerations do not weigh significantly against the need to address alcohol-facilitated sexual assault with specific, individualized statutory language.

Part III.B, infra, will lay out this Note’s main recommendations for successful and fair alcohol-facilitated sexual assault statutes. References will be made to the examples provided by those states that do protect the voluntarily intoxicated, discussed supra Part II, and to some lessons provided by previous rape law reform efforts.

A. Analysis of Counter-Arguments to Protection for the Voluntarily Intoxicated

There are two significant arguments against criminalization of sexual conduct with an individual who is severely but voluntarily intoxicated. The first, which generally assumes that the initiators of intoxicated sexual encounters are men, contends that it is unfair to place the responsibility for staying sober solely on the man. A man who misjudged the degree of incapacitation of his date while himself inebriated should not be labeled a rapist, the argument goes. The second main critique is that the proposals in this Note would criminalize consensual and voluntary sexual conduct. The contention is that criminal law should not declare private sexual activity to be immoral and harmful when the parties engaged in the activity have freely chosen it. These arguments will be analyzed more thoroughly in the following subsections, but in brief, both concerns pale in comparison to the rampant problem of unpunished sexual assault committed against vulnerable victims.

1. The Problem of Mutual Intoxication

The first main criticism is that it is not fair for intoxicated defendants—usually men—to be labeled rapists because of sexual miscommunications that occurred when their judgment was impaired.163 Culpability in this context, the argument goes, punishes

163. See, e.g., Model Penal Code § 213.1. Comment at 315 (1980) (Because liquor and drugs are “common ingredients in the ritual of courtship” it is “unrealistic and unfair to assign to the male total responsibility for the end result.”).
men for having drunk sex and lets women whose impairment contributed to sexual miscommunications disclaim agency for their actions.\textsuperscript{164} Recall that in most cases of acquaintance rape, both parties had been drinking.\textsuperscript{165} It is important to examine this critique in the context of basic criminal law principles.

Broadly speaking, "voluntary intoxication is not a defense to the commission of a crime."\textsuperscript{166} Some states enshrine that common law rule with statutes specifically forbidding any intoxication defense to criminal liability, while others take the opposite approach and permit a voluntary intoxication defense any time intoxication would negate one of the required elements.\textsuperscript{167} Other jurisdictions have taken various middle-ground positions, including retaining the common law distinction between general- and specific-intent crimes.\textsuperscript{168} Rape is typically considered a general-intent crime,\textsuperscript{169} meaning that “general malice or its equivalent” is presumed “by showing that the defendant engaged in the prohibited conduct.”\textsuperscript{170} By contrast, intoxication may be a defense to a specific-intent crime if the state of intoxication prevents the defendant from forming the mental state necessary to sustain a conviction.\textsuperscript{171}

There are strong policy arguments on both sides of the debate. One of the most important principles in criminal law is that there can be no culpability without a guilty mind.\textsuperscript{172} If intoxication prevents such a mental state from forming, then holding the accused

\textsuperscript{164} Karen M. Kramer has compiled a number of studies demonstrating “the tendency to excuse men for alcohol-related sexual violence [despite] the fact that some men deliberately use alcohol as a weapon for sexual aggression.” Karen M. Kramer, \textit{Note, Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes}, 47 \textit{Stan. L. Rev.} 115, 119–24 (1994). Also see Ryan, \textit{supra} note 11, at 420–23, for a discussion of juror reticence to hold men accountable when evidence indicates they were intoxicated during the assault.

\textsuperscript{165} \textit{See supra} notes 11–12.

\textsuperscript{166} 2 \textsc{Charles E. Torcia, Wharton’s Criminal Law} § 111, at 81 (15th ed. 2015) [hereinafter 2 \textsc{Wharton’s}].

\textsuperscript{167} 1 \textsc{Paul H. Robinson, Criminal Law Defense} § 65 (1984).

\textsuperscript{168} Id.

\textsuperscript{169} \textit{See Douglas N. Husak and George C. Thomas III, Date Rape, Social Convention, and Reasonable Mistakes}, 11 \textit{L. \\& Phil.} 95, 99 (1992) (“American courts usually construe rape as a ‘general’ intent offense.”).

\textsuperscript{170} 2 \textsc{Wharton’s}, \textit{supra} note 166, § 111, at 103.

\textsuperscript{171} Robinson § 65, \textsc{supra} note 167. Some commentators argue that any distinction regarding the effect of voluntary intoxication between general- and specific-intent crimes is unprincipled: “[I]f intoxication does in fact negative an intention which is a required element of the crime (whether it be called specific intent or general intent), the crime has not been committed.” LaFave, \textit{supra} note 20, at § 9.5.

\textsuperscript{172} LaFave, \textit{supra} note 20, at § 5.1.
criminal liability is unjust, as LaFave argues. But such a position could lead to social chaos if individuals realize that drunken criminal activity will go unpunished, which is a large part of why common law provided that an accused who voluntarily became drunk chose the consequences that flowed from his drunkenness. Imagine, for instance, if drunkenness were a defense to drunk driving: every person arrested could argue that she was too drunk to know that she was too drunk to drive. The very facts that established her culpability—field sobriety tests, breathalyzers, eyewitness reports of erratic driving—would also exonerate her.

This Note takes a skeptical view towards intoxication as a defense to alcohol-facilitated sexual assault. People even passingly familiar with the effects of alcohol should know that it impairs judgment and increases the risk of social miscommunications. Under those circumstances, the initiator of sexual activity—whether male or female—should take additional precautions to ensure that his or her sexual advances are welcomed and desired by a potential partner. Professor Christine Chambers Goodman advocates a sliding scale where increasingly explicit consent is required as alcohol consumption increases. This would not seem to be too much to ask. People engaged in social drinking, even binge drinking, routinely take a variety of precautions against their own drunk selves, such as giving their car keys to a friend or enabling an app on their phone that will block them from texting or calling an ex-partner later in the evening against their better judgment.

173. Id. at § 9.5.
175. See, e.g., Claude A. Steele & Robert A. Josephs, Alcohol Myopia: Its Prized and Dangerous Effects, 45 AM. PSYCHOL. 921, 923 (1990). Synthesizing previous research, Steele and Josephs note that alcohol intoxication both restricts the range of cues we perceive in a situation and reduces our ability to process and extract meaning from the cues we do receive. “Alcohol . . . causes what we have called an alcohol myopia, a state of shortsightedness in which superficially understood, immediately aspects of experience have a disproportionate influence on behavior and emotion, a state in which we can see the tree, albeit more dimly, but miss the forest altogether.” Id.
176. Goodman, supra note 13, at 58. Goodman later responds to critics who say it is not reasonable to require men to make the determination of what level of explicitness is required for valid consent. “When there is doubt, however, it would seem equally reasonable to err on the side of requiring explicit consent. A firm ‘yes, I do’ will be substantial evidence to establish consent.” Id. at 92.
Allowing an intoxication defense to rape raises the concern that would-be perpetrators will use alcohol as an excuse for aggressive behaviors in which they intend to engage all along. Studies suggest that men use alcohol “as an alibi”; that is, they behave as though alcohol excuses deviant sexual indulgence. A 1993 study found that 35% of college men indicated some likelihood that they would rape if they could get away with it. An earlier study found that 30% of men generally said they would commit rape and 50% would “force a woman into having sex” if they knew they would not get caught. As Professor Katharine K. Baker observes, most adolescents do not get drunk and go rob banks or commit murder. They break “little rules” like those against shoplifting, joyriding, and Committing minor acts of vandalism. “The rule against raping, particularly date raping, is like the rule against shoplifting—it is a little rule.” Allowing an intoxication defense in the acquaintance-rape context opens the door to disingenuous arguments based on antiquated gender-role notions: that men cannot control their sex drive, especially after consuming alcohol.

For the forgoing reasons, this Note takes the position that an intoxication defense is disingenuous and not in keeping with the best criminal law practices. Nonetheless, even in those jurisdictions whose criminal statutes already contemplate such a defense, an intoxication defense will not be fatal to successful prosecution, and prosecutors in such jurisdictions should not shy away from pursuing these cases. In Massachusetts, for instance, case law indicates that where the prosecution must prove that the defendant knew or should


180. Id. at 212 (citing Robin Warshaw, I Never Called It Rape 97 (1988)).


182. Id. at 605.

183. See, e.g., Antonia Abbey, et al., Alcohol and Sexual Assault, 25 Alcohol Res. Health 43, 46 (2001) (collecting studies, including evidence that “heavy drinkers may routinely use intoxication as an excuse for engaging in socially unacceptable behavior, including sexual assault”).
have known\footnote{184}{On a mens rea standard of “knew or should have known,” which is the standard in many of the jurisdictions discussed \textit{supra} notes 134–36, the prosecutor prevails by proving either prong.} that the victim was too intoxicated to consent, the first prong is wholly subjective, and the second prong contains both objective and subjective elements.\footnote{185}{Commonwealth v. Mountry, 972 N.E.2d 438, 447 (Mass. 2012).} Accordingly, it is grounds for error in Massachusetts to instruct the jury that the “should have known” inquiry must be made with reference to what a reasonable non-intoxicated person should have known in the defendant’s position.\footnote{186}{\textit{Id.}} Rather, the jury can consider any “credible evidence that the defendant was affected by the voluntary consumption of alcohol.”\footnote{187}{\textit{Id.} at 448.} The appellate court went on to find the case against the defendant “overwhelming,” the evidence of intoxication “very weak,” and held that no jury, properly instructed as to the subjective element of “should have known” would have acquitted him,\footnote{188}{\textit{Id.} at 449.} demonstrating that the mere fact of defendant intoxication is not fatal to a prosecution even in a jurisdiction that takes his intoxication into account.

An intoxication defense to alcohol-facilitated sexual assault raises the same issues as an intoxication defense to any other crime. There is a concern that individuals will use the fact of their intoxication as an excuse to engage in harmful, criminal activity free from repercussions. Nonetheless, in those jurisdictions that already allow intoxication defenses to specific-intent crimes or otherwise, allowing one here will not preclude successful prosecution of alcohol-facilitated sexual assault.

2. The Problem of Criminalizing Private, Consensual Sexual Activity

The second critique is that many individuals engage in sexual activity while intoxicated, are freely consenting adults, and do not consider their behavior criminal or feel harmed by it.\footnote{189}{When the “progression” of a courtship ritual that begins with facilitating “relaxation” through the use of drugs or alcohol “occurs in a course of mutual and voluntary behavior, it would be unrealistic and unfair to assign to the male total responsibility for the end result.” \textit{LaFave, supra} note 20, at \textit{§} 17.5(e) (quoting \textit{Model Penal Code} \textit{§} 213.1, cmt. at 315 (1980)).} However, the fact that there are, or may be, individuals who do not subjectively feel victimized by sexual acts committed upon them while they are too drunk to consent does not have any bearing on the moral question, nor does it negate the experiences of the vast num-
bers of people who have been deeply harmed by non-violent, non-consensual sex.\textsuperscript{190} This Note advocates a normative vision of the law: that society should protect the voluntarily intoxicated from sexual predators.

The most forceful counterargument to this position is that the government should not be in people’s bedrooms.\textsuperscript{191} The difficult hypothetical here is not the drunk college student, but a couple who jointly (and soberly) agreed to consume drugs, say ecstasy, for the very purpose of enjoying intoxicated sex in the privacy of their own home. While the ecstasy use is already per se illegal, the statutory revisions advocated in this Note would also make the ensuing factually consensual sexual activity illegal. This country has in the past few decades made rapid strides past its puritanical roots towards recognition of a right to intimacy.\textsuperscript{192} But recognition of liberty “in its more transcendent dimensions” does not mean that the government is foreclosed from criminalizing sexual activity where there is a legitimate state interest.\textsuperscript{193} There absolutely is such an interest in alcohol-facilitated sexual assault. Given the outsized role that alcohol plays in sexual assault,\textsuperscript{194} the state must step in with criminal sanctions.

The fact that any criminal statute will sweep in some factually consensual sexual activity is a relatively small price given the magnitude of the problem, and one that society is willing to pay in other areas. For instance, there are very likely a few physically and emotionally mature fourteen-year-olds in happy, healthy, consensual sexual relationships with twenty-five-year olds. But the fact that we might be able to find an exception to the rule does not mean that

\begin{footnotes}
\item[190] For more on the financial and psychological effects of sexual assault, see, for example, Christine Carter, The Other Side of Silence: Women Tell about their Experiences with Date Rape (1995); Michelle J. Anderson, All-American Rape, 79 St. John's L. Rev. 625, 641 (2005); Samuel H. Pillsbury, Crimes Against the Heart: Recognizing the Wrongs of Forced Sex, 35 Loy. L.A. L. Rev. 845, 870–72 (2002); Lori A. Post et al., The Rape Tax: Tangible and Intangible Costs of Sexual Violence, 17 J. Interpersonal Violence 773, 775 (2002).
\item[192] E.g., Lawrence, 539 U.S. 558.
\item[193] Id. at 562, 578.
\item[194] See supra notes 11–14.
\end{footnotes}
the per se rules against adults having sexual relationships with children are invalid.\textsuperscript{195}

Some additional critiques of the approach advocated in this Note tend to misunderstand either this Note’s position or other facts about sexual assault. This Note does not advocate criminalization of all drunk sex. First, the level of victim intoxication required to trigger criminal liability is extremely high. Criminalization of alcohol-facilitated sexual assault does not demand that all sexual decisions be made with a “completely rational, literally sober mind.”\textsuperscript{196} It does not forbid sex after indulgence in a bottle of wine over dinner. It criminalizes predation and exploitation of severely intoxicated individuals who are so impaired that they cannot form the mental state necessary to consent to sexual intercourse.\textsuperscript{197} Second, in cases of true alcohol-facilitated sexual assault there is almost always an imbalance in the level of intoxication. Even though both parties are statistically likely to have consumed alcohol,\textsuperscript{198} typically the man must be less intoxicated than the level of intoxication required of the victim for liability to ensue because alcohol at such high levels causes male impotence.\textsuperscript{199}

\textbf{B. A Statutory Fix: Recommendations for Drafters}

Rape law has moved beyond a stranger with a knife, beyond requiring women to fight with their lives until the moment of penetration.\textsuperscript{200} It now recognizes that the right to bodily integrity, safeguarded by consent standards and greater protections for vulnerable victims, should be legally protected.\textsuperscript{201} More complete statutory protection for the voluntarily intoxicated is a necessary

\textsuperscript{195} About 30\% of statutory rape offenders were boyfriends or girlfriends of their victims. See J. Robert Flores, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN: STATUTORY RAPE KNOWN TO LAW ENFORCEMENT 1 (2005), https://www.ncjrs.gov/pdffiles1/ojjdp/208803.pdf.

\textsuperscript{196} Young, supra note 4, at 34.

\textsuperscript{197} See generally supra Part II; infra Part III.B.1.

\textsuperscript{198} Ryan, supra note 11, at 411.

\textsuperscript{199} E.g., Ethel Sloane, BIOLOGY OF WOMEN 189–90 (William Brottmiller et al. eds., 4th ed. 2004) (Alcohol relaxes inhibitions, but “released inhibition is replaced quickly by a depression of the central nervous system,” which then “proceeds very rapidly to the central nervous system depressant or totally-zonked-out stage, resulting in impotence in the male and complete passivity in the female.”). Of course male impotence prevents only penile penetration, and other forms of unwanted sexual contact could still occur.

\textsuperscript{200} See Anderson, Resistance, supra note 20, at 963 (defining the common-law “utmost resistance requirement”).

\textsuperscript{201} See, e.g., Ryan, supra note 11, at 409.
next step in that evolution. Consent to drink is not tantamount to consent to sex. As that point is increasingly being made on a moral and social level, the law should also supply criminal sanctions. Increased protection can be accomplished without trampling on defendant’s rights by focusing on the victim, imposing standards through jury instructions, maintaining a mens rea of at least recklessness, grading non-violent, non-consensual intercourse as less culpable than more violent rape, and using clear, simple statutory language.

Suggested statutory language is “Rape/sexual assault [in the nth degree] is sexual intercourse accomplished with a person who is mentally incapacitated because of the influence of an intoxicant, such that the person is unable to meaningfully understand the nature and consequences of the act, and the perpetrator knew or consciously disregarded a substantial and unjustifiable risk that the person was so incapacitated.”

The following subsections will further explain the considerations that led to the development of this sample language.

1. Focus on the Victim

This Note declines to take a strong position on whether incapacitation language should be written as “unable to appraise one’s conduct,” “unable to meaningfully understand,” “prevented from resisting,” “robbed of the ability to exercise reasonable judgment,” “incapable of consenting,” or some other synonym. Analysis of these provisions in operation shows that judicial explanations of how they should be interpreted all express the same general idea: when a victim is severely intoxicated—not yet unconscious but significantly, noticeably intoxicated, more than merely buzzed, impaired, or uninhibited—that victim is legally incapable of consenting to intercourse. The provisions express the judgment that a defendant who beguiles, lures, coerces, or forces sex out of such a person has criminally taken advantage of a vulnerable person whom the law should protect.

Professor Patricia J. Falk argues that “the description of the victim’s incapacity should not be written in terms of the victim’s ability to ‘resist,’ ‘appraise or control her conduct,’ or ‘understand the nature or consequences of the act,’ but rather whether the victim is

202. Whether the statute uses “rape” or “sexual assault” and the particular degree should be consistent with the rest of the state’s statute. See also infra Part III.B.4 for a discussion of gradation.

203. See generally supra Parts II.A.1, II.B.1, and II.C.
capable of giving informed or knowing consent.” 204 She argues that the former language inappropriately retains a focus on force, rather than on protecting individuals’ sexual agency and autonomy. 205 While this Note is entirely aligned with Professor Falk’s vision for statutory reform that protects “individuals who are too drunk or otherwise too intoxicated to give informed or knowing consent to sexual activity,” her objection to the above statutory language misses entirely that these descriptors of incapacity are aimed precisely at articulating what informed or knowing consent looks like. Capacity to give knowing and informed consent has to be measured in some way, and there is a limit on how specific statutory language can be. Ability to appraise one’s conduct, to meaningfully understand, and to exercise reasonable judgment are all articulations of the basic principle that the victim must have the mental capacity to consent. They give shape to a legal definition of consent for the voluntarily intoxicated. That definition can be further refined as case law and jury instructions evolve in a given jurisdiction.

2. Careful Jury Instructions

Where statutory language requires interpretation, there is a risk that different juries will adopt different interpretations, leading to unfairness and uncertainty in the law. The usual way to guard against this result is through jury instructions. 206 Appellate decisions interpreting the previously discussed statutes shed some light on what those instructions might include. 207 In a jury system, we must have faith in jurors’ ability to evaluate conflicting sets of facts that may or may not support legal standards. Too much explication of a standard can actually change the plain meaning of the words. 208

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204. Falk, supra note 33, at 188.
205. Id. at 187-88.
206. Critiques of jury instructions are myriad. E.g., David U. Strawn & Raymond W. Buchanan, Jury Confusion: A Threat to Justice, 59 JUDICATURE 478, 483 (1976). The point is merely that if jury instructions are considered valid in other criminal law contexts, they should not be less valid in rape law. The generalized critiques of uncertainty and lack of clarity that suggest plain-language revisions to jury instructions would be helpful should likewise apply to instructions issued in this context.
207. See generally supra Parts II.A.1, II.B.1 and II.C.
208. See e.g., 9 John Henry Wigmore, Evidence in Trials at Common Law § 2497, 408-09 (James Chadbourne rev. 1981) (regarding the efforts to use more detailed jury instructions to explain the standard of proof beyond a reasonable doubt in criminal trials: ‘In practice, these detailed amplifications of the doctrine have usually denigrated into a mere tool for counsel . . . to save a cause for a new
3. Mens Rea of Reckless Disregard

The mens rea requirement for an alcohol-facilitated sexual assault statute should be carefully crafted to safeguard the rights of the accused. While there is variation, many of the statutes discussed above use a standard of actual or constructive knowledge—meaning that the defendant knew or should have known that the victim was too intoxicated to consent to intercourse. Such a standard is relatively anomalous in criminal law, as it allows liability based on negligence: because of the facts and circumstances, a reasonable person should have known that the victim was severely intoxicated, but this defendant did not.

This Note proposes a more stringent recklessness standard, meaning that liability would ensue only if the defendant knew or "consciously disregarded a substantial and unjustifiable risk" that the victim was mentally incapacitated. Recklessness is the default level of culpability in criminal law, and in addition to safeguarding fairness for the defendant, a recklessness mens rea signals that alcohol-facilitated sexual assault is a serious crime that should be treated like other crimes. Likewise, the defendant's mens rea should be an element of the crime that the prosecution must prove. On a two-pronged mens rea requirement like "knew or recklessly disregarded a substantial and unjustifiable risk that the victim was mentally incapacitated due to the effects of alcohol," the prosecution can prevail by proving either prong. Requiring the prosecution to prove the defendant's mens rea is fairer to defendants than the Washington model of allowing defendants to raise their lack of trial. . . . The effort [to develop these elaborate definitions] should be abandoned.

210. See, e.g., LaFave, supra note 20, at § 5.4 (noting that something greater than tort negligence has always been required for common law crimes and that there is an ongoing dispute whether criminal liability should ever be based on objective negligence).
211. Actual knowledge alone is too high a standard because it is simply too difficult to prove—in any area of criminal law, the best and often only evidence of a defendant’s knowledge lies with the defendant himself. Purpose, an even higher standard, almost conflates a voluntarily intoxication provision with a deliberate administration one. See supra note 137.
mens rea as an affirmative defense. Such a standard does not pose too high a hurdle to prosecutions in part because laypersons are familiar with the effects of alcohol. A defendant’s assertion that he did not know will seem disingenuous and self-serving in the face of evidence that the victim was stumbling, slurring her words, unable to stand independently, mumbling, incoherent, and confused—in short, expressing the many physical and outward manifestations of severe inebriation that signal mental cloudiness.

Some feminists and victim advocates have written in support of a negligence standard. Professor Goodman argues that, as applied, a mens rea standard like most of those discussed above (the defendant knew or should have known that the victim was so intoxicated that her consent was invalid) is very high. Her argument is that because the level of intoxication necessary to trigger the operation of the statute is so severe, the statute is not always available and thus rarely operates to place a “substantial” portion of the risk of intoxicated consent on the defendant. However, each legal concept should be kept wholly separate for a statutory regime to be most effective, clear, and fair. And regardless of the other elements of the crime, a mens rea of negligence is not a very high one. Just as a high standard as to degree of intoxication is needed to separate out alcohol-facilitated sexual assault from general drunk sex, risk-taking behavior, and poor judgment, a mens rea of reckless disregard is preferable to one of negligence both because it is fairer to defendants and because it reinforces the notion that this crime is a serious one.

4. Graded Less Seriously Than More Violent Assaults

Some of the statutes discussed in Part II are relatively flat—they lump intercourse with a voluntarily intoxicated victim into the same category, with corresponding level of punishment, as forcible rape or rape by deliberate drugging. It does not minimize the importance of protecting the voluntarily intoxicated to recognize that more violent attacks merit higher punishment. Indeed, graded statutes both protect the defendant in the sense that they attempt to mete out punishment proportionately to culpability, and

215. E.g., Taslitz, supra note 213, at 387 (“Rape is different from other crimes in a way that justifies severe potential penalties even when liability is based solely upon negligent conduct.”).
216. Goodman, supra note 13, at 72.
217. Id.
218. See supra Parts II.A.3 & II.B.3.
they protect victims because they reduce the chance of jury nullification if jurors feel that the crime at hand was not commensurate with a more traditional conception of rape.\textsuperscript{219} Enhancements can be added if the assault of the voluntarily intoxicated person also included a weapon or if the victim suffered additional injuries.

5. Simple Statutory Language

One important lesson from the first wave of rape law reform\textsuperscript{220} is that complex and contradictory statutes can undermine ostensible reforms. For example, a major push for many reformers was to refocus attention from force and resistance requirements onto the issue of consent.\textsuperscript{221} The non-consent movement has achieved statutory success in twenty-eight states.\textsuperscript{222} However, of these states, at least nine undermine the principle through other statutory language.\textsuperscript{223}

For example, Delaware’s second-degree rape provision applies when a person “[i]ntentionally engages in sexual intercourse with another person, and the intercourse occurs without the victim’s consent.”\textsuperscript{224} However, in a separate section containing general definitions, Delaware defines “without consent” as “compel[ling] the victim to submit by any act of coercion . . . or by force, by gesture, or by threat of death, physical injury, pain or kidnapping to be inflicted upon the victim or a third party, or by any other means which would compel a reasonable person under the circumstances to submit.”\textsuperscript{225} Therefore, even though Delaware appears to have enshrined a “no means no” standard, it actually defines non-consent with reference to force, threats of great bodily harm, and coercion. To make matters even more confusing, Delaware has four additional definitions of “non-consent,” codified at § 761(j)(2)-(5), applying to unconscious victims, disabled victims, defendants who are health professionals, and defendants who deliberately administer an intoxicant without the victim’s knowledge or against her will.\textsuperscript{226}

\textsuperscript{220} See supra notes 17, 28–34.
\textsuperscript{221} E.g., Schulhofer, supra note 213.
\textsuperscript{223} Id. at 1090–91.
This sort of “faux reform,” wherein states appear to write victim-friendly statutes and then interpret the language in a manner more closely resembling traditional common law standards, is not merely disingenuous, it also makes prosecution less likely. Decker and Baroni note a “striking dearth” of case law in many non-consent states—suggesting that either non-consent cases are not being prosecuted or they are not being won.227 This evidence indicates that the non-consent movement’s twenty-eight state victory is being chipped away at by both statutory and practice-oriented limitations.

Drafters considering protection for the voluntarily intoxicated need to be alert to the possibility of faux reform and attempts to undermine statutory reform efforts. For these reasons, the enumeration model, discussed supra Part II.B, is preferable to the definitional model outlined in Part II.A. Addressing alcohol-facilitated sexual assault in its own, separate codification is cleaner, clearer, and less susceptible to being undermined elsewhere than a statutory structure that requires cross-referencing various definitions to determine whether the law was violated.

IV. PROSECUTORS’ ETHICAL OBLIGATION TO PURSUE ALCOHOL-FACILITATED SEXUAL ASSAULT

Prosecutors may be reluctant to bring charges if they think they will lose at trial. This section argues that prosecutors have an ethical obligation to bring charges of alcohol-facilitated sexual assault, even if they believe—rightly or wrongly—that the case will be a tough sell for jurors. Some prosecutors may be under the mistaken impression that ethical guidelines for prosecutors advise against bringing cases to trial if they subjectively believe they might lose. This is not a correct understanding of the rules.

The American Bar Association standard related to prosecutorial discretion in charging decisions says that prosecutors should not pursue criminal charges if the prosecutor knows the charges are not supported by probable cause.228 Further, there

227. Decker & Baroni, supra note 222, at 1101. Case law would arise following convictions, as only the defendant has the right to appeal. Case law could be helpful in interpreting, for example, the catch-all provision in Delaware’s statute “or by any other means which would compel a reasonable person under the circumstances to submit.” Del. Code Ann. tit. 11, § 761(j)(1) (West 2015). In the absence of precedent to the contrary, it would be reasonable for courts to apply the cannon of statutory construction ejusdem generis, by which catch-all provisions are defined by reference to the earlier terms in the list—here, force, threat of death, etc.

228. Prosecution Function Standard § 3-3.9(a) (Am. Bar Ass’n 1993).
should be “sufficient admissible evidence to support a conviction.”229 The standard does not ask prosecutors to contemplate the “downstream”230 effects of rape myths and possible juror nullification of the law. In fact, it does exactly the opposite: “In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.”231

There absolutely is a serious threat to the community here. Not only is alcohol-facilitated sexual assault prevalent, the data show that the majority of rapists are serial offenders with an average of six victims each.232 Police and prosecutors need to work with the victims who do come forward instead of shutting them out of the criminal justice system because of a perception that jurors will not be sympathetic to victims who were drinking or using drugs. Even though overburdened prosecutors may be inclined to focus on the most violent cases, treating alcohol-facilitated sexual assault as a priority has the potential to greatly improve community safety by taking serial offenders off the street. And prosecutors may find that changing their own attitudes also changes the way they view the evidence and the “win-ability” of the case. Much of the existing research on the importance of victim credibility on prosecutorial charging decisions “has assumed, to varying degrees, that victim credibility is a phenomenon that exists independently of prosecutors’ interpretations and assessments of such credibility. Such approaches neglect the processes whereby prosecutors actively assess and negotiate victim credibility in actual, ongoing case processing.”233

Studies indicate that police and prosecutors have a “downstream” orientation: when police interview a victim, they consider how her story will be received by the prosecutor, who in turn is considering whether she can prove the case beyond a reasonable doubt to a jury.234 In the past, police and prosecutors may have directly relied on factors beyond whether the conduct in question met the statutory definition of rape—such as the victim’s personal

229. Id.


231. Prosecution Function Standard, supra note 228, § 3-3.9(e).

232. See David Lisak & Paul M. Miller, Repeat Rape and Multiple Offending Among Undetected Rapists, 17 Violence & Victims 73 (2002).

233. Frohmann, supra note 230, at 213.

234. See generally id. at 213–14, 224.
characteristics, the relationship between the victim and the accused, or the victim’s risk-seeking behavior such as walking alone at night—in deciding whether to credit the victim’s story. Now, after several decades of training and public awareness focused on "rape myths," police and prosecutors are much less likely to say that these factors affect whether a crime was “real rape,” but they continue to consider the “downstream” effects of these same factors. This phenomenon is somewhat troubling at the police level. Early assumptions about the strength of a case can seriously impair a fledgling investigation, and police should be wary of confirmation bias—the subconscious tendency to value information that supports a hypothesis and discount evidence that does not. And, we generally do not want police detectives making legal judgments reserved to prosecutors.

Downstream orientation is different for prosecutors. Prosecutors are ethically and often legally required to believe they have sufficient evidence to convict before proceeding to trial. This requirement bases the standard not on what the prosecutor believes

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235. Rape myths are socially perpetuated misconceptions about rape, including:

[W]omen mean 'yes' when they say 'no'; women are 'asking for it' when they wear provocative clothes, go to bars alone, or simply walk down the street at night; . . . if a woman says 'yes' once, there is no reason to believe her 'no' the next time; women who 'tease' men deserve to be raped; the majority of women who are raped are promiscuous or have bad reputations; a woman who goes to the home of a man on the first date implies she is willing to have sex; women cry rape to cover up an illegitimate pregnancy; a man is justified in forcing sex on a woman who makes him sexually excited; a man is entitled to sex if he buys a woman dinner.


237. See Frohman, *supra* note 230, at 213 (listing studies finding that victim credibility is important in police decisions to even investigate cases); Rose Corrigan, *The New Trial by Ordeal: Rape Kits, Police Practices, and the Unintended Effects of Policy Innovation*, 38 LAW & SOC. INQUIRY 920, 932 (2013) (summarizing studies finding that law enforcement officers have learned what answers they are ‘expected’ to give about rape while continuing to treat rape reports with undue skepticism).

238. A determination that there is probable cause to arrest a person, for instance, is a significantly lower bar than the standard of proof beyond a reasonable doubt. See infra Part V.B.1. for a discussion on how a tepid response from a police officer can damage or even thwart a potential prosecution.

239. See Prosecution Function Standard, *supra* note 228, § 3-3.9. (“A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”). See also Recommendation for Dismissal, People v. Strauss-
is the truth, but what she believes she can prove. Therefore, consideration of how jurors’ possible belief in rape myths may affect their reception of the evidence is a crucial part of the prosecutor’s job. But even more crucially, awareness of the obstacles presented by rape myths and juror perceptions should not dissuade prosecutors from pursuing alcohol-facilitated sexual assault cases and even taking them to trial. Studies show that it does: “prosecutors select cases with a high probability of conviction and reject charges in cases in which conviction is unlikely.” Knowledge of the obstacles should change the nature of the investigation and trial, but prosecutors have an ethical obligation to pursue these difficult cases for public safety reasons.

While these ethical obligations are clearest for prosecutors in states whose statutory or common law protects voluntarily intoxicated victims from sexual assault, even prosecutors in jurisdictions requiring deliberate administration of intoxicants by defendants should reconsider their charging decisions. First, for reasons explained supra Part I.C, a victim of surreptitious administration of an intoxicant may not initially realize he or she was drugged, particularly if the victim also consumed alcohol. Further investigation, such as interviewing eyewitnesses or seeking medical and pharmacological evidence, could uncover other evidence of criminality. Second, severely intoxicated individuals may have been slipping in and out of consciousness at times or may have been so inebriated as to meet the jurisdiction’s definition of physically helpless. Prosecutors should try to get as complete a picture of the event as they can, and then turn to their jurisdiction’s law to see if the facts meet the statutory definitions. This two-step process for evaluating victim reports is appropriate irrespective of the particular jurisdiction’s exact statutory language.

When there is such confusion about the legal standards, particularly related to alcohol-facilitated sexual assault, observers should hardly be surprised that a majority of college women who reported facts describing a completed rape did not characterize their experience as rape. Prosecutors cannot expect victims to come forward

Kahn, No. 02526/2011 at 2 (N.Y. Sup. Ct. Aug. 22, 2011) (“If we do not believe [the complainant] beyond a reasonable doubt, we cannot ask a jury to do so.”).


241. See infra Part V.B–C.

if their reports are not taken seriously. When criminal justice system actors take a strong stand against sexual assault, they can slowly change social perceptions, attitudes, and behaviors. The final section proposes recommendations to help prosecutors win alcohol-facilitated sexual assault cases.

V.

STRUCTURAL AND PRACTICE-ORIENTED STRATEGIES:
RECOMMENDATIONS FOR PROSECUTORS

Observers familiar with the criminal justice system know not to assume an orderly progression from crime to complaint to investigation to prosecution and conviction. Rather, there are opportunities for derailment at each stage, a phenomenon known as attrition.243 Many victims choose not to report the crime to police. Police, in turn, do not investigate every allegation, nor do they always alert prosecutors to a victim’s report. For those cases that are referred for prosecution, line prosecutors then make an independent decision of whether to bring charges in court. Finally, juries (and sometimes judges) weigh the evidence and make a determination of guilt. Attrition at any level leads to perpetrators going or remaining free, and in some circumstances can also result in victims feeling betrayed and disbelieved by public servants.

Victim advocates are critical of police and prosecutorial responses to rape allegations.244 They portray a criminal justice system insensitive to rape victims and reluctant to prosecute rapists, which creates a disincentive for victims to report rape at all.245 In-


244. One researcher recently concluded a series of interviews with 167 rape counselors and victim advocates at 112 rape crisis centers in six states that focused on rape crisis workers’ perceptions of victims’ experiences in the criminal justice system. Some of the key takeaways included that reports by individuals from marginalized groups were disregarded, ignored, or not taken seriously by police; that police skepticism about victim veracity included threats to file charges against them; and that detectives and prosecutors in some jurisdictions made illegal demands that victims submit to a polygraph as a precondition of conducting an investigation. Corrigan, supra note 237, at 924, 931, 933.

245. Department of Justice data indicate that only 36% of rape victims report to the police; for college students, the figure was less than 5% in 2000. Catalano,
indeed, one of the big debates in rape law concerns the extent of the attrition problem and the degree to which statutory reforms have actually changed the type and number of rape cases that are prosecuted.

More work needs to be done to validate and expand on social science research aimed at isolating the causal effects of particular statutory reforms. But existing research confirms what scholars and prosecutors already know: statutory revision in isolation is simply not enough. Just as reformist statutes can be undermined within a statutory framework, statutory reforms are vulnerable to being undermined by actors within the criminal justice system. An empirical study attempting to quantify the impact of the strength of various rape shield laws, for example, revealed that judges’, prosecutors’, and defense attorneys’ perceptions of the admissibility of evidence was not entirely determined by the strength of that jurisdiction’s law. If the laws were being implemented as written, assumptions about evidence should depend primarily on variations in the laws across the six tested jurisdictions. The researchers con-

supra note 22, at 10; Fisher, supra note 242, at 23–24. Reporting rates in the United States are currently in a state of decline. Kathleen Daly & Brigitte Bouthouys, Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries, 39 Crime & Just. 565, 581 (2010). The percentage of rape or sexual assault victimizations reported to police increased to a high of 56% in 2003 before declining to 35% in 2010, a level last seen in 1995. Plante et al., supra note 6, at 1.

246. Several studies have found that the attrition pattern for rape at the police and prosecutor level mirrors that of other felonies. David P. Bryden & Sonja Lengnick, Rape in the Criminal Justice System, 87 J. Crim. L. & Criminology 1194, 1212–13 (1997). The authors cited several studies including Jim Galvin & Kenneth Polk, Attrition in Case Processing: Is Rape Unique?, 20 J. Res. Crime Delinqu. 126, 136 (1983) (finding that rape cases in California experienced somewhat more attrition than homicide, but less than robbery and considerably less than assault or burglary); Martha A. Myers & Gary D. LaFree, Sexual Assault and Its Prosecution: A Comparison With Other Crimes, 73 J. Crim. L. & Criminology 1282, 1288 (1982) (finding few differences between rape and other crimes after controlling for evidentiary strength and crime seriousness); and U.S. Dep’t Of Justice, Bureau of Justice Statistics, The Prosecution of Felony Arrests, 1988 15–23 (1992) (finding comparable attrition patterns in rape and aggravated assault in a study of thirty urban jurisdictions). However, this parity does not hold true for acquaintance rape. Bryden & Lengnick, supra, at 1214. Significant differences in outcomes for stranger rape versus acquaintance rape mask high attrition rates for acquaintance rape cases. Id.

247. See supra Part III.B.5.

248. Cassia Spohn & Julie Horney, “The Law’s the Law, but Fair Is Fair:” Rape Shield Laws and Officials’ Assessments of Sexual History Evidence, 29 Criminology 137, 139 (1991). Interestingly, neither the gender of the respondent nor the respondent’s role (as judge, prosecutor, or defense attorney) affected respondents’ answers to whether the hypothetical evidence would be admissible. Id. at 145.
cluded that criminal justice officials’ perceptions of the admissibility of evidence depend on both the statutory mandate and informal norms.\footnote{249} This result echoes a similar study finding that harsh drunk driving laws are unlikely to be implemented as written if officials perceive the laws as too punitive.\footnote{250}

In short, statutes are not self-executing. They must be interpreted and applied by players within the criminal justice system who have enormous power to circumvent the letter and spirit of a progressive law. Accordingly, the following subsections outline best practices suggested by existing research relating to structural considerations for prosecutorial offices, responses to and investigations of the initial victim report, and trial strategies for line prosecutors. Most of the suggested practices work best when combined with other reforms, and research attempting to isolate the effects of a particular change has concluded as much. These subsections are meant to serve as a sketch of the broad considerations, and crucially, the best practices are meant to be valuable regardless of whether the jurisdiction has a deliberate administration statute like those discussed in Part I or has separate provisions to protect the voluntarily intoxicated like those addressed in Parts II and III.

### A. Structural Considerations for Prosecutors’ Offices

The recommendations following in this Part V.A are most applicable in larger district attorney’s offices. Fifteen percent of prosecutor’s offices in the country are part-time offices with no full-time staff.\footnote{251} Most others are small offices serving populations of fewer than 100,000 people.\footnote{252} In such small offices, structural recommendations like appointing specialized units for the prosecution of alcohol-facilitated sexual assault make little sense. But the remainder of the recommendations in this Part V are widely applicable across offices of different sizes and locations.

#### 1. Specialized Units

AEquitas, a group funded by the Department of Justice’s Office of Violence Against Women that provides legal research, case consultation, trainings, and conferences to support prosecutions related to violence against women, recommends specialized units—

\begin{itemize}
  \item \footnote{249} \textit{Id.} at 153.
  \item \footnote{250} \textit{Id.} at 139.
  \item \footnote{251} \textsc{Steven W. Perry & Duren Banks, U.S. Dept of Justice, Bureau of Justice Statistics, Prosecutors in State Courts, 2007 - Statistical Tables, http://www.bjs.gov/content/pub/ascii/psc07st.txt.}
  \item \footnote{252} \textit{Id.}
\end{itemize}
including specialized investigators and prosecutors—for sexual assault cases.\textsuperscript{253} Victims of sexual assaults involving drugs or alcohol are historically less likely to report the crime.\textsuperscript{254} However, as some evidence indicates that reports of alcohol-facilitated sexual assault may be rising nationally,\textsuperscript{255} having experienced attorneys on hand to address these cases specifically may also be beneficial. Specialization helps victims because the victim need not retell the story to a new attorney at each stage of the process.\textsuperscript{256} Specialized units can offer prosecutors better opportunities to become involved early in the investigation, which has been shown to improve case outcomes.\textsuperscript{257} And specialization promotes the accumulation of experience and skills in the attorneys who continue to work on the same kinds of cases.

While specialized units have the potential to positively affect both the process for victims and case outcomes, they are unlikely to change the number or type of cases filed without other good practices in place. Specifically, “prosecutors’ concerns with convictability could be precluding the predicted benefits from emerging in the specialized unit.”\textsuperscript{258} If supervisors are evaluating prosecutors’ job performance based on win-loss record, rather than through more holistic criteria, line ADAs\textsuperscript{259} will be reluctant to take on challenging cases, regardless of whether they belong to a specialized unit. A study comparing two district attorney’s offices, one with a specialized sexual assault unit and one without, found that prosecutors at both offices continued to make charging decisions based on the victim’s perceived “risk-taking” behavior or their assessment of his or her moral character.\textsuperscript{260}

\textsuperscript{253} Jennifer G. Long & Elaine Nugent-Borakove, Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions, AQUITAS STRATEGIES, April 2014.


\textsuperscript{256} Beichner & Spohn, supra note 240, at 490. Vertical prosecutions, without a specialized unit, can have the same effect.

\textsuperscript{257} Id.

\textsuperscript{258} Id. at 491.

\textsuperscript{259} "ADA" is an abbreviation for Assistant District Attorney and is used as short-hand throughout this section, notwithstanding that some jurisdictions use other titles for local prosecutors.

\textsuperscript{260} Beichner & Spohn, supra note 240, at 491.
2. Office Culture, Priorities, and Promotions

District attorneys need to make alcohol-facilitated sexual assault a priority and incentivize line ADAs to take risks in allocating time and resources to these cases. This may require some conscious effort to change the office culture. “The promotion policy of the county district attorney’s . . . office encourages prosecutors to accept only ‘strong’ or ‘winnable’ cases for prosecution by using conviction rates as a measure of prosecutorial performance.” 261

Not guilty verdicts are sometimes considered an indicator of prosecutorial incompetence, rather than of the difficulty of the case. 262 ADAs are also rewarded for early rejections of weak cases as a mechanism for shepherding resources and reducing excessive caseloads. 263 And there is a concern that too many losses will cause judges to question the prosecutor’s competence as an officer of the court. 264 While these considerations have an important place in local prosecutor’s offices, there must be a recognition from office supervisors that pursuing alcohol-facilitated sexual assault is worthwhile, that these cases require resources to pursue adequately, and that sometimes jurors return not guilty verdicts through no obvious error by the prosecutor, even when the case was, ex ante, provable beyond a reasonable doubt.

One experienced prosecutor who has worked in multiple large, urban district attorney’s offices, including in supervisory roles, suggests that supervisors who do not normally carry a case load can send a signal about office priorities to subordinates by taking on difficult cases. 265 He recommends that supervisors must also make clear to the prosecutors they supervise that they are being judged not only by victories, but also by the quality of work they do and how well they manage their caseload. 266

B. Victim Reporting and Subsequent Investigation

1. The Importance of the Initial Report

While prosecutors must evaluate the truth of allegations and jurors are the ultimate fact-finders, police are at the front lines of deciding whether an investigation has generated sufficient proba-

262. Id.
263. Id.
264. Id.
265. Telephone interview (Sept. 23, 2015) (hereinafter 9/15 Interview). The prosecutor requested anonymity because his office’s policies do not permit such interviews.
266. Id.
ble cause for an arrest. “Low-visibility decisions made early in the rape reporting process can influence whether and how sexual assaults are formally acknowledged or are dismissed as ‘not credible’ or ‘unfounded.’”267 As such, the importance of police to successful rape prosecutions can hardly be overstated. Police often serve as a victim’s “first point of contact” with the criminal justice system.268 A negative or judgmental response “may influence the nature and quality of evidence obtained” and even dissuade the victim from continuing to cooperate with law enforcement.269

Criminal justice system personnel, especially police, need to be aware that alcohol-facilitated sexual assault reports may have merit even when they seem less than ideal:

The initial report from the victim may well sound like this: “I think I may have been raped. I’m not sure. I was pretty out of it. I don’t remember everything. But I think I was raped. Maybe.” . . . Within a few moments, it may well emerge that the victim was very intoxicated at the time of the sexual assault, she has significant gaps in her memory of what transpired, she delayed reporting for hours or even days, and she does not think anyone observed significant interactions between herself and the suspect either before or after the reported assault. Perhaps not surprisingly, this type of report often has a very short lifespan within the criminal justice system.270

Police and prosecutors must resist the urge to dismiss such a report without consideration or investigation. Instead, they should view this halting report as an opportunity to catch a serial rapist. One study of 1882 men found that 63% of the 120 identified rapists were serial rapists, with an average of six victims each.271 In another study of 1146 male Navy recruits, 71% of those who engaged in behavior meeting legal definitions of attempted and completed rape admitted to serial rapes, again with an average of six each.272 If a victim is shut out of the criminal justice system before an investigation even has the opportunity to reveal corroborative evidence to

269. Id.
271. David Lisak & Paul M. Miller, Repeat Rape and Multiple Offending Among Undetected Rapists, 17 VIOLENCE & VICTIMS 73, 78 (2002).
fill in the gaps in the victim’s memory, an opportunity to catch a predator is lost, and the predator is potentially emboldened to commit future crimes.

Additional investigation is possible and should be pursued before cases are dismissed. One prosecutor recalled a victim who very honestly told him that she could not say whether the drug-facilitated assault was real or a dream. The prosecutor was able to make the case by having the victim do a controlled phone call and then a controlled meet. The defendant made statements confirming the assault.

Police officers must keep in mind how difficult it is for victims of alcohol-facilitated sexual assault to report at all. Police must also realize that many victims know that something terrible happened to them but do not know that they can or should call it rape. Guidelines issued by both the FBI and the International Association of Chiefs of Police (“IACP”) dictate that police should only “unfound”—declare an allegation false—if it is determined through investigation that the report was false or baseless. A recent study of the Los Angeles Police Department found that the LAPD had inappropriately categorized ten of the eighty-one false reports in the sample as false or baseless, or 12.3%. More troub-

273. 9/15 Interview, supra note 265.
274. Id.
275. Id.
277. See generally Fisher, supra note 242. Less than half of the college women surveyed who reported an experience categorized as a completed rape considered the experience to be rape: “Women may not define a victimization as a rape for many reasons (such as embarrassment, not clearly understanding the legal definition of the term, or not wanting to define someone they know who victimized them as a rapist) or because others blame them for their sexual assault.” Id at 15. The researchers could not definitively substantiate which of these possible factors were applicable. Id.
278. Cassia Spohn, Clair White & Katharine Tellis, Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports, 48 L. & SOC’Y REV. 161, 163 (2014). See also U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTING HANDBOOK (2004) at 77, https://www2.fbi.gov/ucr/handbook/ucrhandbook04.pdf. The guidelines distinguish between “false” and “baseless” claims deliberately: these terms, though often used interchangeably, have different meanings. A false report is one that was deliberately fabricated; a baseless report indicates a claim that was related truthfully but does not meet the legal definition of sexual assault.
279. Spohn, White & Tellis, supra note 278, at 173. In most of the ten cases determined to be not false or baseless, the victim recanted. Id. at 177. In each of
ling, a recent anecdote-based survey of rape victim advocates’ experiences with law enforcement found it was “quite common” for police to threaten to file charges against victims as an investigation or interrogation tactic. Police in several jurisdictions illegally demanded victims submit to a polygraph before they would proceed with an investigation.

Prosecutors can work with their police counterparts to develop community guidelines that stress the difficulty of victim reporting and the importance of thorough investigation. But prosecutors will have trouble maintaining these alliances if they then decline to prosecute after police have done investigatory work. Bringing charges and taking cases to trial are clear signals of prosecutorial priorities.

2. Rape Kits and SANE-Trained Nurses

Sexual Assault Nurse Examiner (SANE) programs train registered nurses in working with sexual assault victims and, in particular, to conduct forensic exams to collect admissible evidence of the assault. A report funded by the Department of Justice suggests that SANE nurses are both considerably more effective at collecting usable evidence than general emergency room staff and more sensitive to victims in the process.

these cases, the researchers determined from the file that it was “clear that [the victim’s] recantation was motivated by fear of reprisal from the suspect, pressure from the suspect or his family or friends, or her lack of interest in pursuing prosecution of the suspect.” Id. Corroborating evidence in these cases, along with other indicia of reliability, led researchers to conclude that the recantations were not genuine. Id. at 178. For example, in one case researchers noted that “complainant gave a very clear account of the incident, used the same words to describe the incident to the patrol officer and the investigating officer, and appeared to be concerned that the suspect would get in trouble.” Id.

280. Corrigan, supra note 237, at 933.
281. Id.
282. Of course there is also a role for plea negotiations, and prosecutors must consider factors including likelihood of success at trial and the level of egregiousness of the behavior. 9/15 Interview, supra note 265. Additionally, in sexual assault cases prosecutors may be inclined to emphasize with victims that the mere fact of bringing the defendant to trial, regardless of outcome, can be part of the healing process. Id.

SANE programs are not a panacea and will not be effective in isolation. If “SANE programs play out against a background of fundamental skepticism about sexual assault,” then police may deny access to SANE exams for victims who do not fit the blameless victim profile that police expect.285 Accordingly, police skepticism not only can be traumatic for a truthful victim and weaken her resolve to pursue justice in the criminal courts, but can actually weaken the case from an evidentiary standpoint. SANE training needs to be accompanied by police training that emphasizes that police should not act as a barrier to access this evidence and that promotes prosecutorial involvement early in the investigative process.

In alcohol-facilitated sexual assault, identification of the perpetrator is less frequently an issue than victim capacity and consent. SANE exams can help build a case even where the identity of the defendant is already known, because they can identify abrasions, bruises, and tears “often so minute they cannot be seen with the naked eye.”286 Any evidence supporting the theory of non-consensual intercourse can be helpful to successful prosecutions.

C. Trial Techniques

The tough thing about alcohol is it affects every stage of the proceeding—victims’ realistic ability to remember and the credibility with the jury. You ask them in voir dire if they would treat them differently, and everybody of course says no, but talking them afterwards, they always let it affect their decision. They’ll say, “We understand that it doesn’t mean she should have been raped, but we have to take it into consideration for consent.” It’s just a complicating factor.287

1. Voir Dire

Even though much of the existing social science research about sexual assault will not be admissible in a criminal case, the prosecutor with a “thorough understanding of the dynamics of sexual assault” can “better identify jurors who might harbor mistaken beliefs and accept false mythology about sexual assault and poison

the rest of the jury with misinformation.”

Voir dire in sexual assault cases should aim to uncover juror rape myth acceptance, to begin to redefine these myths, and to prepare jurors for difficult evidence.

Voir dire should be about more than discovering and striking jurors that prosecutors think are too biased to serve. It is also the prosecutor’s first opportunity to educate the jury pool (and through them, the community) about sexual assault. “Successful juror education begins with voir dire, continues throughout the entire trial, and culminates with a strong closing argument.” One California prosecutor cautions that jurors do not readily admit to subscribing to rape myths. She tries to be creative in asking open-ended questions to solicit their reactions to different hypothetical situations to elucidate their true feelings.

2. Expert Testimony

Expert testimony can be crucial to counter incorrect and unfavorable preconceptions jurors may have about evidence in sexual assault cases and rape victim behaviors. In sexual assault cases generally, experts can help explain any dynamics of sexual assault or victim behaviors that jurors are likely to find troubling or counter-intuitive. Testifying about “syndromes” is not generally advised, as it suggests the victim has a pathological condition and detracts from the victim’s believability. Rather, an expert such as a com...


289. Id. at 2. The specific issues AEquitas suggests prosecutors should raise during voir dire are the following: a victim is more likely to be assaulted by a person the victim knows than by a stranger; sexual violence is never the victim’s fault; rape is an act of violence, not sex; there is no “typical” victim; most victims do not incur physical injuries from sexual assaults; and most rape victims either delay reporting or never report to law enforcement at all. Id. at 2–5.

290. The National District Attorneys Association does not share this view: “[I]t is unlikely that prosecutors will be able to change long-standing prejudices of jurors who are inclined to believe rape stereotypes and myths. Prosecutors will generally be more successful by eliminating jurors who hold such deep-rooted beliefs that they cannot be fair.” TERESA P. SCALZO, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, PROSECUTING ALCOHOL-FACILITATED SEXUAL ASSAULT, 16 (2007).


292. Interview with Wendy Patrick, supra note 287.

293. Id.

294. SCALZO, supra note 290, at 30.

community-based victim advocate can discuss behaviors common to sexual assault victims. The following two subsections discuss expert testimony specifically related to drug- and alcohol-facilitated sexual assault.

a. Forensic Tracing and Negative Reports

In cases of drug-facilitated sexual assault, jurors may wonder why they are not hearing evidence about the type and strength of drugs administered to the victim. Such evidence may often be lacking. GHB, for example, is completely undetectable only twelve hours after ingestion. Victims of drug-facilitated sexual assault, who often sustain memory loss as a result of the intoxicant, are less likely to report the crime to police, less likely to sustain other physical injuries, and more likely to delay seeking treatment at a hospital. Additionally, GHB is extremely unstable, and so even if the victim does timely report and has a blood or urine sample taken, that sample needs to be frozen immediately or the drug will continue to dissipate. Most jurisdictions do not adequately freeze samples prior to testing, and some blame a lack of resources.

In short, there are many reasons prosecutors may lack direct evidence that a victim was drugged. Researchers found that when jurors are presented with a negative forensic report—one that detects no presence of drugs in the victim’s bloodstream—they were less likely to find the defendant guilty, as compared to the group that received expert testimony explaining the result. However, the group that received the same facts but no forensic report at all and no expert testimony was more likely to convict than the group that received the negative report plus expert testimony. This result may suggest that prosecutors are best served by seeking to have evidence of a negative forensic report excluded altogether as too prejudicial. Or, expert testimony, while helping jurors understand evidence, may also produce greater juror skepticism in general. The study may also point to the inadequacy of the manner in which the expert presented her testimony: she may not have drawn “sufficient attention to the relationship between reporting time and the

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297. Schuller et al., supra note 66, at 122.
298. Id. at 121.
299. Mallios Webinar, supra note 276.
300. Id.
301. Schuller et al., supra note 66, at 123.
302. Id.
303. Id. at 122.
scientific veracity of the report,” such that more careful explanation of the times at which the drugs dissipate would have been more helpful.\textsuperscript{304}

b. BAC and Retrograde Extrapolation

Victims of alcohol-facilitated sexual assault often delay reporting. Retrograde extrapolation is designed to estimate an earlier blood-alcohol content (“BAC”) using the principles of alcohol absorption into the blood stream, which occurs along a BAC curve.\textsuperscript{305} Though experts remain divided about the reliability of the science,\textsuperscript{306} courts have permitted expert testimony estimating the victim’s BAC at the time of the earlier incident. For example, in Commonwealth v. Blache, a Massachusetts court allowed an expert to give an estimate of the victim’s BAC at the time of the assault and to testify that such a level was “likely to produce disorientation, loss of judgment, impaired perception, lethargy, imbalance, slurred speech, impaired comprehension, and confusion.”\textsuperscript{307} While the weight of such evidence was for the jury to determine, the evidence was sufficient for the trial court to give an intoxication instruction.\textsuperscript{308} In State v. Al-Hamdani, expert witnesses provided an estimate of the victim’s BAC at the time of the assault, and one expert testified that “a person with a blood alcohol level of .15 could not appreciate the consequences of his or her actions.”\textsuperscript{309} It is important to note that this testimony was only part of a larger factual picture presented indicating that the victim was extremely drunk and also unconscious for part of the assault.

3. Non-Expert Testimony

Rape trials at common law were almost entirely focused on the conduct of the victim.\textsuperscript{310} Because of rape myths, socialized gender roles, and defense attorney tactics, a prosecutor must continually work to put the emphasis back on the defendant and his conduct and not the victim’s drinking, clothing, or sexual history. In an alcohol-facilitated sexual assault case the victim and people close to him

\textsuperscript{304} Id. at 126.


\textsuperscript{306} See generally, id. at 122-24 (noting that the most contested issue for experts is the variability of individuals’ alcohol absorption rates).


\textsuperscript{308} Id. at 748.


\textsuperscript{310} See supra note 27 and accompanying text; see also supra notes 20–24 and accompanying text.
or her can contextualize his or her attitudes and behaviors to highlight the defendant’s predatory conduct.

Focusing on the accused treats the defendant “in the same way as a purported drug dealer, by evaluating his (or her) contacts, social circle, former romantic partners, etc., all with an eye toward developing information that pertains not just to a single crime, but potentially to a larger pattern of offenses.” Prosecutors must anticipate and be prepared to refute the “rape is not regret” defense—a common defense strategy is to argue that the victim simply regretted his or her choices and is now accusing the defendant of rape to cover his or her own embarrassment. Instead, the prosecutor must “keep[ ] the focus every step of the way on the offender.” Prosecutors should elicit testimony from the victim and from eyewitnesses, if any, about any of the defendant’s behaviors that were predatory, such as buying drinks, trying to convince the victim to drink, or orchestrating situations wherein the defendant could be alone with victim, such as volunteering to walk the victim home after someone else at the bar or party observed that the victim was excessively drunk.

Though the victim’s prior sexual history need not be an issue in the case, it can be helpful for illustrating incapacity to consent. For example, “N.J. testified that normally, if having sex with a man for the first time, she would do so in her bedroom, where she kept condoms, rather than in the living room without condoms.”

CONCLUSION

Alcohol is involved in the overwhelming majority of acquaintance sexual assaults. Yet most states do not provide criminal sanctions for sexual intercourse with severely intoxicated individuals unless the perpetrator administered the intoxicant without the victim’s knowledge or consent. A growing minority of states do recognize that intercourse with a person so drunk as to be stumbling, incoherent, and falling over should be criminal, even if the individual voluntarily decided to consume alcohol or drugs. A thorough understanding of the statutory landscape and the ways different jurisdictions explain and interpret their statutory language related to voluntary intoxication can help prosecutors—in all jurisdictions—

311. Harwell & Lisak, supra note 270, at 179.
312. Mallios Webinar, supra note 276.
313. Id.
314. See, e.g., Scalzo, supra note 290, at 11–12.
with everything from voir dire strategy to closing arguments to proposing jury instructions.

Statutory revisions are only one part of the reform process. Statutory language is subject to being undermined by actors in the criminal justice system who do not agree with it, and even by other provisions elsewhere in the statutory regime. Because of the danger to individuals and communities, prosecutors have an ethical obligation to pursue charges in cases of alcohol-facilitated sexual assault. And, legal reform must be accompanied by careful attention to best practices for prosecutions of alcohol-facilitated sexual assault, particularly office-wide recognition that conviction rates are not always the best measure of prosecutorial ability.