Injustice by Design:
Voluntary Intoxication in American Sexual Assault Legislation

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ABSTRACT

This research projects finds that, as of 2022, twenty-nine of the fifty-one American jurisdictions analyzed (all fifty states and the District of Columbia) allow their courts to treat voluntary intoxication as an invitation to rape. This is due to the fact that, in the criminal justice system, there is a tendency to conflate the perceived decorum of the victim with the innocence or guilt of the perpetrator. This tendency produces a systemic failure to provide equal justice under the law to women who fall outside of the bounds of societal codes of propriety. This thesis demonstrates how, within current laws, there remain vestiges of the ancient objectives of rape laws, which were to protect women only insofar as they represented the violation of men's property. These sexual assault laws then interact with current societal rape myths and prejudices in ways that reinforce these biases and, in turn, perpetuate their inclusion in legal processes. This research finally demonstrates the ways in which the inconsistencies in states' laws and court decisions yield large inequities between the fifty-one jurisdictions and the ways they endeavor to protect victims of rape who voluntarily consume alcohol.

TABLE OF CONTENTS

INTRODUCTION

On March 24, 2021, the American justice system failed. On this day, the Minnesota Supreme Court reversed a rape conviction and remanded the case for a new trial. Rape cases are indicted and then prosecuted based upon specific, often alternative, statutory language and the circumstances of the assault, which may include the age or capacity of the victim. A Minnesota jury had found the perpetrator guilty of rape "where the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless," a conviction that carries a sentence up to 15 years in prison, fines up to $30,000 and registration as a sexual offender. The conviction was upheld by an appellate court.[1] However, the Minnesota Supreme Court reversed the case because the victim had voluntarily consumed alcohol before the crime.

The facts of the case were not disputed by either party. On the night of May 13, 2017, J.S. and her friend S.L. traveled to a local bar, where J.S. was denied entry by a bouncer due to her intoxication level. Khalil, along with two other men, then approached the pair outside of the bar and invited them to a party. After driving the group to a house across town, the girls arrived to find that there was no party. Due to her intoxication level, J.S. lay down on the living room couch and fell asleep upon entering the house. She woke up later to find Khalil raping her. She said, "No, I don't want to," to which he responded, "But, you're so hot and you turn me on." J.S. shortly, again, lost consciousness and woke up in the morning to find her shorts around her ankles. She found her friend in another room and the two contacted a ride share to take them

[1] State v. Khalil, 956 N.W.2d 627, 2021 Minn. LEXIS 126, 2021 WL 1112444 (Supreme Court of Minnesota March 24, 2021, Filed). advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:628W-5X01-JSJC-X3VC-00000-00&context=1516831. Accessed March 21, 2022.

home. During the car ride, J.S. confided in her friend about what had happened, and later that day, she went to a local hospital to a have a rape kit performed.

A few days later, J.S. contacted the Minneapolis police department to file a report. Following an investigation, the State charged Khalil with one count of third-degree criminal sexual conduct involving a mentally incapacitated or physically helpless complainant under Minnesota statute 609.344 subdivision 1(b).[2, 3]

At trial, the district court provided the jury with a possible finding of fact and a definition of "mentally incapacitated":

Mr. Khalil knew or had reason to know that [J.S.] was mentally incapacitated or physically helpless.

A person is mentally incapacitated if she lacks the judgement to give reasoned consent to sexual penetration due to the influence of alcohol, a narcotic, or any other substance administered without her agreement.

During deliberations, the jury asked for clarification on the mental incapacitation component of criminal sexual conduct. The jury presented two potential readings of the definition of mentally incapacitated. The first interpretation defined mental incapacitation in a way that required J.S. be under the "influence of alcohol [J.S.] administered herself or [the] influence of [a] narcotic J.S. administered herself or a thing administered [without] her agreement." The second interpretation required that J.S. be under the influence of "alcohol, narcotic or another substance [,] none of which having been administered with her knowledge."

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[2] 609.344 CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE. **Subdivision 1.** ***Adult victim; crime defined.*** **—** "A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists: **(b)** the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless"

[3] The State decided not to charge Khalil with fifth-degree criminal sexual conduct, which is a gross misdemeanor rather than a felony for a first offense. "Office of the Revisor of Statutes." *Chapter 11 - MN Laws*, Minnesota Legislature, https://www.revisor.mn.gov/laws/2021/1/11/.

Therefore, the jury questioned whether it was sufficient under the statute that J.S. had voluntarily consumed alcohol or whether Khalil (or someone else) had to have administered the alcohol to her without her agreement in order for her to meet the requirements of a mentally incapacitated person under Minnesota Statute 609.341 subdivision 7. Despite the defense's objection, the district court indicated that the first definition was correct, asserting that "you can be mentally incapacitated following consumption of alcohol that one administers to one's self or narcotics that one administers to one's self or separately something else that's administered without someone's agreement."

The jury found Khalil guilty of third-degree criminal sexual conduct.

Khalil appealed based upon the argument that the district court's definition of mental incapacitation was incorrect.

In a divided opinion, the court of appeals rejected Khalil's argument and affirmed his conviction.

Khalil appealed again and the case went to the Minnesota Supreme Court centered on the question about the meaning of "mentally incapacitated." The Minnesota law states:

> *"Mentally incapacitated" means that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement, lacks the judgement to give a reasoned consent to sexual contact or sexual penetration.*

The Court was asked to determine if a person can be mentally incapacitated if they voluntarily consume alcohol. The state argued that "administered" only applied to the immediately preceding phrase "any other substance." Based on deliberation on the placement of a comma between "substance" and "administered," the Minnesota Supreme Court held that

mental incapacitation requires that a person is "under the influence of alcohol…administered to that person without the person's agreement." Based on this holding, the Court reversed the decision made by the court of appeals and remanded the case back to the district court for a new trial based on this newly affirmed interpretation of mental incapacitation.[4]

In August 2021, Khalil avoided a retrial by pleading guilty to a fifth-degree criminal sexual conduct charge for "nonconsensual touching" of an intoxicated person's inner thighs and breasts with "sexual intent," which is a gross misdemeanor that only allows for up to one year of incarceration, instead of the felony charge that allows up to 15 years. As a result of this plea, he was released from jail.[5]

The "mentally incapacitated" legislative framework exemplifies an injustice that has long been prevalent in sexual assault laws, processes, and outcomes in the American legal system and which, this thesis will show, remains pervasive in 29 of America's 51 jurisdictions (all states and the District of Columbia).

In the United States, rape is a crime governed by state law. Prior to the codification of state laws, the common law, developed by American courts, governed rape trials. Many of these courts treated intercourse with a victim who had been incapacitated by alcohol or drugs to be rape.[6] As states codified this common law into statutes, most state legislatures required that in order for drugs or alcohol to negate consent, they had to be administered rather than voluntarily

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[4] State v. Khalil, 956 N.W.2d 627, 2021 Minn. LEXIS 126, 2021 WL 1112444 (Supreme Court of Minnesota March 24, 2021, Filed). advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:628W-5X01-JSJC-X3VC-00000-00&context=1516831. Accessed March 21, 2022.

[5] Rochelle Olson. "Attacker at Center of Minnesota Rape Law Change Pleads Guilty to Unwanted Sexual Touching." *Star Tribune*, Star Tribune, 2 Aug. 2021, https://www.startribune.com/attacker-at-center-of-minnesota-rape-law-change-pleads-guilty-to-unwanted-sexual-touching/600084092/?refresh=true. (Throughout the appeal process, Khalil actually served approximately 2 years in jail, more than the 1 year limitation of his plead offense but much less than his original sentence).

[6] State v. Rossbach, 264 Neb. 563, 572, 650 N.W.2d 242, 249-50 (2002).

consumed. In effect, a person gave blanket consent to any sexual penetration by engaging in the act of voluntary self-intoxication. Starting in the 1990s, state laws began to change, adopting in various forms of language the principle that an intoxicated person could not give valid consent to intercourse, no matter whether the intoxication was self-imposed or imposed by another person. These revised laws recognize what Minnesota law, as interpreted by that state's Supreme Court did not: that five shots of vodka and one pill of a prescription narcotic that are ingested voluntarily alter the mind and body in the same ways as they do if administered by another individual, and that the victim's ability, or rather her inability, to consent to sexual intercourse is the same in both situations. However, in 2002,[7] most states still had various forms of language to the effect that a person who voluntarily consumed alcohol or drugs to the point of incapacitation had deprived herself of the right to deny consent to sexual intercourse. The thesis reviews the current statute law on rape in 51 American jurisdictions to show that, in 2022, the injustice of voluntary intoxication equaling consent to sexual intercourse has persisted in 29 of those jurisdictions

Part I contextualizes the paper's findings with a historical narrative of sexual assault law from its ancient origins to its modern application. In Part II, the paper reviews the influences that drive statutory variations through a socio-political lens, detailing how the influence of rape myths and gendered prejudices map onto the innerworkings of court cases and subsequently mold their unfortunate outcomes. Part III provides an evaluation of current rape law and if/how each state contends with voluntary intoxication within a sexual assault context. It will categorize states according to their varying methods and demonstrate how the histories and cultural views discussed in the first two sections continue to influence legal processes and outcomes so that

[7] Ibid.

they fail to effectively disincentivize sexual assault and ultimately deprive certain victims, particularly women, of justice.

Furthermore, the paper applies feminist theoretical frameworks that position sexual assault statutes as a consequence of misogynistic systems of belief and will therefore frame this phenomenon in light of women's attempts to interact with the legal justice system on par with their male counterparts. Thus, this thesis centers on situations of male-toward-female sexual misconduct and follows its analysis through this dichotomy. Although women and girls experience sexual violence at particularly high rates, men and boys are also impacted by sexual violence. Transgender and nonbinary individuals are especially vulnerable targets of sexual assault and research in this field is currently evolving to include more research into this area.[8] Hence, female presenting individuals are by no means the only targets of sexual violence, but given other groups' historical underrepresentation in societal framing of sexual assault, the shaping of sexual assault law is arguably guided by this same female-male dichotomy. Attention to the ways in which men and non-binary individuals experience American sexual assault law is integral to achieving a truly equitable justice system, but this paper pinpoints the implications of the female-male dynamic as the fundamental underpinning of the current condition of sexual assault law.

PART I: A HISTORY OF RAPE

Historical evidence demonstrates that sexual assault laws originated not to protect women as humans but to protect men's property rights in women, a fundamentally different legal objective. Therefore, an impediment in achieving truly protective moral rape statutes derives

[8] "Victims of Sexual Violence: Statistics." RAINN. Accessed April 19, 2022. https://www.rainn.org/statistics/victims-sexual-violence.

from the fact that the framework through which modern society contemplates sexual assault and its possible legal ramifications has been shaped by centuries of precedent antithetical to an unbiased, gender-equal form of criminal prosecution of men who sexually violate women.

Despite the recent evolution of rape laws, the prejudices that plague the justice system today are tied to rape's archaic legal origins. The first known rape law emerged in Babylon circa 1900 B.C.E. within the Code of Hammurabi. It instructed that "if a man force the betrothed wife of another who has not known a male and is living in her father's house and he lie in her bosom and they take him, that man shall be put to death and that woman shall go free."[9] Scholars Sally Gold and Martha Wyatt note that the phrase "and that woman shall go free" has interesting implications because the fate of the victim of an offense is not prescribed anywhere else in the Code. They argue that, in coordinated analysis alongside the two other instances in which this phrase appears, "shall go free" suggests that as the person to whom the goods – her virginity – were entrusted, is initially suspected of said crime. The true victim of the crime is the betrothed husband, as he is the rightful proprietor of the woman, and therefore that which he was promised – a virgin bride – was stolen from him.[10] Because her actions in this scenario vindicate her of complicity, she is allowed to go free.

This trend appears approximately one thousand years later in a set of laws concerning rape outlined in The Book of Deuteronomy of the Old Testament. It states:

> If there is a girl who is a virgin engaged to a man, and another man finds her in the city and lies with her, then you shall bring them both out to the gate of that city and you shall

[9] Sally Gold and Martha Wyatt. "The Rape System: Old Roles and New Times." *Catholic University Law Review*, vol. 27, no. 4, 1978, https://doi.org/https://scholarship.law.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2391&context=lawreview., 696

[10] Ibid.

> stone them to death; the girl, because she did not cry out in the city, and the man, because he has violated his neighbor's wife. Thus you shall purge the evil from among you. But if in the field the man finds the girl who is engaged, and the man forces her and lies with her, then only the man who lies with her shall die. But you shall do nothing to the girl; there is no sin in the girl worthy of death, for just as a man rises against his neighbor and murders him, so is this case. When he found her in the field, the engaged girl cried out, but there was no one to save her.[11]

The woman raped in the field, like the woman in Babylon, can go free.[12] It was assumed that she screamed – her obligation in proving that it was indeed rape – and no one else was close enough to have heard her and intervened. It has been interpretated as giving her "the benefit of the doubt,"[13] language that again reinforces the notion that her complicity is assumed unless the conditions under which she was assaulted exonerate her of her suspected guilt. In contrast, the woman who was raped in the city is not given the same "benefit of the doubt" because the burden of whether a crime was committed against her rests within her responsibility – "she has the burden of proving her innocence."[14] Therefore in both of these contexts, the victim of sexual assault is put in a position where she has lost that which is owned by her legal possessor – her betrothed, her husband, her father. They are the victims, and it must then be decided whether she was complicit in this theft or not.

Centuries later, English common law, from which American law was later developed, shaped the legal concept of rape in strikingly similar ways to that of the ancient world. Rape was

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[11] "Deuteronomy 22:23-27." Essay. In *New American Standard Bible*, 1995. https://biblia.com/bible/nasb95/deuteronomy/22/20-27.
[12] Gold & Wyatt, *supra* note 9, at 698
[13] Ibid.
[14] Ibid.

viewed as a crime against property rather than a person. It was established to protect the economic interests of men. The woman's reproductive ability, contingent upon her chastity, was considered property that was fundamental to the system of patriarchal inheritance.[15] Therefore, it was property to be passed from father to husband so as to create progeny that could continue the family line and thus inherit wealth. Therefore, rape was still viewed as theft of property, with any violation of the woman extraneous.[16] From this system, American law established that rape consisted of male-female penetration by the use of force, which was proof that it occurred "against her will" and would later be defined as "lack of consent." In order to determine that it was indeed against her will, the use of force needed to be established but also her resistance to said force had to be shown.[17] Like in the Book of Deuteronomy, evidence of her resistance (her scream and then physical abuse) is central to the jurisprudence. And as is present in the Code of Hammurabi, Deuteronomy, English Common Law and American law, focus on the actions of the woman –valuable in the appraisal of her purity in regards to morality, religion, or economic interests – is central to the fundamental understanding of the legal concept of rape.

This understanding further evolved from a common dismissal of the female voice due to women being viewed as property and without legal agency to consent or to have her word carry legal significance. This mistrust of the female voice also derives from a "centuries old" view of male and female roles in society as described by Michele Dauber, a law professor at Stanford University.

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[15] Carol E. Tracy, Terry L. Fromson, Jennifer Gentile Long, and Charlene Whitman. "Rape and Sexual Assault in the Legal System," June 5, 2012. https://doi.org/file:///Users/sarahmorton/Documents/Columbia%20University/Spring%202022/Human%20Rights%20Senior%20Thesis/Rape-and-Sexual-Assault-in-the-Legal-System-FINAL.pdf., 4

[16] Ibid.

[17] Ibid.

> The treatment of the two victims – and so many other sexual assault victims- in court is "a centuries old problem" of how men and women are viewed by society. It's indicative of the viewpoint that somehow men can't help themselves from committing sexual violence in certain circumstances. That the situation, that alcohol, that scantily-dressed women causes sexual violence – not predatory behaviour…In general our society has typically seen women as temptresses and men as unable to contain their sexual impulses.[18]

Because of these biases, several procedural anomalies distinctive to rape developed. It required immediate complaint to law enforcement and that the victim's testimony be corroborated by objective testimony and/or proof of significant bodily injury. Because a woman's word lacked legal significance, the justice system needed additional proof. A review of the legal history of rape shows that the justice system expanded a woman's a lack of legal significance to a general lack of credibility and finally to distrust. Therefore, the legal system allowed for information about the character and past sexual history of the victim to be admitted as evidence and indorsed the act of providing "cautionary instructions"[19] to the juries before the start of a trial so as to warn them of the supposedly high rate of false rape accusations, which preset an atmosphere in the courtroom of her untrustworthiness. It is evident that despite progressive alterations to rape law, its history as a crime against property had shaped the way society could view rape. Cultural biases against women obviously originated the ignominious legal concept, but laws such as these perpetuated those beliefs and ingrained them in society as the legitimate, just way to handle the phenomenon. The fact that these special rules and

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[18] Rachel Sharpe. "How Drew Clinton Shows Attackers Still Favoured Years after Brock Turner." The Independent. Independent Digital News and Media, January 14, 2022. https://www.independent.co.uk/news/world/americas/crime/drew-clinton-brock-turner-rape-b1993568.html.
[19] Ibid., 5

requirements were unique to rape cases reinforced the obviousness that the actions of the victim were necessary in determining the guilt of the defendant.

For example, a judge in a 1977 Wisconsin sexual assault case commented about the victim's dress and its purported provocation of a 16-year-old girl's rape.[20] At trial, the judge declared that women should "stop teasing" and called for a "restoration of modesty in dress."[21] He further stated that "whether women like it or not, they are sex objects. Are we supposed to take an impressionable person 15 or 16 years of age and punish that person severely because they react to it normally?"[22] Due to evidence of the defendant's guilt, the judge had to issue a conviction; however, because of his sympathy that the boy was simply reacting "normally," the judge only sentenced him to probation. Therefore, despite the centuries separating this Wisconsin rape case from those prosecuted under ancient Babylonian or English Common Law, the reasoning that women are objects naturally possessed by men and the rationalization that any perceived negligence on her part to properly comport herself in deterrence of males' possible aggression is a relevant, if not vital, element to the determination of a man's guilt persists explicitly today.

The Model Penal Code (MPC) is a further example that notions of rape from thousands of years ago have persisted and are present in legal theory as recently as 60 years ago. The MPC is a code that was drafted by the American Law Institute (ALI) to rationalize criminal law within the context of modern society and to create a logical structure through which criminal offenses

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[20] "Judge in Wisconsin Calls Rape by Boy 'Normal'." The New York Times. The New York Times, May 27, 1977. https://www.nytimes.com/1977/05/27/archives/judge-in-wisconsin-calls-rape-by-boy-normal-reaction.html.
[21] Theresa Lennon., Sharron J. Lennon, and Kim K.P. Johnson . "Is Clothing Probative of Attitude or Intent - Implications for Rape and Sexual Harassment Cases ." *Minnesota Journal of Law and Inequality* 11, no. 2 (December 1993). https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1412&context=lawineq#:~:text=In%20a%20rape%20or%20sexual,because%20it%20is%20not%20probative., 394
[22] Id.

should be defined under a consistent body of general values.[23] Published in 1962, the MPC defined rape as "sexual intercourse with a female not his wife" through force or the threat of serious harm. Under the MPC definition, rape did not constitute a felony in the first degree if there was not severe physical harm or if the victim had a voluntary social relationship with the defendant and had previously engaged in "sexual liberties."[24] Similar to ancient law, a woman's relationship to man, in this case her husband, was the relevant factor in denying any criminal culpability of her husband, and in the case of the "female not his wife," *her behavior*, evaluated with moral underpinnings, was viewed as a determinant in whether he indeed committed a serious crime.

As in English Common Law, men's interests are protected. Through an argument based on her past sexual history, he could not – or at least his guilt is lessened to a lower degree or perhaps even excused – because the actions that she has taken before the assault gave him the right to take those liberties with her again. As if her agreement to previous sexual contact implied a property-like right to her later, even if the advances then were unwanted. In robbery, a person may have previously extended generosities to another individual (perhaps to a friend/ voluntary social partner), but that person's generosity may stop, and the receiver cannot claim further bounties without permission. If the previous recipient attempts to secure them anyway, it is defined as theft, which is the "appropriation of property…without the owner's effective consent."[25] Society has advanced to the point where women are no longer supposed to be seen as property, which means that, instead, she is the possessor of both her body and consent, both of

[23] "Model Penal Code Definition & Meaning." Merriam-Webster. Merriam-Webster. Accessed March 20, 2022. https://www.merriam-webster.com/legal/Model%20Penal%20Code#:~:text=Legal%20Definition%20of%20Model%20Penal%20Code&text=The%20code%20is%20an%20attempt,and%20the%20liability%20of%20accomplices.
[24] Tracy et. Al. *supra* note 15, at 5
[25] *Penal Code Title 7. Offense Against Property*. https://statutes.capitol.texas.gov/Docs/PE/htm/PE.31.htm.

which she has the right to revoke. Implying that a previous agreement of an exchange negates the ability to commit theft breaks consistency with other legal models, which the MCP avowed to provide under the promise that such consistency characterized logical legal theory.

This is significant because the MPC is intended to influence state legislation.[26] Its sex crime frameworks are taught in law schools as the preferred common outline for drafting state laws and interpreting sex crimes.[27] Therefore, many state legislators – former law students– use the legislative theories behind specific statutory language proposed in the MPC to draft and promote similar language in proposed and supported legislation. Furthermore, the MPC is then used by judges – all former law students- to interpret and apply the language of state criminal codes.

However, the Model Penal Code has made significant, but incomplete, improvements in the last few years. For example, the 2021 MPC defines "Sexual Assault in the Absence of Consent" in Section 213.6 as when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the other person does not consent to that act; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) are present.[28]

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[26] Lawrence K. Furbish, Christopher Reinhart, George Coppolo, Sandra Norman-Eady, and Kevin McCarthy. "Model Penal Code Sexual Assault Provision." OLR Research Report, December 18, 1998. https://cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-1535.htm.

[27] Tracy et. Al. *supra* note 15, at 6

[28] *"Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 5." The American Law Institute, May 4, 2021. https://www.ali.org/media/filer_public/85/db/85dba32f-ec36-4161-a27a-994ca795f9f8/ali_editor.pdf.*, 253

Under this model, rape is no longer defined in relation to the victim's legal relationships with men (i.e., husband or father).[29] However, the MPC does still outline Sexual Assault of an Incapacitated, Vulnerable, or Legally Restricted Person (Section 213.3) in ways that are reminiscent of the same mindset that produced past laws – rejected now by much of academia and society – but still found in some state laws. The section currently (as of 2022) states that a person is guilty of sexual assault of an incapacitated person when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person:

(i) is sleeping, unconscious, or physically unable to communicate lack of consent; or

(ii) lacks substantial capacity to appraise, control, or remember the person's own sexual conduct or that of anyone else *because of a substance administered to that person,* without that person's knowledge or consent; and the actor administered the incapacitating substance for the purpose of causing that incapacity or knows that it was surreptitiously administered by another for that person; and

(iii) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) are present[30] (emphasis added).

The section's Comment declares that an actor falls under Section 213.3, which includes incapacitation, vulnerable, and legally restricted, because

[29] The MPC also now uses gender neutral language to recognize that both men and women can be either the perpetrator or victim.
[30] Ibid., 146

> the actor is aware of and disregards a substantial and unjustifiable risk that the specified circumstances are present. Proof of the conditions described in Section 213.3 make consent by the other person ineffective, even if that person's words or behavior, or the totality of the circumstances, would otherwise signify apparent consent as defined by Section 213.0(2)(e). As a matter of law, a person in one or more of the conditions described by this Section – such as sleep, unconsciousness, physical or mental incapacity, or custodial status – lacks the capacity to give valid, effective consent.[31]

Therefore, Section 213.3 is concerned with those situations where the condition of the victim renders them unable to consent and, with one exception, do not require the defendant to have taken any additional action to ensure that the victim fell under this condition. The actor need not cause the victim to become "[asleep], unconscious, or physically unable to communicate lack of consent;" however it is a stipulation in 213.3(1)(b)(ii) that for intoxication to be protected under this statute, that intoxication had to have been administered "without that person's knowledge or consent." This same specification resulted in the injustice of the Minnesota case, *State v. Khalil*.

This thesis argues that this "administered" requirement, the consequence of gender discrimination against women, is grounded in thousands of years' worth of rape law. The concept of rape is inseparable from the fact that, even today, the woman's actions before, during or after the act often determine the guilt of the perpetrator, a feature of criminal law that is unique to sexual assault. The persistence of these biases and rape myths impacts how first responders, prosecutors, juries and judges enforce and interpret laws as well as how legislators choose to write them.[32]

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[31] Ibid., 148
[32] Tracy et. Al. *supra* note 15, at 9

PART II: ALCOHOL IN AMERICAN RAPE LAW

Alcohol plays a significant role in American social life. Even those who do not partake in its use are inundated with the images of the practice through social settings, television, and social media. It is widely consumed throughout college campuses, bars, house parties, the military and high school.[33] Specifically, romantic outings are often associated with some sort of alcohol consumption and a study by the University of Buffalo and University of Missouri found that couples drinking together "is clearly good for relationships." It reasoned that "individuals who drink with their partner report feeling increased intimacy"[34] because alcohol works as a mood enhancer and reduces social and sexual inhibitions.[35] Following this line of thinking, it is not surprising then that alcohol use has also become indelibly entwined with the widespread social context of "hookup culture," where individuals engage in sex casually with others without a committed relationship. One study even found that 64% of uncommitted sexual encounters followed alcohol consumption.[36]

Alcohol's omnipresence throughout social practices and norms occurs alongside, and is contrasted with, the generally accepted perspective and widespread media coverage of the negative effects of alcohol. This negative view of alcohol, especially the perception that excessive consumption of alcohol is inconsistent with the civility expected of a chaste woman, leads to the erroneous conclusion that voluntary intoxication is inconsistent with a lack of consent.

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[33] Michal Buchhandler-Raphael. "The Conundrum of Voluntary Intoxication and Sex." *Brooklyn Law Review* 82, no. 3 (March 22, 2017). http://rd8hp6du2b.search.serialssolutions.com.,1038

[34]Kathleen Weaver. "Alcohol and Romantic Relationships: A Good or Bad Mix?" University at Buffalo, December 7, 2010. https://www.buffalo.edu/news/releases/2010/12/12072.html.

[35] Buchhandler-Raphael, *supra* note 33, at 1034

[36] Ibid., 1038

Similar societal misperceptions about women, voluntary intoxication and consent affect perpetrators. Jennifer Hirsch and Shamus Khan, in the most extensive college campus study of sexual assault to date (conducted at Columbia University) found this same phenomenon. When Hirsch and Khan conducted focus groups with men and women, they noted a stark difference in the way the two understood assaults. When imagining rape, men thought of situations where the woman was screaming "no" and using intense force to fight him off.[37] Therefore, it was likely difficult to understand that the sex they had with a partner could have also been rape if she was too intoxicated to have consented. When women operate outside of the alcohol-free, chaste-woman framework and embody their sexual agency, it can be mistaken by their partners as consent.[38]

These same erroneous perceptions of voluntary alcohol consumption and consent to sex also affect victims of rape. Hirsch and Khan tell Luci's story, which reflects the mindset of a girl who began college with the intention of breaking loose of the very sheltered life she had at her elite boarding school in Thailand. She started her freshman year eager to lose her virginity, meet people, and party. After being raped by a senior that she met a bar, she admitted to blaming herself, along with him, for what had happened. Perhaps if she had not gotten drunk "maybe then he wouldn't have been so cavalier about how it was 'ok'?".[39] It can be argued that Luci's self-blame is the consequence of a complex system of gender expectations, solidified by thousands of years of sexual assault law that focuses on her actions in the assault.

If Luci had come forward about her experience, her voluntariness to drink, coupled with her willingness to engage with some of his advances, likely would have been perceived as

[37] Ibid., 11
[38] Ibid., 8
[39] Ibid., 7

evidence against her allegations and in favor of consent. According to Michal Buchhandler-Raphael in the article, "The Conundrum of Voluntary Intoxication and Sex," a widespread perception of the alleged effects of intoxication on a person's inclination to have sex is the belief that alcohol enhances sexual arousal and relaxes sexual inhibitions. Consequently, the perception is that people intentionally drink in order to achieve those effects and therefore intoxicate themselves with the intention of having sex.[40] These factors create the perilous conditions in which consent is viewed as having already been given with their decision to become intoxicated.[41]

Research confirms that women who choose to consume alcohol are perceived to be more sexually promiscuous than those who do not, which on one hand makes them targets for sexual assault, but is also seen as proof that they wanted to have sex and therefore their experience could not be labeled "assault." Every person is shaped by the beliefs and norms that circulate throughout their communities and so men are influenced by these socially propagated perceptions of alcohol, women and sexuality. Those men who choose to embody these beliefs are what cause this endemic. The moral judgement that should occur should not be on the fact that a person chooses to drink, but that a person would take advantage of a person who is drunk.

However, these pervasive misconceptions, not only cause societal error in blame placement, but also cause police, prosecutors, judges and juries to do the same within the legal sphere. Antonia Abbey et al., in their work "Alcohol, Misperception, and Sexual Assault: How and Why Are They Linked?" argue that shared, preexisting belief systems shape the prevalence

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[40] Buchhandler-Raphael, *supra* note 33, at 1042

[41] Peter Giancola, Cheri Levinson, Michelle Corman, Aaron Godlaski, David Morris, Joshua Phillips, and Jerred Holt. "Men and Women, Alcohol and Aggression." Experimental and Clinical Psychopharmacology. U.S. National Library of Medicine, 2009. https://pubmed.ncbi.nlm.nih.gov/19586230/#:~:text=Alcohol%20increased%20aggression%20for%20both,alcohol%20increases%20aggression%20in%20women.

and manner of sexual assault. Specifically, stereotypes and expectations around voluntary intoxication with alcohol or drugs, specifically by women, influence and are influenced by, how people, including those in the criminal justice system, perceive their peers.[42]

And this is not an equally distributed influence, but one that accumulates as it moves up through the legal process. One major failure intersects at the moment a survivor of sexual assault makes the brave decision to report their experience to law enforcement. There is a significant measure of discretion given to police officers in deciding which reports of sexual misconduct involve criminal conduct and therefore how many accused are even charged with sexual assault.[43] According to the Rape, Abuse & Incest National Network (RAINN), this number is as low as 16 percent.[44] Tracy et al. describe how police officers are allowed to interrogate those who come forward about sexual assault as if they are suspects. For instance, they can have them take undependable and often demeaning polygraph tests, and arrest or threaten to arrest them for alleged false accusations. This ingrained suspicion of false sexual assault reports originates from a history of rape where the initial assessment begins with the assumption that the woman, especially one that is voluntarily intoxicated, must have consented and thus must present proof to the contrary.

Then, prosecutors have the right to choose which cases are taken to court.[45] Scholars are particularly concerned by the ability of these biases to come through because their "discretion is

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[42] David M. Buss, Neil M. Malamuth, Antonia Abbey, Lisa Thomson Ross, Donna McDuffie, and Pam Mcauslan. "Alcohol, Misperception, and Sexual Assault: How and Why Are They Linked?" Essay. In *Sex, Power, Conflict: Evolutionary and Feminist Perspectives*. New York, New York: Oxford University Press, 1996. https://books.google.com/books?hl=en&lr=&id=LswJCAAAQBAJ&oi=fnd&pg=PT230&dq=Antonia+Abbey+et+al.,+Alcohol,+Misperception,+and+Sexual+Assault:+How+and+Why+Are+They+Linked%3F&ots=_DB7Rn8hEH&sig=fBKUFBod1PTAuVQPoHHjEImUdAQ#v=onepage&q=by%20fourth%20grade&f=false., 6

[43] Ibid.

[44] "The Criminal Justice System: Statistics." RAINN. Accessed March 24, 2022. https://www.rainn.org/statistics/criminal-justice-system.

[45] Tracy et. al. *supra* note 15, at 2

unconfined, unstructured, and unchecked."[46] Buchhandler-Raphael argues that this level of discretion allows for extralegal considerations to be made in prosecutors' policy-based decisions about which cases move forward to prosecution. Therefore, the aforementioned societally ingrained misconceptions about women and sexual assaults involving voluntary intoxication influence these decisions beyond a strict understanding of statutes and procedures, molding their part in the legal system in ways that find sexual assault victims' allegations to be deemed "unfounded" or "unsubstantiated." [47] However, these biases not only affect law enforcement officers and prosecutors, but also the way that judges and juries view these types of cases.

Studies find that jurors often perceive victims of sexual assault who had voluntarily been drinking with cynicism and tend to question the validity of their assertion that they did not consent to the sex. They also tend to hold the belief that voluntarily intoxicated victims had simply participated in sexual acts that they then regretted once sober and that these women were looking to "save face" for regretful sex rather than actual sexual assault. In *Rape Narratives in Motion,* Ulrika Andersson describes this type of phenomenon in which women who come forward after assault are perceived to be "cry[ing] rape' to conceal their own immorality" and thus "the position of the ideal victim presupposes ideas of 'worthiness,' where some groups are by definition afforded more authentic claims of victimization over others."[48] Gary Lafree and his colleagues conducted a study on 360 jurors and found that in cases in which there was a debate about whether the victim consented to sexual activities, any indication of alcohol, drug use, or

[46] Buchhandler-Raphael, *supra* note 33, at 1044
[47] Ibid.
[48] Ulrika Andersson, Monika Edgren, Lena Karlsson, and Gabriella Nilsson. "Introductory Chapter: Rape Narratives in Motion." *Rape Narratives in Motion*, 2019, 1–16. https://doi.org/10.1007/978-3-030-13852-3_1., 8

sexual activity outside of marriage on the part of the victim caused jurors to doubt the defendant's guilt.[49]

PART III: CHANGE AND CONTINUITY IN AMERICAN RAPE LAW

In comparison to rape laws' earlier iterations, both at their earliest known codification in ancient civilizations and more recent forms under American jurisprudence, current rape laws appear dramatically changed. However, in many ways, misogynistic behaviors characterized as souvenirs of an age long since forgotten, antithetical to current values, are found in relatively recent legislation.

The "voluntary intoxication loophole" is not the first legal conduit through which women have been seen as consenting to their own sexual assault. For example, a woman's past sexual history with other individuals or her previous consent to other sexual activities with the defendant has historically been used as evidence of her consent. In 1974, Michigan was the first state in the United States to pass what would be called a "rape shield law,"[50] which are "rules of evidence intended to protect the privacy interests of a rape victim at trial by restricting or prohibiting the use of evidence relating to her sexual history"[51] and it was not until the early 1980's that most states had adopted some form of a rape shield statute. Rape shield laws were meant to combat the "presumption that unchaste women lie" or in other words that the actions a woman took before being assaulted undermine her credibility as a complainant and therefore warrant viewing her with distrust.[52]

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[49] Gary D Lafree, Barbara F. Reskin, and Christy A. Visher. "Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials." *Social Problems* 32, no. 4 (1985): 389–407. https://doi.org/10.1525/sp.1985.32.4.03a00070., 392

[50] Michelle J. Anderson, "From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law." *HeinOnline*, 2002. https://doi.org/10.2139/ssrn.326260., 81

[51] Chen Shen. "Study: From Attribution and Thought-Process Theory to Rape-Shield Laws: The Meanings of Victim's Appearance in Rape Trials," Journal of Law & Family Studies 5, no. 2 (2003): 435-448, 436

[52] Anderson, *supra* note 50, at 75

As rape shield laws made it more difficult for defense attorneys to undercut accusers' claims in the eyes of juries during cross examinations, other avenues of moral condemnation not explicitly covered by rape shield laws came to the forefront as alternate legal strategies. The defense presented clothing as either evidence that the accuser did indeed consent and was now lying or as a sympathetic appeal to the jury that the man had plausible reason to assume that she had given her consent because her clothing provided a clear indication of intention to engage in sexual activity – and the courts embraced this argument. For example, in 1989, a jury in Florida concluded that a 22-year-old woman got what she deserved for having been dressed "provocatively" when a Georgia drifter kidnapped her from a restaurant parking lot and raped her multiple times at knifepoint. Referencing the "lacy white miniskirt and green tank top" the woman was wearing at the time of the assault, the jury foreman stated that "We all feel she asked for it for the way she was dressed. With that skirt you could see everything she had. She was advertising for sex." With the victim's clothing used as proof of consent, the defendant was found not guilty of armed kidnapping and sexual assault by the court.[53]

The arguments employed in relation to a woman's clothing in the 1970's and 80's are extraordinarily similar to those concerning alcohol and demonstrates that voluntary intoxication is simply the most recent legal excuse created to uphold the system in which men's sexual aggression and women's moral policing is normalized. The "mentally incapacitated" statute that *State v. Khalil* presided over is the embodiment of these beliefs in the law. "Mentally incapacitated," when defined by the consumption of an intoxicating substance that was surreptitiously administered to that person so that she can no longer consent, is fundamentally discriminatory. It indicates that in order to fall under this distinctly vulnerable category – one in

[53] "Jury Blames Woman's Clothing in Rape Case." UPI. UPI, October 5, 1989. https://www.upi.com/Archives/1989/10/05/Jury-blames-womans-clothing-in-rape-case/3884623563200/.

which the victim is unable to consent to the sexual advances of another due to some physical or mental condition at the time – the victim must not have engaged in any undesirable actions before or during the assault. Historically, this same mindset has manifested through legal practice allowing courts to use arguments such as that the complainant was wearing "provocative" clothing,[54] or had been sexting with the perpetrator before the incident [55] as evidence of behavior that implied consent. And despite still prevalent opinions that these types of behaviors "ask for it," the justice system has found that these arguments have no place in legal determinations of another's criminal offenses. Given that the same rationale produces this definition of "mentally incapacitated," it too should be completely removed from criminal code. However, this legally sanctioned moral policing of women is widespread across much of the United States.

This section analyzes rape laws in fifty-one (51) American jurisdictions (the 50 states as well as the District of Columbia). For simplicity, this paper uses the terms states and jurisdictions interchangeably while recognizing they are not technically the same. This analysis found that **twenty-nine (29) states, or fifty-seven percent (57%), allow their courts to treat voluntary intoxication as an invitation to rape.** These are the states that fail to provide justice for victims of rape, who in other states would have been held incapable of consenting to sex.

To better understand the complexity of how statutory language and state court decisions combine to protect or fail these involuntarily intoxicated victims, it is helpful to categorize the jurisdictions. The data shows that most states statutes fall into one of two categories:

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[54] Lennon, *supra* note 67, at 392

[55] JoAnne Sweeny and John Slack. "Sexting as 'Sexual Behavior' Under Rape Shield Laws." *International Journal of Cyber Criminology* 11, no. 2 (Jul, 2017): 246-260. doi:http://dx.doi.org/10.5281/zenodo.1037401. http://ezproxy.cul.columbia.edu/login?url=https://www.proquest.com/scholarly-journals/sexting-as-sexual-behavior-under-rape-shield-laws/docview/1963104382/se-2.

1) whether the statute explicitly identifies intoxication as a possible factor in the victim's ability to consent, and
2) whether the statute requires that the victim's intoxication, mental incapacitation or other diminished capacity be caused by the perpetrator or another actor of whom the perpetrator had knowledge, often by administration of a substance to the victim.

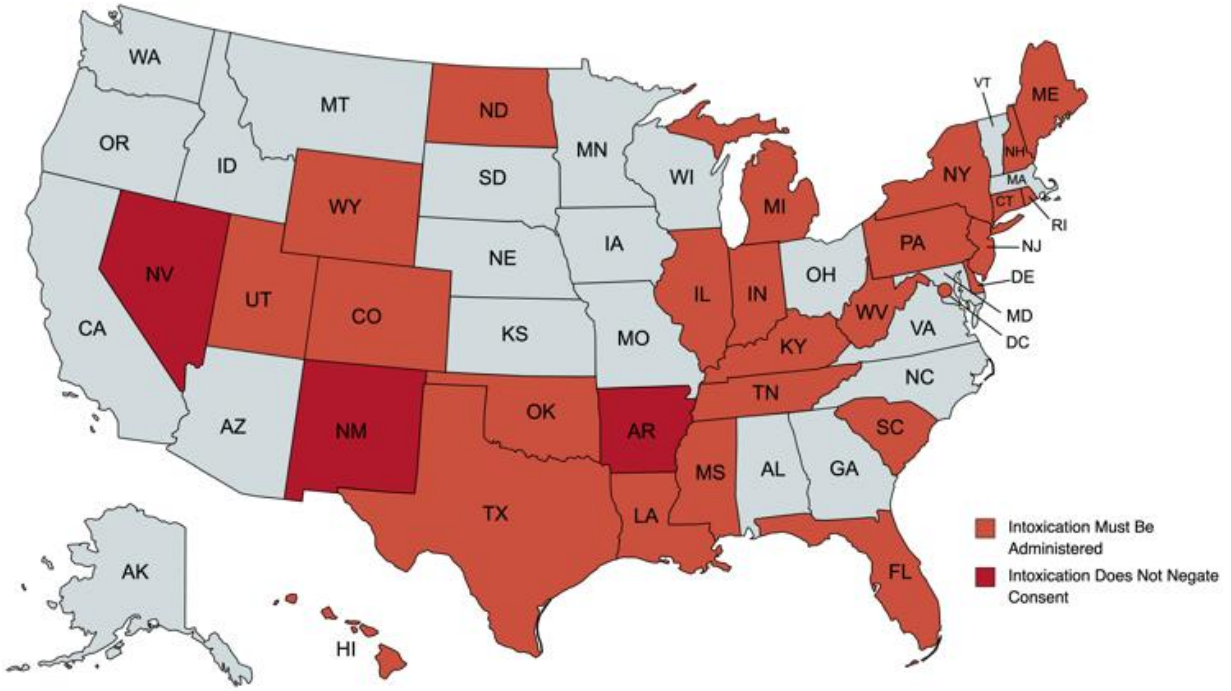
Forty-two (42) jurisdictions, or eighty-two (82%), have rape laws that state that intoxication can negate consent, a fact that seems at first glance to be more protective of victims. However, in the nine (9) remaining states that do not mention in their rape laws that intoxication may potentially negate consent seven of those, or seventy-eight percent (78%), protect voluntarily intoxicated victims. The other two of these states only protect voluntarily intoxicated individuals if the intoxication renders the victim completely or partially unconsciousness.

Twenty-eight (28) of the forty-two (42) states with rape laws that allow intoxication to negate consent, require that someone other the victim administer an intoxicating substance in order to negate consent, which leaves voluntarily intoxicated victims to be considered, in essence, pre-consenting to sex. Most of these states therefore do not protect voluntarily intoxicated victims. However, two (2) of these twenty-eight (28) states have court precedents that protect voluntarily intoxicated victims of rape. This means that twenty-six (26) of these states are considered by this paper to fail voluntarily intoxicated victims.

Adding these twenty-six states with failing statutes with the three states that only protect victims with some degree of unconsciousness, yields the twenty-nine (29) states that this paper considers to fail voluntarily intoxicated victims of rape.

The appendix to this paper lists all 51 jurisdictions and summarizes their statutes and court holdings on the potential for intoxication to negate consent in rape cases. Below is a map

depicting the states that protect and the states that fail to protect these victims. It is accompanied by a brief discussion of some of the states and categories discussed above, which have significant departures from the categorization analysis.



The figure above visually represents the jurisdictions that have inadequate law addressing sexual assault situations in which the victim had been voluntarily intoxicated. The states color coded in orange signify the states with law requiring that intoxication must be administered to the victim without her consent in order for it to negate her ability to consent to sexual acts. The states color coded red indicate those that, in neither their statutes or courts, appear to acknowledge intoxication – either voluntary or involuntary – as a possible nullification of consent. It should be noted, though, that all 51 jurisdictions protect against rape of an intoxicated person when that intoxication has caused the victim to become unconscious. However, in this case, it is the element of being unconscious that protects the victim under the law. A number of conditions can cause an individual to become unconscious, including sleep or fainting as well as intoxication, and therefore the significant element being protected under this standard is the physically helpless state of unconsciousness. This fails to address the impaired mental state that is created by the excess of an intoxicating substance on a victim's ability to knowingly consent to sexual activities.

Nine State Rape Laws Do Not Discuss Intoxication as Possibly Negating Consent

As of March 2022, out of the fifty-one jurisdictions, only nine jurisdictions do not mentioned intoxication in their sexual assault statutes: Alaska, Georgia, Massachusetts, Nebraska, Nevada, New Mexico, North Carolina, Oregon and Virginia. These states have both the best and worst protections for voluntarily intoxicated victims of sexual assault.

Of these nine states, two have likely the broadest statutory protection for voluntarily intoxicated rape victims: North Carolina and Oregon. North Carolina amended its code in 2019 to broaden its definition of what to "any act that does what" in place of its previous "administered" requirement. It now defines "mentally incapacitated" as a "victim who due to *any act* is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act" (emphasis added). The other state, Oregon, removed reference to intoxicating substances administered to the victim from its statutory definition of "mentally incapacitated" in 2009, now stipulating that a mentally incapacitated person is one who is "incapable of appraising or controlling the conduct of the [themselves]."[56]

Five of these nine states – Alaska, Georgia, Massachusetts, Nebraska and Virginia – have statutes that do not specify intoxication as potentially negating consent but have courts that have held that intoxication, including voluntary intoxication, can render a victim incapable of consenting. Alaska law states that mental incapacitation takes place "when he or she is 'temporarily incapable of appraising the nature of [his or her] own conduct or physically unable to express unwillingness to act'" (Alaska Stat. § 11.41.470(2)). Alaskan courts have held that voluntary consumption of a "large quantity of alcohol" could reasonably result in mental

[56] Oregon Revised Statutes, Section 163.305 (2021)

incapacitation.[57] Georgia courts have declared that "sexual intercourse with a woman whose will is temporarily lost from intoxication, or unconsciousness arising from use of drugs or other cause, or sleep, is rape."[58] Courts in Massachusetts have held that "an instruction concerning capacity to consent should be given in any case where the evidence would support a finding that because of the consumption of drugs or alcohol…the complainant was so impaired as to be incapable of consenting to intercourse."[59] Nebraska is "among a handful of states that substantially codifies the common-law view. In these states, the statute requires that the victim be under the influence of an intoxicant or be mentally or physically incapacitated, but does not require that the defendant administer the intoxicant or that the victim be given the intoxicant without consent."[60] Nebraska and these other states grade the offense at the same level as forcible rape.

Nevada and New Mexico are the only jurisdictions that neither mention intoxication in sexual assault statutes nor have any significant precedent in court rulings on the subject. Therefore, these states are at the highest risk of neglecting to protect intoxicated persons from non-forcible sexual assault. New Mexico appears to only protect victims who are unconscious, asleep or physically helpless or have a mental condition. While not explicitly identifying the use of a substance, Nevada appears to allow for intoxication to negate consent, but only under the condition that the victim is rendered unable to resist or understand the nature of the perpetrator's conduct. These requirements elevate the legal threshold under which a victim can be deemed too intoxicated to consent. There appear to be no Nevada court cases that rendered a ruling on the issue of voluntary intoxication.

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[57] Kittick v. State, No. A-10201, 2010 Alas. App. LEXIS 99, at *10 (Ct. App. Aug. 18, 2010).
[58] Paul v. State, 144 Ga. App. 106, 106, 240 S.E.2d 600, 601 (1977).
[59] Commonwealth v. Blache, 450 Mass. 583, 584, 880 N.E.2d 736, 738 (2008).
[60] State v. Rossbach, 264 Neb. 563, 572, 650 N.W.2d 242, 249-50 (2002).

Forty-two State Rape Laws State Intoxication as Possibly Negating Consent

The remaining 42 states have sexual assault statutes that indicate that intoxication can negate consent. However, only 14 of these do not require the intoxicating substance to be administered by the perpetrator or a third-party whose actions are known by the perpetrator. Therefore, 28 states require intoxication to be involuntary in order to be covered under the law.

Minnesota, following the Khalil case's national attention, added a second definition of mental incapacitation in 2021 to allow for prosecution of sexual assault where the victim was voluntarily intoxicated. Similarly, in 2021, Vermont added an additional clause to its rape statute to include substantial impairment by voluntary intoxication in conditions which negate consent.[61] Therefore, as of 2021, Minnesota and Vermont have specific statutes that protect victims of rape that are either involuntary or voluntarily intoxicated.

Two States Have Court Precedents that Protect Voluntarily Intoxicated Victims of Rape

Of the 28 jurisdictions that have statutes that appear to require the administration of an intoxicating substance (involuntary intoxication), two states – Missouri and Ohio – have court precedents that protect voluntarily intoxicated victims of rape.

In Missouri, the courts held that,

> Both the forcible rape and forcible sodomy statutes state that forcible compulsion includes the use of a substance administered without a victim's knowledge or consent which renders the victim physically or mentally impaired so as to be incapable of making an informed consent to sexual intercourse. Mo. Rev. Stat. §§ 566.030.1 and 566.060.1 (Cum. Supp. 2006). Although the statutes do not explicitly refer to voluntary intoxication or ingestion of any substances rendering the victim impaired, the legislature

[61] Vermont Statutes Annotated. § 3252

> uses the word "includes," which indicates the legislature's intent to allow what may be considered forcible compulsion to be expanded beyond merely involuntary intoxication or impairment. "Includes" is not a limiting term. Instead, the term indicates an intent to expand. Its use indicates that which follows does not cover the entirety of possibilities. In such a context, "includes" is not exclusive and other forms of impairment beyond involuntary intoxication could also be considered in the context of determining whether there was forcible compulsion. Therefore, by choosing the word "includes," the legislature emphasizes its desire to broaden rather than restrict actions that constitute forcible compulsion.[62]

In Ohio, the courts held that,

> Therefore, we hold that voluntary intoxication is included in the term "mental or physical condition" as used in R.C. 2907.02(A)(1)(c). 2 A person who engages in the sexual conduct proscribed by R.C. 2902.02(A)(1) and (c) when the victim's ability to resist or consent is substantially impaired by reason of voluntary intoxication is culpable for rape. We do not hold that all persons who engage in sexual conduct with a voluntarily intoxicated person are culpable under R.C. 2907.02(A)(1)(c). A person's conduct becomes criminal under this section only when engaging in sexual conduct with an intoxicated victim when the individual knows or has reasonable cause to believe that the victim's ability to resist or consent is substantially impaired because of voluntary intoxication.[63]

[62] State v. Hunter, 626 S.W.3d 867, 872 (Mo. Ct. App. 2021)
[63] State v. Martin, CASE NO. CA99-09-026, 2000 Ohio App. LEXIS 3649, at *15-16 (Ct. App. Aug. 14, 2000).

This holding is especially significant in light of the draconian comment made by Ohio's Legislative Committee in 1974 that amended the aforementioned section by stating that the consent of victims who are voluntarily intoxicated is a given. It read:

> In this context, the section does not include the situation where a person plies his intended partner with drink or drugs in the hope that lowered inhibitions might lead to a liaison, since when the alcohol or drugs are voluntarily taken in the absence of force or deception, the consent of the "victim" can fairly be inferred.[64]

CONCLUSION

As has been demonstrated throughout this paper, alcohol carries a complex set of implications in society and when overlayed by the long history of discriminatory practices in sexual assault cases (often imagined to be a female victim), a distinctly disturbing phenomenon arises. The "mentally incapacitated" legal category, when defined by a differentiation between voluntary versus surreptitious intoxication, exemplifies the vestiges of long outdated notions of both women and sexual assault. The prejudice that inhibits women from gaining their due justice inundates so many more facets of the criminal justice system than just the law; however, the law sets an example by which the rest of the justice system in a given jurisdiction must follow. The alterable characteristic of law embodies how the prejudice against women who have been sexually assaulted is not an unfightable, inevitable reality. During public outcry at the Minnesota Supreme Court's decision in *State v. Khalil*, the Minnesota legislature changed its definition of "mentally incapacitated" to include under its protections of voluntary intoxication of rape victims.

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[64] Committee Comment, Ohio House Bill, H511 (1974).

The American justice system did not fail in the Khalil case solely because it neglected to provide J.S. with justice, but because the outcome of this case exemplifies the consequences of a system in which certain women are not viewed as equally deserving of justice as others under the law. J.S. voluntarily consumed alcohol and her intoxication, and therefore the effects it had on her ability to consent, were seen as somehow leaving her less vulnerable than intoxication caused by the defendant without her knowledge. Although the outcomes of these situations are the same – the rape of an individual too intoxicated to be able to consent– the legal system concluded that the actions she took prior to meeting him lessened the intensity of the crime that he committed.

The focus on the behavior of the victim prior to the crime is a practice not applied in the prosecution of other criminal offenses. For instance, the crime of robbery is founded exclusively upon the perpetrator's actions and intent. Any conditions of the victim at the time of the crime, which may or may not have made her more vulnerable to targeting or achievement of the robbery, are not viewed as relevant in the case.[65] However, this protection is not afforded to sexual assault victims. In fact, the legal system has a long history of putting emphasis on the character, behavior and words of a sexual assault survivor in order to determine if she did indeed somehow consent to the act and thus if a crime was actually committed.[66] Therefore, in a case attempting to determine whether or not the defendant is guilty of the accused crime, the victim finds herself on trial alongside of him.[67] But, these laws have gone through several phases of change over the past few decades and have significantly improved since the archaic definition of criminal rape was first codified.[68] And yet, vestiges of its antiquated origin as well as enduring influences of patriarchal and misogynistic views remain. Women who choose to drink and then

[65] *Penal Code Title 7. Offense Against Property*. https://statutes.capitol.texas.gov/Docs/PE/htm/PE.31.htm.
[66] Tracy et. Al. *supra* note 15, at 5
[67] Gold & Wyatt, *supra* note 9, at 695
[68] Tracy et. Al. *supra* note 15, at 5

are sexually assaulted are seen as partially culpable of the malice inflicted upon them. Thus, a woman who falls outside the patriarchal bounds of a perfect victim, a female who legally consumes alcohol on par with her male counterparts, a woman who fails to comport herself in a societally contrived civilized manner, is deemed less deserving of equal justice under the law.

All the above data demonstrates how, in the criminal justice system, there is a deeply ingrained mindset that the dichotomy between complainant and defendant is one in which there is an undeniably culpable offender and an "innocent victim, free of contributory fault or moral blame."[69] Under this system, structured by legal precedent that uniquely concentrates on the actions of sexual assault victims, the vast majority of women cannot exercise their right to a fair trial because they are held to a higher standard of victimhood that is determined by a gendered estimation of morality rather than by supposedly indiscriminatory law. Due to the knowledge that this prejudice exists both within the law and those meant to interpret it, many prosecutors have been disinclined to take on cases where the victim has failed to embody conventional perceptions of the blameless "perfect victim" that has fallen prey to an unsympathetic predator.[70] This shows a systemic failure to provide "equal protection of the laws"[71] to women who fall outside of the bounds of societal codes of propriety. Therefore, because these women are not only denied their justice but are often subjected to humiliation, skepticism and intense criticism, sexual assault law in this way works as a state-sponsored mechanism for the moral policing of women.

When women brave the many structural obstacles that attempt to bar them from holding their assaulter accountable, they should not make it over that grueling peak only to be met with

[69] Buchhandler-Raphael, *supra* note 33, at 1044
[70] Id.
[71] "The Constitution of the United States," Amendment 14

unyielding, discriminatory legislation. In fact, ensuring that the law does not set a precedent of moral policing sets an atmosphere for the rest of the system to do the same. It is true that law is influenced by society, but society is also influenced by law. The research and theory have been demonstrated by many scholars to show that these biases exist and shape these types of laws and that both are frighteningly ubiquitous across the United States. Now it is time to change the laws to allow for society to continue to progress toward gender equity. The change in Minnesota's mentally incapacitated statute, in response to a societally recognized egregious outcome of outdated code, demonstrates that this change is indeed possible.

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APPENDIX

(Links to online databases for states' statutes or court decisions have been provided for easy referencing access)

Alabama in § Section 13A-6-70 (b) states that "Lack of consent results from…being incapable of consent…[and] a person is deemed incapable of consent if he or she is…Incapacitated."[72] "Incapacitated" is defined as "A person [that] is temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or intoxicating substance and the condition was known or should have been reasonably known to the offender."[73]

Alaska's statutes state mental incapacitation is "when he or she is 'temporarily incapable of appraising the nature of [his or her] own conduct or physically unable to express unwillingness to act.' " Alaska Stat. § 11.41.470(2).[74] Alaska courts have held that voluntary consumption of a "large quantity of alcohol" could reasonably result in mental incapacitation. Kittick v. State, No. A-10201, 2010 Alas. App. LEXIS 99, at *10 (Ct. App. Aug. 18, 2010).

Arizona Statute § 13-1406 defines sexual assault as "intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person." Arizona Revised Statute §13-1401(A)(7) defines "Without consent" [as] any of the following: 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."[75]

Arkansas Code §§ 5-14-101(5) states that "'Mentally incapacitated' means that a person is temporarily incapable of appreciating or controlling the person's conduct as a result of the influence of a controlled or intoxicating substance: administered to the person without the person's consent; or that renders the person unaware a sexual act is occurring."[76]

California stipulates in Penal Code §261.6. that a "person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved" and that ""(a) In prosecutions under Section 261, 286, 287, or 289, or former Section 262 or 288a, in which consent is at issue, "consent" means positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." "Rape is an act of sexual intercourse accomplished under any of the following circumstances: (3) If a person is prevented from resisting by an intoxicating or anesthetic substance, or a controlled substance, and this condition was known, or reasonably should have been known by the accused."[77]

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[72] https://judicial.alabama.gov/docs/library/docs/13A-6-67(a)(1).pdf
[73] http://alisondb.legislature.state.al.us/alison/codeofalabama/1975/coatoc.htm
[74] https://courts.alaska.gov/crpji/docs/11.41.470-2.doc
[75] https://www.azleg.gov/ars/13/01401.htm
[76] https://advance.lexis.com
[77] https://leginfo.legislature.ca.gov

Colorado says that sexual assault under Section 18-3-402 is when "Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if: (4) Sexual assault is a class 3 felony if it is attended by any one or more of the following circumstances: (d) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission."[78]

Connecticut says that Sexual Assault in the first degree, a Class B or A felony, happens when the person "engages in sexual intercourse with another person and such other person is mentally incapacitated to the extent that such other person is unable to consent to such sexual intercourse" (Sec. 53a-70). "'Mentally incapacitated' means that a person is rendered temporarily incapable of appraising or controlling such person's conduct owing to the influence of a drug or intoxicating substance administered to such person without such person's consent, or owing to any other act committed upon such person without such person's consent" (Sec. 53a-65. Definitions). It also says that "Under Subdiv. (4), state need not show that any specific or identifiable drug or intoxicating substance had been administered to the victim without her consent, only that the victim was under the influence of some drug or intoxicating substance; criminal liability under Subdiv. (4) does not require a showing that the criminal actor administered the drug or intoxicating substance at issue or that the criminal actor knew, or had reason to know, that the victim was mentally incapacitated."[79]

In Delaware, "Without consent" means:… (5) The defendant had substantially impaired the victim's power to appraise or control the victim's own conduct by administering or employing without the other person's knowledge or against the other person's will, drugs, intoxicants or other means for the purpose of preventing resistance."[80]

In DC, "'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent." First Degree Sexual Abuse under Statute 22-3002 happens "After administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct."[81]

In Florida, "'Consent' means intelligent, knowing, and voluntary consent and does not include coerced submission. 'Consent' shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender. "Mentally incapacitated" means temporarily incapable of appraising or controlling a person's own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered without his or her consent or due to any other act committed upon that person without his or her consent. (794.011)[82]

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[78] https://leg.colorado.gov/sites/default/files/images/olls/crs2020-title-18.pdf
[79] https://www.cga.ct.gov/current/pub/chap_952.htm#sec_53a-66
[80] https://delcode.delaware.gov/title11/c005/sc02/#761
[81] https://code.dccouncil.us/us/dc/council/code/sections/22-3002
[82] https://m.flsenate.gov/statutes/794.011

Georgia says that "A person commits the offense of rape when he has carnal knowledge of: (1) A female forcibly and against her will; or (2) A female who is less than ten years of age."[83]

Hawaii defines Sexual Assault in the first degree as "A person commits the offense of sexual assault in the first degree if the person: (e) Knowingly subjects to sexual penetration a person who is mentally incapacitated or physically helpless as a result of the influence of a substance that the actor knowingly caused to be administered to the other person without the other person's consent" (§707-730). [84]

In Idaho, rape is defined under Title 18, Chapter 61 18-6101 as that "Where the victim is incapable, through any unsoundness of mind, due to any cause including, but not limited to, mental illness, mental disability or developmental disability, whether temporary or permanent, of giving legal consent." "Where the victim is prevented from resistance by the infliction, attempted infliction, or threatened infliction of bodily harm, accompanied by apparent power of execution; or is unable to resist due to any intoxicating, narcotic, or anaesthetic substance."[85]

Illinois defines consent as "a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent." (720 ILCS 5/11-0.1, Sec. 11-0.1. Definitions.) "Unable to give knowing consent" includes when the accused administers any intoxicating or anesthetic substance, or any controlled substance causing the victim to become unconscious of the nature of the act and this condition was known, or reasonably should have been known by the accused."[86]

Indiana says that "An offense described in subsection (a) is a Level 1 felony if… (4) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge" (IC 35-42-4-1).[87]

Iowa says that sexual assault occurs if "The act is done by force or against the will of the other. If the consent or acquiescence of the other is procured by threats of violence toward any person or if the act is done while the other is under the influence of a drug inducing sleep or is otherwise in a state of unconsciousness, the act is done against the will of the other. 2. Such other person is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters" (709.1).[88]

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[83] http://ga.elaws.us/law/section16-6-1
[84] http://www.capitol.hawaii.gov/hrscurrent/Vol14_Ch0701-0853/HRS0707/HRS_0707-0730.HTM
[85] https://legislature.idaho.gov/statutesrules/idstat/title18/t18ch61/sect18-6101/
[86] https://www.ilga.gov/legislation
[87] http://iga.in.gov/legislative/laws/2021/ic/titles/035/#35-42-4
[88] https://www.legis.iowa.gov/docs/code/709.1.pdf

Kansas' definition is the following: "Knowingly engaging in sexual intercourse with a victim when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender" (21-5503.).[89]

In Kentucky, "A person is deemed incapable of consent when he or she is… (d) Mentally incapacitated; (e) Physically helpless" (510.020). "'Mentally incapacitated' means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of an intoxicating substance administered to him or her without his or her consent or as a result of any other act committed upon him or her without his or her consent" (510.010).[90]

Louisiana defines Second Degree Rape as "When the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by a narcotic or anesthetic agent or other controlled dangerous substance administered by the offender and without the knowledge of the victim" (RS 14:42.1). "NOTE: This provision of law was included in the Unconstitutional Statutes Biennial Report to the Legislature, dated March 14, 2016."[91]

Maine says that "A person is guilty of gross sexual assault if that person engages in a sexual act with another person and: A. The actor has substantially impaired the other person's power to appraise or control the other person's sexual acts by furnishing, as defined in section 1101, subsection 18, paragraph A, administering or employing drugs, intoxicants or other similar means. Violation of this paragraph is a Class B crime."[92]

Maryland declares that Rape in the Second Degree (assuming women/people with vaginas) "if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual." "Mentally incapacitated individual" means an individual who, because of the influence of a drug, narcotic, or intoxicating substance, or because of an act committed on the individual without the individual's consent or awareness, is rendered substantially incapable of: (1) appraising the nature of the individual's conduct; or (2) resisting vaginal intercourse, a sexual act, or sexual contact."[93]

Massachusetts in Section 22(a) states that "Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury."[94]

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[89] http://www.kslegislature.org
[90] https://apps.legislature.ky.gov/law/statutes/statute.aspx?id=47632
[91] https://legis.la.gov/Legis/Law.aspx?p=y&d=78529
[92] https://www.mainelegislature.org/legis/statutes/17-a/title17-Asec253.html
[93] https://www.dpscs.state.md.us/onlineservs/sor/sor_crimes_article.shtml#_Toc280276142
[94] https://malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter265/Section22

Michigan states that sexual assault happens when "That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following: (i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless" (750.520b).[95] It says that "'Mentally incapacitated' means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent."[96]

Minnesota, under Subdivision 4, says that "'Consent' means words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act. (b) A person who is mentally incapacitated or physically helpless as defined by this section cannot consent to a sexual act. (c) Corroboration of the victim's testimony is not required to show lack of consent." Under Subdivision 7, "Mentally incapacitated" means: (1) that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration; or (2) that a person is under the influence of any substance or substances to a degree that renders them incapable of consenting or incapable of appreciating, understanding, or controlling the person's conduct."[97]

Mississippi, under Section 97-3-97 (Section 4) (b), says that "Consent" means a freely given agreement to sexual activity; a person's lack of verbal or physical resistance or submission resulting from the use or threat of force does not constitute consent; a person's manner of dress does not constitute consent; a person's consent to past sexual activity does not constitute consent to future sexual activity; a person's consent to engage in sexual activity with a person does not constitute consent to engage in sexual activity with another; a person can withdraw consent at any time; and a person cannot consent to sexual activity if that person is unable to understand the nature of the activity or give knowing consent due to circumstances, including, without limitation, the following: (i) The person is incapacitated due to the use of influence of alcohol or drugs." "A person is guilty of sexual assault if he or she engages in sexual penetration with: (a) Another person without his or her consent; (b) A temporarily incapacitated, permanently incapacitated or physically helpless person."[98]

In Missouri "A person commits the offense of rape in the first degree if he or she has sexual intercourse with another person who is incapacitated, incapable of consent, or lacks the capacity to consent, or by the use of forcible compulsion. Forcible compulsion includes the use of a substance administered without a victim's knowledge or consent which renders the victim physically or mentally impaired so as to be incapable of making an informed consent to sexual intercourse." (Mo. Rev. Stat. § 566.030.) "A person commits the offense of rape in the second degree if he or she has sexual intercourse with another person knowing that he or she does so

[95] http://www.legislature.mi.gov
[96] http://www.legislature.mi.gov
[97] https://www.revisor.mn.gov/statutes/cite/609.341
[98] http://billstatus.ls.state.ms.us/documents/2018/html/HB/1300-1399/HB1348IN.htm

without that person's consent. 2. The offense of rape in the second degree is a class D felony." (566.031).[99]

In Montana, "As used in 45-5-503, the term 'without consent' means: (i) the victim is compelled to submit by force against the victim or another; or (ii) subject to subsections (1)(b) and (1)(c), the victim is incapable of consent because the victim is: (A) mentally disordered or incapacitated" (45-5-501).[100] It says consent is ineffective if " it is given by a person who by reason of youth, mental disease or disorder, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense."[101]

In Nebraska, Sexual assault in the first degree is "Any person who subjects another person to sexual penetration (a) without the consent of the victim, (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct (28-319.) "Without consent means: (a)(i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor."[102] There is not a definition of mentally or physically incapable in Section 28-318.[103]

Under Nevada law, NRS 200.366, "a person is guilty of sexual assault if he or she: (a) Subjects another person to sexual penetration, or forces another person to make a sexual penetration on himself or herself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct"

New Hampshire Statute 632-A:2 defines Aggravated Felonious Sexual Assault as when "A person is guilty of the felony of aggravated felonious sexual assault if… (f) When the actor, without the prior knowledge or consent of the victim, administers or has knowledge of another person administering to the victim any intoxicating substance which mentally incapacitates the victim."[104]

New Jersey defines "ineffective consent." It states that "Unless otherwise provided by the code or by the law defining the offense, assent does not constitute consent if:.. (2) It is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature of harmfulness of the conduct charged to constitute an offense" (2C:2-10). [105]

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[99] https://revisor.mo.gov/main/OneSection.aspx?section=566.030
[100] https://leg.mt.gov/bills/2015/mca/45/5/45-5-501.htm
[101] https://leg.mt.gov/bills/mca/title_0450/chapter_0020/part_0020/section_0110/0450-0020-0020-0110.html
[102] https://nebraskalegislature.gov/laws/statutes.php?statute=28-319
[103] https://nebraskalegislature.gov/laws/statutes.php?statute=28-318
[104] https://www.gencourt.state.nh.us/rsa/html/lxii/632-a/632-a-2.htm
[105] https://lis.njleg.state.nj.us

In New Mexico, Consent is not explicitly defined, but it does define "force" and "coercion" as "the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim is unconscious, asleep or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act" (New Mexico Statutes §30-9-10).[106]

New York says that "Lack of consent results from: b) Incapacity to consent (c) Where the offense charged is sexual abuse or forcible touching, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct." "A person is deemed incapable of consent when he or she is: c) mentally incapacitated; or (d) physically helpless" (SECTION 130.05)."'Mentally incapacitated' means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent." (SECTION 130.00)[107]

North Carolina characterizes "mentally incapacitated" as "A victim who due to any act is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act." (§ 14-27.20.)[108] Second degree rape is that which is done to a "mentally incapacitated" person" under Section 14-27.22.[109]

North Dakota uses the term "Gross Sexual Imposition," which is defined as "A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if…. That person or someone with that person's knowledge has substantially impaired the victim's power to appraise or control the victim's conduct by administering or employing without the victim's knowledge intoxicants, a controlled substance as defined in chapter 19-03.1, or other means with intent to prevent resistance" (12.1-20-03.)[110]

Ohio says that under the category of rape Rape "For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception." (Section 2907.02) It also stipulates that "a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section 3719.41"[111]

Oklahoma asserts that "The term "consent" means the affirmative, unambiguous and voluntary agreement to engage in a specific sexual activity during a sexual encounter which can be revoked at any time." "Consent cannot be: 1. Given by an individual who: a. is asleep or is mentally or physically incapacitated either through the effect of drugs or alcohol or for any other reason, or b. is under duress, threat, coercion or force; or 2. Inferred under circumstances in

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[106] https://www.nmlegis.gov/sessions/01%20Regular/FinalVersions/SB0076FV.html
[107] https://www.nycourts.gov/judges/cji/2-PenalLaw/130/130.65-a%281%29%28b%29.pdf
[108] https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_14/GS_14-27.20.pdf
[109] https://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_14/Article_7B.pdf
[110] https://www.ndlegis.gov/cencode/t12-1c20.pdf
[111] https://codes.ohio.gov/ohio-revised-code/section-2907.02/3-22-2019

which consent is not clear including, but not limited to: a. the absence of an individual saying "no" or "stop", or b. the existence of a prior or current relationship or sexual activity."[112]

Oregon says that "A person is considered incapable of consenting to a sexual act if the person is: (a)Under 18 years of age; (b)Mentally defective; (c)Mentally incapacitated; or (d)Physically helpless. (2)A lack of verbal or physical resistance does not, by itself, constitute consent but may be considered by the trier of fact along with all other relevant evidence. [1971 c.743 §105; 1999 c.949 §2; 2001 c.104 §52]."[113] "(3) 'Mentally incapacitated' means that a person is rendered incapable of appraising or controlling the conduct of the person at the time of the alleged offense" (163.305).[114]

According to Pennsylvania law, a "Person engages in sexual intercourse with a complainant: (3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring. (4) Where 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" (18 Pa.C.S.A. § 3121).[115]

Rhode Island says that "A person is guilty of first degree sexual assault if… The accused knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless" (R.I. Gen. Laws § 11-37-2).[116] "'Mentally incapacitated' means a person who is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or who is mentally unable to communicate unwillingness to engage in the act."[117]

In South Carolina, Section 16-3-652 defines "Criminal sexual conduct in the first degree… The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance." Under Section 16-3-651 "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct whether this condition is produced by illness, defect, the influence of a substance or from some other cause."[118]

South Dakota asserts that "Rape is an act of sexual penetration… (3) If the victim is incapable, because of physical or mental incapacity, of giving consent to such act; or (4) If the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis" (22-22-1).[119]

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[112] https://oksenate.gov/sites/default/files/2019-12/os21.pdf
[113] https://oregon.public.law/statutes/ors_163.315#:~:text=effect%20of%20lack%20of%20resistance
[114] https://oregon.public.law/statutes/ors_163.305
[115] https://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/18/00.031.021.000..HTM
[116] http://webserver.rilin.state.ri.us/Statutes/TITLE11/11-37/11-37-2.htm
[117] http://webserver.rilin.state.ri.us/Statutes/TITLE11/11-37/11-37-1.htm
[118] https://www.scstatehouse.gov/code/t16c003.php
[119] https://sdlegislature.gov/Statutes/Codified_Laws/2047298

Tennessee says that "Rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances: (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless" (39-13-503).[120] "'Mentally incapacitated' means that a person is rendered temporarily incapable of appraising or controlling the person's conduct due to the influence of a narcotic, anesthetic or other substance administered to that person without the person's consent, or due to any other act committed upon that person without the person's consent" (39-13-501).[121]

Texas Code Ann. §22.011(b) states that "the other person has not consented and the actor knows the other person is unconscious or physically unable to resist; (b) A sexual assault under Subsection (a)(1) is without the consent of the other person if: (4) the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it (6) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge."[122]

Under Utah legislation, "Simple sexual abuse is without consent of the victim under any of the following circumstances: (a) the victim expresses lack of consent through words or conduct… (e) the actor knows the victim is unconscious, unaware that the act is occurring, or is physically unable to resist; the actor knows or reasonably should know that the victim has a mental disease or defect, which renders the victim unable to:

i. appraise the nature of the act;
ii. resist the act."[123]

Vermont acknowledges "'Consent' [to be] the affirmative, unambiguous, and voluntary agreement to engage in a sexual act, which can be revoked at any time" under 13 V.S.A. § 3251. "'Incapable of consenting' means the person: (A) is incapable of understanding the nature of the conduct at issue; (B) is physically incapable of resisting, declining participation in, or communicating unwillingness to engage in the conduct at issue; or (C) lacks the mental ability to make or communicate a decision about whether to engage in the conduct at issue."[124]

Virginia defines sexual assault as "sexual intercourse with any other person and such act is accomplished (i) against the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person; or (ii) through the use of the complaining witness's mental incapacity or physical helplessness" (Article 7. § 18.2-61.) "'Mental incapacity' means that condition of the complaining witness existing at the time of an offense under this article which prevents the complaining witness from understanding the nature or consequences

[120] https://www.tn.gov/content/dam/tn/tbi/documents/
[121] https://advance.lexis.com
[122] https://statutes.capitol.texas.gov/Docs/PE/htm/PE.22.htm
[123] https://le.utah.gov/xcode/Title76/Chapter5/76-5-S406.html
[124] https://legislature.vermont.gov/statutes/section/13/072/03251

of the sexual act involved in such offense and about which the accused knew or should have known" (18.2-67.10).[125]

Washington says that "'Consent' means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact" (RCW 9A.44.010). "'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 whether that condition is produced by illness, defect, the influence of a substance or from some other cause."[126]

West Virginia states that under W. Va. Code Ann. § 61-8B-2(b) "Lack of consent results from: (2) Incapacity to consent… (c) A person is deemed incapable of consent when such person is: (3) Mentally incapacitated."[127] "'Mentally incapacitated' means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to that person without his or her consent or as a result of any other act committed upon that person without his or her consent."[128]

Wisconsin views rape as having "sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if 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." It defines "intoxicant" as any alcohol beverage, controlled substance, controlled substance analog, or other drug, or any combination of a controlled substance, controlled substance analog or other drug or any combination of an alcohol beverage and a controlled substance, controlled substance analog or other drug. "Intoxicant" does not include any alcohol beverage thereof. [129]

Under Wyoming jurisdiction, "Sexual assault in the second degree (6-2-303) "(iii) The actor administers, or knows that someone else administered to the victim, without the prior knowledge or consent of the victim, any substance which substantially impairs the victim's power to appraise or control his conduct."[130]

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[125] https://law.lis.virginia.gov/vacodefull/title18.2/chapter4/article7/
[126] https://app.leg.wa.gov/rcw/default.aspx?cite=9A.44.010
[127] http://www.wvlegislature.gov/wvcode/ChapterEntire.cfm?chap=61&art=8B&section=2#8B
[128] http://www.wvlegislature.gov/wvcode/code.cfm?chap=61&art=8B
[129] https://docs.legis.wisconsin.gov/statutes/statutes/940/ii/225/4
[130] https://wyoleg.gov/statutes/compress/title06.pdf