

RAPE BY DRUGS: A STATUTORY OVERVIEW AND PROPOSALS FOR REFORM

Patricia J. Falk*

I. INTRODUCTION

*She lost consciousness, and when she came to the accused was having sexual relations with her.*¹

*Later, he took the intoxicated victim B to his barracks where she woke to find him engaged in sexual intercourse with her.*²

*He dozed off again and subsequently awoke to find the defendant performing fellatio on him.*³

She was unable to feel anything nor was she able to move. She again lost consciousness and came round to see the appellant naked from the waist down with his penis erect. He approached her

* Associate Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. J.D., 1983, University of Nebraska-Lincoln, Ph.D., 1988, University of Nebraska-Lincoln. I am grateful to April L. Cherry, David Barnhizer, Phyllis L. Crocker, Joshua Dressler, Kathleen C. Engel, Peter Garlock, Jack Guttenberg, and Tayyab Mahmud for their thoughtful comments on earlier drafts, and to Dena S. Davis and Joel J. Finer for helpful discussions about the subject matter of this article. I am also grateful to my research assistants, Tiffany Anderson, Kristin Karkutt, and Renni Zifferblatt, and to the Cleveland-Marshall Fund for its financial support.

1. United States v. Carver, 12 M.J. 581, 582 (A.F.C.M.R. 1981); *see also* United States v. Willis, 41 M.J. 435, 437 (C.A.A.F. 1995) (“She awoke on appellant’s bed, naked from the waist down, with appellant penetrating her.”); Commonwealth v. Walker, 362 A.2d 227, 230 (Pa. 1976) (“Later when the young girl began to regain consciousness, she became aware that Walker was having sexual relations with her.”); State v. Contreras-Cruz, 765 A.2d 849, 851 (R.I. 2001) (“According to Tess’s testimony, she next remembered being in her bed with someone on top of her, engaging in intercourse with her.”).

2. United States v. Buckley, 35 M.J. 262, 262 n.2 (C.M.A. 1992).

3. Commonwealth v. Tatro, 676 N.E.2d 843, 844 (Mass. App. Ct. 1997).

*grinning. He then penetrated her. When she was next conscious her underwear had been replaced. The appellant remarked, "Do you remember that then? Don't worry you won't...later."*⁴

*She testified that she woke up the next morning naked, with male emissions on her body, leading her to believe that someone had had sex with her that evening.*⁵

*Complainant's son testified that he was awakened by the shaking of the bed and saw a man he had never seen before in bed on top of his mother. He said the man's "private part" was in his mom's "private part." His mother was naked and appeared to be asleep. She was not holding or kissing the man.*⁶

*[S]he was dumped on the lawn in front of her home and was found by her father in a disoriented state;...she had no memory of the incident the night before....*⁷

*The complainant "blacked out again" and later reawoke to find the defendant having intercourse with her.... She lost consciousness and reawoke to find the defendant having intercourse with her again.*⁸

*When she became fully conscious again he was engaged in intercourse with her. When he removed the mask, he told her that "they were going to get along just fine."*⁹

*When he awakened,...[h]e found that his lap had been covered with a blanket,...[and] when he stood up, he realized his pants, including his underwear, had been pulled down and that he had ejaculated.*¹⁰

*Ramona passed out in defendant's car and awakened with her pants pulled partially down and defendant on top of her.*¹¹

4. Regina v. Cobb, [2002] 1 Cr. App. R. (S.) 19 (Crim. App. 2001).

5. United States v. Grier, 53 M.J. 30, 32 (C.A.A.F. 2000).

6. Gallardo v. State, No. 03-99-00653-CR, 2000 Tex. App. LEXIS 3903, at *2 (Tex. App. June 15, 2000).

7. Rapetti v. James, 784 F.2d 85, 91 (2d Cir. 1986).

8. Commonwealth v. Helfant, 496 N.E.2d 433, 437 (Mass. 1986).

9. State v. Oshiro, 696 P.2d 846, 849 (Haw. Ct. App. 1985).

10. State v. Karlen, 589 N.W.2d 594, 606 (S.D. 1999).

11. State v. Quick, 619 P.2d 1347, 1348 (Or. Ct. App. 1980).

*The victim testified that the next thing she remembered was waking up on the floor to find the appellant raping her...while she was on the floor she could not think of anything to do, could not move, and was unable to tell appellant to stop.*¹²

*Momentarily, she became completely unconscious. When she woke, the Doctor was disrobed, moved her on her back, got in bed with her, and had intercourse with her. She related that although she was conscious of all that went on, she had no power of resistance.*¹³

*"I don't remember. I remember...standing up against the bathroom wall and Lester was like kissing me, and then all I remember is really laying on the floor and Lester was having sex with me and he was saying like, ["]oh, this feels so good["] and things like that...."*¹⁴

The methods by which human beings accomplish nonconsensual sexual activity with fellow humans are almost limitless.¹⁵ They use physical force; they beat, choke, and knock their victims unconscious. They kidnap and restrain them. They use weapons and threats of immediate force to subdue their quarry. They come in groups with the superior strength of their number. They exploit the element of surprise. They coerce, extort, and blackmail others into sexual submission. They lie, pretend, impersonate, and defraud, trapping the unwary in webs of deceit.¹⁶ They victimize mentally ill, mentally disabled, physically weak, and physically incapacitated persons. They abuse their positions of trust and authority to overcome their patients, clients, students, foster children, and prisoners. They sexually assault members of their own families. They prey on children.

Another common method of engaging in nonconsensual sexual activity can be described generically as rape by drugs or other intoxicants,¹⁷ which actually encompasses two separate although related offenses. The first offense consists of administering an intoxicant to the victim, which incapacitates her, and then

12. *Yates v. State*, No. CACR 98-620, 1999 Ark. App. LEXIS 500, at *3 (Ark. Ct. App. June 30, 1999).

13. *Rhine v. State*, 336 P.2d 913, 916 (Okla. Crim. App. 1959).

14. *Howard v. Commonwealth*, 465 S.E.2d 142, 143 (Va. Ct. App. 1995).

15. See generally STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998).

16. See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998).

17. I use the term "drugs" in its generic sense to encompass all forms of intoxicating substances, including alcohol and anesthetics. I use the terms "intoxication" or "intoxicated" to describe the results of all forms of drugs.

engaging in nonconsensual sexual intercourse with her (i.e., administration of intoxicant + incapacity to consent due to intoxicant + nonconsensual sexual activity). The second offense involves sexually assaulting a victim who has become incapacitated by alcohol or drugs by self-administration or for reasons unrelated to the defendant (i.e., incapacity to consent due to intoxicant + nonconsensual sexual activity). Both methods of sexual imposition are probably as old as rape law itself; certainly very early formulations of Anglo-American rape law took them into account.¹⁸

In several senses, the two offenses are closely allied because they both involve a common form of victim incapacity to consent and, thus, also share the nonconsensual nature of the sexual conduct.¹⁹ Several courts in comparing these offenses have emphasized that the cause of the victim's incapacity to consent is largely irrelevant to a rape law designed to protect victims from unwanted sexual exploitation.²⁰ Thus, the argument goes, it matters little whether the victim is incapable of giving consent because she intoxicated herself, was knocked unconscious by a blow to the head, was drugged by the defendant, or is insensible because of a disease. For instance, one might be hard-pressed to determine which of the passages quoted above involved self-intoxicated victims and which involved administration of the intoxicant by the defendant. Moreover, the line between defendant administration and victim ingestion is not particularly bright. Consider *Melton v. State*, in which the defendant handed a bottle of whiskey to a sixteen-year-old young woman and told her to drink down to a particular line.²¹ Was this a case of voluntary consumption because no one forced her to drink or a case involving administration? The state's rape statute required administration by the defendant,²² but the trial court instructed the jury that the victim's voluntary

18. See, e.g., *Smith v. State*, 80 Am. Dec. 355, 361, 365-67 (Ohio 1861) (discussing rape of mentally ill, intoxicated, unconscious, and anesthetized victims); *Commonwealth v. Bakeman*, 131 Mass. 577 (1881) (adultery case involving an intoxicated woman); *Commonwealth v. Burke*, 105 Mass. 376, 380-81 (1870) (discussing historical treatment of sexual intercourse with an intoxicated or drugged woman in England and the United States); *Quinn v. State*, 142 N.W. 510 (Wis. 1913) (discussing history of rape by intoxication); *Regina v. Camplin*, 1 Den. C.C. 89, 94 (1845) ("Of the Judges who were in favour of the conviction, several thought that the crime of rape is committed by violating a woman when she is in a state of insensibility and has no power over her will, whether such state is caused by the man or not, the accused knowing at the time that she is in that state.... But all the ten Judges agreed, that in this case, where the prosecutrix was made insensible by the act of the prisoner, and that an unlawful act, and when also the prisoner must have known that the act was against her consent at the last moment that she was capable of exercising her will, because he had attempted to procure her consent and failed, the offence of rape was committed."); 3 WHARTON & STILLE, MEDICAL JURISPRUDENCE § 597 (4th ed. 1884) (discussing 1860 Ohio case involving doctor and chloroform).

19. See *People v. Giardino*, 98 Cal. Rptr. 2d 315 (Ct. App. 2000), for an excellent discussion of the incapacity to consent inherent in California's rape by intoxication statute.

20. See, e.g., *State v. Chaney*, 5 P.3d 492, 501 (Kan. 2000); *Burke*, 105 Mass. at 380-81; *Stadler v. State*, 919 P.2d 439, 443 (Okla. Crim. App. 1996).

21. See *Melton v. State*, 23 S.W.2d 662, 665 (Tenn. 1930).

22. See *id.* at 663.

consumption was sufficient.²³ The conviction was upheld on appeal despite defendant's challenge to the instruction.²⁴ Apparently, administration in some jurisdictions can consist of merely offering liquor to the victim.²⁵

Although the two offenses are similar, a number of courts,²⁶ legislatures,²⁷ and commentators²⁸ have treated them differently. The primary rationale for distinguishing them derives from the construction of the force requirement of rape law. First, some courts have developed the notion of constructive force to cover situations in which the defendant administers an intoxicant to the victim.²⁹

23. *See id.* at 664.

24. *See id.* at 664 ("This court finds no error in the trial judge's construction of the statute. The words 'without her consent' modify the verbal phrase 'has carnal knowledge' and not the verbal noun 'administering.' Both the rules of grammatical construction and the sense of the context justify the trial court's interpretation.")

25. *But see* State v. Morris, No. 18321, 2001 Ohio App. 971 (Ohio Ct. App. Mar. 9, 2001) (overturning defendant's rape and attempted rape convictions under Ohio law because he was found not to have satisfied the administration by force, threat, or deception requirement when he taught his fourteen-year-old twin daughters to huff glue, provided them with the glue, and then sexually assaulted them); State v. Morris, No. 17287, 1999 Ohio App. LEXIS 4003 (Ohio Ct. App. Aug. 27, 1999).

26. *See infra* Part II.

27. *See infra* Part III.

28. *See, e.g.,* WAYNE R. LAFAVE, CRIMINAL LAW 771-72, 775-77 (3d ed. 2000) (discussing the administration of drugs or intoxicants as a form of imposition and separately discussing incapacity as the result of drugs). The Model Penal Code's rape statute contains only a provision criminalizing the administration of an intoxicant followed by sexual assault. *See* MODEL PENAL CODE § 213.1(1)(b) (1980) ("A male who has sexual intercourse with a female not his wife is guilty of rape if...he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance;"). In rejecting a rule outlawing sexual intercourse with an intoxicated person absent defendant administration of the intoxicant, the commentators wrote:

such an approach would be unsatisfactory. For one thing, it fails to take into account the social context of romance and seduction. Liquor and drugs may be potent agents of incapacitation, but they are also common ingredients of the ritual of courtship. The traditional routine of soft music and wine or the modern variant of loud music and marijuana implies some relaxation of inhibition. With continued consumption, relaxation blurs into intoxication and insensibility. Where this progression occurs in a course of mutual and voluntary behavior, it would be unrealistic and unfair to assign to the male total responsibility for the end result.

Id. § 213.1 cmt. at 315.

29. *See* Drake v. State, 236 S.E.2d 748, 750-51 (Ga. 1977) ("When the victim is physically or mentally unable to give consent to the act, as when she is intoxicated, drugged, or mentally incompetent, the requirement of force is found in constructive force, that is, in the use of such force as is necessary to effect the penetration made by the defendant.") (quoting 1 WHARTON, CRIMINAL LAW & PROCEDURE § 307 (1957)); Demetrius v. State, 541 S.E.2d 83, 86 (Ga. Ct. App. 2000) (discussing notion of constructive force in cases of intoxicated and drugged victims); *see also* People v. Lusk, 216 Cal. Rptr. 544 (Ct. App. 1985) (equating drugging with force in sodomy statute and generally discussing the

Drugging is considered an indirect or internal application of force as opposed to the more direct or external methods of physical force.³⁰ Alternatively, the administration of an intoxicant can be considered a battery, thus providing an apt parallel to the traditional notion of physical battery encompassed by rape law.³¹ Third, Texas law emphasized the fraud involved in many administration scenarios (e.g., a drug is surreptitiously introduced into the victim's drink) and equated that species of fraud with force.³² Fourth, as the commentary to the Model Penal Code points out, the administration of an intoxicant, like the use of physical force, verifies victim nonconsent.³³ No ambiguity exists about the victim's consent to intercourse when the defendant has deprived her of the ability to give consent by administering an intoxicating agent. Finally, administration of an intoxicant by the defendant appears to be more morally blameworthy because it requires planning or premeditation while the rape of an intoxicated victim may be an opportunistic

administration of drugs as a form of force); *Miller v. Commonwealth*, 27 S.E.2d 57 (Va. 1943) ("to meet the legal requisite of force to sustain the charge the Commonwealth relied chiefly on the accusation that the prosecutrix was drugged or doped by the accused, which rendered her unconscious and insensible and therefore an easy and irresponsible victim for the accomplishment of his purpose").

The force question is not entirely academic under marital rape provisions that require the defendant to have used force. *See, e.g., Trigg v. State*, 759 So. 2d 448 (Miss. Ct. App. 2000).

30. The concept of constructive force became so popular that it was imported to other substantive criminal areas requiring force, such as robbery. *See, e.g., People v. Dreas*, 200 Cal. Rptr. 586 (1984) (robbery case discussing notion of constructive force, criminal law treatises, and Snyder); *People v. Cline*, 31 P.2d 1095 (Cal. Ct. App. 1934) (grand theft case involving administration of phenobarbital); *State v. Snyder*, 172 P. 364 (Nev. 1918) (robbery case discussing the notion of constructive force in rape law and reviewing old cases). LaFave writes: "One may also render one's victim helpless by more subtle means, as by administering intoxicating liquors or drugs in order to produce a state of unconsciousness or stupefaction; to act in this way is to use force for purposes of robbery." LAFAVE, *supra* note 28, at 872; *see also* ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 348 (3d ed. 1982) ("Just as battery may be committed by the administration of poison, so the force used to obtain property from a person against his will may be applied internally. It was robbery, for example, to take money from a cash register, while the one in charge was helpless nearby, having been rendered unconscious by a drug administered for that purpose." (footnotes omitted)). Similarly, "[j]ust as coercion may be accomplished by force or threat, it may also be effected by using drugs or intoxicants to render the victim incapable of resistance." MODEL PENAL CODE § 213.1 cmt. at 316 (1980).

31. *See* MODEL PENAL CODE § 211.1 cmt. at 187 (1962) (non-therapeutic administration of a drug falls under the Model Penal Code's assault provision).

32. Texas had a statute that defined rape as intercourse secured by force, threat, or fraud; the statute defined fraud to include "the administration, without the woman's knowledge or consent of some substance producing unnatural sexual desire or such stupor as prevents or weakens resistance." *See Montoya v. State*, 185 S.W. 6 (Tex. Crim. App. 1916); *Ford v. State*, 53 S.W. 846 (Tex. Crim. App. 1899); *Milton v. State*, 4 S.W. 574 (Tex. Ct. App. 1887); *Milton v. State*, 6 S.W. 39 (Tex. Ct. App. 1887) (all construing this provision of Texas's former statute); *see also* B.K. Carpenter, Annotation, *Rape by Fraud or Impersonation*, 91 A.L.R.2d 591, 603-04 (1963) (discussing these cases).

33. *See* MODEL PENAL CODE § 213.1 cmt. at 315-18 (1962).

crime committed without foresight.³⁴ Thus, based on these alternate rationales, sexual assault accomplished by the defendant's administration of drugs seems easier to fit into a rape law paradigm that emphasizes force rather than the sexual exploitation of an already intoxicated victim.

Rape law, however, has not excluded from protection those who have voluntarily ingested alcohol or drugs and then have been sexually attacked. While some courts have drawn parallels between the use of physical force and the administration of intoxicants, other courts have made analogies between intoxicated victims and two other traditional categories of victims deserving of special protection: (1) mentally ill or mentally disabled and (2) sleeping, unconscious, or physically helpless persons.³⁵ In these cases, rape law essentially dispenses with the force requirement by finding that the force necessary for sexual penetration is sufficient.³⁶ Within the pantheon of rape offenses, categories requiring little or no force have always existed alongside forcible rape.³⁷ Thus, although the administration + incapacity + sexual assault crime and the incapacity + sexual assault crime are quite similar, they might be understood as deriving from different historical or common law traditions.

34. Typical provisions that divide murder into degrees include the use of poison, for example, as a category of first-degree murder because it shows planning and premeditation. *See* LAFAVE, *supra* note 28, at 696-97.

35. As the Model Penal Code commentary suggests: "In addition to compelled or coerced sexual intercourse, the law of rape, as has been pointed out above, traditionally included several forms of intercourse by a male with an incapacitated female." MODEL PENAL CODE § 213.1 cmt. at 315 (1980) (footnotes omitted).

Other courts have used the doctrine of constructive force in cases involving voluntary ingestion by the victim. *See, e.g.,* State v. Lung, 28 P. 235, 236 (Nev. 1891) ("This constructive force has been held to exist where the defendant had violated the woman's person after she became insensible from intoxicating liquors given her by him for the purpose of exciting her,...where [she] was so drunk as to be insensible, although the liquor was not given her by him, where she was in such deep slumber as to be unconscious of the act, and where her powers of resistance had been overcome by the administration of ether or chloroform." (citations omitted)).

36. *See, e.g.,* United States v. Natkie, ACM 31693, 1996 CCA LEXIS 286, at *11 (A.F. Ct. Crim. App. Sept. 20, 1996) ("When a victim is incapable of consenting because she is asleep, unconscious, or intoxicated to the extent that she lacks the mental capacity to consent, then, no greater force is required than that necessary to achieve penetration."). However, the Model Penal Code commentary argues that when victims are either unconscious or mentally ill, the defendant is put on notice that the victim is not capable of consent. *See* MODEL PENAL CODE § 213.1 cmt. at 319-21 (1980). It is more difficult to determine whether a drunken or drugged victim has reached a similar point of incapacity to consent. *See id.* at 318.

37. As one commentator has noted: "[T]here can be no question that rape, as a legal category, has long included many forms of nonviolent misconduct." Ernst Wilfred Puttkammer, *Consent in Rape*, 19 U. ILL. L. REV. 410, 420 (1925). Similarly, the Model Penal Code commentary notes: "Thus, rape has traditionally included not only intercourse by force or threat, but also sexual imposition on an unconscious or otherwise incapacitated female, intimacy achieved by certain fundamental kinds of deception, and intercourse with a mentally incompetent or underage female." MODEL PENAL CODE § 213.1 cmt. at 301 (1980).

The foregoing discussion is not merely an academic one. Today, almost every American jurisdiction has either a rape (or more commonly sexual assault) statute or case precedent that punishes one or both of these offenses. The theories that first animated rape law with respect to the administration to and sexual exploitation of intoxicated victims continue to exert influence on modern statutory formulations. Approximately one-half of American jurisdictions classify drugged or intoxicated victims with mentally ill or physically helpless persons, implicitly adopting the rationale of the older cases making similar comparisons. On the other hand, a considerable number of jurisdictions punish only instances in which the defendant administers the intoxicant, leaving unprotected victims who have voluntarily ingested intoxicants unless they fall within alternative categories such as unconsciousness. The historical and theoretical underpinnings for punishing criminal actors who administer intoxicants to accomplish rape are also important in considering provisions that separately punish drugging in the context of committing a sexual offense or another crime, as an assault or battery, or as poisoning. If the administration of an intoxicant is already subsumed in the sexual offense, how can that behavior also be separately punished as another crime?

Part II discusses the extant cases with several goals in mind. Before considering the statutory schemes devised to combat and punish certain forms of sexual assault, an examination of the kinds of situations that occur in the real world is useful. What types of factual patterns lead to prosecution of rape by drugs or other intoxicants? Part II discloses a relatively broad range of behavior involving nonconsensual sexual activity between criminal actors and drunken or drugged victims. The latest phenomenon of rape drugs and the attendant increase in the occurrence of sexual assault of drugged victims are only one part of this broader behavioral spectrum. The cases are also useful in understanding the shortcomings of legal analysis and statutory coverage in these contexts. Finally, the cases put a human face to the abstractions of legal theory; real women and men have been sexually assaulted while intoxicated.

Part III provides an overview of American statutory law criminalizing both types of rape by drugs—situations in which the defendant administers the intoxicant and situations in which the defendant sexually exploits an incapacitated victim. The jurisdictions are about equally divided between two general approaches. Some states include intoxication in their definitions of mental incapacitation and then outlaw sexual contact with mentally incapacitated persons as well as mentally ill or physically helpless victims. Other states list sexual activity with a victim who is intoxicated either by her own hand or through the agency of the defendant as an enumerated type of sexual assault without separately defining mental incapacitation. Some states have gone much further. They have enacted special statutes to combat the latest rage of so-called date-rape drugs (although why drugging someone constitutes a “date” is beyond explanation).³⁸

38. According to one news report, “[t]he DEA has also counted 32 GHB-related deaths since 1995 and 22 sexual assaults since 1996 with GHB as a sedative. That’s why GHB and its main ingredient, GBL, are known as ‘date-rape drugs,’ but a better term would simply be ‘rape drugs.’” Angie Cannon, *Sex, Drugs, and Sudden Death: GHB Can Get You*

Part III also considers the criminalization of administering drugs to another, usually as assault or battery, under statutes that prohibit the use of drugs to commit a sexual offense or another crime, non-therapeutic drugging, or poisoning. Some of these provisions date to the late 1800s and are written in terms of drugs such as chloroform and laudanum, while more modern versions tend to focus on the new breed of drugs. Finally, Part III considers legal prohibitions on the possession and distribution of common rape drugs (e.g., gamma hydroxy butyrate (GHB), flunitrazepam (Rohypnol), and ketamine).³⁹

Part IV offers some suggestions for statutory reform. First, sexual assault provisions dealing with drugs or other intoxicants should be explicit. Instead of relying on case precedent, as three jurisdictions do, or describing various forms of mental or physical incapacitation of the victim without mentioning drugs, as six jurisdictions do, states should craft their statutes explicitly to include drugged or drunken victims. Second, because two-thirds of the jurisdictions explicitly provide for criminal liability only when the defendant administers the drug as a prelude to sexual assault, the statutes should be amended to also protect persons who voluntarily ingest or consume intoxicants and then are sexually assaulted. In this section, the article also addresses the difficulties of describing the degree of incapacity that is necessary before a victim is incapable of giving consent to the sexual conduct. Current formulations are written in terms of the victim's failure to resist or an inability to appraise or control her conduct. Both approaches are outdated and inadequate because they deflect attention away from what should be the central inquiry in any sexual offense—whether the victim has the capacity to consent and whether she did in fact consent. States should also continue to punish those who administer intoxicants before a sexual assault either as a higher grade of sexual offense or in a separate drugging statute in addition to the underlying sexual crime. Drugging itself represents a significant harm to overall bodily integrity not encompassed by sexual assault provisions. Finally, courts should take two types of additional behavior into account when sentencing the defendant: videotaping the sexual assault and the abuse of a professional relationship in gaining access to the victim.

High, Turn You into a Rapist's Victim, or Kill You, U.S. NEWS & WORLD REP., May 24, 1999, at 73.

39. See Melissa Abramovitz, *The Knockout Punch of Date Rape Drugs*, CURRENT HEALTH, Mar. 1, 2001; Nora Fitzgerald & K. Jack Riley, *Drug-Facilitated Rape: Looking for the Missing Pieces*, NAT'L INST. JUST. J., Apr. 2000, at 9; Cheryl Wetzstein, *Club Drugs K.O. the Young*, INSIGHT ON NEWS, Jan. 10, 2000; Holly J. Wolcott, *Ventura County News Crime Watch: Cases Involving Date-Rape Drugs Hard to Prove*, L.A. TIMES, July 31, 2000, at B1; *An Overview of Club Drugs*, Drug Intelligence Brief, Drug Enforcement Administration, Feb. 2000, available at <http://www.usdoj.gov/dea/pubs/intel.htm>; *Gamma Hydroxy Butyrate Use in New York and Texas, 1995-1996*, 46 MORBIDITY & MORTALITY WEEKLY REP. (1997); U.S. Department of Health and Human Services, *Substance Abuse & Sexual Assault: When Drugs Are Used for Rape*, D.C. Crisis Center, available at <http://www.dcrcc.org/drugs.html>.

II. THE CASES

The facts are difficult to write about. They portray man's ability to inflict cruelty and degradation upon a fellow human being. As horrible as these facts are to write, they must have been unimaginable to live through....⁴⁰

This Part reviews almost one hundred appellate cases and news accounts,⁴¹ involving nonconsensual sexual conduct with intoxicated persons. The permutations of sexual assault of drunken or drugged victims are almost limitless. For illustrative purposes, I organize the cases into five broad categories, and provide one or two paradigmatic examples of each. The categories are: (1) alcohol-related offenses; (2) drug-induced conduct; (3) professionals as perpetrators; (4) rape-drug incidents (a special subcategory of the drug-induced conduct cases); and (5) cases in which the victim died. Not only are these cases helpful in understanding the variety of behaviors subsumed under rape by drugs, but they illuminate problems with existing statutes and instances of innovative prosecutorial theories—for example, charging drugging crimes in addition to the sexual offenses.

The following case review dispels some possible misconceptions about the crimes of rape by drugs. Sexual assault under these circumstances is not confined to nightclubs or fraternity houses on college campuses; nor are these assaults limited to the young, the poor, or the uneducated. Sexual assault by intoxicants is a crime that cuts across social, economic, and educational lines. The perpetrators are doctors, lawyers, dentists, businessmen, and relatives as well as soldiers, college students, and gang members. Victims encountered their attackers at the doctor's office, in the emergency room, during therapy, at relatives' weddings, and in their own homes. All the offenders were male with one exception;⁴² most victims were female. Many of the offenders were serial rapists, employing their modus operandi on multiple victims, and often going without detection because of the amnesiac quality of the drugs they employed. Some of these sexual offenses involved violence, not only in the sense of the forcible administration of a drug against the victim's will, but in the degree of injury inflicted upon the victim⁴³ and/or in the number of perpetrators who performed

40. *Coley v. State*, 616 So. 2d 1017, 1024 (Fla. Dist. Ct. App. 1993) (Gersten, J., dissenting). Perhaps in recognition of the nature of the facts involved, the court's opinion in *People v. Bohannon*, 98 Cal. Rptr. 2d 488 (Ct. App. 2000), for example, omits the factual summary of the case from publication.

41. Obviously, this set of opinions is not necessarily a representative sample because appellate cases represent only a partial sample of cases involving drunken or drugged victims—those that raise issues worthy of consideration by an appellate court.

42. See *Coley*, 616 So. 2d at 1018.

43. See, e.g., *Horowitz v. State*, No. 01-93-01022-CR, 1996 Tex. App. LEXIS 1080 (Tex. App. Mar. 7, 1996). In that case, the defendant attorney gave a going-away party for a court bailiff. The victim, a probation officer, became extremely intoxicated and was sexually assaulted by the defendant. See *id.* at *3. When the complainant was getting ready for work the next morning, she realized that she had been severely injured the night before and went to the hospital. "A hospital examination later that morning revealed severe trauma

sexual acts on her. Finally, these cases reveal that rape by intoxicants is not a recent phenomenon. The advent of rape drugs may make the offense more common or more dangerous, but criminals have plied their victims with alcohol and other drugs as long as cases have been recorded.

The common denominator in these crimes is a victim who was severely incapacitated at the time of the sexual assault. Most were either completely unconscious or regained consciousness sporadically during the rape, while some victims were substantially impaired without being unconscious. A number had amnesia about their assaults, especially those to whom the defendants had administered the new breed of rape drugs. Some victims discovered they had been assaulted when they awoke with injuries or found blood, semen, or fecal matter on their bodies.⁴⁴ Some, especially in the professional cases, reported that they were conscious, but paralyzed—unable to move their limbs or to speak. As the expert in one case involving a rape drug explained, “a person will suffer ‘depersonalization,’ a condition where a person is unable to do or say what they want.”⁴⁵ Thus, the perpetrators in these cases render their victims inanimate objects—objects for their own pleasure—in a way that is the antithesis of humanity and only one step removed from necrophilia.⁴⁶

to the complainant’s vagina, cervix, anus, and rectum.” *Id.* at *4. In fact, the state argued that the severity of her injuries made it extremely unlikely that she would have consented to the sexual acts causing such injury. *See id.* at *4–*5.

44. See Gail Abarbanel, *Learning from Victims*, NAT’L INST. JUST. J., Apr. 2000, at 11 (“When they regained consciousness, some victims were unsure if they had been sexually assaulted. Others found signs that they had been: They were undressed; they had semen stains on their bodies and/or clothing; they had vaginal or anal trauma, such as soreness and/or lacerations. All of these victims reported significant memory impairment. Most could not recall what was done to them, who participated, or how many people were present while they were unconscious. Some could remember brief, intermittent periods of awakening, during which they were aware of their surroundings but were unable to move or speak. They felt ‘paralyzed.’”).

45. *Yates v. State*, No. CACR 98-620, 1999 Ark. App. 500, at *5 (Ark. Ct. App. June 30, 1999).

46. Martha Nussbaum has identified seven notions of treating another as an object:

1. Instrumentality. The objectifier treats the object as a tool of his or her purposes
2. Denial of autonomy. The objectifier treats the object as lacking in autonomy and self-determination
3. Inertness. The objectifier treats the object as lacking in agency, and perhaps also in activity
4. Fungibility. The objectifier treats the object as interchangeable (a) with other objects of the same type and/or (b) with objects of other types
5. Violability. The objectifier treats the object as lacking in boundary integrity, as something that it is permissible to break up, smash, break into

A. Alcohol-Related Sexual Offenses

What your actions reflect is that you view women as something other than human beings, and that you can have your way with a person to satisfy your own needs, and in doing that, to dehumanize some other human.

It's particularly egregious in this case because of the intoxication issue, but despite of intoxication, both on your own behalf and that of the victim, and the fact that she was[,] or during part of the time [was] passed out, she did say no repeatedly, and you let your physiological drives overcome your human nature, and in the process dehumanized another individual.⁴⁷

Given the ready availability of alcohol—the most common drug in our society—it is hardly surprising that a substantial number of cases, dating back to the nineteenth century,⁴⁸ involve men sexually assaulting intoxicated persons. This category contains cases involving both the victim's voluntary ingestion and defendant's administration of alcohol as a prelude to the sexual assault. Many of the crimes concerning voluntary ingestion were opportunistic; the defendant exploited the victim's already drunken or unconscious state for the purposes of engaging in various forms of sexual contact with her or him. The opportunistic nature of these alcohol-related offenses is underscored by the fact that many of the perpetrators were related to or knew the victims and, therefore, had easy access to them. For instance, assailants have been the victim's half-brother,⁴⁹ former stepfather,⁵⁰ cousins' stepfather,⁵¹ friend's father,⁵² brother's friend,⁵³ boyfriend,⁵⁴

6. Ownership. The objectifier treats the object as something that is owned by another, can be bought or sold, etc.

7. Denial of subjectivity. The objectifier treats the object as something whose experience and feelings (if any) need not be taken into account

MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 218 (1999). All these categories apply to cases in which defendants sexually assault intoxicated persons.

47. *United States v. Morgan*, 164 F.3d 1235, 1239–40 (9th Cir. 1999) (quoting comments of district judge at sentencing).

48. *See, e.g., Regina v. Camplin*, 1 Den. C.C. 89, 94 (1845).

49. *See State v. Contreras-Cruz*, 765 A.2d 849 (R.I. 2001).

50. *See State v. Johnson*, C.A. No. 91CA004991, 1991 Ohio App. LEXIS 6243 (Ohio Ct. App. Dec. 18, 1991).

51. *See State v. Martin*, No. CA99-09-026, 2000 Ohio App. LEXIS 3649 (Ohio Ct. App. Aug. 14, 2000).

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

53. *See State v. Rogers*, 772 So. 2d 960 (La. Ct. App. 2000).

54. *See People v. Cortez*, 35 Cal. Rptr. 2d 500 (Ct. App. 1994) (multiple perpetrators, only one of whom was victim's "boyfriend"); *State v. Wells*, 367 S.W.2d 652 (Mo. 1963) (prosecuted as statutory rape although defendant plied victim with alcohol); *State v. Duffy*, No. CA95-03-006, 1996 Ohio App. LEXIS 1305 (Ohio Ct. App. Apr. 1, 1996).

date,⁵⁵ close friend,⁵⁶ neighbor,⁵⁷ co-worker,⁵⁸ military co-worker,⁵⁹ babysitter's friend,⁶⁰ fellow churchgoer⁶¹ or partygoer.⁶² A few cases involved apparently casual social acquaintances,⁶³ others provide insufficient facts to ascertain if any relationship existed between the perpetrator and the complainant.⁶⁴ Finally, an alarming number of these cases, approximately one-half, involved teenaged victims who were perhaps naïve about the effects of alcohol.⁶⁵

55. See *United States v. Morgan*, 164 F.3d 1235, 1239 (9th Cir. 1999) ("Neither the statutes proscribing the behavior that occurred in this case nor the applicable sentencing guidelines deem sexual assault less serious just because the perpetrator and victim began the evening on a 'date.'"); *United States v. Willis*, 41 M.J. 435 (C.A.A.F. 1995); *Quinn v. State*, 142 N.W. 510 (Wis. 1913).

56. See *United States v. Grier*, 53 M.J. 30 (C.A.A.F. 2000) (friend and wife of co-worker); *United States v. Salib*, No. NMCM 99 01605, 2000 WL 527738 (N-M. Ct. Crim. App. Apr. 26, 2000); *State v. Farnum*, 554 N.W.2d 716 (Iowa Ct. App. 1996).

57. See *Vallejo v. State*, No. 05-99-00173-CR, 2000 Tex. App. LEXIS 859 (Tex. App. Feb. 7, 2000).

58. See *Horowitz v. State*, No. 01-93-01022-CR, 1996 Tex. App. LEXIS 1080 (Tex. App. Mar. 7, 1996).

59. See *United States v. Southworth*, 50 M.J. 74 (C.A.A.F. 1999) (other victim was the thirteen-year-old daughter of petty officer); *United States v. Natkie*, ACM 31693, 1996 CCA LEXIS 286 (A.F. Ct. Crim. App. Sept. 20, 1996); *United States v. Buckley*, 35 M.J. 262 (C.M.A. 1992) (other victim was a fourteen-year-old civilian); *United States v. Carver*, 12 M.J. 581 (A.F.C.M.R. 1981).

60. See *State v. Chaney*, 5 P.3d 492 (Kan. 2000).

61. See *Melton v. State*, 23 S.W.2d 662 (Tenn. 1930).

62. See *Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993); *State v. Bryan*, 713 N.E.2d 494 (Ohio Ct. App. 1998); *State v. Galati*, 365 N.W.2d 575 (S.D. 1985); *Horowitz v. State*, No. 01-93-01022-CR, 1996 Tex. App. LEXIS 1080 (Tex. App. Mar. 7, 1996); *Howard v. Commonwealth*, 465 S.E.2d 142 (Va. Ct. App. 1995).

63. See *People v. O'Brien*, 62 P. 297 (Cal. 1900); *State v. Porter*, 639 So. 2d 1137 (La. 1994); *State v. Gafford*, 709 So. 2d 1076 (La. Ct. App. 1998); *Commonwealth v. Tatro*, 676 N.E.2d 843 (Mass. App. Ct. 1997); *Hirdes v. Ottawa Circuit Judge*, 146 N.W. 646 (Mich. 1914); *Commonwealth v. Erney*, 698 A.2d 56 (Pa. 1997); *Commonwealth v. Walker*, 362 A.2d 227 (Pa. 1976); *Elliott v. State*, 858 S.W.2d 478 (Tex. Crim. App. 1993); *State v. Weaver*, 382 S.E.2d 327 (W. Va. 1989).

64. See *State v. Weiss*, 528 N.W.2d 519 (Iowa 1995); *Commonwealth v. D'Ambrosio*, 61 N.E.2d 852 (Mass. 1945); *Commonwealth v. Burke*, 105 Mass. 376 (1870); *Commonwealth v. Odell*, 607 N.E.2d 423 (Mass. App. Ct. 1993); *People v. Cirina*, 533 N.Y.S.2d 305 (App. Div. 1988); *State v. Aiken*, 326 S.E.2d 919 (N.C. Ct. App. 1985); *Stadler v. State*, 919 P.2d 439 (Okla. Crim. App. 1996); *Regina v. Camplin*, 1 Den. C.C. 89 (1845).

65. See, e.g., *United States v. Southworth*, 50 M.J. 74 (C.A.A.F. 1999) (other victim was thirteen-year-old); *United States v. Natkie*, ACM 31693, 1996 CCA LEXIS 286 (A.F. Ct. Crim. App. Sept. 20, 1996) (seventeen-year-old); *United States v. Willis*, 41 M.J. 435 (C.A.A.F. 1995) (seventeen-year-old); *United States v. Buckley*, 35 M.J. 262 (C.M.A. 1992) (other victim was a fourteen-year-old civilian); *People v. Giardino*, 98 Cal. Rptr. 2d 315 (Ct. App. 2000) (sixteen-year-old); *People v. Cortez*, 35 Cal. Rptr. 2d 500 (Ct. App. 1994) (fifteen-year-old); *State v. Chaney*, 5 P.3d 492 (Kan. 2000) (fourteen-year-old); *Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993) (fifteen-year-old); *State v. Gafford*, 709 So. 2d 1076 (La. Ct. App. 1998) (thirteen-year-old); *Commonwealth v. Tatro*, 676 N.E.2d 843 (Mass. App. Ct. 1997) (fourteen-year-old); *Commonwealth v. Odell*, 607

A recent case, *State v. Rogers*,⁶⁶ illustrates this genre of offense. In *Rogers*, a twenty-one-year-old woman attended her brother's wedding as the maid of honor. She got drunk by her own efforts and then became ill; her mother and the bride helped her to bed.⁶⁷ When the young woman's mother returned to check on her, the mother found Rogers (the brother-groom's friend) on top of her unconscious daughter engaged in sexual intercourse with her.⁶⁸ Rogers was convicted of simple rape.⁶⁹ Louisiana bifurcates its statutory approach to sexual conduct accomplished with an intoxicated or drugged person.⁷⁰ If the defendant administers the intoxicant and sexually assaults the victim, then he is guilty of forcible rape. If, however, he engages in sexual intercourse with a drunken victim without administering the intoxicant, then his crime is simple rape.⁷¹ Rogers unsuccessfully challenged the sufficiency of the evidence on appeal.

Rogers highlights one issue in connection with statutes governing the sexual assault of intoxicated persons, i.e., whether those provisions cover victims who have intoxicated themselves or only situations in which the defendant administers the substance. Compare *Rogers* with a factually similar case, *State v. Galati*.⁷² In *Galati*, the twenty-five-year-old defendant and sixteen-year-old victim attended a senior class party. After voluntarily consuming alcohol, the young woman passed out and was taken to a bedroom; some time later, defendant was discovered attempting to have sexual intercourse with the unconscious teenager.⁷³ On appeal, the South Dakota Supreme Court dismissed the case because the state's rape statute required that the defendant administer the intoxicant and here he had not. The court saw no reason that the administration requirement should prevent prosecution of those who sexually assault drunken victims, but it felt bound by the statutory language.⁷⁴ Later the same year, South Dakota's legislature amended the

N.E.2d 423 (Mass. App. Ct. 1993) (teenager); *State v. Martin*, No. CA99-09-026, 2000 Ohio App. LEXIS 3649 (Ohio Ct. App. Aug. 14, 2000) (fifteen-year-old); *State v. Bryan*, 713 N.E.2d 494 (Ohio Ct. App. 1998) (nineteen-year-old); *Commonwealth v. Erney*, 698 A.2d 56 (Pa. 1997) (fifteen-year-old); *Commonwealth v. Walker*, 362 A.2d 227 (Pa. 1976) (fourteen-year-old); *State v. Galati*, 365 N.W.2d 575 (S.D. 1985) (sixteen-year-old); *Melton v. State*, 23 S.W.2d 662 (Tenn. 1930) (sixteen-year-old); *Howard v. Commonwealth*, 465 S.E.2d 142 (Va. Ct. App. 1995) (fifteen-year-old); see also Wendy L. Scott, *CSU Employee Indicted on Sex, Alcohol Charges*, MORNING J., July 31, 2001 (victim was nineteen-year-old student).

66. 772 So. 2d 960 (La. Ct. App. 2000).

67. See *id.* at 962.

68. See *id.*

69. See *id.* at 963.

70. See MODEL PENAL CODE § 213.1 cmt. at 278 (1980) (discussing Louisiana as first state to divide rape into forcible and simple rape).

71. See LA. REV. STAT. ANN. §§ 14:42.1(2) (forcible rape), :43(1) (simple rape) (West 2000).

72. 365 N.W.2d 575 (S.D. 1985).

73. See *id.* at 576.

74. See *id.* at 578 ("We regretfully hold that South Dakota's statutory definition of rape does not protect persons incapable of consenting to an act of sexual penetration because of an intoxicating, narcotic, or anesthetic agent, or because of hypnosis, unless the

rape statute to include the circumstance “[i]f the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis,”⁷⁵ thus eliminating the administration requirement.

Although most alcohol-related cases concerned the rape of victims who were voluntarily intoxicated, some involved defendant administration of alcohol to the victim,⁷⁶ one of the most egregious examples of which was a case in which the victim was held down and had beer poured down her throat.⁷⁷ In *People v. Cortez*,⁷⁸ the defendant and Lorena, his fifteen-year-old girlfriend, went to a friend’s house. While there Lorena consumed alcohol and engaged in consensual sex with the defendant. Some dispute existed concerning the circumstances of the drinking; Lorena denied being forced to drink but a witness reported that the defendant and his cohorts forced or encouraged her to do so. After Lorena passed out, defendant and two others sexually assaulted her, and she awoke to discover her body covered with black markings (possibly gang graffiti). Cortez was convicted of three counts of rape accomplished by administering an intoxicating substance (one as the principal and two as an accomplice). At the time, California’s statute required that the intoxicant be “administered by or with the privity of the accused.”⁷⁹ Instead of using the statutory language, however, the trial court instructed the jury that the substance had to be administered by or with the actual knowledge of the perpetrator.⁸⁰ The appellate court reversed defendant’s conviction based on error in this jury instruction, concluding that the statute required more than knowledge.⁸¹ In 1994, California amended its rape statute by eliminating the administration language (including the privity provision). The statute now simply requires that the victim be intoxicated and the condition be known or reasonably should be known to the offender.⁸² Other jurisdictions have struggled with the same issue in both alcohol and drug cases.⁸³ The alcohol-related

agent or hypnosis was administered by or with the privity of the accused. We leave it to the legislature to correct this hiatus.” (footnote omitted)).

75. S.D. CODIFIED LAWS § 22-22-1(4) (Michie 2001).

76. See, e.g., *People v. O’Brien*, 62 P. 297, 298 (Cal. 1900) (defendant invited victim to drink whiskey); *Commonwealth v. Tatro*, 676 N.E.2d 843, 844 (Mass. App. Ct. 1997) (defendant plied victim with beer and mixed drinks); *Commonwealth v. Odell*, 607 N.E.2d 423, 424 (Mass. App. Ct. 1993) (defendant plied victims with alcohol and drugs); *Hirdes v. Ottawa Circuit Judge*, 146 N.W. 646, 647 (Mich. 1914) (defendant caused victim to become intoxicated).

77. See *United States v. Southworth*, 50 M.J. 74, 75 (C.A.A.F. 1999).

78. 35 Cal. Rptr. 2d 500 (Ct. App. 1994).

79. CAL. PENAL CODE § 261(a)(3) (amended 1994).

80. See *Cortez*, 35 Cal. Rptr. 2d at 508.

81. See *id.* at 514.

82. See CAL. PENAL CODE § 261(a)(3) (West 2001) (“Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.”).

83. See *People v. Cortez*, 35 Cal. Rptr. 2d 500 (Ct. App. 1994) (discussing administration language in California’s rape statute before it was replaced); *State v. Weiss*, 528 N.W.2d 519 (Iowa 1995) (interpreting “unconscious” in sexual abuse statute to include intoxication); *State v. Chaney*, 5 P.3d 492 (Kan. 2000) (discussing statutory change from

cases are important because of the ready accessibility of alcohol in our society and alcohol's concomitant handiness in facilitating the commission of sexual offenses.

B. Drug-Induced Sexual Assaults

"How can people be so horrible?"⁸⁴

A number of appellate opinions involved defendants' use of legal and illegal drugs to subdue and sexually assault others or situations in which persons voluntarily ingested drugs and were subsequently assaulted.⁸⁵ These cases differ from those in Section D below because the perpetrators did not use rape drugs. Instead, the defendants in these cases used drugs at hand, including:⁸⁶ codeine,⁸⁷ cocaine,⁸⁸ glue,⁸⁹ Benadryl and Ambien,⁹⁰ Percodan,⁹¹ Valium,⁹² Halcion,⁹³

1969 statute requiring administration to 1993 statute requiring victim incapable of consent); *State v. Aiken*, 326 S.E.2d 919, 925–26 (N.C. Ct. App. 1985) (noting North Carolina's statute does not require the defendant to make the victim mentally incapacitated or physically helpless); *State v. Duffy*, No. CA95-03-006, 1996 Ohio App. LEXIS 1305 (Ohio Ct. App. Apr. 1, 1996) (interpreting "mental or physical condition" in Ohio's former felonious penetration statute to include unconsciousness by voluntary intoxication because rape statute uses administering language); *Commonwealth v. Erney*, 698 A.2d 56 (Pa. 1997) (discussing definition of "unconscious" for purposes of Pennsylvania's rape statute, which also had an explicit drug provision dealing with the administration of drugs or intoxicants). *Melton v. State*, 23 S.W.2d 662 (Tenn. 1930), is a great example of a case in which the trial and reviewing courts interpreted the administration requirement so broadly that it was virtually eliminated. *See supra* notes 21–24 and accompanying text.

84. *People v. Rose*, 253 N.E.2d 456, 459 (Ill. 1969).

85. *See United States v. Altman*, 901 F.2d 1161 (2d Cir. 1990); *Rapetti v. James*, 784 F.2d 85 (2d Cir. 1986); *United States v. Ibarra*, 53 M.J. 616 (N-M. Ct. Crim. App. 2000); *People v. Bohannon*, 98 Cal. Rptr. 2d 488 (Ct. App. 2000); *People v. Avila*, 95 Cal. Rptr. 2d 651 (Ct. App. 2000); *People v. Lusk*, 216 Cal. Rptr. 544 (Ct. App. 1985); *People v. Crosby*, 120 P. 441 (Cal. Ct. App. 1911); *Coley v. State*, 616 So. 2d 1017 (Fla. Dist. Ct. App. 1993); *People v. Rose*, 253 N.E.2d 456 (Ill. 1969); *Commonwealth v. Lowe*, 76 S.W. 119 (Ky. Ct. App. 1903); *Trigg v. State*, 759 So. 2d 448 (Miss. Ct. App. 2000); *State v. Morris*, No. 18321, 2001 Ohio App. LEXIS 971 (Ohio Ct. App. Mar. 9, 2001); *State v. Morris*, No. 17287, 1999 Ohio App. LEXIS 4003 (Ohio Ct. App. Aug. 27, 1999); *State v. Dillon*, No. 79AP-785, 1980 Ohio App. LEXIS 10876 (Ohio Ct. App. June 24, 1980); *State v. Quick*, 619 P.2d 1347 (Or. Ct. App. 1980); *State v. Karlen*, 589 N.W.2d 594 (S.D. 1999); *State v. McCracken*, No. 44126-4-I, 2000 Wash. App. LEXIS 491 (Wash. Ct. App. Mar. 27, 2000); *State v. Lough*, 853 P.2d 920 (Wash. Ct. App. 1993), *aff'd*, 889 P.2d 487 (Wash. 1995); *see also Willis v. State*, 473 S.W.2d 200 (Tex. Crim. App. 1971) (assault with intent to rape); James Walsh, *Authorities Hope 9-year Sentence Sends Message on Date-Rape Drug, A Detroit Lakes Man Was the First to Be Prosecuted Under a Federal Law Against Using Drugs in Rape*, STAR TRIB. (Minneapolis-St. Paul), Feb. 25, 2000, at 01B.

86. Some cases do not disclose the type of drug used. *See, e.g., Rapetti v. James*, 784 F.2d 85 (2d Cir. 1986) (possibly quaaludes); *People v. Bohannon*, 98 Cal. Rptr. 2d 488 (Ct. App. 2000); *People v. Crosby*, 120 P. 441 (Cal. Ct. App. 1911); *People v. Rose*, 253 N.E.2d 456 (Ill. 1969); *Commonwealth v. Lowe*, 76 S.W. 119 (Ky. Ct. App. 1903); *State v. Quick*, 619 P.2d 1347 (Or. Ct. App. 1980).

87. *See State v. Karlen*, 589 N.W.2d 594 (S.D. 1999).

88. *See Coley v. State*, 616 So. 2d 1017 (Fla. Dist. Ct. App. 1993).

amphetamines,⁹⁴ barbiturates,⁹⁵ and anti-depressants.⁹⁶ Two old cases involved cantharides, which were thought at one time to excite sexual desire.⁹⁷

In one case concerning an illegal drug, although not a rape drug, and the only case involving a female perpetrator discovered in this research, *Coley v. State*, the defendant was convicted of sexual battery and conspiracy to commit sexual battery.⁹⁸ The victim, a fifteen-year-old runaway, fell in with a group of older persons and consumed alcohol and cocaine with them.⁹⁹ On the day in question, the victim voluntarily snorted cocaine, and was tied to a bed with her consent, where Coley engaged in two counts of oral sexual contact with her.¹⁰⁰ Florida's statute did not explicitly provide criminal liability for those who sexually assaulted victims who had voluntarily ingested alcohol or drugs.¹⁰¹ Therefore, the prosecution proceeded on a theory that the victim had been physically helpless, a separate provision in Florida's sexual battery statute.¹⁰²

The appellate court reviewed the sufficiency of the evidence on the issue of physical helplessness, which Florida's statute defined as a person who is asleep, unconscious, or physically unable to communicate an unwillingness to an act.¹⁰³ The court concluded that the victim was physically able to communicate—in fact, she expressed unwillingness to engage in some of the acts performed upon her—and dismissed the convictions of Coley and one of her alleged co-conspirators. As is often the case, a sharp difference of opinion existed between the majority and dissenting opinions regarding the factual context in which the crime occurred. The majority emphasized the initial willingness of the young woman to engage in

89. See *State v. Morris*, No. 18321, 2001 Ohio App. LEXIS 971 (Ohio Ct. App. Mar. 9, 2001); *State v. Morris*, No. 17287, 1999 Ohio App. LEXIS 4003 (Ohio Ct. App. Aug. 27, 1999).

90. See *People v. Avila*, 95 Cal. Rptr. 2d 651, 652 (Ct. App. 2000); Walsh, *supra* note 85, at 01B.

91. See *People v. Mack*, 15 Cal. Rptr. 2d 193, 195 (Ct. App. 1992).

92. See *State v. Dillon*, No. 79AP-785, 1980 Ohio App. LEXIS 10876, at *1 (Ohio Ct. App. June 24, 1980); see also *People v. Lusk*, 216 Cal. Rptr. 544 (Ct. App. 1985) (possibly Valium, cocaine, codeine, or soma).

93. See *State v. Lough*, 853 P.2d 920 (Wash. Ct. App. 1993), *aff'd*, 889 P.2d 487 (Wash. 1995).

94. See *United States v. Altman*, 901 F.2d 1161, 1162 (2d Cir. 1990).

95. See *Willis v. State*, 473 S.W.2d 200, 201 (Tex. Crim. App. 1971); *State v. McCracken*, No. 44126-4-I, 2000 Wash. App. LEXIS 491, at *3 (Wash. Ct. App. Mar. 27, 2000).

96. See *Trigg v. State*, 759 So. 2d 448 (Miss. Ct. App. 2000).

97. See *Bechtelheimer v. State*, 54 Ind. 128, 130 (1876); *State v. Lung*, 28 P. 235 (Nev. 1891).

98. See *Coley v. State*, 616 So. 2d 1017 (Fla. Dist. Ct. App. 1993).

99. See *id.* at 1020.

100. See *id.*

101. See also *State v. Morris*, No. 17287, 1999 Ohio App. LEXIS 4003 (Ohio Ct. App. Aug. 27, 1999) (defendant's rape and attempted rape convictions for sexually assaulting his twin daughters thrown out because he had not administered the glue).

102. See *Coley*, 616 So. 2d at 1020.

103. See FLA. STAT. ch. 794.011(1)(e), (4)(a) (2001).

various sexual acts.¹⁰⁴ The dissent stressed the facts that the victim was given additional drugs during the sexual episode (a plate of cocaine was placed under her face), passed out several times, and expressed her unwillingness to continue.¹⁰⁵

The dissenting judge wrote:

The majority opinions hold that the victim consented to waking up in a bed covered with blood and fecal stained sheets; stripped of dignity, upset, afraid and abandoned. I cannot agree. While these facts are much more complex, this case comes down to one simple point: in my view, a consent to kiss, is not a consent to rape. I therefore respectfully dissent and would affirm the convictions that each majority reverses.¹⁰⁶

Coley illustrates not only the issues that arise when statutes criminalize rape by administering drugs and not rape following self-ingestion of drugs, but also the problems associated with trying to fit drug-induced sexual conduct into categories such as physical helplessness, rather than dealing more straightforwardly with the problem of reduced capacity to consent based on intoxication.

*State v. Morris*¹⁰⁷ raises similar issues. In that case, the defendant's fourteen-year-old twin daughters came to live with him. Defendant allowed the young women to smoke pot and drink at his home. He also taught them to huff glue, which he acquired from his remodeling business.¹⁰⁸ When the daughters were high from the glue, defendant raped one of them and attempted to rape the other.¹⁰⁹ The state charged Morris with rape, attempted rape, and corrupting another with drugs (based on the marijuana, not the glue).¹¹⁰ Morris was convicted but successfully appealed, arguing that the state had failed to prove that he had administered the drug "by force, threat, or deception," a requirement of Ohio's rape statute.¹¹¹ The state filed new charges against Morris for sexual battery and attempted sexual battery, provisions that punish an offender who is a parent of the victim.¹¹² He unsuccessfully challenged the new charges on double jeopardy grounds.¹¹³ The number and variety of sexual assault cases involving drugs emphasize the need to combat multiple forms of drug-induced conduct, not only the situations when that conduct occurs as the result of the new rape drugs.

104. See *Coley*, 616 So. 2d at 1021.

105. See *id.* at 1033-35.

106. See *id.* at 1036.

107. No. 17287, 1999 Ohio App. LEXIS 4003 (Ohio Ct. App. Aug. 27, 1999).

108. See *id.* at *2.

109. See *id.* at *3.

110. See *id.* at *1.

111. OHIO REV. CODE ANN. § 2907.02(A)(1) (Anderson 2001).

112. See *id.* § 2907.03(A)(5) ("No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:...(5) The offender is the other person's natural or adoptive parent, or stepparent, or guardian, custodian, or person in loco parentis of the other person.").

113. See *State v. Morris*, No. 18321, 2001 Ohio App. LEXIS 971 (Ohio Ct. App. Mar. 9, 2001).

C. Professionals as Perpetrators

Another paradigmatic type of rape or sexual assault by intoxicants involves professionals, a category of offenders who has ready access to drugs. Sadly, but perhaps not surprisingly, doctors,¹¹⁴ dentists,¹¹⁵ psychotherapists,¹¹⁶

114. See *Dubria v. Smith*, 197 F.3d 390, 394 (9th Cir. 1999), *aff'd*, 224 F.3d 995 (9th Cir. 2000); *Snyder v. Major*, 789 F. Supp. 646, 647 (S.D.N.Y. 1992) (civil action involving same doctor); *Frank v. People*, 770 P.2d 1119, 1120 (Cal. 1989); *People v. Ing*, 422 P.2d 590, 592 (Cal. 1967); *Ballard v. People*, 410 P.2d 838, 840 (Cal. 1966); *People v. Ragen*, 262 Cal. App. 2d 392, 396 (Ct. App. 1968); *People v. Wojahn*, 337 P.2d 192, 194 (Cal. Ct. App. 1959); *Middleton v. Clayton*, 470 N.E.2d 1271, 1272 (Ill. App. Ct. 1984) (licensure case involving same doctor); *People v. Middleton*, 350 N.E.2d 223, 225 (Ill. App. Ct. 1976); *State v. Porter*, 11 N.W. 644, 645 (Iowa 1882); *Copithorne v. Framingham Union Hospital*, 520 N.E.2d 139, 140 (Mass. 1988) (civil case by one of Helfant's victims); *Commonwealth v. Helfant*, 496 N.E.2d 433 (Mass. 1986); *People v. Major*, 545 N.Y.S.2d 923, 923 (App. Div. 1989); *Rhine v. State*, 336 P.2d 913 (Okla. Crim. App. 1959); *State v. Still*, 202 N.W. 479, 479 (S.D. 1925); *Morton Mintz*, *High Court Asked to Rule on Evidence in Physician-Rape Case*, WASH. POST, Oct. 30, 1977, at A7; *Linnnet Myers*, *25 Patients of Suspect in Sex-Abuse Case Fear They're Victims*, CHI. TRIB., Apr. 3, 1986, at C7; see also *People v. Avila*, 95 Cal. Rptr. 2d 651, 652 (2000) (curandero, healer of witch diseases, sodomized two boys after drugging them); *People v. Royal*, 53 Cal. 62, 62 (1878) (doctor practiced some sort of manipulation on victim and then had carnal connection with her); *Shea v. Bd. of Med. Exam'rs*, 146 Cal. Rptr. 653, 656 (1978).

115. See, e.g., *People v. Dayan*, 40 Cal. Rptr. 2d 391, 392 (Ct. App. 1995); *McIlwain v. State*, 402 So. 2d 1194, 1196 (Fla. Dist. Ct. App. 1981); *State v. Oshiro*, 696 P.2d 846 (Haw. Ct. App. 1985); *State v. Sladek*, 835 S.W.2d 308 (Mo. 1992); *People v. Yankowitz*, 564 N.Y.S.2d 488 (App. Div. 1991); *People v. Teicher*, 425 N.Y.S.2d 315 (App. Div. 1980), *aff'd*, 422 N.E.2d 506 (N.Y. 1981); *State v. Baden*, Trial No. B-840408, 1985 Ohio App. LEXIS 8538 (Ohio Ct. App. Aug. 21, 1985); *State v. Leuin*, No. CA 774, 1983 Ohio App. LEXIS 13985 (Ohio Ct. App. Sept. 21, 1983). A number of civil cases encompass the same type of behavior. See, e.g., *Sciola v. Shernow*, 577 A.2d 1081 (Conn. App. Ct. 1990); *St. Paul Fire & Marine Ins. Co. v. Shernow*, No. 088197, 1991 Conn. Super. LEXIS 533 (Conn. Super. Ct. Mar. 8, 1991), *aff'd*, 610 A.2d 1281 (Conn. 1992); *Lindheimer v. St. Paul Fire & Marine Ins. Co.*, No. 92-2254, 1993 Fla. App. LEXIS 10935 (Fla. Dist. Ct. App. Oct. 26, 1993), *aff'd on reh'g*, 643 So. 2d 636 (Fla. Dist. Ct. App. 1994); *In re McCollough*, 431 S.E.2d 816 (N.C. Ct. App. 1993); *Standard Fire Ins. Co. v. Blakeslee*, 771 P.2d 1172 (Wash. Ct. App. 1989); *Steven G. v. Herget*, 505 N.W.2d 422 (Wis. Ct. App. 1993).

116. See *Demetrios v. State*, 541 S.E.2d 83 (Ga. Ct. App. 2000) (therapist alleged to have stolen medication from hospital); see also *DiLeo v. Nugent*, 592 A.2d 1126 (Md. Ct. Spec. App. 1991) (civil case involving sexual contact between therapist and client under influence of drugs).

A few cases exist in which therapists used hypnosis to subdue their patients to achieve sexual contact with them. See, e.g., *State v. Remsen*, C.C.A. No. 01C01-9204-CR-00122, 1993 Tenn. Crim. App. LEXIS 86 (Tenn. Crim. App. Feb. 11, 1993) (victim could only account for twenty to thirty minutes of three-hour therapy session); *Accused of Misconduct, Doctor Gives up License*, ORLANDO SENTINAL TRIB., Jan. 11, 1992, at A12; *Doctor, 75, Quits Practice in Hypnosis-sex Investigation*, CHI. TRIB., Jan. 10, 1992, at 4; *Michael Durham, Hypnotherapist Hotline Set up in Assault Case*, INDEPENDENT (LONDON), Apr. 10, 1993, at 3 ("Officers who raided the man's home found 30 home-made videotapes, some showing women apparently under hypnosis allegedly being subject to sexual assaults. Some women appeared to have taken drink or drugs."); *Yung Kim, Hypnotist Arrested in Assault*,

male nurses,¹¹⁷ paramedics,¹¹⁸ and pharmacists¹¹⁹ have used drugs to sedate their patients, either while rendering professional services or while socializing with them, for purposes of sexually assaulting them. The cases involving sexual assault in professional settings merit separate consideration because they involve special issues, notably the abuse of a professional, trust-based relationship and the fact that the victim often consented to the administration of drugs. Some sexual offense provisions require victim nonconsent to the administration of the intoxicant.¹²⁰ Another notable characteristic of the cases in this category is that many involved serial rapists.¹²¹

A classic example of this category of crime, one that illustrates both a doctrinal problem and an evidentiary issue, is *Commonwealth v. Helfant*,¹²² which involved a fifty-one-year-old neurosurgeon convicted of both rape and drugging a person for unlawful sexual intercourse. The defendant injected a young woman, his patient, co-worker, and former girlfriend, with Valium after she complained to

L.A. TIMES, Apr. 15, 1998, at B2; Larry King, *When Sex Therapy Becomes Sexual Abuse*, LARRY KING LIVE, May 8, 1991, Transcript # 297; *Women Raped by Hypnotist with Black Box QC Tells Court*, DAILY TELEGRAPH, Sept. 27, 1988, at 3.

117. See *Doe v. Young*, 656 So. 2d 569 (Fla. Dist. Ct. App. 1995) (discussing Young's guilty pleas to seven incidents of sexually battering female patients under anesthesia); *State v. Raines*, 324 S.E.2d 279 (N.C. Ct. App. 1985) (insufficient evidence of physical or constructive force in case involving alleged rape of a female patient by a male nurse); *Regina v. Cobb*, [2002] 1 Cr. App. R. (S.) 19 (Crim. App. 2001); Renne Madeleine Hom, *Survey of Developments in North Carolina Law, 1986: V. Criminal Law: State v. Moorman: Can Sex with a Sleeping Woman Constitute Forcible Rape?*, 65 N.C. L. REV. 1246 (1987) (discussing Raines); *Male Nurse Accused in Rape of 4 Unconscious Patients*, L.A. TIMES, Oct. 8, 1994, at A22; Jamal Thalji, *Police Lose Sex Crime Specialist to County*, ST. PETERSBURG TIMES, Aug. 30, 1997, at 1.

118. See *State v. Lough*, 853 P.2d 920, 922 (Wash. Ct. App. 1993), *aff'd*, 889 P.2d 487 (Wash. 1995); see also *United States v. Ibarra*, 53 M.J. 616, 616 (N-M. Ct. Crim. App. 2000) (defendant was a Navy hospitalman).

119. See *People v. Lombardi*, 229 N.E.2d 206 (N.Y. 1967); *Primmer v. Vrable*, No. 95APE07-936, 1996 Ohio App. LEXIS 1049 (Ohio Ct. App. Mar. 19, 1996) (civil case discussing pharmacist's guilty plea to rape and corrupting another with drugs charges).

120. See, e.g., FLA. STAT. ch. 794.011(1)(c) (2001) (narcotic...administered without his or her consent). *But see* OHIO REV. CODE ANN. § 2907.05(A)(3) (Anderson 2001) ("The offender knows that the judgment or control of the other person...is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person's consent for the purpose of any kind of medical or dental examination, treatment, or surgery.").

121. See, e.g., *Frank v. People*, 770 P.2d 1119 (Cal. 1989); *People v. Ing*, 422 P.2d 590 (Cal. 1967); *People v. Dayan*, 40 Cal. Rptr. 2d 391 (Ct. App. 1995); *People v. Ragen*, 262 Cal. App. 2d 392 (Ct. App. 1968); *People v. Wojahn*, 337 P.2d 192 (Cal. Ct. App. 1959); *Demetrios v. State*, 541 S.E.2d 83 (Ga. Ct. App. 2000); *People v. Middleton*, 350 N.E.2d 223 (Ill. App. Ct. 1976); *Commonwealth v. Helfant*, 496 N.E.2d 433 (Mass. 1986); *State v. Sladek*, 835 S.W.2d 308 (Mo. 1992); *People v. Yankowitz*, 564 N.Y.S.2d 488 (App. Div. 1991); *People v. Teicher*, 425 N.Y.S.2d 315 (App. Div. 1980), *aff'd*, 422 N.E.2d 506 (N.Y. 1981); *Rhine v. State*, 336 P.2d 913 (Okla. Crim. App. 1959).

122. *Commonwealth v. Helfant*, 496 N.E.2d 433 (Mass. 1986).

him of back pain.¹²³ She passed out almost immediately and awoke to discover the defendant having intercourse with her. The victim lost consciousness again and when she regained it, the defendant was repeating his sexual assault of her.¹²⁴

With respect to rape doctrine, Helfant argued that the sexual assault of his patient did not fall within the state's rape statute because he used no force, which is required on the face of the provision.¹²⁵ Massachusetts did not have an explicit drug provision in its rape statute, although the state had a separate crime for drugging with the intent of committing a sexual offense.¹²⁶ Relying on an 1870 case, the court found that the force required for penetration was sufficient for rape in cases in which the victim was rendered unconscious.¹²⁷ In terms of evidence law, one issue on appeal was the admissibility of prior misconduct by the defendant. Two other women testified that Helfant came to their apartments, injected them with drugs, and sexually assaulted them. The Supreme Judicial Court of Massachusetts ultimately upheld the admission of the testimony with respect to only the drugging, but not the rape charge, reasoning that the drugging statute required an intent to overpower for the purpose of having unlawful sexual intercourse.¹²⁸ Thus, the testimony by the other women helped show a distinctive pattern of conduct and was relevant to show the defendant's intent.

In *Regina v. Cobb*,¹²⁹ an English case, the defendant worked as a male nurse in the emergency department of a hospital. He injected three patients with Midazolam, a drug that causes memory loss, and had sexual intercourse with two of them while they were sedated.¹³⁰ When officials investigated further, they learned that one of Cobb's fellow nursing students had died three years earlier under suspicious circumstances. Apparently, the defendant had given her a fatal overdose by mixing the same drug with alcohol.¹³¹ When the court sentenced Cobb to life in prison, he appealed arguing his sentence was too long. The court upheld the sentence, noting:

A particularly serious feature to which the judge drew attention in passing the life sentence was the fact that having administered the drug to the nurse and caused her death, three years later, in

123. See *id.* at 436–37.

124. See *id.*

125. See MASS. GEN. LAWS ch. 265, § 22 (2001).

126. See *id.* ch. 272, § 3; see also *infra* notes 264–65 and accompanying text.

127. See *Commonwealth v. Burke*, 105 Mass. 376, 380–81 (1870) (“[T]he crime, which the evidence in this case tended to prove, of a man’s having carnal intercourse with a woman, without her consent, while she was, as he knew, wholly insensible so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was rape.”).

128. See *Helfant*, 496 N.E.2d at 442.

129. *Regina v. Cobb*, [2002] 1 Cr. App. R. (S.) 19 (Crim. App. 2001).

130. See *id.*

131. See *id.*

circumstances which were quite shocking, he used the drug again three times on three separate women raping two of them.¹³²

In affirming Cobb's lengthy imprisonment, the court also noted the obligation of the courts to protect other women from this type of sexual exploitation.¹³³ The cases involving professional perpetrators who sexually exploited their patients underscore the importance of crafting provisions that vindicate the multiple harms to victims, including the abuse of a trust-based professional relationship.

D. Rape Drugs and Videotaping

Rape drugs make it relatively easy for rapists to gain control of their victims. Perpetrators do not have to overcome any form of resistance. They do not have to use physical force. They do not have to threaten to harm the victim to get compliance. Nor do they have to be concerned about a victim's screams attracting attention. The drugs they administer immobilize and silence the victim.¹³⁴

The three foregoing categories of cases have long and checkered histories dating from the time when cases were first recorded. Unfortunately, advances in science and technology have made rape by drugs more common,¹³⁵ more virulent, and more invasive of victims' privacy interests because offenders can now videotape their sexual assaults. A number of recent cases involve the new breed of rape drugs (e.g., GHB, Rohypnol, and ketamine)¹³⁶ and/or videotaping or photographs.¹³⁷ In *Sera v. State*,¹³⁸ a case illustrating the greater availability of

132. *Id.*

133. *See id.*

134. Abarbanel, *supra* note 44, at 11.

135. Cannon, *supra* note 38, at 73 (reporting that DEA has documented twenty-two sexual assaults since 1996 involving GHB).

136. In *Yates v. State*, No. CACR 98-620, 1999 Ark. App. LEXIS 500 (Ark. Ct. App. June 30, 1999), the defendant was convicted of rape and the introduction of a controlled substance, Rohypnol, into the victim's person. Evidence at trial revealed that the defendant had also drugged and sexually assaulted or attempted to assault three other women. The appellate court upheld the admission of three other women's testimony on the theory that it showed "his intent, plan, motive, and knowledge of and access to Rohypnol or a similar substance." In *Gallardo v. State*, No. 03-99-00653-CR, 2000 Tex. App. LEXIS 3903 (Tex. App. June 15, 2000), defendant was convicted of sexual assault on an unconscious woman. Rohypnol was suspected. "One Broward County man who pleaded guilty to 'roofie rape' in a 1993 case—Mark Anthony Perez—told authorities he had used the drug to rape as many as 20 women." *The Date Rape Drug: The Difficulty of Obtaining Convictions*, PROSECUTOR, March/April 1997, at 28; *see also* *People v. Puff*, 724 N.Y.S.2d 247 (2001) (defendant participated in gang rape and sexual abuse of young woman who lost consciousness after taking Ecstasy provided her by defendant); Ben Schmitt, *Brothers Convicted in Date Rape Drug Case Win Bid for New Trial*, FULTON COUNTY DAILY REP., June 25, 1999, at 1.

137. In *People v. Lusk*, 216 Cal. Rptr. 544 (1985), the defendant wrestling coach sexually assaulted two boys after he drugged them and videotaped his assaults. *See also* *United States v. Altman*, 901 F.2d 1161, 1162 (2d Cir. 1990) (defendant gave victims amphetamines, had intercourse with them, and took sexually explicit photographs); *United*

Rohypnol and the use of technology, a Texas businessman drugged three women in three states (including his college-age sister-in-law) with Rohypnol, had sexual intercourse with them, and made videotapes of the sexual assaults. He unsuccessfully attempted to repeat his crime with a fourth victim.¹³⁹

Sera's use of Rohypnol, with its powerful amnesiac effect,¹⁴⁰ meant that the women had very little memory of the sexual assaults. The Arkansas victim "testified that she did not recall any of the 100-mile trip home to Warren, and that the next time she was aware, she was waking up in bed with Sera the next morning...."¹⁴¹ The Texas victim reported "that she drank one glass of wine at the game, and started another glass, but began to feel bad. She testified that she remembered leaving the game, but that her next memory is waking up the next morning, and seeing Sera walk into her bedroom."¹⁴² The Mississippi victim, the defendant's sister-in-law, "testified that when she left the hotel with Sera to go back to her dormitory, she saw a tripod in the back seat of the car, and remembered seeing a camera or a red dot."¹⁴³ Ironically, Sera's crimes were discovered when his wife found the videotape of the assaults. Arkansas authorities charged Sera with eight criminal violations, including administering a controlled substance, sexual assault, and kidnapping for the purpose of having sexual intercourse.¹⁴⁴

Sera appealed his convictions on a number of grounds, including sufficiency of the evidence and other evidentiary issues. In discussing the sufficiency of the evidence, the court noted that expert witnesses at Sera's trial had testified to the amnesiac qualities of Rohypnol, which "prevents victims from recalling most or all events once the drug takes effect."¹⁴⁵ The effect of the drug makes prosecutions of this kind more difficult. In Sera's case, enough other evidence existed, notably the videotape. The court also upheld the trial court's admission of the prior-similar-act evidence, explaining that the evidence demonstrated his modus operandi, which included ending each taped sexual encounter with "a similar degrading sex act."¹⁴⁶ Presumably Sera is subject to prosecution in Texas and Mississippi for his other offenses. Like the professional-

States v. Fogg, No. 96 01958, 1998 WL 238588 (N.M. Ct. Crim. App. Apr. 29, 1998), *aff'd*, 52 M.J. 144 (C.A.A.F. 1999) (videotape seized depicting defendant raping teenaged, unconscious girl, and son sexually molesting two other teenagers); United States v. Natkie, ACM 31693, 1996 CCA LEXIS 286 (A.F. Ct. Crim. App. Sept. 20, 1996) (three servicemen videotaped the unconscious intoxicated victim in the nude; afterwards she was sexually assaulted by one of them); Trigg v. State, 759 So. 2d 448 (Miss. Ct. App. 2000) (husband drugged wife and made videotape of his sexual assault on her); Myers, *supra* note 114, at C7 (doctor anesthetized victims, sexually assaulted them, and took photographs).

138. 17 S.W.3d 61 (Ark. 2000).

139. *See id.* at 64-72.

140. *See The Date Rape Drug*, *supra* note 136, at 28 (One prosecutor noted that prosecutions are difficult because the drug impairs victim's ability to recall sexual assault).

141. *Sera*, 17 S.W.3d at 65.

142. *Id.* at 68.

143. *Id.* at 71.

144. *See id.* at 70.

145. *Id.* at 75.

146. *Id.* at 77.

perpetrator cases which implicate the abuse of trust, the cases concerning persons who have been drugged, sexually assaulted, and videotaped demonstrate the incursion on a different type of interest—here, the privacy interests of the victim.

*E. Cases Involving Victims Who Died*¹⁴⁷

The only thing that Hillory Janean Farias is known to have drunk that night was a couple of soda pops. Still, she came home from the dance club near her hometown of La Porte, Texas with nausea and a severe headache. Within 24 hours the 17-year-old varsity volleyball player was dead.¹⁴⁸

Samantha Reid, 15, was “scooped.” That’s what they say on the street when someone slips GHB, an odorless, colorless drug, into a woman’s drink. The drug knocks the victim out by depressing her central nervous system; often she is raped. What happened to Reid was worse. She lost consciousness after sipping a spiked Mountain Dew at a suburban Detroit party and died the next day.¹⁴⁹

Unfortunately, a growing number of cases exist in which the victim died in connection with rape by drugs or other intoxicants. I consider these cases separately because they illustrate not only the dangerousness of all sexual assaults but also the greater risk of bodily harm to a victim when enough alcohol or drugs are administered to render the victim unconscious or immobile. The deaths in these cases were attributable to one of two causes: either the perpetrator killed the victim to silence her or he accidentally overdosed her. Cases involving death come from the previous four categories. For instance, two cases involved severely drunken victims¹⁵⁰ and one concerned a drugged woman¹⁵¹ that resulted in their deaths when the assailants killed to silence them. Two professional cases¹⁵² and two cases

147. Apparently, Wisconsin is the only state that has a homicide statute crafted in light of rape drugs. First-degree reckless homicide includes when the actor causes the death of another by either the manufacture, distribution, or delivery of a controlled substance or administering or assisting in administering such substance, including specified rape drugs. See WIS. STAT. § 940.02 (2000). New Hampshire makes those who manufacture, sell, or dispense various controlled substances strictly liable for any death caused. See N.H. REV. STAT. ANN. § 318-B:26IX (2000). Its statute also provides: “Nothing in this section shall be construed to preclude or limit any prosecution for homicide. A conviction arising under this section shall not merge with a conviction of one as a drug enterprise leader or for any other offense defined in this chapter.” *Id.* § 318-B:26IX(b)(2).

148. Christine Gorman & Deborah Fowler, *Liquid X a Club Drug Called GHB May be a Fatal Aphrodisiac*, TIME, Sept. 30, 1996, at 64.

149. Cannon, *supra* note 38, at 73; see also *Four Convicted in Date-Rape Case*, AP, Mar. 14, 2000, available at 2000 WL 16859056 (discussing Reid case).

150. See *State v. Duffy*, No. CA95-03-006, 1996 Ohio App. LEXIS 1305 (Ohio Ct. App. Apr. 1, 1996); *Elliott v. State*, 858 S.W.2d 478 (Tex. Crim. App. 1993).

151. See *People v. Medina*, 116 Cal. Rptr. 133 (Ct. App. 1974).

152. See *Dubria v. Smith*, 197 F.3d 390, 394 (9th Cir. 1999), *aff'd*, 224 F.3d 995 (9th Cir. 2000); *Regina v. Cobb*, [2002] 1 Cr. App. R. (S.) 19 (Crim. App. 2001).

involving non-rape drugs¹⁵³ led to the victims' deaths when the defendants accidentally overdosed their victims. The cases of Farias and Reid, the two persons for whom the federal legislation on rape drugs was named, died in rape-drug cases.¹⁵⁴

A tragic example of a case in this category is *Dubria v. Smith*, a federal habeas opinion.¹⁵⁵ Dubria, a resident physician, persuaded Klapper, who worked in a medical library, to accompany him on a trip to California. Klapper told Dubria that she had a boyfriend and was not interested in a sexual relationship with him; she also told him "that if he expected to have a physical relationship with her while on the trip, she would have to cancel her plans to go."¹⁵⁶ Police later discovered Klapper, after a 911 call by Dubria, dead in a hotel room.¹⁵⁷ An autopsy revealed that she had been sexually assaulted and had died from a lethal reaction to chloroform.¹⁵⁸ Dubria was convicted in California of first-degree murder, rape by drugs, and administering a drug to commit a felony; he was sentenced to life without the possibility of parole. He filed a federal habeas petition claiming various errors, including insufficient evidence (i.e., an absence of evidence that he had administered the chloroform or raped Klapper), the admission of other evidence, and ineffective assistance of counsel.¹⁵⁹ The Ninth Circuit, en banc, affirmed the denial of the petition because it found no merit in Dubria's grounds for appeal.¹⁶⁰ This final category of cases, those involving victim death, emphasizes the dangers inherent in what might otherwise be considered a nonviolent method of sexual exploitation.

F. Conclusion

The foregoing review of cases involving the sexual assault of victims who have been intoxicated by alcohol or drugs, either by their own efforts or at the hands of defendants, displays some common and disturbing patterns. Many of the crimes, especially those involving alcohol, appeared to be opportunistic. Perpetrators took advantage of the weakened or unconscious condition of the victims to sexually exploit them; sometimes more than one defendant participated in the assault. Cases with street, prescription, or rape drugs, that more often involved administration, revealed defendants who had planned their criminal activity and had executed their premeditated sexual assaults on more than one

153. See *People v. Mack*, 15 Cal. Rptr. 2d 193, 196 (Ct. App. 1992); *Bechtelheimer v. State*, 54 Ind. 128, 129-30 (1876).

154. See sources cited in notes 148-49.

155. See *Dubria v. Smith*, 197 F.3d 390 (9th Cir. 1999), *aff'd*, 224 F.3d 995 (9th Cir. 2000).

156. *Id.* at 394-95.

157. See *id.* at 395.

158. See *id.* at 396.

159. See *id.* at 397-98.

160. See *Dubria*, 224 F.3d at 1004. For two fascinating articles about the imposition of the death penalty in cases of rape and murder, see Phyllis L. Crocker, *Is the Death Penalty Good for Women?*, 4 BUFF. CRIM. L. REV. 917 (2001), and Phyllis L. Crocker, *Rape-Murder and the Death Penalty*, 26 OHIO N.U. L. REV. 689 (2000).

victim. These cases also illustrate some of the problems encountered in prosecuting cases involving drugged or intoxicated persons. Now, I turn to an examination of how criminal statutes in American jurisdictions treat these offenses.

III. STATUTORY OVERVIEW

“Mentally incapacitated” means a victim who, due to the influence of a drug, narcotic or intoxicating substance, or due to any act committed upon the victim without the victim’s consent or awareness, is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse, a sexual act, or sexual contact.¹⁶¹

A person commits [rape] when he or she engages in sexual intercourse with a complainant...Where the person has substantially impaired the complainant’s power to appraise or control his or her conduct by administering or employing, without knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance.¹⁶²

Whoever applies, administers to or causes to be taken any drug, matter or thing with intent to stupefy or overpower such person so as to thereby enable any person to have sexual intercourse or unnatural sexual intercourse with such person shall be punished by imprisonment in the state prison for life or for any term of years not less than ten years.¹⁶³

This Part reviews the statutes in fifty-six jurisdictions—the fifty states, the District of Columbia, three territories (Guam, Puerto Rico, and the Virgin Islands), the federal system, and the Uniform Code of Military Justice—with respect to the criminalization of sexual intercourse or contact accomplished by means of drugs or other intoxicants. No dearth of enactments exists. Almost all jurisdictions have an explicit provision outlawing the use of intoxicants to accomplish sexual activity.¹⁶⁴ In addition, many states have provisions dealing

161. MD. ANN. CODE OF 1957, CRIMES & PUN. § 461(c) (2001).

162. 18 PA. CONS. STAT. § 3121(A)(4) (2000).

163. MASS. GEN. LAWS ch. 272, § 3 (2001).

164. See 18 U.S.C. § 2241(b)(2) (2001); ALA. CODE §§ 13A-6-60(6), -6-61(a)(2), -6-63(a)(2), -6-66(a)(2), -6-70(c)(3) (2001); ARIZ. REV. STAT. §§ 13-1401(5)(b), -1404(A), -1406(A) (2000); ARK. CODE ANN. §§ 5-14-101(4), -102(d), -103(a)(1)(B), -125(a)(2) (Michie 2001); CAL. PENAL CODE §§ 261(a)(3), 262(a)(2), 286(i), 288a(i), 289(e), 243.4(b), (f)(4) (West 2001); COLO. REV. STAT. §§ 18-3-402(4)(d), -404(1)(d) (2000); CONN. GEN. STAT. §§ 53a-65(5), -67(a), -70(a)(4), -73a(a)(1)(B) (2001); DEL. CODE ANN. tit. 11, §§ 761(h)(5), 767, 770(a)(3)a., 772(a)(2)b.2., 773(a)(2)b. (2000); D.C. CODE ANN. §§ 22-3002(a)(4), -3004(4) (2001); FLA. STAT. ch. 794.011(1)(c), (4)(d) (2001); 9 GUAM CODE ANN. §§ 25.10(a)(5), .15(a)(4)(i), (a)(7), .20(a)(4)(i), (a)(7), .25(a)(3), .30(a)(2) (2000); HAW. REV. STAT. §§ 707-700, -731(1)(b), -732(1)(d) (2001); IDAHO CODE §§ 18-6101(4), -6108(4) (Michie 2000); 720 ILL. COMP. STAT. 5/12-14(a)(7), -16(a)(7) (2001); IND. CODE §§ 35-42-4-1(b)(4), -2(b)(4), -3(a)(4), -5(a)(1)(B), -8(b)(3), -9(a)(2), (b)(2) (2001); IOWA CODE §§ 709.1(1)-(2), .1A(1), .4(2)(a), .4(3)-(4) (2001); KAN. STAT. ANN. §§ 21-

with sexual conduct with physically helpless persons without mentioning intoxicating agents.¹⁶⁵ Although some overlap exists, American jurisdictions fall into four general categories depending on where in the sexual offense provisions the language regarding drugs is located. The first group consists of jurisdictions that integrate language regarding intoxicants into definitions of mental incapacitation and then use mental-incapacitation phraseology in the substantive sexual offense provisions. The second group of states includes intoxicant language in the definitions of "without consent;" the third group defines force to include intoxicants. The fourth category incorporates intoxicant language directly into specific sexual offense provisions, bypassing the definitional approaches of the three other groups. A fifth category contains jurisdictions with case precedent rather than statutory law. Jurisdictions vary not only in the location of their intoxication language but also in terms of three critical issues: (1) the requirement that the defendant administer the intoxicant, (2) the defendant's *mens rea* regarding the victim's incapacity, and (3) the relationship between the victim's intoxication and consent.

As many of the cases illustrate, a consideration of two additional types of criminal statutes is necessary in order to gain a complete understanding of the prosecution of drug-related sexual offenses. The first category encompasses provisions that outlaw the administration of drugs as a crime, separate and apart from the sexual offense, usually classified as a form of assault or battery.

3502(a)(1)(C), -3506(a)(3)(C), -3518(a)(3) (2000); KY. REV. STAT. ANN. §§ 510.010(5), .020(3)(c), .030, .060(1)(a), .090(1)(a), .120(1)(a) (Michie 2001); LA. REV. STAT. ANN. §§ 14:42.1(A)(2), :43(A)(1), :89.1(A)(5), :93.5(A)(2) (West 2001); ME. REV. STAT. ANN. tit. 17-A, §§ 253(2)(A), (3) (West 2000); MD. ANN. CODE OF 1957, CRIMES & PUN. §§ 461(c), 463(a)(2), 464A(a)(2), 464B(a)(2) (2001); MICH. COMP. LAWS §§ 750.520a(g), b(1)(d)(i), c(1)(d)(i), (g), d(1)(c), e(1)(c) (2000); MINN. STAT. §§ 609.341(7), .342(1)(e)(ii), .343(1)(e)(ii), .344(1)(d), .345(1)(d) (2000); MISS. CODE ANN. §§ 97-3-65(3)(a), -3-95(1)(b), -3-97(c), -5-23(1) (2001); MO. REV. STAT. §§ 566.020(1), .030(1), .060(1), .061(5)(a)-(b), (13) (2000); MONT. CODE ANN. §§ 45-2-101(40), -2-211(2)(b), -5-501(1)(b)(i), -5-502(1), -5-503(1) (2000); N.H. REV. STAT. ANN. §§ 632-A:2.I(f), 626.6(III) (2000); N.J. STAT. ANN. §§ 2C:14-1(i), -2(a)(7) (West 2001); N.Y. PENAL LAW §§ 130.00(6), .05(2)(b), (3)(c), .10, .30(2), .45(2) (Consol. 2001); N.D. CENT. CODE §§ 12.1-20-03(1)(b), -07(1)(c) (2000); OHIO REV. CODE ANN. §§ 2907.02(A)(1)(a), .05(A)(2)-(3) (Anderson 2001); OKLA. STAT. tit. 21, § 1111(A)(4) (2000); OR. REV. STAT. §§ 163.305(4), .315(1)(c), .325(3), .375(1)(d), .405(1)(d), .411(1)(c), .427(1)(a)(C) (1999); 18 PA. CONS. STAT. §§ 3121(A)(4), 3123(A)(4), 3125(5), 3126(5) (2000); 33 P.R. LAWS ANN. §§ 4061(c), 4065(b), 4067(b) (1998); R.I. GEN. LAWS §§ 11-37-1(5), -2(1), -4(1) (2001); S.C. CODE ANN. §§ 16-3-651(f), -652(1)(c), -654(1)(b) (Law. Co-op. 2000); S.D. CODIFIED LAWS § 22-22-1(4) (Michie 2001); TENN. CODE ANN. §§ 39-13-501(4), -502(a)(3)(B), -503(a)(3), -504(a)(3)(B), -505(a)(3), -522(c) (2001); TEX. PENAL CODE ANN. §§ 22.011(b)(6), .021(a)(2)(A)(vi), (c) (Vernon 2000); UTAH CODE ANN. §§ 76-5-402(1), -402.2, -403(2), -404(1), -406(8) (2000); VT. STAT. ANN. tit. 13, § 3252(a)(2) (2001); 14 V.I. CODE ANN. §§ 1701(4), 1708(5) (2001); WASH. REV. CODE §§ 9A.44.010(4), .050(1)(b), 100(1)(b) (2001); W. VA. CODE §§ 61-8B-1(4), -2(c)(3), -5(a)(1), -8(a), -12(a) (2001); WIS. STAT. § 940.225(2)(cm), (5)(ai) (2000); WYO. STAT. ANN. §§ 6-2-303(a)(iii), -304(a)(iii) (Michie 2000).

165. See *infra* notes 173-77, 204, 213-14, 225 and accompanying text.

Approximately one-half of American jurisdictions have various types of drugging statutes on their books; some jurisdictions also take drugging into account in terms of grading the severity of the sexual offense or in determining the length of sentence an offender should receive. These provisions fall into five groups: (1) drugging to accomplish a sexual offense, (2) drugging to commit any crime, (3) non-therapeutic drugging, (4) poisoning, and (5) grading and sentencing provisions based on drugging. The second category of related statutes consists of controlled substances provisions outlawing the possession and distribution of rape drugs.

A. Sexual Offense Provisions: Statutes Outlawing Rape by Drugs

1. Mental-Incapacitation Provisions

In one of the most common approaches to the problem of drug-induced sexual conduct, twenty-three jurisdictions organize their sexual offenses by first providing a separate definitional section and then following it with the substantive provisions. The important characteristic of this general approach, for present purposes, is that twenty of these jurisdictions define the term “mentally incapacitated” to include the situation in which the victim is drugged. These definitions explicitly mention drugs, narcotics, intoxicants, controlled substances, anesthetics, or, more simply, substances.¹⁶⁶ Two additional states, North Carolina

166. See ALA. CODE § 13A-6-60(6) (2001) (narcotic or intoxicating substance); ARK. CODE ANN. § 5-14-101(4) (Michie 2001) (controlled or intoxicating substance); CONN. GEN. STAT. § 53a-65(5) (2001) (drug or intoxicating substance); FLA. STAT. ch. 794.011(1)(c) (2000) (narcotic, anesthetic, or intoxicating substance); 9 GUAM CODE ANN. § 25.10(a)(5) (2000) (narcotic, anesthetic, or other substance); HAW. REV. STAT. § 707-700 (2000) (substance); IOWA CODE § 709.1A(1) (2001) (narcotic, anesthetic, or intoxicating substance); KY. REV. STAT. ANN. § 510.010(5) (Michie 2001) (controlled or intoxicating substance); MD. ANN. CODE OF 1957, CRIMES & PUN. § 461 (c) (2001) (drug, narcotic, or intoxicating substance); MICH. COMP. LAWS § 750.520a(g) (2000) (narcotic, anesthetic, or other substance); MINN. STAT. § 609.341(7) (2000) (narcotic, anesthetic, or any substance); MISS. CODE ANN. § 97-3-97(c) (2001) (drug, narcotic, anesthetic, or other substance); N.J. STAT. ANN. § 2C:14-1(i) (West 2001) (narcotic, anesthetic, intoxicant, or other substance); N.Y. PENAL LAW § 130.00(6) (Consol. 2001) (narcotic or intoxicating substance); OR. REV. STAT. § 163.305(4) (1999) (controlled or other intoxicating substance); R.I. GEN. LAWS § 11-37-1(5) (2001) (narcotic, anesthetic, or other substance); S.C. CODE ANN. § 16-3-651(f) (Law. Co-op. 2000) (substance); TENN. CODE ANN. § 39-13-501(4) (2001) (narcotic, anesthetic, or other substance); WASH. REV. CODE § 9A.44.010(4) (2001) (substance); W. VA. CODE § 61-8B-1(4) (2001) (controlled or intoxicating substance).

One state in this category explicitly mentions a common rape drug. Iowa’s third-degree sexual abuse statute makes it a crime to perform a sex act:

while the other person is under the influence of a controlled substance, which may include but is not limited to flunitrazepam, and all of the following are true: (a) The controlled substance, which may include but is not limited to flunitrazepam, prevents the other person from consenting to the act. (b) The person performing the act knows or reasonably should have known that the other person was under the influence of the controlled substance, which may include but is not limited to flunitrazepam.

and Virginia, define mental incapacitation without referring to intoxicants but arguably include drugged victims;¹⁶⁷ Alaska defines incapacitated to include both mental and physical impairments, also without reference to drugs.¹⁶⁸

A typical definition of mentally incapacitated, this one from New Jersey, reads:

“Mentally incapacitated” means that condition in which a person is rendered temporarily incapable of understanding or controlling his conduct due to the influence of a narcotic, anesthetic, intoxicant, or other substance administered to that person without his prior knowledge or consent, or due to any other act committed upon that person which rendered that person incapable of appraising or controlling his conduct.¹⁶⁹

Most states use similar language in describing mental incapacitation—the victim is rendered incapable of appraising or controlling her conduct. A few emphasize that the person is prevented from understanding the nature or consequence of the sexual act;¹⁷⁰ some add the requirement that the victim is incapable of resisting the act.¹⁷¹ Minnesota takes a different approach in stressing the effect of drugs on capacity to consent by defining “mentally incapacitated” as someone “under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person’s agreement, [who] lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.”¹⁷²

The twenty-three jurisdictions following this general approach also define “physically helpless” and “mentally defective.” Twenty-two define “physically helpless;”¹⁷³ the remaining state, Alaska, combines both mental and physical

IOWA CODE § 709.4(3) (2001).

167. See N.C. GEN. STAT. § 14-27.1(2) (2000) (“due to any act committed upon the victim is rendered substantially incapable of appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act”); VA. CODE ANN. § 18.2-67.10(3) (Michie 2000) (condition of victim that prevents her from understanding nature or consequences of sexual act). Virginia’s definition more closely resembles the definition of mentally defective persons used in other states. See *infra* notes 178–80.

168. See ALASKA STAT. § 11.41.470(2) (Michie 2001) (victim incapable of appraising her conduct or physically unable to express unwillingness to act).

169. N.J. STAT. ANN. § 2C:14-1(i) (West 2001).

170. See VA. CODE ANN. § 18.2-67.10(3) (Michie 2000); WASH. REV. CODE § 9A.44.010(4) (2001).

171. See MD. ANN. CODE OF 1957, CRIMES & PUN. § 461 (c) (2001); MISS. CODE ANN. § 97-3-97(c) (2001); N.C. GEN. STAT. § 14-27.1(2) (2000).

172. MINN. STAT. § 609.341(7) (2000).

173. ALA. CODE § 13A-6-60(7) (2001); ARK. CODE ANN. § 5-14-101(5) (Michie 2001); CONN. GEN. STAT. § 53a-65(6) (2001); FLA. STAT. ch. 794.011(1)(e) (2000); 9 GUAM CODE ANN. § 25.10(a)(6) (2000); HAW. REV. STAT. § 707-700 (2000); IOWA CODE § 709.1A(2) (2001); KY. REV. STAT. ANN. § 510.010(6) (Michie 2001); MD. ANN. CODE OF 1957, CRIMES & PUN. § 461(d) (2001); MICH. COMP. LAWS § 750.520a(i) (2000); MINN. STAT. § 609.341(9) (2000); MISS. CODE ANN. § 97-3-97(d) (2001); N.J. STAT. ANN. § 2C:14-1(g) (West 2001); N.Y. PENAL LAW § 130.00(7) (Consol. 2001); N.C. GEN. STAT. § 14-27.1(3) (2000); OR. REV. STAT. § 163.305(5) (1999); R.I. GEN. LAWS § 11-37-1(6)

impairments in one provision.¹⁷⁴ A typical definition of “physically helpless,” this one from West Virginia, describes the condition as one in which a person is “unconscious or for any reason is physically unable to communicate unwillingness to act.”¹⁷⁵ All states (except Alaska) include the condition of “unconsciousness”; almost all add physically unable to communicate an unwillingness to act.¹⁷⁶ Three states incorporate consent language in their definitions; for instance, Minnesota’s statute defines a physically helpless person as someone unable to withhold or withdraw consent, or to communicate nonconsent.¹⁷⁷

Twenty jurisdictions define mentally defective, mentally retarded, mentally disabled, mentally incapable, or mentally impaired individuals;¹⁷⁸ three states have only one mental-impairment provision.¹⁷⁹ Alabama provides a typical definition of “mentally defective” as a person who “suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct.”¹⁸⁰

(2001); S.C. CODE ANN. § 16-3-651(g) (Law. Co-op. 2000); TENN. CODE ANN. § 39-13-501(5) (2001); VA. CODE ANN. § 18.2-67.10(4) (Michie 2000); WASH. REV. CODE § 9A.44.010(5) (2001); W. VA. CODE § 61-8B-1(5) (2001).

Two states provide a separate definition of physically incapacitated. *See* FLA. STAT. ch. 794.011(1)(j) (2000) (“bodily impaired or handicapped and substantially limited in ability to resist or flee”); IOWA CODE § 709.1A(3) (2001) (same).

174. *See* ALASKA STAT. § 11.41.470(2) (Michie 2001). Alaska combines mental and physical incapacitation in its definition of “incapacitated” and separately defines “mentally incapable.” Alaska defines “without consent” as a person who “is incapacitated as a result of an act of the defendant” and defines “incapacitated” as “temporarily incapable of appraising the nature of one’s own conduct or physically unable to express unwillingness to act.” ALASKA STAT. §§ 11.41.470(2), (4), (8)(b) (Michie 2001) (definitions of incapacitated, mentally incapable, and without consent, respectively).

175. W. VA. CODE § 61-8B-1(5) (2001).

176. Several states add language to the basic definition. *See, e.g.*, N.J. STAT. ANN. § 2C:14-1(i) (West 2001) (physically unable to flee); N.C. GEN. STAT. § 14-27.1(2) (2000) (physically unable to resist); *see also* FLA. STAT. ch. 794.011(1)(e), (1)(j) (2000) (defining both physically helpless and physically incapacitated, the latter including the inability to resist or flee); IOWA CODE § 709.1A (2001) (same).

177. *See* MINN. STAT. § 609.341(7) (2000); *see also* ARK. CODE ANN. § 5-14-101(5) (Michie 2001) (“physically unable to communicate lack of consent”); MD. ANN. CODE OF 1957, CRIMES & PUN. § 461(c) (2001) (does not consent and is physically unable to resist).

178. *See* ALA. CODE § 13A-6-60(5) (2001); ALASKA STAT. §§ 11.41.470(4) (Michie 2001); ARK. CODE ANN. § 5-14-101(3) (Michie 2001); CONN. GEN. STAT. § 53a-65(4) (2001); FLA. STAT. ch. 794.011(1)(b) (2000); 9 GUAM CODE ANN. § 25.10(a)(4) (2000); HAW. REV. STAT. § 707-700 (2000); KY. REV. STAT. ANN. § 510.010(4) (Michie 2001); MD. ANN. CODE OF 1957, CRIMES & PUN. § 461(c) (2001); MICH. COMP. LAWS § 750.520a(e)-(f) (2000); MINN. STAT. § 609.341(6) (2000); MISS. CODE ANN. § 97-3-97(b) (2001); N.J. STAT. ANN. § 2C:14-1(h) (West 2001); N.Y. PENAL LAW § 130.00(5) (Consol. 2001); N.C. GEN. STAT. § 14-27.1(2) (2000); OR. REV. STAT. § 163.305(3) (1999); R.I. GEN. LAWS § 11-37-1(4) (2001); S.C. CODE ANN. § 16-3-651(e) (Law. Co-op. 2000); TENN. CODE ANN. § 39-13-501(3) (2001); W. VA. CODE § 61-8B-1(4) (2001); *see also* IOWA CODE § 709.1(2) (2001) (person with mental defect).

179. *See* IOWA CODE § 709.1(2) (2001); VA. CODE ANN. § 18.2-67.10(3) (Michie 2000); WASH. REV. CODE § 9A.44.010(4) (2001).

180. ALA. CODE § 13A-6-60(5) (2001).

Notably, the language in many of the mentally defective definitions is very similar to that in the mental incapacitation provisions, although the former provisions tend to describe more permanent mental impairments, insanity or mental retardation, while the latter refer to more transient conditions such as being intoxicated.

Most of the jurisdictions combine all three conditions in the operative language of their sexual offense provisions. Thus, for instance, New Jersey defines sexual assault to include the circumstance when “[t]he victim is one whom the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated.”¹⁸¹ States tend to treat the three categories equally, but three punish the sexual exploitation of physically helpless individuals more severely than the same behavior with mentally incapacitated or mentally disabled people,¹⁸² and one punishes sexual assault of mentally defective persons less severely.¹⁸³

a. Administration of the Intoxicant

Although the mental-incapacitation provisions appear to equate intoxicated persons with mentally ill or physically helpless victims—two categories of persons deemed incapable of consent and for whom the traditional force requirement is eliminated—sixteen of these jurisdictions also require the defendant to administer the intoxicant before the victim is deemed mentally incapacitated.¹⁸⁴ A typical provision requires the intoxicant be “administered to that person without his prior knowledge or consent.”¹⁸⁵ The remaining six mental-incapacitation states focus exclusively on the victim’s condition without requiring

181. N.J. STAT. ANN. § 2C:14-2(a)(7) (West 2001).

182. See KY. REV. STAT. ANN. §§ 510.040(1)(b)(1), .060(1)(a) (Michie 2001) (first-degree rape for physically helpless victims, third-degree rape for mentally incapacitated victims and similar schemes for sodomy and sexual abuse under KY. REV. STAT. ANN. §§ 510.070, .090, .110, .120 (Michie 2001)); N.Y. PENAL LAW §§ 130.35(2), .30(2) (Consol. 2001) (first-degree rape when victim physically helpless and second-degree rape when victim mentally incapacitated; similar scheme in other sex offenses); W. VA. CODE §§ 61-8B-4(a)(2), -5(a)(1) (2001) (second-degree sexual assault for physically helpless victims, third-degree sexual assault for mentally incapacitated victims and same general scheme for sexual abuse).

183. See ALA. CODE § 13A-6-62(a)(2), -6-64(a)(2) (2001) (first-degree rape for physically helpless and mentally incapacitated victims and second-degree rape for mentally defective victims; same for sodomy).

184. See ALA. CODE § 13A-6-60(6) (2001); CONN. GEN. STAT. § 53a-65(5) (2001); FLA. STAT. ch. 794.011(1)(c) (2000); 9 GUAM CODE ANN. § 25.10(a)(5) (2000); HAW. REV. STAT. § 707-700 (2000); KY. REV. STAT. ANN. § 510.010(5) (Michie 2001); MICH. COMP. LAWS § 750.520a(g) (2000); MINN. STAT. § 609.341(7) (2000); MISS. CODE ANN. § 97-3-97(c) (2001); N.J. STAT. ANN. § 2C:14.1(i) (West 2001); N.Y. PENAL LAW § 130.00(6) (Consol. 2001); OR. REV. STAT. § 163.305(4) (1999); R.I. GEN. LAWS § 11-37-1(5) (2001); TENN. CODE ANN. § 39-13-501(4) (2001); W. VA. CODE § 61-8B-1(4) (2001); see also N.C. GEN. STAT. § 14-27.1(2) (2000) (“due to any act committed upon the victim”); S.C. CODE ANN. § 16-3-652(1)(c) (Law. Co-op. 2000) (actor causes victim to become mentally incapacitated in one criminal sexual conduct provision).

185. N.J. STAT. ANN. § 2C:14-1(i) (West 2001).

that the defendant have administered the intoxicant,¹⁸⁶ Arkansas appears to provide for either administration or victim unawareness.¹⁸⁷ For instance, South Carolina defines mentally incapacitated as “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.”¹⁸⁸ Washington’s statute is very similar except that it describes the impairment as being unable to understand the nature or consequences of the act of sexual intercourse.¹⁸⁹

b. The Defendant’s *Mens Rea*

The twenty-three jurisdictions in the mental-incapacitation category differ on the defendant’s *mens rea* regarding the victim’s mental incapacitation. Most require that the defendant know, have reason to know, or should have known of the victim’s incapacity¹⁹⁰ or that he knowingly engaged in sexual activity with an incapacitated person.¹⁹¹ Six states remain silent on *mens rea* in the substantive sexual offense provisions, but provide an affirmative defense with respect to knowledge of the victim’s incapacitated condition.¹⁹² For instance, Arkansas

186. See ALASKA STAT. §§ 11.41.470(2) (Michie 2001); IOWA CODE § 709.1A(1) (2001); MD. ANN. CODE OF 1957, CRIMES & PUN. § 461 (c) (2001); S.C. CODE ANN. § 16-3-651(f) (Law. Co-op. 2000); WASH. REV. CODE § 9A.44.010(4) (2001); VA. CODE ANN. § 18.2-67.10(3) (Michie 2000).

187. See ARK. CODE ANN. § 5-14-101(4) (Michie 2001).

188. S.C. CODE ANN. § 16-3-651(f) (Law. Co-op. 2000).

189. See WASH. REV. CODE § 9A.44.010(4) (2001).

190. See ALASKA STAT. §§ 11.41.420(a)(3)(B), .425(a)(1)(B) (Michie 2001) (knows); 9 GUAM CODE ANN. §§ 25.15(a)(4)(i), (a)(7), .20(a)(4)(i), (a)(7), .25(a)(3), .30(a)(2) (2000) (knows or has reason to know); IOWA CODE § 709.4(3)(b) (2001) (knows or reasonably should have known); MD. ANN. CODE OF 1957, CRIMES & PUN. §§ 463(a)(2), 464A(a)(2), 464B(a)(2) (2001) (knows or should reasonably know); MICH. COMP. LAWS §§ 750.520b(1)(d)(i), c(1)(d)(i), d(c), e(c) (2000) (knows or has reason to know); MINN. STAT. §§ 609.342(1)(e)(ii), .343(1)(e)(ii), .344(1)(d), .345(1)(d) (2000) (knows or has reason to know); N.J. STAT. ANN. § 2C:14-2(a)(7) (West 2001) (knew or should have known); R.I. GEN. LAWS §§ 11-37-2(1), -4(1) (2001) (knows or has reason to know); S.C. CODE ANN. § 16-3-654(1)(b) (Law. Co-op. 2000) (knows or has reason to know); TENN. CODE ANN. §§ 39-13-502(a)(3)(B), -503(a)(3), -504(a)(3)(B), -505(a)(3) (2001) (knows or has reason to know).

191. See HAW. REV. STAT. §§ 707-731(1)(b), -732(1)(c) (2000) (knowingly subjects); WASH. REV. CODE §§ 9A.44.050(1)(b), .100(1)(b) (2001) (knowingly causes); VA. CODE ANN. §§ 18.2-61(A), -67.3(A)(2), -67.1(A)(2), -67.2(A)(2), -67.4(A)(i) (Michie 2000) (through use of mental incapacity).

192. See ARK. CODE ANN. § 5-14-102(d) (Michie 2001) (affirmative defense if reasonably believed victim capable of consent); CONN. GEN. STAT. § 53a-67 (2001) (affirmative defense if did not know victim mentally incapacitated); KY. REV. STAT. ANN. § 510.030 (Michie 2001) (defense if did not know of facts/conditions responsible for incapacity to consent); N.Y. PENAL LAW § 130.10 (Consol. 2001) (affirmative defense if did not know facts/conditions responsible for incapacity to consent); OR. REV. STAT. § 163.325(3) (1999) (affirmative defense if did not know facts/conditions responsible for incapacity to consent); W. VA. CODE § 61-8B-12 (2001) (affirmative defense if did not know facts/conditions for incapacity to consent, unless reckless in failing to know such facts/conditions).

provides a defense if the actor reasonably believed the victim was capable of consent.¹⁹³ West Virginia's statute offers an affirmative defense if the defendant did not know of the facts or conditions responsible for the victim's incapacity unless the actor is reckless in failing to know such facts or conditions.¹⁹⁴

c. Consent

With respect to the relationship between victim incapacity and consent, eight jurisdictions in this category explicitly provide that mentally incapacitated, physically helpless, or mentally disabled persons are incapable of consent.¹⁹⁵ Minnesota's definitions of mentally impaired, mentally incapacitated, and physically helpless draw a direct connection between these conditions and the inability of the victim to give reasoned consent, to withhold or withdraw consent, or to communicate nonconsent.¹⁹⁶ Two other states have special consent approaches.¹⁹⁷

2. Lack-of-Consent Provisions

Five states approach the problem of rape by drugs by including intoxication in the consent provisions of their sexual assault statutes and then incorporating the term "without consent" or lack of consent language into their substantive sexual offenses.¹⁹⁸ All five states explicitly mention drugs or

193. See ARK. CODE ANN. § 5-14-102(d) (Michie 2001).

194. See W. VA. CODE § 61-8B-12(a) (2001).

195. See ALA. CODE §§ 13A-6-61, -63, -70 (2001); ARK. CODE ANN. §§ 5-14-103(a)(1)(B), -125(a)(2) (Michie 2001); CONN. GEN. STAT. §§ 53a-70, -73a (2001); KY. REV. STAT. ANN. §§ 510.020(3), .060, .090, .120 (Michie 2001); MD. ANN. CODE OF 1957, CRIMES & PUN. § 461(c) (2001); N.Y. PENAL LAW § 130.05(3), .30, .45 (Consol. 2001); OR. REV. STAT. §§ 163.315, .375, .405, .411, .427 (1999); WASH. REV. CODE §§ 9A.44.050, .44.100 (2001); W. VA. CODE § 61-8B-2 (2001).

196. See MINN. STAT. § 609.341(6)-(9) (2000).

197. See ALASKA STAT. § 11.41.470(8)(B) (Michie 2001) (defining "without consent" to include person "incapacitated as a result of an act of the defendant"); IOWA CODE § 709.1(1) (2001) (providing that "if the [sex] 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").

198. See ARIZ. REV. STAT. §§ 13-1401(5) (definition of without consent), -1404(A) (sexual abuse); -1406(A) (sexual assault) (2000); DEL. CODE ANN. tit. 11, § 761(h)(2), (3), (5) (definition of without consent includes physically helpless, mentally defective, and mentally incapacitated), 767, 770(a)(3)a., 772(a)(2)b.2., 773(a)(2)b. (2000); MONT. CODE ANN. § 45-2-101(39), (40), (57) (definitions of mentally defective, mentally incapacitated, and physically helpless, respectively), -5-501 (definition of without consent), -5-502(1), -5-503(1) (2001); TEX. PENAL CODE ANN. § 22.011(b)(3)-(6) (Vernon 2000) (without consent includes physically helpless, mental defective, unaware, and mentally incapacitated); UTAH CODE ANN. §§ 76-5-406(5), (6), (8) (definition of without consent to include physical helplessness, mental defects, and mental incapacitation), -402(1), -402.2, -403(2), -404(1) (2000).

intoxicants in their lack-of-consent definitions.¹⁹⁹ For instance, Arizona defines “without consent” to include when “[t]he victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any similar impairment of cognition....”²⁰⁰ Delaware defines “without consent” to include when “the defendant had substantially impaired the victim’s power to appraise or control the victim’s 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.”²⁰¹ Utah’s definition is: “the actor intentionally impaired the power of the victim to appraise or control his or her conduct by administering any substance without the victim’s knowledge....”²⁰² Texas’s definition, which is very similar to Utah’s, appears in its sexual assault statute and is then incorporated into its aggravated sexual assault statute.²⁰³

This approach is essentially a variant of the mental-incapacitation provisions because the definitions of “without consent” mirror the language of the definitions of mentally incapacitated. Moreover, all five states include the three categories of impairment—mental incapacitation, physical helplessness, and mental disability—in their definitions of without consent.²⁰⁴ The major difference is that the substantive sexual offense provisions employ consent rather than mental-incapacitation language. The similarity of approach is reinforced by the fact that many of the mental-incapacitation provisions also emphasize consent.²⁰⁵

Three states in the lack-of-consent category require the defendant to administer the intoxicant before criminal liability attaches.²⁰⁶ The other two focus only on the victim’s incapacity to consent or to appraise her conduct.²⁰⁷ On the question of *mens rea*, one state, Arizona, provides for criminal punishment of

199. See ARIZ. REV. STAT. § 13-1401(5)(b) (2000) (drugs or alcohol); DEL. CODE ANN. tit. 11, § 761(h)(5) (2000) (drugs, intoxicants or other means); MONT. CODE ANN. § 45-2-101(40) (2001) (intoxicating substance); TEX. PENAL CODE ANN. § 22.011(b)(6) (Vernon 2000) (substance); UTAH CODE ANN. § 76-5-406(8) (2000) (substance).

200. ARIZ. REV. STAT. § 13-1401(5) (2000).

201. DEL. CODE ANN. tit. 11, § 761(h)(5) (2000) (definition of without consent).

202. UTAH CODE ANN. §§ 76-5-406(8) (definition of without consent), -402(1), -402.2, -403(2), -404(1) (2000).

203. See TEX. PENAL CODE ANN. §§ 22.011(b), .021(c) (Vernon 2000).

204. See ARIZ. REV. STAT. § 13-1401(5) (2000) (without consent definition combining all three conditions); DEL. CODE ANN. tit. 11, § 761(h)(2), (3), (5) (2000) (without consent definition separately listing three conditions); MONT. CODE ANN. §§ 45-2-101(39), (40), (57), -5-501 (2000) (without consent definition listing three conditions); TEX. PENAL CODE ANN. § 22.011(b)(3)–(6) (Vernon 2000) (defining without consent for one type of sexual assault as when a victim is physically helpless, mentally defective, unaware, and mentally incapacitated); UTAH CODE ANN. § 76-5-406(5), (6), (8) (2000) (listing three conditions among others as a circumstance of without consent).

205. See *supra* notes 196–97 and accompanying text.

206. See DEL. CODE ANN. tit. 11, § 761(h)(5) (2000) (administers or employs); TEX. PENAL CODE ANN. §§ 22.011(b)(6), .021(a)(2)(A)(vi) (Vernon 2000) (administers or provides); UTAH CODE ANN. § 76-5-406(8) (2000) (administers).

207. See ARIZ. REV. STAT. § 13-1401(5) (2000) (incapable of consent); MONT. CODE ANN. § 45-2-101(40) (2001) (incapable of appreciating or controlling conduct).

sexual assault if the drugged condition of the victim was known or should have been known by the defendant.²⁰⁸ Montana outlaws a defendant knowingly engaging in sexual intercourse or contact without consent.²⁰⁹ Texas and Utah require that the actor intentionally impair the victim,²¹⁰ implicitly requiring knowledge that the victim is impaired.²¹¹

3. Force Provisions

Two states, Missouri and New Mexico, arguably include the administration of drugs in their definitions of force. Missouri outlaws rape and sodomy accomplished by forcible compulsion, which "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."²¹² New Mexico defines "force or coercion," *inter alia*, as "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..."²¹³ Although New Mexico's provision fails to mention intoxicants, the language suggests that the statute would cover drugged victims who were physically helpless²¹⁴ and those with a drug-induced mental condition who did not understand the nature of their conduct. No other jurisdictions define force as including mental incapacitation, physical helplessness, or mental defect, but some states appear to equate the use of force with the administration of drugs, thereby implicitly adopting the same rationale.²¹⁵ Notably, the three jurisdictions

208. See ARIZ. REV. STAT. § 13-1401(5)(b) (2000).

209. See MONT. CODE ANN. §§ 45-5-502(1), -503(1) (2000).

210. See TEX. PENAL CODE ANN. § 22.011(b)(6) (Vernon 2000) (intentionally impaired); UTAH CODE ANN. § 76-5-406(8) (2000) (intentionally impaired).

211. See *also* DEL. CODE ANN. tit. 11, § 761(h)(5) (2000) (requiring that defendant impair victim).

212. MO. REV. STAT. §§ 566.030(1), .060(1) (2000).

213. N.M. STAT. ANN. § 30-9-10(A)(4) (Michie 2000). This definition resembles the physical helplessness and mental defect definitions used in the mental-incapacitation states. It is possible that drugging is not included in New Mexico.

214. Missouri also includes physically helpless persons in its definition of incapacitated. See MO. REV. STAT. § 556.061(13) (2000).

215. See, e.g., OKLA. STAT. tit. 21, § 1111(A)(4) (2000) ("Where the victim is intoxicated by a narcotic or anesthetic agent, administered by or with the privity of the accused as a means of forcing the victim to submit;..."); VA. CODE ANN. § 18.2-61 (Michie 2000) (using language "by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness" in number of sexual offenses); 33 P.R. LAWS ANN. §§ 4061(c), 4065(b), 4067(b) (1998) (compelled to act by use of irresistible physical force or threats of grave and immediate bodily harm, accompanied by apparent power of execution; or by overcoming or diminishing her capacity to resist substantially, without her knowledge, by means of hypnosis, narcotics, depressant or stimulant drugs or similar substances or means); see *also* IND. CODE §§ 35-42-4-1(b)(4), -2(b)(4), -3(a)(4), -5(a)(2)(B), -8(b)(3) (2000) (equating the use of deadly force or being armed with a dangerous weapon

that rely on case precedent fit rape by drugs under the force requirements of their sexual offense provisions.²¹⁶

The two states in the force-provision category differ with respect to the issues of administration, *mens rea*, and consent. Missouri requires defendant administration of the intoxicant;²¹⁷ New Mexico does not. New Mexico's statute requires a *mens rea* of "knows or has reason to know" of the victim's incapacity.²¹⁸ Missouri's statute is silent on intent, but provides a defense if the actor reasonably believed that the victim was not incapacitated and reasonably believed the victim consented. The defendant has the burden of injecting the issue of belief regarding capacity and consent.²¹⁹ Finally, Missouri's statute explicitly connects the effects of incapacitation with consent (i.e., the victim is incapable of informed consent)²²⁰ while New Mexico describes incapacity as the inability to understand the nature or consequences of the act.²²¹

4. *The Non-Definitional Approach—Enumerated Sexual Offense Provisions*

Twenty-one jurisdictions (and the Model Penal Code)²²² explicitly include sexual conduct with intoxicated persons as a species of rape or sexual

with administration of drugs without victim's knowledge in sentence enhancement scheme). In *Stadler v. State*, 919 P.2d 439 (Okla. Ct. App. 1996), the court wrote:

It seems inconsistent to allow a person to use overt force to overcome a victim's will and call that first degree rape, yet let that same person by deceit and the use of an intoxicant or narcotic overcome a victim's will, and call that second-degree rape. Still, it is the job of the Legislature, not this Court, to determine crimes and punishments.

Id. at 443.

216. See *infra* notes 248–54 and accompanying text.

217. See MO. REV. STAT. §§ 556.030, .060 (2000) (use of a substance).

218. N.M. STAT. ANN. § 30-9-10(A)(4) (Michie 2000).

219. See MO. REV. STAT. § 566.020(1) (2000); see also ME. REV. STAT. ANN. tit. 17-A, § 253(3) (West 2000) (defense if victim voluntarily consumed or allowed administration of substance).

220. See MO. REV. STAT. §§ 566.030(1), .060(1) (2000) (incapable of informed consent).

221. See N.M. STAT. ANN. § 30-9-10(A)(4) (Michie 2000).

222. The Model Penal Code's rape statute provides: "A male who has sexual intercourse with a female not his wife is guilty of rape if:...(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance...." MODEL PENAL CODE § 213.1 (1962). The Model Penal Code's sexual assault statute provides:

A person who has sexual contact with another not his spouse, or causes such other to have sexual conduct with him, is guilty of sexual assault, a misdemeanor, if:...(5) he has substantially impaired the other person's power to appraise or control his or her conduct, by administering or

assault without separately defining mental incapacitation, lack of consent, or force to include intoxication or drugging.²²³ Two additional states, Nebraska and Nevada, do not mention intoxicants in their rape statutes, but describe the same types of mental and physical incapacitation that other states have defined as resulting from the ingestion of drugs in their various sexual offenses.²²⁴ In addition to provisions regarding intoxicated persons, most jurisdictions that follow the non-definitional approach also criminalize sexual conduct with unconscious, physically helpless, or mentally disabled persons although they describe these conditions differently.²²⁵

employing without the other's knowledge drugs, intoxicants, or other means for the purpose of preventing resistance;...

Id. § 213.4.

223. See 18 U.S.C. § 2241(b)(2) (2001) (drug, intoxicant, or other similar substance); CAL. PENAL CODE §§ 261(a)(3), 262(a)(2), 286(i), 288a(i), 289(e), 243.4(b), 243(f)(4) (West 2001) (intoxicating or anesthetic substance or controlled substance); COLO. REV. STAT. §§ 18-3-402(4)(d), -404(1)(d) (2000) (drug, intoxicant, or other means); D.C. CODE ANN. §§ 22-3002(a)(4), -3004(4) (2000) (drug, intoxicant, or other similar substance); IDAHO CODE §§ 18-6101(4), -6108(4) (Michie 2000) (intoxicating, narcotic, or anaesthetic substance); 720 ILL. COMP. STAT. 5/12-14(a)(7), -16(a)(7) (2001) (controlled substance); IND. CODE §§ 35-42-4-1(b)(4), -2(b)(4), -3(a)(4), -5(a)(1)(B), -8(b)(3), -9(a)(2), (b)(2) (2000) (drug or controlled substance); KAN. STAT. ANN. §§ 21-3502(a)(1)(C), -3506(a)(3)(C), -3518(a)(3) (2000) (alcoholic liquor, narcotic, drug, or other substance); LA. REV. STAT. ANN. §§ 14:42.1(A)(2), :43(A)(1) (narcotic or anesthetic agent or other controlled dangerous substance), :89.1(A)(5) (narcotic or anesthetic agent), :93.5(A)(2) (intoxicating, narcotic, or anesthetic agent) (West 2000); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(A) (West 2000) (drugs, intoxicants, or other similar means); N.H. REV. STAT. ANN. § 632-A:2(1)(f) (2000) (intoxicating substance); N.D. CENT. CODE §§ 12.1-20-03(1)(b), -07(1)(c) (2000) (intoxicants, a controlled substance, or other means); OHIO REV. CODE ANN. § 2907.02(A)(1)(a), .05(A)(2) (Anderson 2001) (drug, intoxicant, or controlled substance); OKLA. STAT. tit. 21, § 1111(A)(4) (2000) (narcotic or anesthetic agent); 18 PA. CONS. STAT. §§ 3121(A)(4), 3123(A)(4), 3125(5), 3126(5) (2000) (drugs, intoxicants, or other means); 33 P.R. LAWS ANN. §§ 4061(c), 4065(b), 4067(b) (1998) (hypnosis, narcotics, depressant or stimulant drugs or similar substances or means); S.D. CODIFIED LAWS § 22-22-1(4) (Michie 2001) (intoxicating, narcotic, or anesthetic agent or hypnosis); VT. STAT. ANN. tit. 13, § 3252(a)(2) (2001) (drugs or intoxicants); 14 V.I. CODE ANN. §§ 1701(4), 1708(5) (2001) (intoxicating, narcotic, or anaesthetic agent); WIS. STAT. § 940.225(2)(cm) (2000) (intoxicant); WYO. STAT. ANN. § 6-2-303(a)(iii) (Michie 2000) (substance).

Two states specifically include hypnosis in their "intoxication" provisions. See 33 P.R. LAWS ANN. §§ 4061(c), 4065(b), 4067(b) (1998); S.D. CODIFIED LAWS § 22-22-1(4) (Michie 2001).

224. See NEB. REV. STAT. §§ 28-319(1), -320(1) (2001) ("victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct"); NEV. REV. STAT. 200.366(1) (2001) ("victim was mentally or physically incapable of resisting or understanding the nature of his conduct"). Interestingly, Nevada also has two separate crimes punishing the administration of drugs for the purpose of committing a crime. See NEV. REV. STAT. 200.405, .408 (2001).

225. See 18 U.S.C. § 2241(b)(1) (2001) (unconscious); CAL. PENAL CODE §§ 261(a)(4), 262(a)(3), 286(f), 288a(f), 289(d), 243.4(b), (f)(4) (West 2001) (unconscious of the nature of the act); COLO. REV. STAT. §§ 18-3-401(3), -403(4)(e), -404(1)(c) (physically helpless), -401(3), -404(1)(b) (2000) (incapable of appraising conduct); D.C.

Maine provides a typical statutory passage: “[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 administering or employing drugs, intoxicants or other similar means....”²²⁶ California outlaws a host of sexual offenses and incorporates the following provision into each statute: “[w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.”²²⁷

a. Administration of the Intoxicant

Sixteen jurisdictions in this category (and the Model Penal Code)²²⁸ require that the defendant administer the drugs before criminal liability attaches, at least for some grades of the offense.²²⁹ Louisiana has simple and forcible rape

CODE ANN. §§ 22-3002(a)(3), -3004(3) (unconscious), -3003(2), -3005(2) (mental and physical incapacitation) (2001); IDAHO CODE §§ 18-6101(2), -6108(1) (unsoundness of mind), -6101(5), -6108(5) (unconscious of nature of act) (Michie 2000); 720 ILL. COMP. STAT. 5/12-13(a)(2), -15(a)(2) (unable to understand nature of act or give knowing consent), -14(a)(6), -16(a)(4) (physically handicapped) (2001); IND. CODE §§ 35-42-4-1(a)(2)-(3), -2(a)(2)-(3), -8(a)(2) (2001) (unaware or mentally disabled or deficient); KAN. STAT. ANN. §§ 21-3502(a)(1)(B), -3506(a)(3)(B), -3518(a)(2) (2000) (unconscious or physically powerless); LA. REV. STAT. ANN. §§ 14:43(A)(2), :89.1(A)(4), :93.5(A)(1) (physically incapable), :93.5(A)(4) (unsoundness of mind) (West 2000); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(C)-(D), 255(1)(B), (D) (West 2000) (mental disability, unconscious, physically incapable of resisting); NEB. REV. STAT. §§ 28-319(1), -320(1) (2001) (mentally or physically incapable of resisting or appraising the nature of conduct); NEV. REV. STAT. 200.366(1) (2001) (mentally or physically incapable of resisting or understanding nature of conduct); N.H. REV. STAT. ANN. § 632-A:2(1)(b) (2000) (physically helpless); N.D. CENT. CODE §§ 12.1-20-03(1)(c), (e), -07(1)(b) (2000) (mental disease or defect, unaware); OHIO REV. CODE ANN. §§ 2907.02(A)(1)(c) (mental or physical condition), .03(A)(2)-(3) (impaired ability to appraise or control conduct, unaware), .05(A)(5) (mental or physical condition) (Anderson 2001); OKLA. STAT. tit. 21, § 1111(A)(2), (5) (2000) (mental illness or unsoundness of mind, unconscious of nature of act); 18 PA. CONS. STAT. §§ 3121(A)(3), (5), 3123(A)(3), (5), 3125(4), (6), 3126(4), (6) (2000) (unconscious, mental disability); 33 P.R. LAWS ANN. §§ 4061(b), (d), 4067(c) (illness or unsoundness of mind, unaware of its nature), 4065(c) (mental deficiency) (1998); S.D. CODIFIED LAWS §§ 22-22-1(3), -7.2 (Michie 2001) (physical or mental incapacity); 14 V.I. CODE ANN. §§ 1701(1), (5) (unsoundness of mind, mental or physical weakness, unconsciousness), 1708(6) (unconscious, physically helpless, mental defect) (2001); WIS. STAT. § 940.225(2)(c), (d) (mental illness or deficiency, unconscious), (4) (mental illness or defect, unconscious) (2000); WYO. STAT. ANN. §§ 6-2-301(a)(iii) (physically helpless), -302(a)(iii)-(iv) (physically helpless, mental illness, mental deficiency, or developmental disability) (Michie 2000).

226. ME. REV. STAT. ANN. tit. 17-A, § 253(2)(A) (West 2001).

227. CAL. PENAL CODE §§ 261(a)(3), 262(a)(2), 286(i), 288a(i), 289(e), 243.4(b), (f)(4) (West 2001).

228. MODEL PENAL CODE §§ 213.1(b), 213.4(5) (1962).

229. See 18 U.S.C. § 2241(b)(2) (2001) (administers); COLO. REV. STAT. §§ 18-3-402(4)(d), -404(1)(d) (2000) (employing); D.C. CODE ANN. §§ 22-3002, -3004 (2001) (administering); FLA. STAT. ch. 794.011(4)(d) (2001) (administers or knows someone else

statutes; the forcible version requires administration while simple rape does not.²³⁰ Some jurisdictions require that the administration be without knowledge or against the will of the victim.²³¹ To reach a broader spectrum of potential offenders, several states have expanded the administration requirement to include not only the person who actually administers the drug but also those who act in privity with him²³² or who know that someone else has drugged the victim.²³³ Illinois's statute uses the term "delivered," which is defined to mean "by injection, inhalation, ingestion, transfer of possession, or any other means..."²³⁴ Indiana uses the term "furnishing."²³⁵ Eight jurisdictions do not require administration by the

administering); IDAHO CODE §§ 18-6101(4), -6108(4) (Michie 2000) (administered by or with privity); 720 ILL. COMP. STAT. 5/12-14(a)(7), -16(a)(7) (2001) (delivered drug); IND. CODE §§ 35-42-4-1(b)(4), -2(b)(4), -3(a)(4), -5(a)(1)(B), -8(b)(3), -9(b)(2) (2001) (furnishing drug); LA. REV. STAT. ANN. §§ 14:42.1(A)(2) (administered), :89.1(A)(5) (administered by or with privity), :93.5(A)(2) (same) (West 2001); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(A) (administering or employing), (3) (defense if other person voluntarily consumed or allowed administration of substance) (West 2001); N.H. REV. STAT. ANN. § 632-A:2(1)(f) (2000) (administers or knows of another administering); N.D. CENT. CODE §§ 12.1-20-03(1)(b)-(c), -07(1)(c) (2000) (person or someone with person's knowledge administering or employing); OHIO REV. CODE ANN. §§ 2907.02(A)(1)(a), .05(A)(2) (Anderson 2001) (administering); OKLA. STAT. tit. 21, § 1111(A)(4) (2000) (administered by or with privity); 18 PA. CONS. STAT. §§ 3121(A)(4), 3123(A)(4), 3125(5), 3126(5) (2000) (administering or employing); 33 P.R. LAWS ANN. § 4061(c) (1998) (victim overcome by means of drugs, etc.); VT. STAT. ANN. tit. 13, § 3252(a)(2) (2001) (administering or employing); WYO. STAT. ANN. § 6-2-303(a)(iii) (Michie 2000) (administers or knows that someone administered).

230. See *supra* notes 70-71 and accompanying text. Illinois punishes as sexual assault an act when the victim is unable to understand the nature of the act or unable to give knowing consent, while punishing as aggravated sexual assault an act when the accused delivered any controlled substance to the victim. See 720 ILL. COMP. STAT. 5/12-13(a)(2), -14(a)(7) (2001). Indiana makes it a Class B felony to have sexual intercourse with a person so mentally disabled or deficient that consent cannot be given and a Class A felony when the offense is facilitated by furnishing the victim with a drug or controlled substance. See IND. CODE § 35-42-4-1(a)(3), (b)(4) (2001).

231. See, e.g., D.C. CODE ANN. § 22-3002, -3004 (2001) (by force, threat, or without knowledge or permission); 720 ILL. COMP. STAT. 5/12-14(a)(7), -16(a)(7) (2001) (without consent or by threat, deception); OHIO REV. CODE ANN. §§ 2907.02(A)(1)(a), .05(A)(2) (Anderson 2001) (by force, threat of force, or deception); VT. STAT. ANN. tit. 13, § 3252(a)(2) (2001) (without knowledge or against will).

232. See IDAHO CODE §§ 18-6101(4), -6108(4) (Michie 2000); OKLA. STAT. tit. 21, § 1111(A)(4) (2000).

233. See FLA. STAT. ch. 794.011(4)(d) (2001) (offender administers or has knowledge of someone else administering); IND. CODE §§ 35-42-4-1(b)(4), -2(b)(4), -3(a)(4), -5(a)(2)(B), -8(b)(3), -9(a)(2) (2001) (offense facilitated by furnishing victim drug or knowing that victim was furnished drug); N.H. REV. STAT. ANN. §§ 632-A:2(1)(f) (2000) (administers or has knowledge of another administering); N.D. CENT. CODE §§ 12.1-20-03(1)(b)-(c), -07(1)(c) (2000) (person or someone with person's knowledge substantially impaired by administering or employing); WYO. STAT. ANN. § 6-2-303(a)(iii) (Michie 2000) (defendant administers or know that someone administered).

234. 720 ILL. COMP. STAT. 5/12-14(a)(7), -16(a)(7) (2001).

235. IND. CODE §§ 35-42-4-1(b)(4), -2(b)(4), -3(a)(4), -5(a)(2)(B), -8(b)(3), -9(b)(2) (2001).

defendant.²³⁶ Within the last sixteen years, three states in this category, South Dakota (in 1985), Kansas (in 1993), and California (in 1994), have amended their rape statutes to eliminate the administration element.²³⁷

Many of the jurisdictions requiring administration stress the fact that the victim is prevented from resistance by the introduction of the drug,²³⁸ while others speak of submission.²³⁹ A few provisions are written in terms of the inability of the victim to appraise or control her conduct²⁴⁰ (phraseology common to the mental-incapacitation provisions) or to consent to the sexual acts.²⁴¹ As discussed in more detail below, the resistance language in these provisions is particularly unfortunate because such language harkens back to a time when resistance to the utmost was an important lynchpin of rape law.²⁴²

236. See CAL. PENAL CODE §§ 261(a)(3), 262(a)(2), 286(i), 288a(i), 289(e), 243.4(b), 243(f)(4) (West 2001); KAN. STAT. ANN. §§ 21-3502(a)(1)(C), -3506(a)(3)(C), -3518(a)(3) (2000); LA. REV. STAT. ANN. § 14:43(A)(1) (West 2001); NEB. REV. STAT. §§ 28-319(1), -320(1) (2001); NEV. REV. STAT. 200.366(1) (2001); S.D. CODIFIED LAWS § 22-22-1(4) (Michie 2001); 14 V.I. CODE ANN. §§ 1701(4), 1708(5) (2001); WIS. STAT. § 940.225(2)(cm) (2000).

237. See *supra* notes 75, 82 and *infra* note 402 and accompanying text.

238. See CAL. PENAL CODE §§ 261(a)(3), 262(a)(2), 286(i); 288a(i), 289(e) (West 2001) (“prevented from resisting”); DEL. CODE ANN. tit. 11, § 761(h)(5) (2000) (for purpose of preventing resistance); IDAHO CODE §§ 18-6101(4), -6108(4) (Michie 2000) (“prevented from resistance”); LA. REV. STAT. ANN. §§ 14:42.1(A)(2), :43(A)(1), :89.1(A)(5), :93.5(A)(2) (West 2001) (“incapable of resisting or of understanding”); NEB. REV. STAT. §§ 28-319(1), -320(1) (2001) (“incapable of resisting or appraising”); NEV. REV. STAT. 200.366(1) (2001) (“incapable of resisting or understanding”); N.D. CENT. CODE §§ 12.1-20-03(1)(b), -07(1)(c) (2000) (“with intent to prevent resistance”); OHIO REV. CODE ANN. §§ 2907.02(A)(1)(a), .05(A)(2) (Anderson 2001) (“For the purpose of preventing resistance...”); 18 PA. CONS. STAT. §§ 3121(A)(4), 3123(A)(4), 3125(5), 3126(5) (2000) (“for the purpose of preventing resistance”); 33 P.R. LAWS ANN. §§ 4061(c), 4065(b), 4067(b) (1998) (overcoming or diminishing her/his capacity/will to resist substantially); 14 V.I. CODE ANN. §§ 1701(4) (“when the person’s resistance is prevented”), 1708(5) (“when the other person’s ability to consent to or resist”) (2001); see also ME. REV. STAT. ANN. tit. 17-A, § 253(2)(D) (West 2000) (retaining resistance language in physical helplessness provision); N.H. REV. STAT. ANN. §§ 632-A:2(1)(b) (2000) (same); TEX. PENAL CODE ANN. § 22.011(b)(3) (Vernon 2000) (same).

239. See COLO. REV. STAT. §§ 18-3-402(4)(d), -404(1)(d) (2000) (“for the purpose of causing submission”); OKLA. STAT. tit. 21, § 1111(A)(4) (2000) (“as a means of forcing the victim to submit”).

240. See 18 U.S.C. § 2241(b)(2)(A) (2001); D.C. CODE ANN. §§ 22-3002(a)(4), -3004(4) (2001); VT. STAT. ANN. tit. 13, § 3252(a)(2) (2001); WIS. STAT. § 940.225(2)(cm) (2000); WYO. STAT. ANN. § 6-2-303(a)(iii) (Michie 2000).

241. See 720 ILL. COMP. STAT. 5/12-13(a)(2), -15(a)(2) (2001) (unable to give knowing consent); KAN. STAT. ANN. §§ 21-3502(a)(1)(C), -3506(a)(3)(C), -3518(a)(3) (2000) (“incapable of giving consent”); S.D. CODIFIED LAWS § 22-22-1(4) (Michie 2001) (“incapable of giving consent”).

242. See *infra* notes 372–81 and accompanying text.

b. The Defendant's *Mens Rea*

Like the mental-incapacitation provisions, a large number of jurisdictions in the non-definitional category impose a knowledge or negligence *mens rea* requirement on the defendant regarding the victim's incapacity.²⁴³ None of the jurisdictions in this category provide a statutory defense that the defendant reasonably believed that the victim was capable of consenting. California has case precedent allowing for a reasonable-mistake defense regarding the victim's capacity to give consent.²⁴⁴

c. Consent

Only a few jurisdictions in this category draw an explicit connection between intoxication and consent.²⁴⁵ A few additional states provide a more global definition of consent in the context of their sexual offense provisions²⁴⁶ or for criminal offenses in general.²⁴⁷

5. Statutory Silence and the Common Law

Two states, Georgia and Massachusetts, and the Uniform Code of Military Justice, do not fall into any of the previous four categories because their rape statutes do not include drugs or use language describing various forms of victim incapacitation. Instead, these jurisdictions rely on case precedent for coverage of cases involving the sexual assault of intoxicated persons. Georgia's

243. See CAL. PENAL CODE §§ 261(a)(3), 262(a)(2), 286(i), 288a(i); 289(e) (West 2001) (known or reasonably should have been known); D.C. CODE ANN. §§ 22-3003(2), -3005(2) (2001) (knows or has reason to know); KAN. STAT. ANN. §§ 21-3502(a)(1)(C), -3506(a)(3)(C), -3518(a)(3) (2000) (known or reasonably apparent); LA. REV. STAT. ANN. §§ 14:43(A)(1), :89.1(A)(5) (West 2001) (knew or should have known of victim's incapacity); NEB. REV. STAT. §§ 28-319(1), -320(1) (2001) (knew or should have known); NEV. REV. STAT. 200.366(1) (2001) (knows or should know); N.H. REV. STAT. ANN. § 626.6(III) (2000) (known to be unable to exercise reasonable judgment); N.C. GEN. STAT. §§ 14-27.3(a)(2), -.5(a)(2) (2000) (knows or should reasonably know); 14 V.I. CODE ANN. § 1701(4) (2001) (known to be in stupor); WIS. STAT. § 940.225(2)(cm) (2000) (knows such condition).

244. See *People v. Giardino*, 98 Cal. Rptr. 2d 315 (Ct. App. 2000) (honest and reasonable mistake that sexual partner is not too intoxicated to give legal consent is defense).

245. See 720 ILL. COMP. STAT. 5/12-13(a)(2), -15(a)(2) (2001) (unable to give knowing consent); KAN. STAT. ANN. §§ 21-3502(a)(1)(C), -3506(a)(3)(C), -3518(a)(3) (2000) (incapable of giving consent); S.D. CODIFIED LAWS § 22-22-1(4) (Michie 2001) (incapable of giving consent); see also IND. CODE §§ 35-42-4-1(a)(3), -2(a)(3), -8(a)(2) (2001) (person so mentally disabled or deficient that consent cannot be given).

246. See CAL. PENAL CODE § 261.6 (West 2001) (defining consent in sexual offense provisions); COLO. REV. STAT. § 18-3-401(1.5) (2000) (defining consent in unlawful sexual behavior provisions).

247. See ME. REV. STAT. ANN. tit. 17-A, § 109 (West 2000) (defining consent in general); N.H. REV. STAT. ANN. § 626.6 (2000) (defining consent in general); WIS. STAT. § 939.22(48)(c) (2000) (defining without consent).

sexual offense statutes are completely silent on the issue of intoxicants; they do not contain language dealing with mental incapacitation, consent, or force with respect to alcohol or drugs. However, in *Drake v. State*, the Georgia Supreme Court held:

When the victim is physically or mentally unable to give consent to the act, as when she is intoxicated, drugged, or mentally incompetent, the requirement of force is found in constructive force, that is, in the use of force as is necessary to effect the penetration made by the defendant.²⁴⁸

Thus, the court provided a judicial gloss to Georgia's rape statute.

Massachusetts also has case precedent, dating from 1870, holding that sexual intercourse with an intoxicated or drugged victim is rape.²⁴⁹ In *Commonwealth v. Burke*, a case in which the defendant took advantage of an intoxicated woman without having made her drunk beforehand, the court wrote:

We, are therefore, unanimously of the opinion that the crime, which the evidence in this case tended to prove, of a man's having carnal intercourse with a woman, without her consent, while she was, as he knew, wholly insensible so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was rape. If it were otherwise, any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take even by the defendant himself, would be unprotected from personal dishonor. The law is not open to such reproach.²⁵⁰

In addition, Massachusetts has a separate crime for drugging, discussed below. Although not the only jurisdiction with a separate drug statute, Massachusetts is the only state with such a law that has no reference to intoxicants in its sexual offense provisions.

Finally, the Uniform Code of Military Justice also has a rape and carnal knowledge provision that is silent about drugs and other intoxicants.²⁵¹ This absence is particularly unfortunate because a large number of these cases involve

248. *Drake v. State*, 236 S.E.2d 748, 750–51 (Ga. 1977) (quoting 1 WHARTON, CRIMINAL LAW & PROCEDURE § 307 (1957)); see also *Demetrios v. State*, 541 S.E.2d 83, 86 (Ga. Ct. App. 2000) (discussing notion of constructive force in cases of intoxicated and drugged victims).

249. See *Commonwealth v. Burke*, 105 Mass. 376 (1870); see also PERKINS & BOYCE, *supra* note 30, at 212 (characterizing *Burke* as “one of the leading American cases on the law of rape...”).

250. *Burke*, 105 Mass. at 380–81; see also *Commonwealth v. Helfant*, 496 N.E.2d 433 (Mass. 1986) (reaffirming the holding in *Burke*). But see *Commonwealth v. Tatro*, 676 N.E.2d 843, 846 (Mass. 1997) (where jury asked “whether intoxication or accompanying inability to consent constituted force” within the meaning of Massachusetts's child rape statute).

251. See 10 U.S.C. § 920 (2001).

military personnel, both as victims and perpetrators.²⁵² However, several cases have held that sexual activity with an intoxicated or drugged victim constitutes rape under military law.²⁵³ A standard jury instruction reads:

An act of sexual intercourse occurs "by force" when the accused uses physical violence or power to compel the victim to submit against her will. When a victim is incapable of consenting because she is asleep, unconscious, or intoxicated to the extent that she lacks the mental capacity to consent, then, no greater force is required than that necessary to achieve penetration.²⁵⁴

Thus, courts in Georgia, Massachusetts, and the military have interpreted their traditional rape provisions to subsume sexual assault of intoxicated or drugged victims under the rubric of the force requirement in their statutes. None of these jurisdictions appear to limit criminal liability to cases in which the defendant administered the intoxicant.

In summary, forty-seven of the fifty-six American jurisdictions reviewed here explicitly include rape of intoxicated or drugged victims in their sexual offenses. Three jurisdictions, Georgia, Massachusetts, and the military, rely on case law; six states protect mentally or physically incapacitated person without mentioning drugs or other intoxicants. Approximately two-thirds of these jurisdictions require that the defendant administer the intoxicant before criminal liability attaches. The remaining states focus instead on the inability of the victim to appraise the sexual nature of the conduct or to consent. The most common approach to the defendant's *mens rea* with respect to the incapacitated condition of the victim is to require knowledge that the victim is incapacitated.²⁵⁵ About twenty percent of the jurisdictions emphasize the central question of consent and the connection between consent and victim incapacity in one form or another.

252. See, e.g., *United States v. Southworth*, 50 M.J. 74 (C.A.A.F. 1999) (other victim thirteen-year-old daughter of petty officer); *United States v. Carver*, 12 M.J. 581 (A.F.C.M.R. 1981); *United States v. Buckley*, 35 M.J. 262 (C.M.A. 1992) (other victim fourteen-year-old civilian); *United States v. Natkie*, ACM 31693, 1996 CCA LEXIS 286 (A.F. Ct. Crim. App. Sept. 20, 1996).

253. See, e.g., *United States v. Baron*, 22 M.J. 265, 266 (C.M.A. 1986); *United States v. Short*, 16 C.M.R. 11, 15 (C.M.A. 1954).

254. *United States v. Natkie*, ACM 31693, 1996 CCA LEXIS 286, at *11 (A.F. Ct. Crim. App. Sept. 20, 1996) (citing *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991)).

255. A few cases raise a mistake of fact defense in cases involving intoxicated victims—two with respect to the issue of consent. See *United States v. Willis*, 41 M.J. 435 (C.A.A.F. 1995) (honest and reasonable mistake as to consent is defense); *United States v. Buckley*, 35 M.J. 262 (C.M.A. 1992). One raises such a defense with respect to the issue of intoxication. See *People v. Giardino*, 98 Cal. Rptr. 2d 315 (Ct. App. 2000) (honest and reasonable mistake that sexual partner is not too intoxicated to give legal consent is defense to rape).

B. Criminal Drugging Provisions

In addition to sexual offense enactments, approximately one-half of American jurisdictions separately criminalize the administration of drugs or other intoxicants, usually as a type of assault or battery.²⁵⁶ Obviously, these statutes are only relevant to cases in which the defendant administers the intoxicant. While some of these statutes may be recent legislation in reaction to the increased incidence of sexual assault with rape drugs,²⁵⁷ some of these provisions are quite old. For instance, California enacted a law making it illegal to drug a person for the purpose of committing a felony in 1872.²⁵⁸ Because drugging can be a medically necessary or an otherwise legal act, statutes that criminalize the administration of intoxicants must demarcate lawful from unlawful behavior. Some statutes accomplish this line drawing by emphasizing criminal intent, others by punishing non-therapeutic drugging, and some by prohibiting the administration of harmful substances such as poisons. These drugging provisions are organized into four groups: (1) drugging to accomplish a sexual offense, (2) drugging to commit a crime, (3) non-therapeutic drugging, and (4) poisoning. Some jurisdictions have provisions in more than one of these categories.²⁵⁹ Collectively, by providing for separate criminal liability, the criminal drugging provisions demonstrate the legislative judgment that drugging is a separate harm; they also increase the penalty for offenders using drugs to commit sexual assault by making the defendants liable for more than one offense. This section also considers grading strategies and sentence enhancement schemes based on the use of intoxicants. While not providing for separate criminal liability, these statutes share the characteristic of enhancing the penalty based on the use of intoxicants.

1. Drugging to Accomplish a Sexual Offense

Massachusetts, New York, Pennsylvania, and Louisiana outlaw the administration of drugs in the exclusive context of committing sexual offenses.²⁶⁰

256. These offenses more closely resemble the common law crime of battery in that they require the application of a substance to a person rather than an attempted battery or an intentional scaring type of assault. However, it appears that modern assault statutes, like the Model Penal Code, essentially subsume both battery and assault in one provision bearing the label assault.

257. Colorado recently enacted a statute that prohibits the administration of gamma hydroxybutyrate or ketamine. *See* COLO. REV. STAT. § 18-13-123 (2001); *see also* NEV. REV. STAT. 200.408(1) (2001) (outlawing the administration flunitrazepam and GHB to aid in the commission of a crime of violence); S.C. CODE ANN. § 44-53-370(f) (Law. Cop. 2000) (outlawing the distribution of GHB or other controlled substance with intent to commit various crimes).

258. *See* CAL. PENAL CODE § 222 (West 2001).

259. For instance, New York outlaws drugging to commit a sexual offense, N.Y. PENAL LAW § 130.90(1) (McKinney 2001) and non-therapeutic drugging, N.Y. PENAL LAW § 120.05(5) (McKinney 2001).

260. *See* LA. REV. STAT. ANN. § 40:969 (West 2000); MASS. GEN. LAWS ch. 272, § 3 (2001); N.Y. PENAL LAW § 130.90(1) (McKinney 2001); 18 PA. CONS. STAT. § 2714 (2000).

Additionally, Kansas, in a unique provision, prohibits furnishing alcohol to minors for purposes of engaging in incest.²⁶¹ England has a similar statute, entitled "Administering Drugs to Obtain or Facilitate Intercourse."²⁶² These statutes are noteworthy because they create new substantive offenses for using drugs to accomplish sexual intercourse. The five states differ in their classifications of their drugging crimes.²⁶³ All require a heightened intent or *mens rea* for commission of the offenses as described below.

The Massachusetts statute provides that "[w]hoever applies, administers to or causes to be taken any drug, matter or thing with intent to stupefy or overpower such person so as to thereby enable any person to have sexual intercourse or unnatural sexual intercourse with such person shall be punished...."²⁶⁴ This provision is noteworthy because Massachusetts's rape statute does not address the circumstance when the victim is incapacitated by drugs,²⁶⁵ although case precedent covers those instances.²⁶⁶ Yet, Massachusetts makes it a separate crime to administer drugs to accomplish sexual intercourse. All other states in this category explicitly mention intoxicants in their sexual offense provisions.

New York also has a separate statute, entitled "Facilitating a sex offense with a controlled substance," which provides for criminal liability when a person "knowingly and unlawfully possesses a controlled substance and administers such substance to another person without such person's consent and with intent to commit against such person conduct constituting a felony defined in this article...."²⁶⁷ Pennsylvania prohibits the unauthorized administration of an intoxicant

when, with intent to commit an offense under...[the rape, involuntary deviate sexual intercourse, aggravated indecent assault, indecent assault statutes] he or she substantially impairs the complainant's power to appraise or control his or her conduct by

261. See KAN. STAT. ANN. § 21-3610b (2000) (furnishing alcoholic beverages to minors to commit incest).

262. Sexual Offences Act, 1956, c. 69, § 4 (Eng.) ("It is an offence for a person to apply or administer to, or cause to be taken by, a woman any drug, matter or thing with intent to stupefy or overpower her so as thereby to enable any man to have unlawful sexual intercourse with her.").

263. Massachusetts classifies its crime as a crimes against chastity, morality, decency and good order, New York puts its provisions under sex offenses, Pennsylvania classifies its crime under the assault chapter, Louisiana classifies its crime as a drug offense, and Kansas classifies its very specific offense as one affecting family relationships and children.

264. MASS. GEN. LAWS ch. 272, § 3 (2001). For a case involving both Massachusetts's rape and drugging statute, see *Commonwealth v. Helfant*, 496 N.E.2d 433 (Mass. 1986).

265. See MASS. GEN. LAWS ch. 265, § 22 (2001).

266. See *supra* notes 249–50 and accompanying text.

267. N.Y. PENAL LAW § 130.90(1) (McKinney 2001).

administering, without the knowledge of the complainant, drugs or other intoxicants.²⁶⁸

Louisiana makes the use of intoxicants for the purposes of committing a sexual offense a controlled substance crime. The statute provides that “[w]hoeever, with the intent to commit a crime of violence as defined in R.S. 14:2(13)(j) [forcible rape] against an individual, violates Subsection A of this Section by administering a controlled dangerous substance to a person who is unaware that the controlled dangerous substance has been or is being administered to him, shall be sentenced to a term of imprisonment....”²⁶⁹

Finally, one additional state, Arkansas, makes it an assault crime to introduce a controlled substance into the body of another without necessarily requiring that the defendant also intend to commit a sexual offense.²⁷⁰ However, the statute grades this assault crime more severely if the drugging occurred in connection with a sexual offense:

Notwithstanding the provisions of subsection (c) of this section, any person who violates this section by introducing a controlled substance into the body of another person without their knowledge or consent with the purpose of committing any felonious sexual offense...or...any unlawful sexual act...or sexual contact...or any act involving a child engaging in sexual explicit conduct...is guilty of a Class Y felony.²⁷¹

Criminal actors in Arkansas, Louisiana, Massachusetts, New York, Pennsylvania, and Kansas, then, would be responsible for these separate drugging-for-sexual-assault crimes in addition to the attendant sexual offense. For instance, in *Helfant*, Massachusetts authorities prosecuted the defendant for both drugging the victim and raping her.²⁷² In *Regina v. Cobb*, the British case involving a male nurse, the defendant was prosecuted for murder, rape, and administering a stupefying drug.²⁷³

2. *Drugging to Commit a Crime*

Unlike the statutes criminalizing the use of intoxicants in accomplishing exclusively sexual offenses, nine jurisdictions have statutes that make it unlawful to drug a person for the purpose of committing any crime.²⁷⁴ Two states

268. 18 PA. CONS. STAT. § 2714 (2000).

269. LA. REV. STAT. ANN. § 40:969(D) (West 2001).

270. See ARK. CODE ANN. § 5-13-210(a) (Michie 2001) (“It is unlawful for any person to inject any controlled substance...into the human body of another person....”); ARK. CODE ANN. § 5-13-210(b) (Michie 2001) (“It is unlawful for any person to administer or cause to be ingested, inhaled, or otherwise introduced into the human body of another person a controlled substance....”).

271. ARK. CODE ANN. § 5-13-210(f) (Michie 2001).

272. See *supra* notes 122–28 and accompanying text.

273. See *Regina v. Cobb*, [2002] 1 Cr. App. R. (S.) 19 (Crim. App. 2001).

274. See CAL. PENAL CODE § 222 (West 2001) (administering drugs with intent to commit felony); IDAHO CODE § 18-913 (Michie 2000) (felonious administering of drugs);

specifically include sexual offenses as falling within this larger category of felonies,²⁷⁵ and one identifies a commonly used rape drug.²⁷⁶ Most of these statutes are classified as assault crimes. All require the intent to commit another felony or crime.

California's statute, enacted in 1872, provides: "Every person guilty of administering to another any chloroform, ether, laudanum, or any controlled substance, anaesthetic, or intoxicating agent, with intent thereby to enable or assist himself or herself or any other person to commit a felony, is guilty of a felony."²⁷⁷ The provisions in Idaho, Minnesota, Nevada, the Virgin Islands, and Wisconsin are essentially the same;²⁷⁸ Vermont's law is limited to anesthetics.²⁷⁹ Maryland's statute provides that "[a] person may not administer a controlled dangerous substance or other drug to another person without that person's knowledge and commit against that person: (1) A crime of violence...; or (2) A sexual offense in the third degree...."²⁸⁰ Nevada has two provisions; one appears to be modeled after California's statute,²⁸¹ and the other is similar to Maryland's:

A person who causes to be administered to another any controlled substance without that person's knowledge and with the intent thereby to enable or assist himself or any other person to commit a

MD. ANN. CODE OF 1957, CRIMES & PUN. § 287c (2001) (drug-induced crime of violence or sexual offense); MINN. STAT. § 609.235 (2000) (use of drugs to injure or facilitate crime); NEV. REV. STAT. 200.405 (2001) (administration of drugs to aid commission of crime of violence); S.C. CODE ANN. § 44-53-370(f) (Law. Co-op. 2000) (narcotics offense to use drugs to commit sexual offenses, kidnapping, larceny); VT. STAT. ANN. tit 13, § 12 (2000) (criminal use of anesthetics); 14 V.I. CODE ANN. § 300 (2000) (administration of narcotic with intent to commit felony); WIS. STAT. § 941.32 (2000) (administering drugs to facilitate commission of crime); *see also* LA. REV. STAT. ANN. § 14:38.1 (West 2000) ("mingling harmful substances is the intentional mingling of any harmful substance or matter with any food, drink, or medicine with intent that the same shall be taken by any human being to his injury").

275. *See* MD. ANN. CODE OF 1957, CRIMES & PUN. § 287(c) (2001) (drug-induced crime of violence or sexual offense); S.C. CODE ANN. § 44-53-370(f) (Law. Co-op. 2000) (narcotics and controlled substances offense to use drugs to commit sexual offenses, kidnapping, or larceny).

276. *See* NEV. REV. STAT. 200.408(a) (2001).

277. CAL. PENAL CODE § 222 (West 2001); *see also id.* §§ 12022.75 (enhancement for administration of controlled substances against victim's will), 667.61 (specified sex offenses subject to life imprisonment).

278. *See* IDAHO CODE § 18-913 (Michie 2000); MINN. STAT. § 609.235 (2000); NEV. REV. STAT. 200.405 (2001) (administration of drugs to aid commission of crime of violence); 14 V.I. CODE ANN. § 300 (2000) (administration of narcotic with intent to commit felony); WIS. STAT. § 941.32 (2000) (administering drugs to facilitate commission of crime).

279. *See* VT. STAT. ANN. tit 13, § 12 (2000) (criminal use of anesthetics).

280. MD. ANN. CODE OF 1957, CRIMES & PUN. § 287(c) (2001).

281. *See* NEV. REV. STAT. 200.405 (2001) ("a person who administers to another person any chloroform, ether, laudanum, or any controlled substance, anesthetic, or intoxicating or emetic agent, with the intent thereby to enable or assist himself or any other person to commit a felony, is guilty of a category B felony...").

crime of violence against that person or the property of that person is guilty of a category B felony....²⁸²

The statute also defines “controlled substances” to include those commonly associated with sexual offenses (i.e., the rape drugs flunitrazepam and gamma-hydroxybutyrate).²⁸³

South Carolina takes a slightly different approach by embedding its drugging provision in the narcotics and controlled substances article rather than the assault law. The statute provides:

It shall be unlawful for a person to administer, distribute, deliver, or aid, abet, attempt, or conspire to administer, distribute, dispense, or deliver a controlled substance or gamma hydroxy butyrate to an individual with the intent to commit one of the following crimes against that individual:...[inter alia] criminal sexual conduct in the first, second or third degree...²⁸⁴

Thus, in South Carolina, the administration of a substance to aid in the commission of another specified crime, including various sexual crimes, is a drug offense.²⁸⁵

3. *Non-Therapeutic Drugging*

Ten jurisdictions make it an assault or battery crime to administer intoxicants without the additional requirement that the drugging occur for the purpose of committing either a sexual offense or another crime,²⁸⁶ although

282. *Id.* 200.408(1).

283. *Id.* 200.408(2)(a).

284. S.C. CODE ANN. § 44-53-370(f) (Law. Co-op. 2000).

285. As noted above, Louisiana makes it a controlled substance offense to administer drugs to another to commit a sexual offense. *See* LA. REV. STAT. ANN. § 40:969(D) (West 2001).

286. *See* ALA. CODE § 13A-6-21(a)(6) (2001); ARIZ. REV. STAT. § 13-1205(A) (2000); ARK. CODE ANN. § 5-13-210 (Michie 2001) (“It is unlawful for any person to inject any controlled substance...into the human body of another person...”); COLO. REV. STAT. §§ 18-3-203(1)(e) (“For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness, or other physical or mental impairment or injury to another person by administering to him, without his consent, a drug, substance, or preparation capable of producing the intended harm”), -13-123(3) (outlawing the unlawful administration of gamma hydroxybutyrate (GHB) or ketamine) (2001); CONN. GEN. STAT. § 53a-60(a)(4) (2001); DEL. CODE ANN. tit. 11, §§ 625 (“A person is guilty of unlawfully administering drugs when, for a purpose other than lawful medical or therapeutic treatment, the person intentionally causes stupor, unconsciousness or other alteration of the physical or mental condition of another person by administering to the other person, without consent, a drug.”), 626 (similar provision for controlled substance, counterfeit substance, or narcotic drug) (2000); 720 ILL. COMP. STAT. 5/12-4(c) (2001) (“A person who administers to an individual or causes him to take, without his consent or by threat or deception, and for other than medical purposes, any intoxicating, poisonous, stupefying, narcotic, anesthetic, or controlled substance commits aggravated battery.”); IOWA CODE § 708.5 (2001) (“Any person who administers to another...any poisonous, stupefying, stimulating, [etc.] substance in sufficient quantity to have such effect...”); N.Y. PENAL LAW § 120.05(5) (McKinney

Arkansas grades the crime more severely if the drugging occurred to commit a sexual offense.²⁸⁷ Instead of requiring intent to commit a sexual offense or other crime, these statutes require that the administration be done for other than medical or therapeutic purposes²⁸⁸ and without the victim's consent²⁸⁹ or knowledge²⁹⁰ or by threat or deception.²⁹¹ Arizona has a typical statute, which provides that a person commits an assault "if, for a purpose other than lawful medical or therapeutic treatment, such person knowingly introduces or causes to be introduced into the body of another person, without such other person's consent, intoxicating liquors, a narcotic drug or dangerous drug."²⁹² Thus, these statutes demarcate legal from illegal drugging based on the lack of medical necessity rather than the defendant's felonious intent. The approach of these statutes is similar to the Model Penal Code's combined assault and battery offense with one difference. That provision is written in terms of bodily injury,²⁹³ which is defined as "physical pain, illness or any impairment of physical condition,"²⁹⁴ and which includes,

2001) ("For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing same..."); VT. STAT. ANN. tit 13, § 1024(a)(3) (2000) ("for a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness, or other physical or mental impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the intended harm..."); see also COLO. REV. STAT. §§ 18-18-416, -5-116 (2000) (inducing consumption of controlled substances by fraudulent means). At least one jurisdiction had such a statute but it was repealed. See WASH. REV. CODE § 9.11.020 (repealed) (second-degree assault to administer drug with intent to commit any crime).

287. Arkansas's provision specifically refers to sexual offenses. See ARK. CODE ANN. § 5-13-210(f) (Michie 2001); see also *Sera v. State*, 17 S.W.3d 61 (Ark. 2000) (discussing Arkansas's administration provision).

288. See ALA. CODE § 13A-6-21(a)(6) (2001) (other than lawful medical or therapeutic treatment); ARIZ. REV. STAT. § 13-1205(A) (2000) (same); COLO. REV. STAT. § 18-3-203(1)(e) (2000) (same); CONN. GEN. STAT. § 53a-60(a)(4) (2001) (same); DEL. CODE ANN. tit. 11, §§ 625, 626 (2000) (same); 720 ILL. COMP. STAT. 5/12-4(c) (2001) (other than medical purposes); IOWA CODE § 708.5 (2001) (same); N.Y. PENAL LAW § 120.05(5) (McKinney 2001) (other than lawful medical or therapeutic treatment); VT. STAT. ANN. tit 13, § 1024(a)(3) (2000) (same).

289. See ALA. CODE § 13A-6-21(a)(6) (2001); ARIZ. REV. STAT. § 13-1205(A) (2000); ARK. CODE ANN. § 5-13-210(f) (Michie 2001); COLO. REV. STAT. § 18-3-203(1)(e) (2000); CONN. GEN. STAT. § 53a-60(a)(4) (2001); DEL. CODE ANN. tit. 11, §§ 625, 626 (2000); 720 ILL. COMP. STAT. 5/12-4(c) (2001); IOWA CODE § 708.5 (2001); N.Y. PENAL LAW § 120.05(5) (McKinney 2001); VT. STAT. ANN. tit 13, § 1024(a)(3) (2000).

290. See ARK. CODE ANN. § 5-13-210 (Michie 2001) (without knowledge or consent).

291. See 720 ILL. COMP. STAT. 5/12-4(c) (2001) (without consent or by threat or deception); IOWA CODE § 708.5 (2001) (same). Ohio's rape and gross sexual imposition statutes provide that the "offender substantially impairs the other person's judgment or control by administering any drug,...surreptitiously or by force, threat of force, or deception." OHIO REV. CODE ANN. §§ 2907.02(A)(1)(a), .05(A)(2) (Anderson 2001).

292. ARIZ. REV. STAT. § 13-1205(A) (2001).

293. See MODEL PENAL CODE § 211.1 (1962).

294. *Id.* § 210.0(2).

according to the commentary, “non-therapeutic administration of a drug or narcotic.”²⁹⁵ Interestingly, the commentary also notes that “[i]t is therefore unnecessary to make special provision for occasioning these harms, as some existing statutes have done.”²⁹⁶ In addition to its assault statute, Colorado specifically outlaws the unlawful administration of GHB and ketamine in a separate statute,²⁹⁷ and has two controlled substances provisions that make it a crime to induce consumption of controlled substances by fraudulent means.²⁹⁸

Less clear is the question of whether these non-therapeutic drugging statutes are intended as anticipatory or inchoate crimes, which would merge with the completed sexual assault, or as independent offenses worthy of punishment in addition to the sexual offense. Arkansas’s statute explicitly addresses this problem: “The provisions of this section and the criminal penalties provided for this section shall be in addition to all other criminal penalties a person is subjected to under provisions of the Arkansas Criminal Code and the Uniform Controlled Substances Act....”²⁹⁹ Notably, in *Sera*, Arkansas prosecuted the defendant, who drugged, sexually assaulted, and videotaped the assaults of his three victims, for both the sexual and drugging offenses.³⁰⁰ Delaware also makes an explicit connection between one of its two drugging statutes³⁰¹ and sexual assault offenses, auguring in favor of the view that both offenses are punishable. Delaware’s first- and second-degree rape statutes provide:

The sexual intercourse [or penetration] occurs without the victim’s consent and [] was facilitated by or occurred during the course of the commission or attempted commission of: 1. Any felony; or 2.

295. *Id.* § 211.1 cmt. at 187; *see also* IDAHO CODE § 18-907(d) (Michie 2000) (defining aggravated battery to include “[u]ses any poison or other noxious or destructive substance or liquid”); LA. REV. STAT. ANN. § 14:33 (West 2001) (“Battery is the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another.”); LA FAVE, *supra* note 28, at 738 n.11.

296. MODEL PENAL CODE § 211.1 cmt. at 187–88 (1980) (footnote omitted). The omitted footnote cites some of the very provisions discussed in this section.

297. *See* COLO. REV. STAT. § 18-13-123(3) (2001) (“it shall be unlawful for any person to knowingly cause or attempt to cause any other person to unknowingly consume or receive the direct administration of gamma hydroxybutyrate (GHB) or ketamine or the immediate chemical precursors or chemical analogs for either of such substances”).

298. *See* COLO. REV. STAT. §§ 18-18-416(1), -5-116 (2000) (“It is unlawful for any person, surreptitiously or by means of fraud, misrepresentation, suppression of truth, deception, or subterfuge, to cause any other person to unknowingly consume or receive the direct administration of any controlled substance....”).

299. ARK. CODE ANN. § 5-13-210(d) (Michie 2001).

300. *See supra* notes 138–46 and accompanying text.

301. *See* DEL. CODE ANN. tit. 11, § 625 (2000) (“when, for a purpose other than lawful medical or therapeutic treatment, the person intentionally causes stupor, unconsciousness or other alteration of the physical or mental condition of another person by administering to the other person, without consent, a drug”).

Any of the following misdemeanors...unlawfully administering drugs...³⁰²

Three states, Arizona, Delaware, and Iowa, have stand-alone drugging provisions, rather than embedding them in larger assault or battery statutes, which may be suggestive of treating them as completed crimes rather than anticipatory offenses.³⁰³ Finally, one additional state, Ohio, has a unique provision entitled "corrupting another with drugs" which prohibits various forms of administration of drugs to another.³⁰⁴ Several cases in Ohio have been brought charging defendants with both the rape and drug crimes.³⁰⁵

4. Poisoning Statutes

Fifteen jurisdictions criminalize the administration of a poison or other noxious substances with the intent to kill or injure the victim.³⁰⁶ Most jurisdictions treat poisoning in miscellaneous or unique criminal provisions; four jurisdictions include poisoning in battery or assault crimes.³⁰⁷ While it may be a stretch to prosecute criminals who administer intoxicants to victims under these poisoning statutes, at least one case has. In *State v. Weaver*, the defendant got an eight-year-

302. *Id.* §§ 772(a)(2)(b), 773(a)(2).

303. *See* ARIZ. REV. STAT. § 13-1205(A) (2000) (unlawfully administering intoxicating liquors, narcotic or dangerous drug); DEL. CODE ANN. tit. §§ 625, 626 (2000) (unlawfully administering drugs, controlled or counterfeit substances, narcotic drugs); IOWA CODE § 708.5 (2001) (administering harmful substances).

304. OHIO REV. CODE ANN. § 2925.02 (Anderson 2001). It provides, in part, [n]o person shall knowingly...(1) By force, threat, or deception, administer to another or induce or cause another to use a controlled substance; (2) By any means, administer or furnish to another or induce or cause another to use a controlled substance with purpose to cause serious physical harm to the other person, or with purpose to cause the other person to become drug dependent; (3) By any means, administer or furnish to another or induce or cause another to use a controlled substance, and thereby cause serious physical harm to the other person, or cause the other person to become drug dependent....

Id.

305. *See, e.g.,* *State v. Dillon*, No. 79AP-785, 1980 Ohio App. LEXIS 10876 (Ohio Ct. App. June 24, 1980).

306. *See* CAL. PENAL CODE § 347 (West 2001); FLA. STAT. ch. 859.01 (2000); IDAHO CODE §§ 18-907(d), -5501 (Michie 2000); LA. REV. STAT. ANN. §§ 14:33, :38.1 (West 2001); MASS. GEN. LAWS ch. 265, § 28 (2001); MICH. COMP. LAWS § 750.436 (2001); MISS. CODE ANN. §§ 97-3-61, -63 (2001); OKLA. STAT. tit. 21, § 832 (2000); R.I. GEN. LAWS § 11-16-5 (2001); S.D. CODIFIED LAWS § 34-20-23 (Michie 2001); VT. STAT. ANN. tit. 13, § 2306 (2001); VA. CODE ANN. § 18.2-54.1 (Michie 2001); 14 V.I. CODE ANN. §§ 295(2), 296 (2001); WASH. REV. CODE §§ 69.40.030, 9A.36.011(1)(b), 9A.36.021(1)(d) (2001); W. VA. CODE § 61-2-7 (2001).

307. *See* IDAHO CODE § 18-907(d) (Michie 2000) (aggravated battery); LA. REV. STAT. ANN. § 14:33 (West 2000) (battery); 14 V.I. CODE ANN. §§ 295(2), 296 (2001) (first- and second-degree assault, respectively); WASH. REV. CODE §§ 9A.36.011(1)(b), .021(1)(d) (2001) (same).

old girl severely drunk and was discovered by authorities with his head between her unclothed legs.³⁰⁸ The child suffered cardiac arrest, as a result of the excessive amount of alcohol in her system, and had to be resuscitated.³⁰⁹ West Virginia prosecuted Weaver for sexual assault and separately for the administration of alcohol under the state's attempt-to-kill-or-injure-by-poison statute.³¹⁰ Weaver argued that alcohol did not constitute a poison within the meaning of the statute. The appellate court rejected his contention, noting that one definition of poison is "[a]ny agent which, introduced...into an organism, may chemically produce an injurious or deadly effect...."³¹¹ Thus, in jurisdictions with poisoning statutes, actors may incur additional liability for the administration of intoxicants as a prelude to sexual assault, especially in cases involving rape drugs that pose considerably more danger than alcohol.

In summary, then, twenty-two jurisdictions criminalize the administration of an intoxicant to another person, although these provisions vary considerably in scope, and fifteen jurisdictions outlaw various forms of poisoning. These statutes are significant because they recognize that a separate harm befalls victims when drugs are introduced into their systems irrespective of any subsequent harm, such as sexual assault. Thus, in states with drug-related assault or poisoning statutes, perpetrators of sexual assault accomplished by drugs or other intoxicants can be prosecuted for both the sexual offenses and the separate assault or poisoning charges. Indeed, as a number of cases in Part II demonstrate, authorities did just that.³¹² Furthermore, offenders in these jurisdictions may be punished more severely because they have committed two, not one, criminal acts, although the possibility of concurrent sentences must be considered. Finally, in cases where the defendant has intoxicated the victim but has not succeeded in accomplishing the sexual assault, he may be prosecuted for any of these drugging crimes or, alternatively, for another type of assault crime—assault with intent to rape.³¹³

308. See *State v. Weaver*, 382 S.E.2d 327, 329 (W. Va. 1989).

309. See *id.*

310. See *id.* at 329–30 (referring to W. VA. CODE § 61-2-7 (2001)).

311. *Id.* at 330.

312. In *State v. Karlen*, 589 N.W.2d 594 (S.D. 1999), the defendant drugged several male victims and had sexual contact with them. He was prosecuted for the sexual offenses and unauthorized distribution of a substance.

313. Seven states punish the crime of assault with the intent to commit rape or other types of sexual offenses. See, e.g., CAL. PENAL CODE § 220 (West 2001) (assault to commit mayhem or specified sex offenses); IDAHO CODE § 18-909 (Michie 2000) (assault with intent to commit a serious felony including rape); MASS. GEN. LAWS ch. 265, §§ 24, 24B (2001) (assault with intent to commit rape and assault on child under sixteen with intent to commit rape, respectively); MISS. CODE ANN. § 97-3-71 (2001) (assault with intent to ravish); N.M. STAT. ANN. § 30-3-3 (Michie 2000) (assault with intent to commit violent felony including criminal sexual penetration); R.I. GEN. LAWS § 11-37-8 (2001) (assault with intent to commit first-degree sexual assault); 14 V.I. CODE ANN. § 295 (2001) (first-degree assault includes assault with intent to commit rape, etc.). Other jurisdictions have repealed similar statutes. Historically these crimes were intended to cover cases in which an act of sexual penetration had not occurred and therefore the defendant could not be held criminally liable for the underlying sexual offense because it had not been completed. Thus,

5. *Grading and Sentence Enhancement Provisions Involving the Use of Drugs*

A number of jurisdictions address the problem of drug-induced sexual assaults by (1) grading sexual offenses committed with intoxicants as higher crimes, (2) enhancing the penalty for the use of drugs, (3) including victim incapacity as an aggravating factor in sentencing guidelines, or (4) crafting sexual predator laws to encompass perpetrators who use intoxicants.³¹⁴ Conceptually, these approaches express legislative condemnation for conduct involving the administration of drugs to facilitate the commission of a sexual offense. Also, the increased penalties in these statutes recognize that the victim has experienced more than the sexual harm.

First, several states grade their sexual offenses more highly when the crime is committed by the administration of an intoxicant. For instance, Indiana makes it a higher level of felony to commit the sexual offense if it "is facilitated by furnishing the victim, without the victim's knowledge, with a drug...or controlled substance...or knowing that the victim was furnished with a drug or a controlled substance."³¹⁵ Louisiana punishes the sexual assault of an intoxicated victim as simple assault, but punishes the same conduct as forcible rape when the defendant has administered the intoxicant.³¹⁶ Texas outlaws the use of drugs in its sexual assault statute, but if the criminal actor uses rape drugs (i.e., "administers or provides flunitrazepam, otherwise known as rohypnol, or gamma hydroxybutyrate to the victim of the offense with the intent of facilitating the commission of the offense...."),³¹⁷ the offense becomes aggravated sexual assault.³¹⁸

An example of a sentence enhancement scheme can be found in Arizona's sexual assault statute, which provides that if the crime "involved the

assault with intent to commit rape was understood as a lesser included offense of rape and that conviction for both the assault and the completed crime would be barred. This may also explain why several states have abolished this offense after they criminalized sexual conduct not involving penetration as a lesser form of sexual offense. One old case, *Quinn v. State*, 142 N.W. 510 (Wis. 1913), discusses the introduction of intoxicants to a victim for the purposes of committing a sexual assault upon her as an assault to commit rape. The court explained that if the defendant had the felonious intent at the time he administered the liquor, then he committed an assault, but if he administered the liquor only for the purpose of inducing her to submit, then no assault occurred.

314. See ARIZ. REV. STAT. § 13-1406(B) (2001); CAL. PENAL CODE §§ 12022.75, 667.61 (West 2001); see also CAL. PENAL CODE § 666.7(f)(11) (West 2001); IND. CODE §§ 35-42-4-1(b)(4), -2(b)(4), -3(a)(4), -5(a)(2)(B), -8(b)(3) (2000); MISS. CODE ANN. § 97-3-65 (2001); TENN. CODE ANN. §§ 39-13-503(c), -505(d), -522(c) (2001); see also ARK. CODE ANN. § 5-13-210 (Michie 2001) (making it a more severe form of assault and battery to use drugs to commit sexual offense).

315. IND. CODE §§ 35-42-4-1(b)(4), -2(b)(4), -3(a)(4), -5(a)(2)(B), -8(b)(3) (2000).

316. See LA. REV. STAT. ANN. §§ 14:42.1(A)(2) (forcible rape), :43(A)(1) (simple rape) (West 2001).

317. TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(vi) (Vernon 2000).

318. Compare TEX. PENAL CODE ANN. § 22.011(b)(6) (Vernon 2000), with TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(vi) (Vernon 2000).

intentional or knowing administration of flunitrazepam, gamma hydroxy butyrate or ketamine hydrochloride without the victim's knowledge, the presumptive, minimum and maximum sentence for the offense shall be increased three years."³¹⁹ Similarly, Tennessee's rape, sexual battery, and child rape statutes provide that "the court shall consider as an enhancement factor that the defendant caused the victim to be mentally incapacitated or physically helpless by use of a controlled substance."³²⁰ Mississippi provides for possible life imprisonment.³²¹ One of California's sentence enhancement provisions reads:

Any person who, for the purpose of committing a felony, administers by injection, inhalation, ingestion, or any other means, any controlled substance...against the victim's will by means of force, violence, or fear of immediate and unlawful bodily injury to the victim or another person, shall, in addition and consecutive to the penalty provided for the felony or attempted felony of which he or she is convicted, be punished by an additional term of three years.³²²

California also has a penalty enhancement scheme for sex offenses. If the defendant accomplishes various specified sexual offenses by administering a controlled substance to the victim by "force, violence, or fear" and another circumstance, then he or she is eligible for life imprisonment and is not eligible for parole for twenty-five years.³²³

Michigan's sentencing guidelines take into account the degree of the offender's exploitation of victim vulnerability. The offender receives five points if he or she "exploit[s] a victim by his or her difference in size or strength, or both, or exploit[s] a victim who was intoxicated, under the influence of drugs, asleep, or unconscious."³²⁴ Similarly, the Federal Sentencing Guidelines incorporate victim

319. ARIZ. REV. STAT. § 13-1406(B) (2001).

320. TENN. CODE ANN. §§ 39-13-503(c), -505(d), -522(c) (2001).

321. See MISS. CODE ANN. § 97-3-65 (2001) (enhanced penalty for forcible sexual intercourse or statutory rape by administering substances).

Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction shall be imprisoned for life...[or] any term as the court, in its discretion, may determine.

Id.

322. CAL. PENAL CODE § 12022.75 (West 2001).

323. *Id.* § 667.6; see also *id.* § 666.7(f)(11) (listing current sentence enhancement provisions); *People v. Bohannon*, 98 Cal. Rptr. 2d 488 (Ct. App. 2000) (recently interpreting 667.6(c)).

324. MICH. COMP. LAWS § 777.40(c) (2000). For an interesting case involving the application of the Guidelines to a sexual assault case not involving drugs, but concerning

vulnerability as an aggravating factor.³²⁵ Finally, a number of jurisdictions include individuals who have committed their sexual offenses through the agency of drugs or other intoxicants within the purview of their sexual predator schemes.³²⁶

C. Controlled Substances Provisions Regarding Rape Drugs

In 2000, Congress passed the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act.³²⁷ The act makes gamma hydroxybutyric acid a schedule I chemical, which is subject to the strictest type of controlled substances regulation. Congress made the following finding, among others: "At least 20 States have scheduled such drug in their drug laws and law enforcement officials have been experiencing an increased presence of the drug in driving under the influence, sexual assault, and overdose cases especially at night clubs and parties."³²⁸ Some states outlaw the possession and/or distribution of certain controlled substances, including those commonly used to commit sexual offenses:³²⁹ gamma hydroxy

the rape of defendant's fourteen-year-old cousin, see *People v. Houston*, 532 N.W.2d 508 (Mich. 1995). The majority of the Michigan Supreme Court upheld the trial court's upward departure from the guidelines in sentencing the defendant to a substantial term of imprisonment.

325. See U.S. SENTENCING GUIDELINES MANUAL §§ 2A3.1(b)(1) (providing a four-level enhancement for administering drug, intoxicant, or similar substance among other means), 3A1.1(b)(1) (providing for a two-level enhancement for vulnerable victims) (2001); see also *United States v. Morgan*, 164 F.3d 1235 (9th Cir. 1999) (applying the federal sentencing guidelines to a case involving the sexual assault of an intoxicated victim); *United States v. Altman*, 901 F.2d 1161, 1165 (2d Cir. 1990) (applying federal sentencing guidelines in case involving drugged victim); Jay Dyckman, Note, *Brightening the Line: Properly Identifying a Vulnerable Victim for Purposes of Section 3A1.1 of the Federal Sentencing Guidelines*, 98 COLUM. L. REV. 1960 (1998) (discussing the vulnerable-victim provision).

326. See, e.g., *State v. Stimmel*, No. 99AP-629, 2000 Ohio App. LEXIS 1473 (Ohio Ct. App. Apr. 4, 2000) (discussing Ohio's sexual predator law); *State v. Sunnycalb*, No. CA97-05-100, 1998 Ohio App. LEXIS 28 (Ohio Ct. App. Jan. 12, 1998) (same). In two cases, rape by drugs was the basis for deportation. See *Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000); *Ourk v. INS*, No. 00-35645 (Sept. 18, 2000) (described in *Zadvydys v. Davis*, 533 U.S. 678 (2001) (Kennedy, J., dissenting)).

327. See 21 U.S.C. § 801 (2000).

328. *Id.* § 812 (2000).

329. See, e.g., ARK. CODE ANN. § 5-64-201 (Michie 2001) (GHB); COLO. REV. STAT. § 18-18-203 (GHB), -405(2.5) (flunitrazepam) (2001); DEL. CODE ANN. tit. 16, § 4714(e) (2000) (GHB); FLA. STAT. ch. 893.03(1)(a)(30), (1)(d)(3) (2001) (flunitrazepam and GHB, respectively); GA. CODE ANN. § 16-13-30(f) (2000) (flunitrazepam); HAW. REV. STAT. § 329-14(d)(17) (2000) (GHB); IDAHO CODE § 37-2705(e)(1)-(2) (Michie 2000) (GHB, flunitrazepam); IND. CODE § 35-48-2-4(e) (2001) (GHB); IOWA CODE § 126.23 (2001) (outlawing possession and distribution of gamma hydroxybutyrate); ME. REV. STAT. ANN. tit. 17-A, § 1102(2)(L)-(M) (West 2001) (GHB and ketamine); MASS. GEN. LAWS ch. 94C, § 31 (flunitrazepam, GHB, ketamine); MISS. CODE ANN. § 41-29-113(e) (2001) (GHB); NEB. REV. STAT. § 28-405(f) (2001) (GHB); NEV. REV. STAT. 453.336, .337 (2001) (flunitrazepam, GHB); N.H. REV. STAT. ANN. §§ 318-B:1-c (flunitrazepam, GHB, ketamine), :26 (flunitrazepam) (2000); N.J. STAT. ANN. §§ 2C:35-5.3 (outlawing manufacture, distribution, and possession of flunitrazepam), -10.2 (outlawing obtaining or

butyrate, flunitrazepam, and ketamine. Six states also refer to these substances in other criminal provisions dealing with sexual assault³³⁰ or drugging.³³¹ Two states place prohibitions on the use of intoxicants to commit sexual offenses in their controlled substances codes rather than in their sexual assault statutes.³³²

D. Summary and Conclusion

The foregoing review of American statutory law reveals that collectively federal and state legislatures have done a fairly good job of punishing many aspects of sexual assault by drugs. A host of provisions from almost every jurisdiction specifically criminalize rape by drugs or other intoxicants. Defendants who administer drugs and then sexually assault victims are subject to punishment almost everywhere they commit the crime in the United States. In fewer jurisdictions, those who opportunistically take advantage of persons who have voluntarily ingested alcohol or drugs face criminal liability. In total, these statutes protect and vindicate the right of all citizens to be free of nonconsensual sexual exploitation.

In addition to the sexual offenses, more than one-half of the jurisdictions separately punish the administration of an intoxicant. Whether to prohibit the commission of a sexual offense or other felony, to protect against non-therapeutic drugging, or to guard against injurious poisoning, all these offenses recognize that drugging may constitute a criminal harm in its own right, separate and apart from the nonconsensual sexual activity that the drugging may precede. That recognition is echoed in those grading and sentencing provisions that give added weight to the administration of intoxicants in sexual assault cases beyond the sexual harm.

Finally, changes are occurring with respect to the treatment of common rape drugs, such as GHB, flunitrazepam, and ketamine. The federal system and a considerable number of states have changed their narcotics and controlled substances provisions to treat these drugs as the dangerous substances they are, whether voluntarily ingested or administered as a prelude to rape. Collectively,

possessing gamma hydroxybutyrate without prescription) (2001); N.C. GEN. STAT. § 90-89(4)c (2000) (GHB); OHIO REV. CODE ANN. § 3719.41 (Anderson 2001) (GHB); 35 PA. CONS. STAT. § 780-113 (2001) (GHB); S.C. CODE ANN. § 44-53-370 (Law. Co-op. 2000) (flunitrazepam, GHB); VA. CODE ANN. §§ 18.2-251.2 (flunitrazepam), 54.1-3446(4) (GHB) (Michie 2001); WASH. REV. CODE § 9.94A.515 (2000) (flunitrazepam); WIS. STAT. § 961.14(5)(ag) (2000) (GHB); WYO. STAT. ANN. § 35-7-1014(e)(iii) (Michie 2001) (GHB); *see also* 2001 Cal. Adv. Legis. Serv. 841 (Deering) (reclassifying GHB as a schedule I controlled substance); FLA. STAT. ch. 893.135(1)(g)-(h) (2000) (providing for mandatory sentences for trafficking in flunitrazepam and GHB, respectively); 2001 Tex. Sess. Law Serv. 251 (Vernon) (classifying flunitrazepam and GHB in one penalty group and ketamine in another).

330. *See* ARIZ. REV. STAT. § 13-1406(B) (2000); IOWA CODE § 709.4(3)(a)-(b) (2001); TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(vi) (Vernon 2000).

331. *See* COLO. REV. STAT. § 18-13-123(3) (2001); NEV. REV. STAT. 200.408(2)(a) (2001); S.C. CODE ANN. § 44-53-370(f) (Law. Co-op. 2000).

332. *See* LA. REV. STAT. ANN. § 40:969(D) (West 2001); S.C. CODE ANN. § 44-53-370(f) (Law. Co-op. 2000).

these three sets of provisions go a long way toward combating the abuses witnessed in the cases excerpted at the beginning of the Article and discussed in more detail in Section I.

On the other hand, the statutory schemes in place for the control and punishment of rape by drugs and other intoxicants would benefit from some forms of statutory reform in terms of coverage, language, and general approach. The last section of this article makes suggestions for statutory reform, arguing for the incorporation of many of the good aspects of existing statutory schemes across the board. This will ensure the maximum criminal coverage for those who commit rape by drugs and will provide a measure of uniformity in approach across the jurisdictions in the United States.

IV. SUGGESTIONS FOR STATUTORY REFORM

As these authorities make clear, the fundamental wrong at which the law of rape is aimed is not the application of physical force that causes physical harm. Rather, the law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent. Because the fundamental wrong is the violation of a woman's will and sexuality, the law of rape does not require that "force" cause physical harm. Rather, in this scenario, "force" plays merely a supporting evidentiary role, as necessary only to ensure an act of intercourse has been undertaken against a victim's will.³³³

Criminal sexual offense statutes should protect citizens from unwanted, nonconsensual sexual activity by whatever means it is achieved, be it force, threat, coercion, power, fraud, or drugs. As many commentators have observed, the central value protected by sexual offense provisions is sexual autonomy or sexual integrity,³³⁴ the violation of which represents a unique, not readily comparable, type of harm to the victim.³³⁵ In one sense, it should be irrelevant to rape law how the victim became incapable of giving consent—whether intoxicated by her own

333. *People v. Cicero*, 204 Cal. Rptr. 582, 590 (1984).

334. The New Jersey Supreme Court wrote:

Today the law of sexual assault is indispensable to the system of legal rules that assures each of us the right to decide who may touch our bodies, when, and under what circumstances. The decision to engage in sexual relations with another person is one of the most private and intimate decisions a person can make. Each person has the right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and character of that contact.

State of New Jersey in Interest of M.T.S., 609 A.2d 1266, 1278 (N.J. 1992).

335. See Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1448 (1993) ("spiritual murder"); Lynne N. Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193 (1987-88) ("negation of existence"); see also *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) ("ultimate violation of self").

efforts or by those of the defendant. Thus, at a minimum, every jurisdiction should have an explicit statutory provision that covers those individuals who are too drunk or otherwise too intoxicated to give informed or knowing consent to sexual activity. These provisions should be explicit; reliance on case precedent or mental or physical incapacitation provisions that are silent with respect to intoxicants is inadequate. Furthermore, and perhaps most importantly, the description of the victim's incapacity should not be written in terms of the victim's ability to "resist," "appraise or control her conduct," or "understand the nature or consequences of the act," but rather whether the victim is capable of giving informed or knowing consent.

In addition to outlawing nonconsensual sexual activity with intoxicated persons, every jurisdiction should continue to criminalize the administration of intoxicants as a prelude to rape either by grading this conduct as an aggravated form of sexual assault or by punishing it as a separate criminal offense. The administration of drugs poses such a substantial risk to human life and bodily integrity, over and above the drug's use to subdue the victim to accomplish sexual assault, that separate criminalization is appropriate. Treating administration of an intoxicant as a separate criminal offense is hardly radical in light of the host of assault statutes that already do so and the considerable number of cases in which defendants have been prosecuted for both offenses. Moreover, disaggregating drugging from sexual assault emphasizes that force is not necessarily required for all types of sexual crimes.

Third, every jurisdiction should follow the lead of Congress by scheduling frequently used rape drugs as the most serious type of controlled substances and provide appropriate penalties for the possession and distribution of those substances. Such legislation will reinforce the restraints already present in the rape and drugging statutes and complete an all-fronts attack on rape by drugs and other intoxicants. Finally, courts should take into account at sentencing two aggravating circumstances, videotaping or photographing the sexual assault as well as the abuse of a position of professional trust, because they demonstrate either the defendant's extraordinary moral blameworthiness or produce substantial additional harms not adequately addressed by the basic criminal sexual offense. The focus on sentencing is particularly apt at a time when an increasing number of states are passing sentencing guidelines or sentence enhancement provisions.

A. Explicit Reference to the Intoxicants in Sexual Offense Provisions

Of the fifty-six jurisdictions in the United States, forty-seven explicitly mention drugs or other intoxicants in one or more of their sexual offenses.³³⁶ The exceptions are Georgia, Massachusetts, the military, Alaska, North Carolina, Virginia, New Mexico, Nebraska, and Nevada. The first three jurisdictions have common law case precedent interpreting their rape statutes to include the circumstance where the victim is drugged or intoxicated.³³⁷ The remaining six

336. See *supra* Part III and accompanying text.

337. See *supra* notes 248–54 and accompanying text.

states use language in their sexual offense provisions that might arguably include intoxicated persons, often employing phraseology common to definitions of mentally incapacitated, physically helpless, or mentally disabled persons but omitting intoxicants.³³⁸ The omission of explicit statutory references to alcohol, drugs, and other intoxicants is undesirable for a number of reasons, as the next section discusses.

1. Problems with Relying on Case Precedent

The problems associated with relying on case precedent for the imposition of criminal liability for sexual assault of an intoxicated person are beautifully illustrated by cases coming from the three jurisdictions that rely on case precedent: Massachusetts, Georgia, and the military. In the Massachusetts case of *Commonwealth v. Tatro*, the defendant was tried for child rape and drugging for sexual intercourse.³³⁹ During its deliberations, the jury asked “whether intoxication or accompanying inability to consent constituted force,”³⁴⁰ an explicit requirement of Massachusetts’s rape statute.³⁴¹ Instead of answering in the affirmative based on case law, the court gave an erroneous and non-responsive answer.³⁴² Thus even if case law in Massachusetts covers these instances, how would juries know? Juries (and perhaps judges) are confused by statutory language and jury instructions that do not mention intoxicants.

A second example of confusion comes from a military case; the military’s rape code has no explicit provision relating to drugs or intoxication, although military courts adopt the rule that nonconsensual intercourse with an intoxicated person is rape.³⁴³ In *United States v. Grier*,³⁴⁴ the defendant related the following in an interview with investigating authorities: “At the time this happened, I did not know if a woman is not capable of giving consent, it is rape. Now, I know it is rape.”³⁴⁵ Thus, *Grier* illustrates the problem that citizens and defendants may not be able to ascertain the contours of rape law in their jurisdictions, and the importance in phrasing statutory language in a way that focuses on the victim’s inability to consent.

A recent case from Georgia, reported in a newspaper article, provides a third illustration of the problems that arise when states do not have explicit statutory provisions governing the sexual assault of intoxicated victims.³⁴⁶ Two brothers, who were also fraternity brothers, allegedly drugged a Georgia State co-

338. See *supra* notes 167–68, 213–14, 224 and accompanying text.

339. See *Commonwealth v. Tatro*, 676 N.E.2d 843 (Mass. App. Ct. 1997).

340. *Id.* at 846.

341. See MASS. GEN. LAWS ch. 265, § 22 (2001).

342. The court responded, erroneously, that consent was not an issue in the case because of the victim’s age; this error was held to be harmless on appeal. See *Tatro*, 676 N.E.2d at 846.

343. See *supra* notes 251–54 and accompanying text.

344. 53 M.J. 30 (C.A.A.F. 2000).

345. *Id.* at 33.

346. See Schmitt, *supra* note 136, at 1.

ed and sexually assaulted her.³⁴⁷ Although Georgia's rape statute is silent on drugging, case precedent brings these cases within the statute's purview under the constructive force doctrine.³⁴⁸ However, instead of relying on this precedent, the prosecution proceeded on a theory that the victim was "mentally incapable" of expressing nonconsent because of her drugged condition.³⁴⁹ Unfortunately, the convictions were overturned because the appellate court found that the category of "mentally incapable" is limited to mentally retarded or defective persons, not those who are drugged.³⁵⁰ The victim's father opined: "'Of course, we think [the judge is] wrong,' he says. 'I just feel sorry for the women of Georgia—that advances made over the years are now moving backwards.'"³⁵¹

Thus, juries, judges, defendants, and even prosecutors may have a difficult time ascertaining the law in states with no explicit sexual assault provision mentioning intoxicants. Basic constitutional principles of notice and fairness require that states inform citizens of what is criminally proscribed conduct.³⁵² If precedent already exists in these three jurisdictions regarding the rape of drunken or drugged victims, then it should be a fairly simple matter to codify the precedent; no new law is created. The need seems particularly acute in Massachusetts because of that jurisdiction's separate statute outlawing drugging for the purpose of sexual intercourse and in the military in light of the large number of cases involving members of the armed services.

347. *See id.*

348. *See supra* note 248 and accompanying text.

349. Schmitt, *supra* note 136, at 1.

350. *Id.*

351. *Id.*

352. In *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952), the United States Supreme Court explained: "[a] criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation." *Id.* at 340.

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court wrote:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108–09.

2. Problems with Using Mental Incapacitation or Physical Helplessness Language Without Referring to Intoxicants

Six states, Alaska, Nebraska, Nevada, New Mexico, North Carolina, and Virginia, also do not mention drugs or other intoxicants in any of their sexual offense provisions. But unlike Georgia, Massachusetts, and the military, these states describe various forms of victim incapacitation that may trigger criminal liability in their statutes, such as the inability to appraise or understand conduct or the inability to resist.³⁵³ The problem with these provisions is ambiguity. Are persons who have become self-intoxicated or intoxicated with the defendant's help protected under these statutes? One possible interpretation is that these statutes fail to specify drugs or other intoxicants because they are equating incapacitation from all possible sources (e.g., beating, medical illness, retardation, intoxicants) and thus choose not to limit their provisions to only intoxicants. Alternatively, the absence of intoxicant language may be evidence of a legislative judgment that only mentally ill and physically helpless, but not intoxicated, persons are protected from sexual predation. For all the reasons noted in the previous section, it is incumbent on these states to articulate unambiguously the scope of their sexual assault statutes. The paucity of the published cases from these jurisdictions involving sexual assault by intoxicants may also underscore the ambiguity of these statutes.³⁵⁴

3. Description of the Intoxicants

Modern sexual assault statutes should utilize language, describing the types of intoxicants subsumed under their auspices, that is broad enough to cover the range of such substances. Of particular importance is the question whether alcohol is included in the list. Wisconsin's choice to specifically exclude alcohol

353. Alaska combines mental and physical incapacitation in its definition of "incapacitated" and separately defines mentally incapable. Alaska defines incapacitated as "temporarily incapable of appraising the nature of one's own conduct or physically unable to express unwillingness to act." ALASKA STAT. §§ 11.41.470(2) (Michie 2001). In Nebraska, the description is as follows: "the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct..." NEB. REV. STAT. §§ 28-319(1), -320(1) (2001). Nevada's statute provides: "the victim was mentally or physically incapable of resisting or understanding the nature of his conduct..." NEV. REV. STAT. 200.366(1) (2001). New Mexico defines "force or coercion," *inter alia*, as "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...." N.M. STAT. ANN. § 30-9-10(A)(4) (Michie 2000). North Carolina's provision states: "due to any act committed upon the victim is rendered substantially incapable of appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act." N.C. GEN. STAT. § 14-27.1(2) (2000). Finally, Virginia's statute describes the condition of the victim as one that prevents her from understanding nature or consequences of the sexual act. *See* VA. CODE ANN. § 18.2-67.10(3) (Michie 2000).

354. *But see* State v. Aiken, 326 S.E.2d 919 (N.C. Ct. App. 1985); State v. Raines, 324 S.E.2d 279 (N.C. Ct. App. 1985); Miller v. Commonwealth, 27 S.E.2d 57 (Va. 1943); Howard v. Commonwealth, 465 S.E.2d 142, 143 (Va. Ct. App. 1995).

from its definition of intoxicant³⁵⁵ seems problematic because of the large number of cases in which victims were severely intoxicated by alcohol and then raped.³⁵⁶ Other statutes merely speak of “substances.”³⁵⁷ The better practice would be to provide some description of the critical quality of those substances—their narcotic, anesthetic, or otherwise intoxicating effects. No harm exists in also listing commonly used rape drugs as long as the list is not exhaustive.³⁵⁸ Finally, two states include hypnosis,³⁵⁹ a laudable addition because hypnosis may have the same effect as drugs and because it has been used in the commission of sexual offenses.³⁶⁰

B. Criminalizing Multiple Harms: Sexual Assault and Administration/Drugging

1. Sexual Assault of Intoxicated Victims: Ingestion versus Administration of Intoxicants

The most significant shortcoming of modern sexual offense statutes in terms of criminalizing rape by drugs is that approximately two-thirds of the jurisdictions explicitly provide for liability only when the defendant administers the intoxicant. Criminal liability for sexual conduct with intoxicated victims should not be limited to those actors who administer a substance as a prelude to sexual assault but should encompass all whom sexually prey on persons too intoxicated to give informed consent. In other words, modern statutes should also protect all citizens, even those who voluntarily ingest alcohol or drugs, from sexual assault. Strong public policy reasons exist for such an approach. As the court in *State v. Duffy* wrote, “[u]nder appellant’s interpretation, any person who intoxicated herself to the point of unconsciousness or impaired ability to resist would be fair game for any attacker who would commit violent, felonious sexual acts against her. We cannot find that the legislature intended such a result.”³⁶¹

355. See WIS. STAT. § 940.225(5)(ai) (2000).

356. See *supra* notes 47–83 and accompanying text.

357. See, e.g., HAW. REV. STAT. § 707-700 (2000).

358. See, e.g., IOWA CODE § 709.4(3) (2001); TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(vi) (Vernon 2000).

359. See *supra* note 223.

360. See *supra* note 116.

361. *State v. Duffy*, No. CA95-03-006, 1996 Ohio App. LEXIS 1305, at *22 (Ohio Ct. App. Apr. 1, 1996). See also *Commonwealth v. Burke*, 105 Mass. 376 (1870), where the court wrote more than a century ago:

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

Id. at 380–81; see also *Commonwealth v. Helfant*, 496 N.E.2d 433 (Mass. 1986) (reaffirming the holding in *Burke*). In *Stadler v. State*, 919 P.2d 439 (Okla. Crim. App. 1996), the court wrote:

In other words, the Court’s concern was that the victim be unconscious of the nature of the act, whether by drugs, sleep, or as here, intoxication.

Thus, whether the victim passed out at her brother's wedding because she drank too much or because someone slipped GHB into her soda, she should be protected from nonconsensual sexual acts.

The central harm protected by sexual offenses is the same in both situations—sexual acts to which the victim has not consented because she lacks the capacity to give informed consent. As many commentators have pointed out, sexual offenses protect citizens against a serious and unique harm—a violation of their sexual autonomy or integrity—that is, the freedom to choose with whom and under what circumstances to engage in sexual activity.³⁶² Statutes that explicitly criminalize only administration followed by sexual assault conflate the two harms in these cases—the drugging harm and the separate sexual autonomy harm.

The mechanism of victim incapacitation is legally irrelevant to vindicating the right to be free of nonconsensual sexual predation.³⁶³ It does not

From this, I am forced to conclude that it is of no apparent consequence how the victim came to be unconscious of the nature of the act.

Id. at 443. In *State v. Chaney*, 5 P.3d 492 (Kan. 2000), the dissenting judge quotes from the legislative history changing the statute from one requiring administration to one that does not:

'It seems when a victim is incapable of giving consent because of the effect of any alcoholic liquor or drug, it is rather immaterial who has administered the substance. A rapist should not be able to hide behind the fact that he didn't administer the drugs or he didn't know they had been administered when it is obvious that the victim cannot give consent for some reason.' Testimony of Senator Lillian Papay, Senate Judiciary Committee (Feb. 18, 1993).

Id. at 501.

Compare these statements with the Model Penal Code Commentary:

Some of these [non-administration] statutes may well achieve excessively broad coverage. It seems extravagant to assign felony sanctions to the male who, without force or threat, engages in sexual intercourse with a decidedly and obviously intoxicated woman without at least knowledge that drugs had involuntarily been administered. From the actor's perception, at least, the situation is exceedingly difficult to identify and perilously close to a common kind of social interaction.

MODEL PENAL CODE § 213.1 cmt. at 318 (1980). The notion that sexual intercourse with a "decidedly and obviously intoxicated" person is a "common kind of social interaction" seems highly suspect. Statements like this give credence to feminists' arguments that much of what passes for consensual sexual relations in our society is really the result of various forms of coercion. *See, e.g.,* CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 88 (1987).

362. *See, e.g.,* Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously, Rape Law and Beyond*, 11 *LAW & PHIL.* 35 (1992).

363. Even the Model Penal Code observes:

Hypothetically, at least, it might be possible to condemn as rape intercourse with any female who lacks substantial capacity to appraise or control her conduct. At a wholly conceptual level, that position would

matter whether victims are beaten into unconsciousness, exist in persistent vegetative states, or pass out because they consume too much alcohol. The permanence or genesis of victim incapacitation is not important vis-à-vis the harm of nonconsensual sex. Those jurisdictions that currently punish sexual offenses involving self-intoxicated or drugged victims tend to equate these persons with the traditional categories worthy of special protection under rape law—the mentally ill and the physically helpless.

Moreover, no notion of consent to intoxication can be stretched to include consent to subsequent sexual conduct. When a person voluntarily consumes alcohol or drugs, he has not thrown open the doors to all manner of unwanted criminal conduct, be it murder, assault, robbery, or sexual offenses; rather, the criminal law protects drunken or drugged persons from these harms. Contributory negligence, here in the form of becoming intoxicated, is not recognized as a defense to criminal liability.³⁶⁴ Finally, the notion of blaming the victim because of her conduct in precipitating a sexual crime is particularly problematic in light of the history of similar abuses in rape law.³⁶⁵

By insisting on the administration of the intoxicant for all forms of sexual assault, states perpetuate the notion that force is the critical consideration in rape law rather than nonconsent.³⁶⁶ The administration of an intoxicant can be considered a type of force (i.e., constructive force)³⁶⁷ or simply comparable to

accord with the underlying premise that the law of rape and related offenses should protect against non-consensual intimacy.

MODEL PENAL CODE § 213.1 cmt. at 315 (1980). Elsewhere the commentators write: “The unifying principle among this diversity of conduct is the idea of meaningful consent.” *Id.* at 301. The writers then go on to argue that such a rule would be unsatisfactory because of the role that alcohol and drugs play in normal courtship activities. *See id.* at 315, 318.

364. LaFave observes that the contributory negligence defense “has no place in the criminal law”: “Negligence by the victim, just as with criminal conduct by the victim, ‘does not bar an action against another for the wrong which he has committed against the peace and dignity of the state.’” LAFAVE, *supra* note 28, at 520 (footnote omitted).

365. For a brief overview of the phenomenon of blaming the victim in rape cases, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 536–37 (2d ed. 1995). *See also* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 311–13 (1975) (discussing the she-was-asking-for-it phenomenon); Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 26 n.163 (1977) (quoting a mock examination of a mugging victim).

366. *See* MODEL PENAL CODE § 213.1 cmt. at 301–02 (1980) (describing the ancient definition of rape as based on consent, not force); *see also* State of New Jersey in Interest of M.T.S., 609 A.2d 1266, 1270 (N.J. 1992) (“Under the common law, rape was defined as ‘carnal knowledge of a woman against her will.’ American jurisdictions generally adopted the English view, but over time states added the requirement that the carnal knowledge have been forcible, apparently in order to prove that the act was against the victim’s will.” (citation omitted)); Schulhofer, *supra* note 362, at 60 (1992) (suggesting that force was not part of the original common law definition of rape, which was described as “unlawful sexual intercourse with a female person without her consent”).

367. In defending the choice to include only defendant administration of the intoxicant followed by sexual assault in its version of rape, the Model Penal Code commentators observe: “Where these conditions obtain, the actor’s conduct amounts to

force, and is certainly blameworthy in its own right, but need not be an indispensable element of all types of sexual offenses involving intoxicated victims. Legislatures should recognize that categories of non-forcible rape have always existed, notably the two types which are highly comparable in terms of victim incapacitation: mentally ill and physically helpless persons. Furthermore, many modern forms of sexual assault crimes do not require force, such as the abuse of authority, coercion, or fraud, in securing sexual compliance. Thus, the criminalization of rape by drugs only when the defendant administers, and not when the victim voluntarily ingests, the intoxicant is a throwback to the time when rape statutes focused more on force than nonconsent.

Analogizing rape law to theft offenses,³⁶⁸ one way of thinking about the crimes of sexual assault of an intoxicated victim and administration of drugs followed by sexual assault is to liken the first to larceny (the nonconsensual taking of property) and the second to robbery (the forcible and nonconsensual taking of property). Failure to explicitly criminalize sexual assault of self-intoxicated persons means that only the robbery-like or forcible offense is being punished. As Schulhofer has argued in another context, “[t]hese cases make clear that one thing missing in the law of rape is some way to punish sexual misconduct that is not physically violent. It is as if we had a law against armed robbery but no law against theft.”³⁶⁹ Sexual crimes should encompass both types of offenses because they share the central harm to sexual integrity.³⁷⁰

2. Tests of Victim Incapacity

Of course, the critical question is how to describe the degree of intoxication, or more accurately incapacity due to intoxication, that a victim must suffer before sexual activity with her is nonconsensual and worthy of criminal punishment. The most common test currently employed is that the person is so incapacitated as to be unable to appraise or control her conduct.³⁷¹ Other provisions focus on the victim’s ability to resist the sexual acts; the physical

coercion and may be assimilated to the paradigm case of forcible rape for purposes of liability and grading.” MODEL PENAL CODE § 213.1 cmt. at 317 (1980).

368. Many commentators are strongly opposed to such an analogy on the grounds that sexual offenses and property offenses are not in the least comparable. *See, e.g.*, Henderson, *supra* note 335, at 219 n.97; West, *supra* note 335, at 1148.

369. Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2184 (1995).

370. Finally, the line between ingestion and administration can be a difficult one at times. If the actor is liable regardless of administration issues, then the sexual integrity of the victim is vindicated.

371. For instance, Maryland defines mentally incapacitated as: “a victim who, due to the influence of a drug, narcotic or intoxicating substance,...is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting....” MD. ANN. CODE of 1957, CRIMES & PUN. § 461(c) (2001). Wisconsin provides: “a person who is under the influence of an intoxicant to a degree which renders that person incapable of appraising the person’s conduct, and the defendant knows of such condition.” WIS. STAT. § 940.225(2)(cm) (2000).

helplessness provisions use the test of whether the victim is unconscious or unable to communicate her unwillingness to act. Each of these approaches is inadequate because it fails to emphasize the central inquiry—whether the victim is intoxicated or drugged to the extent of not being able to give informed consent to the sexual activity.

a. Eliminate Resistance Language

The use of resistance language in modern sexual assault provisions dealing with intoxicants (e.g., the victim was prevented from resisting because of an intoxicant) is particularly unfortunate because such language dates back to a time when resistance to the utmost was an important hallmark of rape law. Now that resistance is ceasing to be an important consideration in any other facet of modern sexual offenses,³⁷² encountering this language in provisions relating to victim incapacitation due to intoxicants is confusing. Courts have had to construe the resistance language in their jurisdiction's intoxication provisions to be consistent with the remaining portions of their rape or sexual assault statutes.

An excellent example of a case in which the issue of resistance was raised is the recent case of *People v. Giardino*,³⁷³ in which the jury requested guidance on the meaning of resistance in California's rape statute.³⁷⁴ The appellate court noted that normally jury instructions that track the statutory language are sufficient unless the jury would have difficulty applying them, but the court went on to hold that an additional instruction was required in the case because the meaning of the phrase preventing resistance was not clear.³⁷⁵ In explaining that resistance did not refer to physical resistance, but rather the victim's ability to exercise judgment, the court held that the jury should have been instructed that "as a result of her level of intoxication, the victim lacked the legal capacity to give 'consent' as that term is defined in section 261.6."³⁷⁶ In reversing the conviction,

372. See, e.g., Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 799 (1988). Singer and La Fond observe that the majority of states no longer have a resistance requirement. RICHARD G. SINGER & JOHN Q. LA FOND, *CRIMINAL LAW: EXAMPLES AND EXPLANATIONS* 199 (2d ed. 2001). Similarly, La Fave reports that thirty states have no resistance language in their rape statutes and that six states have explicitly provided that physical resistance is no longer required, although he cautions that resistance may still play a tacit role in some jurisdictions. See LAFAVE, *supra* note 28, at 773. Dressler writes: "Although many states retain the resistance requirement, the trend is to reduce the significance of the rule or abolish it entirely." DRESSLER, *supra* note 365, at 541.

373. 98 Cal. Rptr. 2d 315 (Ct. App. 2000); see also *People v. Salazar*, 193 Cal. Rptr. 1 (Ct. App. 1983) (discussing resistance requirement in rape-by-drugs provision although case involved the use of physical force; defendant argued that the continuance of the resistance requirement in rape-by-drug cases indicated that legislature also intended to retain it in other rape provisions; the court rejected the argument).

374. See CAL. PENAL CODE § 261(a)(3) (West 2001).

375. See *Giardino*, 98 Cal. Rptr. 2d at 324.

376. *Id.* California defines consent as follows: "positive cooperation in act or attitude pursuant to the exercise of free will. The person must act freely and voluntarily and

the appellate court added: “We are sympathetic to the quandary in which the trial court was placed. Its reluctance to vary from the statutory language or the standard jury instructions is understandable, particularly in light of the absence of any prior case law directly interpreting the phrase at issue.”³⁷⁷ Thus, resistance apparently is not really resistance, but is a question of consent, under California’s rape law.

Similarly, in *Elliott v. State*,³⁷⁸ the Texas Court of Criminal Appeals had to decipher the meaning of “physically unable to resist” in the state’s sexual assault statute. Reviewing the history of the resistance requirement in Texas rape law, the court concluded, “the notion that the amount of compulsion necessary to constitute sexual assault should be measured by the degree of resistance to be expected under the circumstances was dropped from the statutory scheme.”³⁷⁹ Like *Giardino*, the *Elliott* court interpreted its resistance provision in terms of consent, holding “that where assent in fact has not been given, and the actor knows that the victim’s physical impairment is such that resistance is not reasonably to be expected, sexual intercourse is ‘without consent’ under the sexual assault statute.”³⁸⁰ Thus, resistance language misdirects the inquiry of interest; the question is not whether a victim resisted but whether she or he consented.³⁸¹

b. Replace or Modify Appraise/Understand or Control Conduct Language

Sexual assault statutes that utilize tests of incapacity based on the victim’s inability to either appraise or understand her conduct or to control her conduct are less objectionable than the resistance provisions because they do not invite inquiry into a question that is no longer legally relevant in rape cases. The principal shortcoming with these tests is their emphasis, like the resistance provisions, on the victim’s conduct rather than focusing more directly on her ability to consent. These provisions are couched in language remarkably reminiscent of the two most common tests for an insanity defense, the M’Naghten³⁸² and the Model Penal Code standards,³⁸³ and for an involuntary intoxication defense.³⁸⁴ When the defendant’s

have knowledge of the nature of the act or transaction involved.” CAL. PENAL CODE § 261.6 (West 2001).

377. *Giardino*, 98 Cal. Rptr. 2d at 325.

378. 858 S.W.2d 478 (Tex. Crim. App. 1993).

379. *Id.* at 485.

380. *Id.*; see also *Horowitz v. State*, No. 01-93-01022-CR, 1996 Tex. App. LEXIS 1080, at *22-*23 (Tex. App. Mar. 7, 1996) (reaffirming the standard).

381. In discussing the resistance requirement in general, the dissenting judge in *Rusk v. State*, 406 A.2d 624 (Md. Ct. Spec. App. 1979), *rev’d* 424 A.2d 720 (Md. 1981), wrote: “Thus it is that the focus is almost entirely on the extent of resistance—the victim’s acts, rather than those of her assailant. Attention is directed not to the wrongful stimulus, but to the victim’s reactions to it.” *Id.* at 629 (Wilner, J., dissenting) (emphasis added).

382. *M’Naghten* provides a defense if the actor, because of a mental defect or disease, did “not know the nature or quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.” *M’Naghten’s Case*, 8 Eng. Rep. 718, 722 (1843).

383. The Model Penal Code test provides: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct

production of criminal conduct is that which is of interest, tests designed to assess the actor's cognition (understand or appreciate) or volition (control) with respect to that conduct are critical in determining culpability. However, in the sexual assault context, the victim's conduct is not the primary focus of attention; like all other crimes, it is the defendant's conduct and mental state that continue to be pivotal in determining criminal liability. The victim's conduct is only legally relevant as a proxy or indicator of consent or, perhaps more accurately in this instance, her capacity to consent. Not only does the focus on the victim's conduct direct the inquiry away from the defendant (where it should be) to the victim, such focus also tends to obfuscate the critical connection that the victim's conduct has to her capacity to consent. One example of a provision that makes an explicit connection between consent and the victim's ability to appraise or control her conduct is California's definition of consent, which provides that "'consent' shall be defined to mean positive cooperation in act or attitude pursuant to the exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."³⁸⁵ Thus, tests phrased in terms of conduct should be modified to draw an explicit connection between the conduct and the victim's capacity to give consent. Or, alternatively, the test should be written simply in terms of consent.

c. Utilize Lack of Capacity to Give Informed, Knowing, or Reasoned Consent

lacks judgment to give a *reasoned* consent to sexual contact or sexual penetration³⁸⁶

Consent is no defense if it is given by...one, who, by reason of immaturity, insanity, intoxication or use of drugs is unable and known by the actor to be unable to exercise a *reasonable judgment* as to the harm involved.³⁸⁷

or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (1962).

384. For example, the Model Penal Code provides: "Intoxication that (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law." MODEL PENAL CODE § 2.08(4) (1962).

385. CAL. PENAL CODE § 261.6 (West 2001).

386. MINN. STAT. § 609.341(7) (2000) (emphasis added) (in definition of mentally incapacitated).

387. N.H. REV. STAT. ANN. § 626.6 (2000) (emphasis added) (in consent provision); see also MONT. CODE ANN. § 45-2-211(2)(b) (2000) (This consent-as-a-defense statute provides: "Consent is ineffective if...it is given by a person who by reason of youth, mental disease or defect, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense."); OHIO REV. CODE ANN. § 2907.02 (Anderson 2001) ("substantially impairs the other person's judgment or control").

incapable of making an *informed* consent to sexual intercourse³⁸⁸

unable to give *knowing* consent³⁸⁹

incapable, through any unsoundness of mind, whether temporary or permanent, of giving *legal* consent³⁹⁰

“consent” shall be defined to mean positive cooperation in act or attitude pursuant to the exercise of free will. The person must act freely and *voluntarily* and have *knowledge* of the nature of the act or transaction involved.³⁹¹

The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of *cognition*³⁹²

unable to *withhold* consent or to *withdraw* consent because of a physical condition, or...unable to *communicate* nonconsent³⁹³

substantially incapable of appraising the nature of the contact involved or of understanding that the person has the right to *deny* or *withdraw* consent³⁹⁴

The operative incapacity language of the intoxication provisions in sexual assault statutes should focus directly on consent because, after all, sexual offenses protect citizens from unwanted, nonconsensual sexual activity. As the statutes excerpted above indicate, a number of jurisdictions have already crafted their provisions to emphasize consent. Some of these provisions require that consent be reasoned, informed, knowing, or legal. Others stress the importance of various cognitive or volitional abilities in the context of assessing consent. California’s definition emphasizes two important considerations in arriving at a notion of informed or knowing consent. First, to make a reasoned choice to participate in the proposed activity, the person must have sufficient information (knowledge) about the proposed activity, including the type of sexual contact involved, the identity of her sexual partner, and, perhaps even, information about the HIV-status of her partner. Second, that choice must be the product of her free will and not the result of various forms of coercion; California’s statute captures

388. MO. REV. STAT. §§ 566.030(1), .060(1) (2000) (emphasis added) (in definition of forcible compulsion).

389. 720 ILL. COMP. STAT. 5/12-13(a)(2) (2001) (emphasis added) (in criminal sexual assault provision).

390. IDAHO CODE § 18-6101(2) (Michie 2000) (emphasis added) (in rape statute); *see also* OKLA. STAT. tit. 21, §§ 1111(A)(2), 1114(A)(2) (2000); 33 P.R. LAWS ANN. §§ 4061(b), 4067(c) (1998).

391. CAL. PENAL CODE § 261.6 (West 2001) (emphasis added).

392. ARIZ. REV. STAT. § 13-1401(5)(b) (2000) (emphasis added).

393. MINN. STAT. § 609.341(9) (2000) (emphasis added) (in definition of physically helpless); *see also* ARK. CODE ANN. § 5-14-101(5) (Michie 2001) (“physically unable to communicate lack of consent”).

394. ME. REV. STAT. ANN. tit. 17-A, § 253(1)(C) (West 2001) (emphasis added) (in mental disability provision).

this notion in the use of voluntariness. Minnesota's tripartite formulation— withhold consent, withdraw it, or communicate nonconsent—is helpful because it emphasizes that consent is a continuing activity not a one-time event.³⁹⁵

Furthermore, the emphasis on consent is not very different from the types of questions that must be addressed in cases of mentally ill or disabled victims (or physically helpless persons), where an inquiry into whether the person is capable of giving consent to the sexual intercourse is also necessary. As LaFave notes:

Here, the “critical issue is to define the degree of mental disease or deficiency that suffices to make noncoercive intercourse a crime,” for the statute should not be so broad as to cover persons suffering from only a relatively slight mental deficiency, nor so narrow as to protect only those in state of absolute imbecility.³⁹⁶

In many other facets of law, the question of informed and/or knowing consent is examined with great care, for example in the contexts of waiver of rights³⁹⁷ and consent to medical treatment,³⁹⁸ and should be in the law of rape as well. As some commentators have argued, the law of rape has an impoverished sense of consent.³⁹⁹ Crafting the intoxication provisions in terms of consent will advance the development of a meaningful notion of consent in rape law.

Thus, every jurisdiction should explicitly prohibit sexual conduct with persons who are so intoxicated that they are incapable of giving informed consent to the sexual activity. This position is in line with a minority of jurisdictions doing so already and the statutory trend in the direction of expanding coverage in this fashion. This approach also accords with the common law approach of analogizing sexual contact with drunken or drugged victims to mentally ill or physically helpless persons. Rape law should protect all those who have been deprived of capacity to make informed choices about engaging in sexual acts, whether by their own intoxication or by drugs administered to them.

The first part of this reform can be achieved with a minimum of statutory amendment. Following the lead of such diverse jurisdictions as California,⁴⁰⁰

395. Lois Pineau proposes a notion of communicative sexuality that “sees consent as something more like an ongoing cooperation than the one-shot agreement which we are inclined to see it as on the contract model.” Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 242 (1989).

396. LAFAVE, *supra* note 28, at 777 (footnotes omitted).

397. See Lucy Reed Harris, Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613 (1976).

398. See Joel Feinberg, *Victims' Excuses: The Case of Fraudulently Procured Consent*, 96 ETHICS 330 (1986).

399. See, e.g., Harris, *supra* note 397, at 645.

400. California's previous statutes read: “where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, administered by or with the privity of the accused.” CAL. PENAL CODE § 261(a)(3) (amended 1994). Its current statute provides: “Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition

South Dakota,⁴⁰¹ Kansas,⁴⁰² and possibly Arkansas,⁴⁰³ states should simply omit the administration language common to most explicit rape by drug provisions. The second reform regarding the description of the victim's incapacity to consent may require some additional amendment. The statutes' descriptions of victim incapacitation should be written in terms of the inability of the victim to give informed or knowing consent to the sexual act rather than her inability to resist, to appraise or control her conduct, or to understand the nature or consequences of the act. In jurisdictions like California, which have consent definitions for their sexual

was known, or reasonably should have been known by the accused." CAL. PENAL CODE § 261(a)(3) (West 2001).

401. South Dakota's previous statute read: "Where she is prevented from resisting by any intoxicating, narcotic, or anesthetic agent administered by or with privity of the accused." S.D. CODIFIED LAWS § 22-22-1(4) (amended 1985). Its current statute reads: "Where the victim is incapable of giving consent because of any intoxicating narcotic...agent, or hypnosis." S.D. CODIFIED LAWS § 22-22-1(4) (Michie 2001).

402. Kansas's 1969 rape statute read:

When the woman's resistance is prevented by the effect of any alcoholic liquor, narcotic, drug or other substance administered to the woman by the man or another for the purpose of preventing the woman's resistance, unless the woman voluntarily consumes or allows the administration of the substance with knowledge of its nature.

KAN. STAT. ANN. § 21-3502(1)(d) (1969) (quoted in *State v. Chaney*, 5 P.3d 492, 495 (Kan. 2000)). The 1992 statute read:

When the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to the victim by the offender, or by another person with the offender's knowledge, unless the victim voluntarily consumes or allows the administration of the substance with knowledge of its nature.

KAN. STAT. ANN. § 21-3502(1)(d) (amended 1993). Its current provision reads:

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.

KAN. STAT. ANN. § 21-3502(C) (2000).

403. Arkansas's previous statute provided: "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." ARK. CODE ANN. § 5-14-101(4) (Michie amended 2000). Its current statute provides: "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: (A) Administered to the person without the person's consent; or (B) Which renders the person unaware the sexual act is occurring." ARK. CODE ANN. § 5-14-101(4)(A)-(B) (Michie 2001). Although Arkansas's new statute is ambiguous, it appears that the legislature has provided an alternative to administration by the defendant. However, the scope of this alternative is unclear. Does it include self-intoxicated victims? If so, must self-intoxicated victims meet a higher standard of victim incapacity (unawareness of the sexual act) rather than being incapable of appreciating or controlling their conduct?

offenses, consent already has an established meaning and no additional description is required. In addition, some jurisdictions define consent for purposes of all of their criminal statutes, often employing language based on Model Penal Code § 2.11, which provides that

assent does not constitute consent if...(b) 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 or harmfulness of the conduct charged to constitute the offense...⁴⁰⁴

In jurisdictions that provide neither a global criminal-offense definition nor a sexual-offense definition of consent, the use of descriptive words such as informed, knowing, or reasoned, in characterizing the nature of the consent required in sexual assault cases, may be advisable.

Finally, these provisions should include a *mens rea* requirement, currently used in many incapacitation provisions, that the defendant knew or should have known of the victim's incapacity to consent. Thus, at least criminal defendants who are not negligent with respect to the victim's capacity to consent will be able to raise a defense. The *mens rea* requirement in these provisions will ameliorate the potential harshness of a rule based on consent alone.

3. Punishing the Administration of an Intoxicant as a Prelude to Sexual Assault: Two Possible Approaches

In the foregoing section, I argued that all jurisdictions should have a sexual offense category that outlaws sexual conduct with an intoxicated victim, regardless of whether the perpetrator drugged the victim or whether she ingested the intoxicants, which would eliminate the administration requirement from the basic sexual offense. The next question is how to punish defendants who also administered the intoxicants before engaging in nonconsensual conduct with their victims. Two possible approaches exist. The first is to punish the administration of intoxicants as a prelude to sexual assault as an aggravated form of sexual assault, thus combining administration and nonconsensual sexual conduct in a higher grade of sexual offense. The second is to punish drug administration as a separate criminal offense in addition to the underlying sexual crime.

Examples of these approaches exist in current statutory schemes. For instance, Louisiana, adopting the first approach, criminalizes both simple and forcible rape. Simple rape occurs:

When the victim is incapable of resisting or of understanding the nature of the act by reason of a stupor or abnormal condition of mind produced by an intoxicating agent or any cause, other than the administration by the offender, and without the knowledge of the victim, of any narcotic or anesthetic agent or other controlled

404. MODEL PENAL CODE § 2.11(3)(b) (1962).

dangerous substance and the offender knew or should have known of the victim's incapacity.⁴⁰⁵

Forcible rape covers the instance:

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.⁴⁰⁶

The sentence for simple rape is up to twenty-five years and for forcible rape is up to forty years.⁴⁰⁷ Thus, under Louisiana's two-part scheme, rape involving defendant administration of the intoxicant is a more serious and heinous crime and merits a higher penalty.⁴⁰⁸

On the other hand, Arkansas's statutory scheme demonstrates the second approach. Arkansas defines mentally incapacitated as "temporarily incapable of appreciating or controlling the person's conduct as a result of the influence of a controlled or intoxicating substance: (A) Administered to the person without the person's consent; or (B) Which renders the person unaware the sexual act is occurring."⁴⁰⁹ The state then incorporates the phrase "mentally incapacitated" into its rape⁴¹⁰ and sexual assault provisions.⁴¹¹ Arkansas has a separate crime of introducing controlled substances into the body of another either by injection, inhalation, or otherwise.⁴¹² Arkansas's statute also provides that criminal liability for drugging is in addition to any other criminal liability,⁴¹³ and grades the drugging crime more severely if it was done in contemplation of committing a sexual offense.⁴¹⁴ Thus, in Arkansas, citizens' sexual autonomy is protected by the sexual offense statute and their bodily integrity is protected by the separate drugging statute.

Treating the administration of intoxicants as an aggravated form of sexual assault is in line with a host of sexual offense provisions that divide the once-unitary concept of rape into higher and lesser degrees depending on the existence of various circumstances, such as the use of physical force, the participation of multiple perpetrators, or severe physical injury to the victim. Moreover, this notion of including forcible rape and non-forcible rape under an umbrella sexual offense

405. LA. REV. STAT. ANN. § 14:43(A)(1) (West 2001).

406. *Id.* § 14:42.1(A)(2).

407. *See id.* §§ 14:42.1(B), :43(C).

408. Other states also punish, often less severely, sexual contact with a mentally disabled or physically helpless person without the criminal actor having administered the drug itself. *See, e.g.*, D.C. CODE ANN. §§ 22-3003, -3005 (2001); 720 ILL. COMP. STAT. 5/12-13(a)(2), -15(a)(2) (2001).

409. ARK. CODE ANN. § 5-14-101(4)(A)-(B) (Michie 2001).

410. *Id.* § 5-14-103(a)(1)(B).

411. *Id.* § 5-14-125(a)(2).

412. *See id.* § 5-13-210(a)(1)-(2).

413. *See id.* § 5-13-210(d).

414. *See id.* § 5-13-210(e).

provision may be likened to punishing both robbery and larceny as two different types of theft offenses. Adopting this approach will ensure that those defendants who drug and assault their victims are punished to a greater extent than those who opportunistically take advantage of drunken or drugged persons to sexually exploit them. Despite these very cogent arguments, I argue for the separate treatment of drugging in the following section.

4. Drugging as a Separate Crime

Many of the difficulties victims face in the aftermath of these assaults are due to the effects of the drugs given by offenders. The surreptitious drugging of a victim is, in and of itself, a cruel and criminal violation of the person. Some victims describe this aspect of the trauma as "mind rape." The drugging should be recognized as a separate and distinct act of victimization in addition to any other acts of abuse and degradation to which the victim is subjected.⁴¹⁵

Although both approaches to the treatment of defendants who intoxicate their victims as a prelude to committing a sexual offense have merit, the separate-crime approach is preferable for a number of reasons, which are explained in more detail below. First, the nonconsensual administration of drugs is a substantial invasion of bodily integrity, in addition to the harm of the sexual offense, which poses a significant threat to the health and safety of human beings. Second, a host of criminal statutes already exist, outside the sexual offenses categories, that outlaw nonconsensual drugging, illustrating that legislatures have already judged this offense worthy of separate punishment.⁴¹⁶ In numerous cases, defendants have been prosecuted for both crimes.⁴¹⁷ Third, subsuming drugging in the sexual offense provisions, even as an aggravated form of the crime, perpetuates the hegemony of the force requirement in traditional rape law rather recognizing that modern rape law punishes many forms of non-forcible, nonconsensual sexual assault.

First, by altering both the physical functioning of the body and the person's consciousness, the nonconsensual administration of street, prescription, or rape drugs represents a significant invasion of a person's bodily integrity in all circumstances, not just in those associated with the subsequent commission of a sexual offense. Professor Sheldon Gelman makes a compelling argument that when the state engages in nonconsensual biological alteration of its citizens, including the administration of various types of drugs, strict scrutiny should be applied to the state's action.⁴¹⁸ Similarly, the law recognizes that doctors and other

415. Abarbanel, *supra* note 44, at 12.

416. See *supra* notes 256–305 and accompanying text.

417. See, e.g., *Dubria v. Smith*, 197 F.3d 390 (9th Cir. 1999), *aff'd*, 224 F.3d 995 (9th Cir. 2000); *Sera v. State*, 17 S.W.3d 61 (Ark. 2000).

418. See Sheldon Gelman, *The Biological Alteration Cases*, 36 WM. & MARY L. REV. 1203 (1995).

health workers must get informed consent before they administer drugs to their patients.

The nonconsensual or non-therapeutic administration of drugs to another person is a severe form of bodily invasion because drugging poses significant risks to human life, safety, and health. The most extreme danger is death, and is cogently illustrated by cases in which the victim died. For example, in *Dubria v. Smith*, the defendant doctor used too much chloroform in subduing his victim, killing her.⁴¹⁹ Cobb, the male nurse, mixed a prescription drug with alcohol, and the victim died from the lethal combination.⁴²⁰ Samantha Reid died after sipping a drink spiked with a rape drug.⁴²¹ In addition to the risk of death, many victims of drug-induced sexual assaults reported significant residuary symptoms associated with ingestion of the drugs.⁴²² Also, as the quote at the beginning of this section suggests, victims suffer psychological harm, “mind rape,” from the drugging aspect of the sexual assault.⁴²³

On the whole, our society considers the dangers associated with certain forms of drugs so serious that we have a plethora of legislative enactments that prohibit the possession, ingestion, distribution, and manufacture of so-called controlled substances. The United States has been waging a war on drugs for decades. Even the medicinal use of narcotics is heavily regulated. Thus, if the self-administration of a variety of drugs is illegal because of the dangers the drugs pose, it likewise should be illegal to administer them to others without their knowledge or consent.

The dangers to life, safety, and health posed by the administration of drugs are not the types of harm normally protected by sexual offense categories. Sexual crimes protect against incursions to a victim’s sexual autonomy. The dangers of drugging are of a different order because they relate to the victim’s overall bodily integrity. Thus, when a victim is drugged and then sexually assaulted, she has been harmed in more than one way. First, drugs or intoxicants have been administered against her will violating her overall bodily integrity, and secondly, her sexual autonomy has been severely violated. Punishing these two harms as separate crimes make this difference crystal clear. Offenders who drug and sexually assault their victims should be convicted of two crimes, not one.

419. See *Dubria*, 197 F.3d at 394.

420. See *Regina v. Cobb*, [2002] 1 Cr. App. R. (S.) 19 (Crim. App. 2001).

421. See Cannon, *supra* note 38, at 73.

422. See Abarbanel, *supra* note 44, at 12.

423. As the same author noted:

Because [victims of drug-facilitated rapes] cannot *recall* what happened during a significant time period, they have to cope with a gap in their memory. They experience the horror, powerlessness, and humiliation of not knowing what was done to them. They can only imagine what happened. One victim said, ‘I would rather have the nightmare.’

Abarbanel, *supra* note 44, at 12.

The notion of punishing the administration of drugs as a separate criminal offense is not new. Today, approximately one-half of American jurisdictions outlaw drugging as a separate criminal offense.⁴²⁴ Five states make drugging a separate offense when done for the purposes of committing a sexual offense,⁴²⁵ and nine make it a separate crime to drug a person for the purpose of committing a felony.⁴²⁶ Ten jurisdictions outlaw non-therapeutic drugging⁴²⁷ and fourteen prohibit various forms of poisoning.⁴²⁸ Under traditional criminal law, the administration of a poison or drug was considered a form of battery.⁴²⁹ Thus, recognition already exists for the proposition that the administration of drugs without consent constitutes a separate harm from the sexual assault of a drugged victim. A considerable number of the cases considered in Part II were prosecuted under the dual offenses. Finally, it is important to note that fifteen states have statutes that require that the drugging be done for the purpose of committing another crime.⁴³⁰ In other words, these statutes contemplate the imposition of punishment for more than one substantive offense.

The separate-crime approach is also preferable because it continues to move rape law away from its over-reliance on force as an indispensable element of all forms of the crime. Including the administration of drugs within the sexual offense perpetuates the notion that only the forcible sexual exploitation of victims matters, rather than asserting that nonconsensual sexual contact is the real harm and that force is merely one of many mechanisms to achieve that harm. Forcible rape is really two crimes: rape and battery (physical force) or assault (threat of force). Because early conceptions of rape law covered only cases of forcible rape, the force requirement became subsumed into the sexual offense when actually force represented a completely different type of harm from the sexual battery.

In light of the serious dangers posed by the unlawful administration of intoxicants and the fact that drugging statutes already exist, disaggregating drugging from sexual assault is a good starting place for thinking about the crime of sexual assault separate from the force with which the assault is brought about. The rape-by-drug cases make the severity of the two separate harms abundantly clear and have important implications for thinking about all types of sexual offenses. Perhaps we should confine sexual assault to instances of sexual battery and separately punish offenders who use force in accomplishing their sexual

424. See *supra* notes 256–313 and accompanying text.

425. See *supra* notes 260–73 and accompanying text.

426. See *supra* notes 274–85 and accompanying text.

427. See *supra* notes 286–305 and accompanying text.

428. See *supra* notes 306–11 and accompanying text.

429. In describing the means of perpetrating a battery, Perkins and Boyce comment: “Force may be applied to the person of another in many ways,...It may be committed by administering a poison or other deleterious substance, by applying a caustic chemical, or by communicating a disease.” PERKINS & BOYCE, *supra* note 30, at 153 (footnotes omitted); see also MODEL PENAL CODE § 211.1 cmt. at 187–88 (1980); LA FAVE, *supra* note 28, at 738 (“So too a battery may be committed by administering a poison or by infecting with a disease.”).

430. See *supra* notes 260–85 and accompanying text.

crimes. Other examples of separately condemning multiple harms are found in statutes that punish kidnapping for the purpose of securing sexual intercourse as well as for the underlying sexual crime.⁴³¹ The division of offenses will make clear that the harm victims experience in all sexual offenses is the harm against having sexual relations thrust upon them against their will or without their consent. Some methods of achieving nonconsensual sexual contact are far more morally blameworthy because they also involve physical violence. But we could take into account this added degree of moral blameworthiness by separately punishing those who beat or batter or threaten their victims into compliance.

Thus, in addition to enacting intoxication provisions that do not require administration, states should either enact (or utilize already existing) drugging statutes to punish the administration of an intoxicant as a prelude to a sexual assault. Alternatively, states should bifurcate their sexual assault provisions and should grade cases in which the defendant administers the intoxicant as an aggravated form of sexual assault while treating the opportunistic variety of offense as a lower form of sexual crime. States that use the separate-treatment approach should ensure that defendants who commit both the sexual offense and the drugging offense do not receive concurrent sentences, but are punished for each of the wrongs they have committed against their victims.⁴³²

C. Possession and Distribution of Rape Drugs

The problems discussed in this Article may be alleviated by more states enacting legislation that punishes the possession and/or distribution of various types of drugs commonly used to render victims unconscious and facilitate the commission of sexual offenses. In this way, the legislation may act as a prophylactic measure. Making possession of these substances illegal may discourage offenders from acquiring them. Also, if a defendant is found in possession of these substances before using them, law enforcement officials can prevent sexual assaults.⁴³³

D. Provide Additional Punishment for Aggravating Factors

Finally, legislative enactments dealing with the phenomena of sexual assault by drugs or other intoxicants should explicitly treat certain circumstances

431. See, e.g., *Sera v. State*, 17 S.W.3d 61 (Ark. 2000) (discussing defendant's kidnapping as well as drugging and raping his victims); *State v. Lombardi*, 229 N.E.2d 206 (N.Y. 1967) (dissent discussing kidnapping and drugging and sexual assault).

432. See, e.g., ARK. CODE ANN. § 5-13-210(d) (Michie 2001) (specifying separate punishment for the drugging offense).

433. See, e.g., *United States v. Gore*, No. 00 CR 77, 2001 U.S. Dist. LEXIS 6304 (N.D. Ill. May 14, 2001) (prosecution for conspiracy to possess with intent to distribute rape drugs); *Oakley v. State*, 457 So. 2d 459 (Ala. Crim. App. 1984) (assault prosecution based on the injection of ketamine); *State v. Sansotta*, 769 A.2d 1108 (N.J. Super. Ct. App. Div. 2001) (prosecution for possession of GHB and possession with intent to distribute); *Morris v. Commonwealth*, No. 1141-98-4, 1999 Va. App. LEXIS 629 (Va. Ct. App. Nov. 9, 1999) (prosecution for distribution of Rohypnol to a minor).

surrounding the commission of these offenses as sentence enhancement, or more broadly, sentencing factors. As noted above, many jurisdictions already have sentence enhancement provisions;⁴³⁴ a growing number are passing sentencing guidelines like those in the federal system. The cases reviewed in Part II reveal that victims suffer multiple harms during their sexual assaults in addition to the two central harms to sexual autonomy and bodily integrity (in cases involving the administration of intoxicants). These other circumstances, perhaps not worthy of treatment in separate criminal statutes, should nonetheless be considered as bearing on the moral culpability of the criminal actor and taken into account at sentencing. The list of such factors might be quite long, for instance, abuse of a family relationship, degree of physical injury to the victim, psychological damage, multiple perpetrators,⁴³⁵ and serial rapists. This section focuses on two factors, (1) videotaping or photographing the sexual assault and (2) the abuse of a position of professional trust, which seem particularly egregious and are not adequately considered in extant statutory schemes, unlike the factors listed above.

1. Videotaping or Photographing the Victim or the Sexual Assault

In the most egregious cases of administering drugs for the purposes of committing sexual assault, defendants not only drug and rape the victims but also make photographic or videotaped records of their assaults.⁴³⁶ The harms that accrue from videotaping are of a different order of magnitude from those experienced by victims in the usual cases. At least two additional types of harm befall the victims in these cases. First, offenders have invaded the privacy of the victims by making sexually explicit recordings of them without their consent, a radical invasion of privacy under any circumstances. This harm is so significant that at least ten states criminalize the photographing or videotaping of a person who has an expectation of privacy.⁴³⁷ For instance, West Virginia's statute

434. See *supra* notes 319–26 and accompanying text.

435. Florida has a special statute, entitled “sexual battery by multiple perpetrators,” which provides:

The legislature finds that an act of sexual battery, when committed by more than one person, presents a great danger to the public and is extremely offensive to civilized society. It is therefore the intent of the Legislature to reclassify offenses for acts of sexual battery committed by more than one person.

FLA. STAT. ch. 794.023 (2000); see also CONN. GEN. STAT. § 53a-70(a)(3) (2001) (commission is aided by two or more persons actually present); IOWA CODE § 709.3(3) (2001) (person aided and abetted by one or more persons); MICH. COMP. LAWS § 750.520b(1)(d) (2000) (same).

436. See *supra* note 137 and accompanying text.

437. See ARK. CODE ANN. § 5-16-101 (Michie 2000) (Video voyeurism—unlawful to videotape person in residence and elsewhere where person has reasonable expectation of privacy and has not consented); CAL. PENAL CODE § 647 (West 2001) (disorderly conduct—videotape another under or through clothing without consent with intent to gratify sexual desires and invade person's privacy); COLO. REV. STAT. § 18-3-404 (2000) (unlawful sexual contact); GA. CODE ANN. § 16-11-61 (2000) (peeping tom statute);

provides that “[i]t is unlawful for a person to knowingly visually portray another person without that person’s knowledge, while that other person is fully or partially nude and is in a place where a reasonable person would have an expectation of privacy.”⁴³⁸ Colorado’s provision makes this behavior a type of unlawful sexual contact:

Any person who knowingly observes or takes a photograph of another’s intimate parts without that person’s consent, in a situation where the person observed has a reasonable expectation or privacy, for the purpose of the observer’s own sexual gratification, commits unlawful sexual contact. For purposes of this subsection (1.7), “photograph” includes any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material.⁴³⁹

The fact that victims are depicted in the worst possible light—when they are unconscious or severely impaired or subjected to degrading acts⁴⁴⁰—makes this invasion of privacy all the more heinous.

Secondly, victims may also experience harm from the transmission or circulation of the recorded images of their sexual assaults. The ready accessibility of the Internet makes the possibility of quickly transmitting these photographic or videotaped images to a wider audience very real. The fact that a photographic recording was made and circulated will be a constant source of harm, in some senses the most enduring harm, those victims may experience. As the Court in *New York v. Ferber* quoted in relation to child pornography:

[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.⁴⁴¹

720 ILL. COMP. STAT. 5/26-4 (2001) (unauthorized videotaping—illegal to videotape person in restroom and other like places, residence, or under or through clothing); KAN. STAT. ANN. § 21-4001 (2000) (eavesdropping—same as California’s statute); ME. REV. STAT. ANN. tit. 17-A, § 511 (West 1999) (violation of privacy—illegal to install photographing or listening devices in or outside private place); S.C. CODE ANN. § 16-7-470 (Law. Co-op. 2001) (unlawful voyeurism etc.—illegal to video record another person without consent while person is in place where she has expectation of privacy and aggravated voyeurism to sell or distribute such images); WASH. REV. CODE § 9A.44.115 (2001) (voyeurism—same as South Carolina’s statute); W. VA. CODE § 61-8-28(b)–(c) (2001).

438. W. VA. CODE § 61-8-28(b) (2001).

439. COLO. REV. STAT. § 18-3-404 (2000).

440. *See Sera v. State*, 17 S.W.3d 61 (Ark. 2000).

441. *New York v. Ferber*, 458 U.S. 747, 760 n.10 (1982) (quoting Shoumlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)).

West Virginia's statute, excerpted above, also prohibits circulation: "Any person who displays or distributes visual images of another person with knowledge that said visual images were obtained in violation of subsection (b) of this section is guilty of a misdemeanor..."⁴⁴² Although the remaining states should strongly consider enacting provisions dealing with these types of criminal invasions of privacy, at a bare minimum sentencing courts should give special consideration to offenders who make photographic or videotaped records of their sexual assaults and/or broadcast those images.

2. *Abuse of a Professional Relationship*

The cases in which health-care professionals are the perpetrators of rape by drugs are especially egregious because they involve not only sexual assault and drugging but also the additional factors of the abuse of a professional relationship and the exploitation of exceptionally vulnerable victims. Doctors, dentists, and nurses violate their ethical and professional duties toward patients by exploiting those patients for their own sexual gratification.⁴⁴³ The professionals gain access to their victim's bodies through the office of their profession. They breach the basic trust that members of the public have a right to expect in their dealings with health-care professionals. The more global problem of sexual assault committed by health-care and mental-health professionals has already been recognized in the plethora of sexual offense statutes criminalizing sexual conduct between these professionals and their patients or clients.⁴⁴⁴ For instance, Michigan outlaws sexual contact "[w]hen the actor engages in medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable."⁴⁴⁵ When drugging as a prelude to the sexual assault occurs in these contexts, the sexual offenses and drugging statutes vindicate the sexual integrity and bodily integrity harms, but not the harm deriving from the abuse of a professional trust.

Secondly, victims who encounter their assailants in professional contexts are especially vulnerable to attack because they trust in the health-care givers to provide professional services at a time of need. Many citizens view their health-care professionals with a certain awe and respect not generally afforded other members of the community. Moreover, these patients consent to the administration of the drugs they are given believing that the administration is for medically necessary reasons. Two states explicitly invalidate consent given in the context of medical treatment.⁴⁴⁶ Therefore, courts should give special consideration in

442. W. VA. CODE § 61-8-28(b)-(c) (2001).

443. See *supra* notes 114-33 and accompanying text.

444. See Falk, *supra* note 16, for a discussion of these statutes.

445. MICH. COMP. LAWS § 750.520b(1)(f)(iv) (2001).

446. See ME. REV. STAT. ANN. tit.17-A, § 253(3) (West 2001) ("It is a defense...that the other person voluntarily consumed or allowed administration of the substance with knowledge of its nature, except that it is no defense when the other person is a patient of the actor and has a reasonable belief that the actor is administering the substance for medical or dental examination or treatment."); OHIO REV. CODE ANN. § 2907.05

sentencing to persons who use their professional offices for the purposes of committing sexual assault.

V. CONCLUSION

Although most jurisdictions in the United States explicitly mention drugs or other intoxicants in at least one of their sexual assault or rape provisions, these statutory enactments vary widely in terms of approach, language, and coverage. The single biggest deficit of these statutes, en masse, is their failure to explicitly cover cases in which the victim voluntarily ingested alcohol or drugs and then was sexually assaulted. Modern sexual offenses should protect this class of victim from the harm of nonconsensual sexual activity. The second biggest deficiency of the existing statutory law in the United States is the language used to describe the degree of incapacitation required for protection of intoxicated victims against sexual assault. These provisions should focus attention on the central inquiry in all rape cases—whether the victim actively consented, not whether she resisted or failed to appraise or control her conduct. Many states already have definitions of consent that provide guidance on the legally relevant contours of consent. Third, states should criminalize those who administer drugs as a prelude to sexual assault either as an aggravated form of sexual assault or as a separate crime in addition to the underlying offense. Fourth, states should follow Congress's lead by more strictly regulating common rape drugs. Finally, videotaping of sexual assaults and abusing a professional relationship for the purpose of committing rape should be aggravating sentencing factors.

The foregoing analysis of statutory enactments criminalizing rape by drugs is not only interesting in its own right—under what circumstances should sexual conduct with intoxicated persons be subject to criminal punishment—but also for the window this variation of nonconsensual sexual crime provides into rape law in general. Rape by drug prosecutions provide an opportunity for thinking about whether sexual offense provisions are the best place to outlaw and punish not only the sexual harm lying at the heart of all such offenses but the various mechanisms through which that harm is achieved. Given the longstanding existence of statutes that make drugging a crime when done in contemplation of committing another offense or under other circumstances, it is possible to disaggregate the sexual harm from the drugging harm in rape by drug cases involving administration. The extent of the bodily invasion that drugs entail, the significant danger they pose, and their handiness in committing any number of offenses, have underscored the need to consider separate criminal liability for one mechanism to accomplish rape. Perhaps these statutes, then, also provide an opportunity for thinking about other mechanisms, equally dangerous and abhorrent to human life, as separate harms in accomplishing nonconsensual sexual intercourse as well. For instance, is the force inherent in traditional rape doctrine

(Anderson 2001) (“The offender knows that the judgment or control of the other person or one of the other persons is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person’s consent for the purpose of any kind of medical or dental examination, treatment, or surgery.”).

really part and parcel of the crime of rape—or is force in the form of a beating, battery, or threat, assault, really another form of harm worthy of separate punishment? Perhaps in a more modern era, when unitary concepts of forcible rape have given way to a plethora of sexual assault offenses, only some of which retain the force requirement, is a good time to begin thinking about separately criminalizing the various harms inherent in obtaining sexual intercourse by mechanisms punishable in their own right. This is one lesson we might learn from studying cases and statutes involving rape by drugs.