

ALCOHOL- AND DRUG-FACILITATED SEXUAL ASSAULT: A SURVEY OF THE LAW

Jennifer Long, JD, Charlene Whitman-Barr, JD, and Viktoria Kristiansson, JD¹

INTRODUCTION

This *STATUTES in Review*² will summarize the laws addressing the sexual assault of an intoxicated victim. It will compare the elements required in each jurisdiction and describe their applicability to criminal conduct. Because many of these statutes do not specifically reference intoxication, they are sometimes overlooked in the national conversation around current rape and sexual assault laws.

Sexual activity with an individual who has voluntarily consumed drugs or alcohol is not in itself criminal. Intoxication, whether by alcohol, drugs, or a combination of both may impact an individual's ability to appraise danger, capacity to communicate a lack of consent, and ability to perceive or remember all or parts of an assault.⁶ Even where a victim's intoxication results from alcohol consumption alone, experts have described its effects as devastating with one noting: "If recreational drugs were tools, alcohol would be a sledgehammer."⁷ A sexual assault occurs where a victim's intoxication impairs cognitive and/or physical functions to such an extent that it prevents one's ability to consent or one's actions associated with consent (*e.g.*, the ability to communicate unwillingness to engage in sexual activity³ or inability to appraise the nature of conduct,⁴ or inability to control one's conduct).⁵

Perpetrators use alcohol and drugs to facilitate sexual assault by openly or surreptitiously administering intoxicants to their victims, or by targeting victims who are too intoxicated by drugs and/or alcohol to consent. Offenders exploit their victims' intoxication creating uniquely effective weapons that help them commit and escape accountability for their crimes. Perpetrators use alcohol to decrease the chance that victims will report their rape because they will self-blame.⁸ They count on the system and society disbelieving or blaming victims for their assaults, and labeling rapes as "drunk sex."⁹ These realities are particularly significant⁹ in light of the fact that women are more vulnerable to the effects of alcohol than their male counterparts.¹⁰

While the absence of laws covering the assault of a voluntarily intoxicated victim is often cited as a barrier to prosecuting sexual assault cases,¹¹ the laws in all 58 U.S. jurisdictions¹² allow for the prosecution of sexual assault cases where the victim was voluntarily intoxicated.¹³ The language in some statutes, however, may not always include the assaultive conduct relevant to a specific case. Additionally, some sexual assault statutes do include an element requiring the victim's intoxication to be caused by a perpetrator, without the victim's knowledge, for the purpose of perpetrating a sexual assault.¹⁴ Because language among these statutes is not consistent and may not specifically refer to intoxicated victims, this *STATUTES in Review* synthesizes the similarities and distinctions among the statutory language and summarizes AEQUITAS' more comprehensive analysis of rape and sexual assault laws covering alcohol- and drug -facilitated sexual assault involving penetration in all jurisdictions in the country. Part I of this survey looks at both voluntary and involuntary intoxication statutes and describes how these statutes' elements address intoxication. Part II of this survey includes a brief discussion of how the statutory language applies to the charging and prosecution of cases.¹⁵

PART I: SURVEY OF STATUTES APPLICABLE TO SEXUAL ASSAULT OF AN INTOXICATED VICTIM

This section breaks down the sexual assault penetration statutes into two categories – those that cover victims who were (A) voluntarily intoxicated and (B) involuntarily intoxicated. Note that most jurisdictions have more than one type of statute.

A. Voluntary Intoxication Sexual Assault Statutes

Voluntary intoxication sexual assault statutes cover assaults where the victim's intoxication was a result of her/his own willful conduct (*i.e.*, intoxication not attributable to the perpetrator). There are two types of these statutes: (1) those that explicitly reference intoxication and (2) those that do *not* reference intoxication but instead describe the effects of "intoxication" (*e.g.*, incapable of making a reasonable judgement around one's conduct).

Twenty-seven (27) jurisdictions have statutes that **explicitly reference intoxication**, including references to the use of alcohol or drugs or language requiring the prosecution to show that the victim was too intoxicated to consent.¹⁶ These statutes address the sexual assault of voluntarily intoxicated victims in standalone provisions,¹⁷ within the definitions of consent or ineffective consent,¹⁸ or in statutes outlining the defense of consent.¹⁹

In every jurisdiction, there are statutory elements that describe typical characteristics of intoxicated victims resulting from their cognitive and/or physical impairments. Fifty-seven (57) jurisdictions have statutes that make **no specific reference to intoxication** but instead focus on the effects of drugs and alcohol. The fifty-eighth jurisdiction, Georgia, does not have a statutory provision describing the effects of intoxication, but has long-standing case law holding that "sexual intercourse with a woman whose will is temporarily lost from intoxication, or unconsciousness arising from using drugs or other cause, or sleep, is rape."²⁰

Drawing clear lines from the statutory language to the correlating impairment to which it may apply is not always easy or possible.²¹ In some instances, the impairment implicates both cognitive and physical functions. In others, the case law or commentary may define statutory language differently than how the terms are commonly understood.²² Jury instructions and case law interpreting a statute provide further guidance clarifying conduct that is included²³ or excluded by a relevant statute.

Common statutory language used in voluntary intoxication statutes is listed below:

- Incapable of consent;²⁴
- Incapable of appreciating/appraising/understanding the nature or consequences of, or incapable of making reasonable judgments around, the conduct;
- Unable to resist physically or mentally/incapable of controlling one's own conduct;
- Unconscious, unaware, or renders the person unaware of the conduct;
- Physically helpless, which is defined in many jurisdictions' statutes to include victims who are unconscious, unaware, or physically incapable of communication or resistance.

B. Involuntary Intoxication Sexual Assault Statutes

Thirty-seven (37) jurisdictions²⁵ have statutes that specifically cover a sexual assault where the victim became intoxicated without her/his consent. Of the 37, Colorado, Delaware, Massachusetts, North Dakota, Oklahoma, and Pennsylvania also include an element requiring the intoxication to be *caused in order to prevent resistance or to otherwise complete an assault*. Involuntary intoxication statutes cover sexual assaults of victims who were: administered an intoxicating substance (e.g., alcohol or drugs), that impacted their cognitive or physical ability,²⁶ by the perpetrator or at the perpetrator's direction, without their consent. Some of these statutes require that the intoxicant was administered for the purpose of perpetrating a sexual assault,²⁷ and some require that the intoxicant prevented the victim from resisting.²⁸ These statutes may include perpetrators who *caused* the victim's intoxication and perpetrators who *knew that someone else caused* the victim's intoxication.²⁹

PART II: APPLICATION OF THE LAW TO PROSECUTION

As mentioned above, the criminal code of every U.S. jurisdiction offers a number of charges under which perpetrators of alcohol- and/or drug-facilitated sexual assaults can be prosecuted.³⁰ If a jury is presented with credible testimony and facts that meet the criminal elements, but ultimately finds a defendant not guilty, state statutes are not to blame. Rather, general misconceptions about sexual assault, victim blaming, and minimization of the offender's culpability are what most often cause such verdicts.

Proving the Elements of Voluntary Intoxication Statutes

In many jurisdictions, alcohol- and drug -facilitated sexual assaults have long been prosecuted under the theory that consent is ineffective when the victim is intoxicated to the extent that s/he is unable to make reasonable judgments as to the consequences of her/his actions.³¹ Regardless of the exact theory articulated to meet the statutory elements, consent is the most common defense.³² As a result, evidence of the victim's intoxication plays a crucial role in determining whether or not the victim consented, including whether s/he was able to consent, to sexual activity. There is no bright-line test, such as a per-se blood alcohol level, for determining whether a victim was *too intoxicated to consent*.³³ A victim's ability to consent after ingestion of alcohol or drugs is determined by introducing evidence of the facts and circumstances surrounding the victim's behaviors, including, but not limited to: the amount of alcohol or drugs the victim ingested and over what period of time, the victim's physical stature (height and weight), the victim's level of consciousness, the impact of alcohol on the victim's cognitive abilities, the impact of alcohol on the victim's physical abilities, evidence of impairment in victim's decision making, whether and in what manner the victim communicated (verbally or nonverbally) with the defendant about consent (or lack thereof), and any evidence of the perpetrator's attempts to manipulate the victim.

Some voluntary intoxication sexual assault statutes require the prosecution to show the victim was incapable of appreciating, appraising, or understanding the nature or consequences of her/his conduct, or incapable of making reasonable judgments around the harmful consequences of her/his conduct. Prosecutors can establish this element by introducing evidence of the victim's known blood alcohol content (BAC) or of the approximate amount of alcohol ingested by the victim prior to the assault.³⁴ Regardless of whether the prosecution knows – or is able to introduce evidence of – the victim's (BAC), prosecutors can introduce expert testimony from a toxicologist or similar professional to explain the impact of the intoxicants ingested by the victim on the victim's cognitive and physical abilities. Other relevant evidence may include observations that a victim had difficulty walking, spoke with slurred speech, had difficulty staying awake, or was exhibiting other signs of significant intoxication. Other relevant evidence – such as involuntarily defecating or urinating – is highly probative of a victim's inability to appreciate the nature of her/his conduct. It is not necessary, however, that a victim exhibit such extreme signs in order to demonstrate her/his incapacity to appreciate the conduct.³⁵

The majority of jurisdictions criminalize penetration of victims who are *unconscious, unaware the conduct was occurring, or incapable of controlling their own conduct or of resisting or communicating their unwillingness*. Evidence relevant to establishing that a victim was unaware of contact *includes evidence the victim fell asleep after ingesting alcohol or was asleep during the initial or continued penetration*; these individuals can be determined to have been unaware the conduct was occurring and/or incapable of communicating unwillingness.³⁶

A sexual assault can also occur where a victim is intermittently conscious.³⁷ Courts are not, however, consistent in their interpretation that a victim's intermittent consciousness satisfies the element(s) of *unconsciousness or being unaware the conduct was occurring, or incapable of controlling their own conduct or of resisting or communicating their unwillingness*.³⁸ Such cases may have to be prosecuted under other sexual assault statutes.³⁹ Pennsylvania is an example of a jurisdiction where the victim's intermittent unconsciousness is sufficient to establish s/he was unconscious for purpose of the statute:

Because the evidence supports the findings that the victim ... was at all relevant times in such impaired physical and mental condition so as to be unable to knowingly consent, her submission to intercourse was involuntary. That intercourse, therefore, is sufficient to constitute rape of an unconscious individual.⁴⁰

Prosecutors should charge all statutes or theories of criminal liability that apply based on the victim's condition during the entirety of the assault. For example, where a victim moves in and out of consciousness, prosecutors can point to other evidence of a cognitive and/or physical impairment, such as vomiting; slurred or incoherent speech; and difficulty walking, sitting up, or speaking. One or more of these factors is relevant to the victim's ability to resist or communicate her/his unwillingness to participate in a sexual act. For example, if a person is vomiting during penetration, s/he is certainly unable to communicate unwillingness to participate in the act. In this way, prosecutors can seek to hold perpetrators accountable for all the criminally assaultive behavior perpetrated on a victim.

Prosecutors also may be required to prove a victim's inability to resist in order to satisfy elements related to the victim's level of intoxication.⁴¹ The victim's condition may have changed throughout the assault, necessitating the application of statutes that cover nonconsent, coercion, and a victim who was unaware of the assault.⁴² Cases should also be reviewed for evidence of constructive force.⁴³ Constructive force may be established where the assault occurs in an isolated or otherwise unfamiliar location; where the perpetrator is an individual whom the victim only recently met; or where the perpetrator is showing a side of him/herself the victim never before experienced. Although covered by other statutes, a perpetrator's actual or perceived position of authority over a victim can also be relevant. These types of facts are relevant to the selection of statutes under which the perpetrator should be prosecuted, the theory of the case, and the evidence that should be introduced at trial.

Proving the Elements of Involuntary Intoxication Sexual Assault Statutes

In cases where the victim's intoxication was involuntary, courts look to evidence that establishes the perpetrator's motivations for surreptitiously intoxicating the victim. Many potential sources of evidence can be relevant to establishing the perpetrator's intent, such as: social media posts, text messages, or other public statements that indicate an interest in penetrating or contacting intoxicated victims; the existence of other victims;⁴⁴ victim, perpetrator, or witness statements describing alcohol as undetected in beverages at a party or social gathering; paraphernalia such as a Benadryl-laced syringe found on the perpetrator or in his premises or car; or evidence that the identity or effects of drugs or alcohol were misrepresented.⁴⁵

OTHER RELEVANT LAWS

Charging decisions should be made based on application of the facts to *all* available sexual assault statutes. While all jurisdictions cover alcohol- and drug- facilitated sexual assault, some have added an element of proof as to the defendant's knowledge of the victim's condition. In addition, some jurisdictions' sexual assault statutes are designed as specific intent crimes and may allow for a defense of intoxication. These two types of statutes are discussed briefly below.

Defendant Knew or Should Have Known the Victim Was Intoxicated

Some jurisdictions' sexual assault statutes require the perpetrator to know that the victim was intoxicated to the point of impacting her/his cognitive abilities (including the victim's ability to consent) or physical abilities.⁴⁶ In those jurisdictions, prosecutors should introduce evidence that the perpetrator knew the victim's level of intoxication, such as whether the offender provided the victim with drugs or alcohol or was aware of the quantity the victim ingested, whether the victim's motor functions or speech were noticeably impaired, and whether the victim became sick.⁴⁷

Defendant's Voluntary Intoxication as a Defense

Sexual assault is almost always a general intent crime,⁴⁸ to which voluntary intoxication is *not* a defense.⁴⁹ In other words, a defendant's voluntary intoxication does not generally negate her/his culpability for the crime of sexual assault. Voluntary intoxication can *potentially* provide a defense to specific intent sexual assault crimes,⁵⁰ such as those that require the act be committed for the purpose of sexual arousal or gratification,⁵¹ or those that require knowledge of a victim's incapacity to consent.⁵² Most *attempt* offenses are also considered specific intent crimes.⁵³ Not all statutes that include a sexual arousal or gratification requirement or include a knowledge of victim's incapacity to consent requirement allow for an intoxication defense. However, even where the defense is not available, prosecutors must be vigilant in opposing attempts to introduce evidence of the defendant's intoxication under the rule of general relevance.⁵⁴ Studies demonstrate that although jurors tend to consistently assign increased blame to intoxicated victims who report rape, they may assign less blame to intoxicated defendants who commit rape.⁵⁵ Defenses are grounded in a minimization of sexual violence and victim blaming and must be addressed during trial. Such misperceptions should be countered through witness testimony, objective evidence of defendant's behavior, and through arguments directly confronting these myths in opening and closing statements that include the use of a strong trial theme.⁵⁶

CONCLUSION

Alcohol is the weapon of choice for many sex offenders because it is highly effective and may serve to mitigate their criminal liability in the eyes of a sympathetic jury. Offenders who use alcohol to perpetrate their crimes must be held accountable; victims deserve justice and communities deserve protection.⁵⁷ The laws in every jurisdiction provide prosecutors with the fundamental statutory tools they need to charge and prosecute offenders. And, where case decisions interpreting those laws provide offenders with loopholes to accountability, prosecutors should introduce information and evidence regarding the physiological impact of intoxication to challenge the reasoning upon which those decisions are based. Thorough investigations, an understanding of the dynamics of alcohol- and drug-facilitated sexual assault, and a complete review of the elements of applicable sexual assault statutes can help prosecutors incorporate sound research, craft effective pretrial motions, anticipate defenses, utilize appropriate jury instructions, and strongly advocate for convictions.

ENDNOTES

- 1 Jennifer Long is the CEO of AEQUITAS, Charlene Whitman-Barr is an Associate Attorney Advisor at AEQUITAS, and Viktoria Kristiansson is an Attorney Advisor at AEQUITAS. The purpose of this article is to provide a survey of the laws related to sexual assault of intoxicated victims and to briefly summarize some of the issues related to successfully prosecuting perpetrators. AEQUITAS has additional resources on this topic, including recorded webinars that lay out detailed strategies for prosecuting these cases. The authors wish to acknowledge the extensive work addressing alcohol-facilitated sexual assault done by Teresa P. Scalzo, JD (1969-2016), formerly Deputy Director, Trial Counsel Assistance Program, U.S. Navy, including her creation of the seminal work on this topic, *Prosecuting Alcohol Facilitated Sexual Assault* (2007).
- 2 This is the first of a new STATUTES *in Review* series that will summarize and analyze laws addressing gender-based violence and human trafficking. The underlying research and laws are available upon request from AEQUITAS.
- 3 See, e.g., CONN. GEN. STAT. ANN. § 53a-65(6) (defining “Physically helpless” where a person is “(A) unconscious, or (B) for any other reason, is physically unable to resist an act of sexual intercourse or sexual contact or to communicate unwillingness to an act of sexual intercourse or sexual contact.” Physically helpless is an element in Sexual Assault 2, § 53a-71(a)(3); Sexual Assault 4, § 53a-73(a)(1)(D)); D.C. CODE ANN. § 22-3003(2) (defining “Other incapacitation” Where the person “knows or has reason to know that the other person is: (A) Incapable of appraising the nature of the conduct; (B) Incapable of declining participation in that sexual act; or (C) Incapable of communicating unwillingness to engage in that sexual act.” Other incapacitation is an element in Fourth Degree Sexual Abuse).
- 4 See, e.g., R.I. GEN. LAWS § 11-37-1(4) (defining “Mentally disabled” where a person “who has a mental impairment which renders that person incapable of appraising the nature of the act.” Mentally disabled is an element in Sexual assault 1, § 11-37-2(1); Sexual assault 2, § 11-37-4(1)); 18 U.S.C. § 2242(A) (criminalizing “Whoever ... (2) engages in a sexual act with another person if that other person is-- (A) incapable of appraising the nature of the conduct.” This language is also referenced in *Abusive Sexual Contact*, § 2244(a)(2).
- 5 See, e.g., IOWA CODE § 709.1A(1) (defining “Mentally incapacitated” where “a person is temporarily incapable of appraising or controlling the person’s own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance.” Mentally incapacitated is an element in: Sexual Abuse Defined, § 709.1; Sexual Abuse 3, § 709.4I); MONT. CODE ANN. § 45-2-101(41) (defining “Mentally incapacitated” where “a person is rendered temporarily incapable of appreciating or controlling the person’s own conduct as a result of the influence of an intoxicating substance.” Mentally incapacitated also appears in the definitions of “without consent”, § 45-5-501(1)(a)(ii)(A) and as an element in Sexual Assault, §45-5-502(1); Sexual Intercourse Without Consent, § 645-5-503(1)).
- 6 TERESA SCALZO, NAT’L DISTRICT ATTORNEYS ASS’N, *PROSECUTING ALCOHOL FACILITATED SEXUAL ASSAULT*, 1 (2007). For additional information on drug-facilitated sexual assault, see DEAN G. KILPATRICK, ET AL., MEDICAL UNIVERSITY OF SOUTH CAROLINA, NATIONAL CRIME VICTIMS RESEARCH & TREATMENT CENTER, *DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY* (2007) see also, Heather D. Flowe, Melanie K. T. Takarangi, Joyce E. Humphries & Deborah S. Wright, *Alcohol and remembering a hypothetical sexual assault: Can people who were under the influence of alcohol during the event provide accurate testimony?*, MEMORY 1-20 (2015).
- 7 Aaron M. White, *What Happened? Alcohol, Memory, Blackouts, and the Brain*, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm> (last visited July 14, 2015).
- 8 Amy M. Cohn, Heidi M. Zinzo, Heidi S. Resnick & Dean G. Kilpatrick, *Correlates of Reasons for Not Reporting Rape to Police: Results From a National Telephone Household Probability Sample of Women With Forcible or Drug-or- Alcohol Facilitated/ Incapacitated Rape*, 28 (3) J INTERPERSONAL VIOLENCE 455-73 (2013).
- 9 SCALZO, *supra* note 6.
- 10 *Are Women More Vulnerable to Alcohol’s Effects?*, NAT’L INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/aa46.htm> (last visited June 2, 2016).
- 11 See, e.g., Ashley A. Wenger & Brian H. Bornstein, *The Effects of Victim’s Substance Use and Relationship Closeness on Mock Jurors’ Judgments in an Acquaintance Rape Case*, 54 SEX ROLES 547-55 (2006) (studying juror assessment of credibility when victims are not sober/not sober); CASSIA SPOHN & DAVID HOLLERAN, *PROSECUTING SEXUAL ASSAULT: A COMPARISON OF CHARGING DECISIONS IN SEXUAL ASSAULT CASES INVOLVING STRANGERS, ACQUAINTANCES, AND INTIMATE PARTNERS* (2004), <https://www.ncjrs.gov/pdffiles1/nij/199720.pdf> (investigating likelihood of charging when victim is engaging in risk-taking behavior).
- 12 AEQUITAS looked at all 50 U.S. states, the District of Columbia, the U.S. Territories, federal, and the military.
- 13 Some statutes specifically reference alcohol, drugs, or intoxication directly in the sexual assault statute. Some make references in their general definitions of consent or ineffective consent. Still, other statutes may address how consent is negated or nonexistent without specifically referencing alcohol, drugs, or intoxication, but describing particular behaviors or their effects. For a detailed breakdown and analysis of states, please see AEQUITAS, *ALCOHOL-FACILITATED SEXUAL ASSAULT* (Jan. 2016) (available upon request.)
- 14 Statutory language includes scenarios where the perpetrator intoxicates a victim to prevent her/his resistance.
- 15 Please contact AEQUITAS for technical assistance. Technical Assistance, AEQUITAS, <http://www.aequitasresource.org/taRegister.cfm> (last visited Aug. 12, 2016). Please also check AEQUITAS’ Library for new and updated resources. Library, AEQUITAS, www.aequitasresource.org/library.cfm (last visited Aug. 12, 2016).
- 16 The 27 jurisdictions are **American Samoa**, Arizona, Arkansas, California, **Colorado**, **Georgia** (see *infra* note 18), **Guam**, **Hawaii**, Idaho, Iowa, Kansas, Louisiana, **Maine**, Maryland, **Massachusetts**, **Missouri**, Montana, **New Hampshire**, **New Jersey**, **North Dakota**, **Pennsylvania**, South Carolina, South Dakota, the Virgin Islands, Washington, Wisconsin, and the military. The bolded jurisdictions cover voluntary intoxication through their ineffective consent statutes; Missouri is bolded and italicized because it has both a specific sexual assault statute covering voluntarily intoxicating

cated victims and also covers them in its consent statute.

17 See, e.g., ARIZ. REV. STAT. ANN. § 13-1401(a)(7)(b); ARK. CODE ANN. § 5-14-101(5)(B); CAL. PENAL CODE § 261(a)(3); IDAHO CODE ANN. § 18-6101(5); IOWA CODE § 709.1A(1); KAN. STAT. ANN. § 21-5503(a)(2); LA. REV. STAT. ANN. § 14:43(A)(1); MD. CODE ANN., CRIM. LAW § 3-301(c); MO. ANN. STAT. § 566.030 (1); MONT. CODE ANN. § 45-2-101(41); S.C. CODE ANN. § 16-3-651(f); S.D. CODIFIED LAWS § 22-22-1(4); WASH. REV. CODE ANN. § 9A.44.010(4); WIS. STAT. § 940.225(2)(cm); V.I. CODE ANN. 14 § 1701(a)(4); UCMJ § 920 Art. 120(b)(3)(a).

18 See, e.g., AM. SAMOA CODE ANN. 46.3111(4)(B); HAW. REV. STAT. § 702-235(2); ME. REV. STAT. ANN. tit. 17-A, § 109(3)(B); N.H. REV. STAT. ANN. § 626:6(III); N.J. STAT. ANN. § 2C:2-10(c)(2); MO. ANN. STAT. § 556.061(14)(b); 18 PA. CON. STAT. ANN. § 311(c). Georgia also covers voluntarily intoxicated victims through its consent statute, case law, and jury instruction interpreting Georgia's definition of consent. In addition to the ineffective consent statute (GA. CODE ANN. § 16-1-3), Georgia and its corresponding jury instruction (Georgia Suggested Pattern Jury Instructions - Criminal 2.30.15), there is long-standing case law holding that "sexual intercourse with a woman whose will is temporarily lost from intoxication, or unconsciousness arising from using drugs or other cause, or sleep, is rape." Paul v. State, 144 Ga.App. 106, 240 S.E.2d 600, 602 (1977) (affirming conviction for rape committed by defendant while victim was drunk) (citing Gore v. State, 119 Ga. 418 (1904)). Massachusetts also covers voluntary intoxication via case law. Commonwealth v. Blache, 450 Mass. 583, 880 N.E.2d 73 (2008) (holding that jury instruction concerning capacity to consent should be given in any rape case in which the evidence would support a finding that because of the consumption of drugs or alcohol or for some other reason, for example, sleep, unconsciousness, mental retardation, or helplessness, the complainant was so impaired as to be incapable of consenting to intercourse).

19 See, e.g., COLO. REV. STAT. ANN. § 18-1-505(3)(b); 9 GUAM CODE ANN. § 7.64(c)(2).

20 Paul, 144 Ga. App. 106.

21 See generally People v. Teichner, 422 N.E.2d 506 (N.Y. 1981) (declined to extend by People v. Charles, 821 N.Y.S.2d 878 (N.Y. App. Div. 2006) on other grounds).

22 Some jurisdictions, for example, define lack of consent in terms of force used. See, e.g., ALASKA STAT. ANN. § 11.41.470 (8); DEL. CODE ANN. tit. 11, § 761(j); TEX. PENAL CODE ANN. § 22.011(b).

23 See, e.g., Georgia and Massachusetts case law, *supra* note 18; see also, e.g., Travis v. State, 98 A.3d 281 (Md. Spec. App. 2014).

24 See, e.g., Georgia and Massachusetts case law, *supra* note 18; see also, e.g., Travis v. State, 98 A.3d 281 (Md. Spec. App. 2014).

25 The 37 jurisdictions are Alabama, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, West Virginia, Wyoming, Guam, Puerto Rico, federal, and military.

26 See, e.g., involuntary intoxication defined in ARK. CODE ANN. § 5-14-101(5)(A) ("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).

27 See, e.g., MASS. GEN. LAWS ANN. ch. 272, § 3.

28 See, e.g., DEL. CODE ANN. § 761(j)(5); OHIO REV. CODE ANN. § 2907.02(A)(1)(a); 18 PA. CONS. STAT. ANN. § 3121(a)(4).

29 See, e.g., IND. CODE § 35-42-4-1(b)(4); N.H. REV. STAT. ANN. § 632-A:2(1)(f); N.D. CENT. CODE § 12.1-20-03(1)(b); WYO. STAT. ANN. § 6-2-303(a) (iii).

30 See 18 PA. CONS. STAT. ANN. §§ 3125(a)(1), (a)(4), and (a)(5) (West 2011). Aggravated indecent assault. For information about other Pennsylvania sexual assault statutes, please see the comprehensive research, available upon request. For information about sexual assault statutes in other U.S. jurisdictions, please see CAROL TRACY, TERRY FROMSON, JENNIFER G. LONG, CHARLENE WHITMAN, RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM (2013) (on file with AEquitas).

31 See, e.g., 18 PA. CONS. STAT. ANN. § 311 (c) Ineffective consent --Unless otherwise provided by this title or by the law defining the offense, assent does not constitute consent if: ... (2) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute.

32 Whether or not consent is included as an element of a specific statute, it is always an available defense theory, which has been raised in stranger and nonstranger cases alike.

33 See SCALZO, *supra* note 6.

34 See, e.g., AMERICAN PROSECUTORS' RESEARCH INSTITUTE, ALCOHOL TOXICOLOGY FOR PROSECUTORS: TARGETING HARDCORE IMPAIRED DRIVERS (July 2003).

35 In addition, a victim who fell asleep, whether or not s/he was drinking or using drugs, and awakened to a penetration occurring, can be determined to have been incapable of appraising the conduct due to the fact s/he was sleeping. Platt v. People (en banc), 201 P.3d 545, 547 (Colo. 2009) (specifically analyzing the application of the prong of the statute focusing on where "[t]he actor knows that the victim is incapable of appraising the nature of the victim's conduct" COLO. REV. STAT. ANN. § 18-3-402(1)(b)).

36 “[A] person who is sleeping is ‘physically helpless’ for the purposes of consenting to sexual intercourse, particularly where the sleep was drug and alcohol induced.” *People v. Fuller*, 50 A.D.3d 1171 (N.Y. App. Div. 2008) (citing *People v. Williams*, 40 A.D.3d 1364, 1366 (N.Y. App. Div. 2007)); see also KY. REV. STAT. ANN. § 510.010 (commentary to statute providing “physically helpless” – where a person is who is unconscious or for any other reason is physically unable to communicate unwillingness – includes “where a person is in a deep sleep as a result of barbiturates, unconscious because of excessive alcohol consumption, or a total “paralytic.”

37 “[I]t is the rare [sexual assault] case that does not involve a victim who was physically helpless due to unconsciousness, sleep or intoxication.”

38 *Commonwealth v. Erney*, 548 Pa. 467, 473-74 (1997). This case analyzed the unconscious provision under § 3121 (Rape), but the analysis would apply to § 3125 (Aggravated Indecent Assault). See also *State v. Digerlamo*, 2014 Wash. App. LEXIS 531 (Wash. Ct. App. Mar. 10, 2014) (unpublished) (Defendant appealed his conviction for rape in the second degree. The victim could not remember exactly how much she drank, but she estimated she had had approximately ten drinks. According to the expert testimony, the victim’s estimated blood alcohol level at the time of the sexual assault was between .1375 and .21 at the time of the sexual assault, and the victim experienced severe symptoms of intoxication, such as dizziness, vomiting, and passing in and out of consciousness. The defendant claimed that there was insufficient evidence to prove that the victim was incapable of consent due to mental incapacity or physical helplessness. The Washington Court of Appeals stated that physical helplessness and mental incapacity are ways in which the victim may be incapable of giving consent. The court affirmed the conviction, holding that the jury could have reasonably found that the victim was “unable to appreciate the nature and consequences of sexual intercourse at the time it occurred,” because she was mostly unconscious during the assault.). *But see, e.g., Ragsdale v. State*, 23 P.3d 653 (Alaska Ct. App. 2001).

39 *Id.*

40 *Commonwealth v. Erney*, 548 Pa. 467 (1997).

41 See, e.g., CAL. PENAL CODE § 261(a)(3); IDAHO CODE ANN. § 18-6101(5).

42 See Viktoria Kristiansson & Charlene Whitman-Barr, *Integrating a Trauma-Informed Response in Violence Against Women and Human Trafficking Prosecutions*, 13 STRATEGIES (Feb. 2015), available at www.aequitasresource.org/library.cfm (Trauma and alcohol can impact a victim’s ability to remember and disclose facts. Prosecutors should review all facts carefully and prepare victims for trial with a focus on sensory details in order to present the factfinder with a sense of what the victim recalls about what happened at various times. This important evidence may come from other witnesses or video as well).

43 See, e.g., *McIntosh v. State*, 247 Ga. App. 640, 545 S.E.2d 61 (2001) (The defendant asserted that the jury instruction on constructive force was given in error because “there was no evidence that the victim was incompetent or that her intoxication rose to a level of complete loss of will.” *Id.* at 644. The court disagreed and held that a constructive force instruction was justified because there was evidence of the victim’s alcohol intake, allowing the jury to include the victim was intoxicated. Ultimately, the court held any error to be harmless due to the evidence of actual force in the case.).

44 While character evidence is generally inadmissible to show actions in accordance with character, Fed. R. Evid. 404(b) governs the introduction of evidence of crimes, wrongs, or other acts for purposes such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a case where the victim willingly ingests an intoxicant given to her by a perpetrator but is unaware of its actual impact (and/or is perhaps misled by the intoxicant’s true identity), the perpetrator’s and victim’s comparative knowledge of the effects of the intoxicant are relevant, and this relevance may positively impact the admissibility of evidence. For example, the fact that the perpetrator had previously called 911 when a female friend became unresponsive after ingesting the same drug may be relevant.

45 There are two important factors to consider regarding misrepresentation. First, if an individual is offered one thing (i.e., a non-intoxicant), but is given another (i.e., an intoxicant), the delivery of that other offering is sneaky and surreptitious, and the offeree has been deceived. Second, if an individual offers one thing (i.e., a non-intoxicant), but delivers another (i.e., an intoxicant), the offeror is engaging in deception.

46 See, e.g., ARIZ. REV. STAT. ANN. § 13-1401 (5)(b) (The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For purposes of this subdivision, “mental defect” means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.).

47 See, e.g., *People v. Giardino*, 82 Cal. App. 4th 454, 466–467 (Cal. Ct. App. 2000) (The court discussed that, in deciding whether the level of the victim’s intoxication deprived the victim of legal capacity to consent, the jury shall consider all the circumstances, including the victim’s age and maturity. It is not enough that the victim was intoxicated to some degree, or that the intoxication reduced the victim’s sexual inhibitions. The level of intoxication and the resulting mental impairment must have been so great that the victim could no longer exercise reasonable judgment concerning that issue.). As a result of the variability of sexual assault statutes relating to non-forcible conduct involving intoxicated victims, prosecutors sometimes charge these crimes as violations of sex crime statutes that do not address intoxication. Rather, these statutes relate to victim incapacity or other inability to communicate unwillingness to participate in sexual activity. Note that there are limitations to the application of the physically helpless or incapacitated statutes. Contact AEQuitas for additional resources and consultation.

48 Kit Kinports, *Rape and Force: The Forgotten Mens Rea*, 4 BUFF. CRIM. L. REV. 755, 776 (2001).

49 General intent is “[t]he intent to perform an act even though the actor does not desire the consequences that result.” BLACK’S LAW DICTIONARY (9th ed. 2009); R.W. Gascoyen, *Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge*, 8 A.L.R. 3d. 1236 (1996) (§ 3[b] General rule that voluntary intoxication is not a defense—Rationale).

50 Specific intent is “[t]he intent to accomplish the precise criminal act that one is later charged with,” BLACK’S LAW DICTIONARY (9th ed.2009); R.W. GASCOYEN, *supra* note 49 (§ 4[a] Specific intent crimes; defense recognized—Generally).

51 See, e.g., MONT. CODE ANN. § 45-5-503 (2011); MONT. CODE ANN. § 45-2-101(2011).

52 See *U.S. v. Bruguier*, 735 F.3d 754 (2013).

53 Attempt offenses require specific intent. 4 WHARTON'S CRIMINAL LAW § 695 (15th ed. 2014).

54 FED. R. EVID. 401. See, e.g., N.Y. Penal Law § 15.25 ("Intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.").

55 See, e.g., WILLIAM O'DONOHUE & ERIC R. LEVENSKY, EDS., HANDBOOK OF FORENSIC PSYCHOLOGY: RESOURCES FOR MENTAL HEALTH AND LEGAL PROFESSIONALS 999 (Academic Press 2003).

56 *Technical Assistance*, AEQUITAS, <http://www.aequitasresource.org/taRegister.cfm> (last visited June 30, 2016). Please reach out to AEQUITAS for more in depth assistance when preparing your case.

57 David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14(4) SEXUAL ASSAULT REPORT, 49-64 (2011).

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1100 H Street NW, Suite 310 • Washington, DC 20005
P: 202-558-0040 • F: 202-393-1918