

Legal Dilemmas when Victims of Sexual Assault are Voluntarily Intoxicated

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This issue of *The Journal* includes an article that brings to the forefront legal challenges that arise in prosecuting sexual assault cases in which the victim is voluntarily intoxicated. As we move as a society away from victim blaming and closer to an objective, nonjudgmental approach to victims of sexual assault, the law too has to evolve. In this commentary, we review how laws have generally approached intoxication in the contexts of criminal defenses, sexual consent, and other decisional capacities related to voluntary intoxication. We explore Teravskis and colleagues' findings and conclude with an exploration of possible implications for defendants and considerations for forensic psychiatrists working in this area.

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O thou invisible spirit of wine, if thou has no name to be known by, let us call thee devil . . . O God, that men should put an enemy in their mouths to steal away their brains! that we should, with joy, pleasance revel and applause, transform ourselves into beasts!

—*Othello* (Act 2, Scene 3, 281–93)

Consuming alcohol in the context of sexual relationships is commonplace and embedded in many cultures, as referenced in William Shakespeare's *Othello*. Also embedded is the notion that individuals are responsible for their behavior. This includes an individual who chooses to consume alcohol until intoxication, even if "transform[ed] into beasts." Within these societal norms have been gendered beliefs that women who get drunk are not exhibiting socially acceptable behavior¹ and deserve the perils they encounter,² an important consideration given that females are consistently reported as the overwhelming majority of sexual violence victims.³

In this issue of *The Journal*, Teravskis and colleagues⁴ review legal dilemmas that arise in sexual

assault cases when victims' voluntary intoxication may have impaired their decision-making capacity. As the authors describe, the challenge in prosecuting sexual assaults involving a voluntarily intoxicated victim often rests on whether the victim possessed the capacity to consent to the sexual act. Even when there is sufficient evidence to support a victim's lack of ability to consent, defendants may not be successfully prosecuted because of the legal definition of incapacity in the context of sexual assault. Teravskis and colleagues have brought this challenging topic to the forefront by reviewing the various jurisdictional approaches to sexual assault cases in which the victim is incapacitated because of voluntary intoxication. In this commentary, we review how laws have generally approached intoxication in the contexts of criminal defenses, sexual consent, and other decisional capacities related to voluntary intoxication. We explore Teravskis and colleagues' findings and potential future directions. We also discuss possible implications for defendants and conclude with considerations for forensic psychiatrists working in this area.

Intoxication and Criminal Defenses

Voluntary intoxication is typically not accepted as a defense to fully absolve criminal responsibility.

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Conversely, many jurisdictions allow voluntary intoxication to be presented as a “partial defense” to negate the criminal intent (*mens rea*) required to commit a specific intent crime, not the act (*actus reus*) itself.⁵ In such cases, defendants could argue that their intoxication prohibited them from being able to form specific intent to commit the charged crime, often referred to as “diminished capacity.”⁶ As prosecutors must prove beyond a reasonable doubt that a defendant had specific intent, evidence of voluntary intoxication can be a defense strategy to cast doubt on specific intent in these jurisdictions. For example, if a criminal defendant caused the death of another person while voluntarily intoxicated from alcohol, the defense attorney could argue that the defendant’s altered mental state at the time of the offense prohibited the defendant from forming the *mens rea* required to commit a specific intent crime (e.g., murder), and the defendant might instead be found guilty of a lesser charge not requiring specific intent (e.g., manslaughter).⁷

Although many states allow evidence of voluntary intoxication to be used to negate the *mens rea* of a specific intent crime, not all states allow it.⁷ This was highlighted in the case of *Montana v. Egelhoff*,⁸ where Mr. Egelhoff argued that he should have been allowed to present evidence of voluntary intoxication to negate the premeditation aspect of his murder conviction. The U.S. Supreme Court ruled against Mr. Egelhoff, outlining that prohibiting evidence of voluntary intoxication as a defense to the *mens rea* aspect of his crime was not a violation of his Fourteenth Amendment right to due process.⁸

In contrast, voluntary intoxication can never be presented as a defense for general intent crimes, such as driving under the influence, disorderly conduct, or involuntary manslaughter. All that general intent crimes require is a willingness to commit the act in question; they do not require proof of a mental state nor any specific intent.⁵ Voluntary intoxication would not negate that the general intent crime was committed and, thus, could not be used as part of a criminal defense. Likewise, voluntary intoxication does not amount to a severe mental disease or defect that is required for an insanity defense. Yet, some jurisdictions allow the concept of “settled insanity” to be used as basis for an insanity defense. Although clearly defined statutes do not exist in many states, in general terms, settled insanity refers to the presence of continued psychotic symptoms in the absence of acute substance intoxication. For example, after habitually using alcohol or

other substances, a defendant develops unremitting psychotic symptoms similar to those found in organic psychotic disorders.⁹ Although the defendant’s mental disease or defect was ultimately caused by voluntary ingestion of substances, if psychotic symptoms subsequently exist independently from a period of acute intoxication, the defendant could still be considered insane and thus use settled insanity as a defense. It is important to note that the concepts of settled insanity and diminished capacity differ in that settled insanity, if successful, results in an insanity acquittal. Diminished capacity is an argument about the specific elements of a charge.⁶

On the other hand, involuntary intoxication, in most jurisdictions, is often more acceptable as a criminal defense. Involuntary intoxication consists of someone unknowingly ingesting an intoxicating substance or not being aware of the possible effects of the substance.¹⁰ When used as a criminal defense, the focus is usually on whether defendants’ involuntary intoxication rendered them unable to distinguish right from wrong or to appreciate the nature and consequences of their acts. Whether or not the defendant’s intoxication was involuntary is a question for the factfinder to determine.

As outlined by Tervaskis and colleagues, several jurisdictions have examined the role of victims’ voluntary intoxication in the setting of sexual assault, focusing on the role of intoxication, either voluntary or involuntary, in decision-making capacity or consent. Although arguments about voluntary intoxication or incapacitation are relevant when applied to victims of sexual assault, these same arguments are not relevant when applied to defendants of most sexual offenses, including rape. Because rape is viewed as a general intent crime in the United States, voluntary intoxication is not considered when determining criminal responsibility; no further proof of the defendant’s mental state is required other than a willingness to engage in non-consensual sexual activity. Because of severe intoxication, however, it is possible that a defendant may not have been able to appreciate another person’s lack of consent to engage in sexual activity.

Using severe voluntary intoxication as a criminal defense was recently addressed by the Supreme Court of Canada in *R v. Brown*.¹¹ The Court held that prohibiting an accused from using voluntary intoxication as a criminal defense was unconstitutional. As a result, *Brown* was permitted to use a defense of “extreme intoxication akin to automatism” at trial. The Court

reasoned that by not allowing the use of voluntary intoxication as a defense, a defendant could be convicted without any proof of intent to commit a criminal act. Although *R v. Brown* did not involve a sexual assault, ramifications from the ruling could potentially apply to sexual assault cases in the future and will likely be a controversial legal topic.

Intoxication and Sexual Consent

Alcohol and other substances can affect an individual's desire for sex as well as an individual's ability to make decisions related to sexual acts. Alcohol, in particular, has been described as having aphrodisiac effects and affecting sexual decision-making, including judgment and communication.¹² Approximately one half of nonconsensual sexual encounters involved voluntary consumption of alcohol by both the perpetrator and the victim prior to or during the encounter,¹³ and studies have shown that a victim's alcohol consumption is frequently encouraged¹⁴ by the perpetrator.¹⁵ Yet, a victim who consumes alcohol does not immediately lose the capacity to consent to the sexual encounter.¹⁶ Understanding the difference between intoxication and incapacitation is important in determining an individual's capacity to consent. Intoxication simply refers to the impairment that occurs with the consumption of substances without mention of the degree of impairment. An individual is incapacitated when the cognitive capacity to consent is impaired.¹⁶ Thus, an individual can be intoxicated but not incapacitated.

Sexual consent has been conceptualized as a willingness to have sex,¹⁷ an explicit agreement to have sex, and showing behavioral manifestations or cues that demonstrate this willingness.¹³ The most common way that individuals determine consent is through nonverbal expression of sexual consent, despite prevailing policies that outline affirmative, verbal consent.¹³ Substance use, including alcohol, is one factor that can impair consent by interfering with cognition, such as working memory and executive function.¹⁸ Individuals have varied responses to alcohol, making it difficult to apply generalizations about the amount of alcohol consumed and the expected impairments one would demonstrate. Additionally, alcohol consumption may also alter an individual's perception of consent. Muehlenhard *et al.*¹⁷ found that college students who consumed alcohol were more likely to perceive others as sexually available. Compared with sober individuals, individuals consuming alcohol were also found to

use fewer sexual verbal communications, instead relying on nonverbal behavior to communicate consent.¹⁹ Young adults describe environments²⁰ in which alcohol is available²¹ as a context in which consent might be assumed.²² Also, intoxication may increase the likelihood that a victim appears passive or unresistant; passivity has been associated with consent in the eyes of the general public.²³

As outlined by Teravskis and colleagues, a retrospective determination of one's capacity to consent to a sexual act is complex and rife with challenges. Gendered roles about consensual sex and rape myths, such as that intoxicated women are more sexually available than sober women,²⁴ may alter a juror's opinion about voluntary intoxication.²⁵ Victim intoxication is associated with fewer police²⁶ and prosecutor decisions to proceed with charges based on rape allegations as well as lower conviction rates compared with sober victims.²⁷ Nitschke *et al.*¹⁶ found that juror gender influenced how intoxicated rape victims are perceived. Male jurors blamed intoxicated rape victims more than did female jurors. Earlier studies, however, found female jurors more likely to blame rape victims than male jurors.²⁸ Another factor that influenced juror perceptions of intoxication in sexual assault is the person who purchased the drinks. Jurors were more likely to render guilty verdicts and make negative judgments about the defendant when that defendant purchased the drinks that led to the victim's intoxication.²⁹

Voluntary Intoxication and Decisional Capacity

Historically, the law has recognized that voluntary intoxication may cause impaired decisional capacity in other circumstances. This is evident in statutes that allow confinement or civil commitment for substance use disorders³⁰ and guardianship for individuals who have demonstrated an inability to care for themselves as a result of voluntary substance use.³¹ For example, a 2015 study of 33 states that have statutory provisions for the civil commitment of substance use disorders found that 13 states identify lack of decisional capacity (inability to make a rational decision with respect to need for substance use treatment) as a criterion for commitment.³² Although more attention is likely needed on the subject of acute intoxication as a basis for incapacity and civil commitment,³³ acute intoxication is clinically relevant when considering immediate decisional capacity.³⁴ For instance, in a

scenario likely very familiar to emergency and inpatient psychiatrists, a voluntarily intoxicated and incapacitated patient may be deemed unable to consent to leaving the hospital against medical advice.

Current Study and Future Directions

Teravskis and colleagues implement a useful methodological approach in reviewing voluntary intoxication sexual assault laws in the United States. For all 50 U.S. states and the District of Columbia, they searched Lexis+ and Westlaw Edge for statutes or codes in which victim incapacity is relevant in sexual offenses. They additionally searched appellate case law for those states without clear definitions of incapacity or equivalent. As noted by the authors, and relevant to forensic psychiatrists, differences in terminology and definitions across jurisdictions often present difficulty in finding and comparing statutes; this is particularly evident in sexual assault laws.³⁵ By including terminology such as “inability” or “impairment” as well as searching various locations in state legislatures where victim intoxication may have been addressed, the authors were able to represent how these laws define incapacity to consent in this context. Similarly, by further examining states that do consider voluntary intoxication as potentially incapacitating a victim’s ability to consent, a more nuanced picture becomes evident in that the severity of the defendant’s penalty may vary based on the victim’s involuntary versus voluntary intoxication. Further, by reviewing case law of those states that do not explicitly define mental incapacity in their statute, the authors are able to provide a more complete review of these laws and insight into the courts’ thinking and interpretations.

Subsequent studies may additionally consider closely examining differences among current findings and previous surveys. As an example, DeMatteo *et al.*³⁵ found that 24 states statutorily define “temporary incapacity,” and Teravskis *et al.* also found that 24 jurisdictions “use language related to incapacity or inability” (Ref. 4, p 603); however their listed states do not entirely overlap. Similarly, of these 24 states, Teravskis *et al.* identified at least four additional states that include incapacity due to voluntary intoxication compared with DeMatteo *et al.* Understanding whether these nuances are related to methodological approaches described by the authors (e.g., search terms), or possibly changes in state laws over time, may be useful in future investigations.

Another important consideration is raised by the authors’ examples of five jurisdictions in which victims’ involuntary intoxication carries a greater penalty than voluntary intoxication. A point worth noting is that these laws often involve involuntary intoxication specifically caused by the perpetrator, not just involuntary intoxication in general. For example, in the District of Columbia, one component of first-degree sexual abuse involves whether a person engages in a sexual act after administering “by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.”³⁶ This suggests that the greater penalty in these specific laws is related to the perpetrator’s actions, rather than reflecting a lesser penalty for a victim’s voluntary intoxication. Although the authors’ categorizations are helpful to understand the broad national legal landscape, this also speaks to the inherent limitations of such an overview and the importance of reviewing nuances of jurisdictional laws in individual cases.

An exploration of the Minnesota Supreme Court’s opinion in *State v. Khalil*³⁷ helps highlight aspects of sexual assault laws. For example, it is helpful to remember that perpetrators may be charged with other sexual offenses that do not rely on a victim’s mental incapacitation. Nonetheless, these other charges may be fraught with their own challenges unrelated to intoxication. Although only the charge of third-degree criminal sexual conduct involving a mentally incapacitated or physically helpless complainant³⁷ was involved in the appeal in *Khalil*, Mr. Khalil originally also faced charges of first- and third-degree criminal sexual conduct involving use of force or coercion.³⁷ These charges do not require the element of a victim’s mental incapacity. Yet, force or coercion might be difficult to prove, as potentially evidenced by Mr. Khalil’s being acquitted of these charges despite the victim allegedly telling him, “No, I don’t want to” (Ref. 37, p 630). Thus, further exploring relevance of capacity to consent in cases where there is actually evidence of refusal may be informative.

Similarly, both the prosecution and defense in *Khalil* conceded that fifth-degree criminal sexual conduct criminalizing nonconsensual sexual contact would cover the alleged actions in this case, which would not require the victim’s mental incapacity. Still, Mr. Khalil was not charged with this offense,

and it would also have only been a gross misdemeanor rather than a felony. Additionally, a potential solution to sidestep the deliberation of mental incapacity altogether in this case may have been to consider whether the victim was “physically helpless” (i.e., per statute, “the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless”³⁸). But, as the court’s opinion states, “More importantly, the jury requested clarification on the definition of mentally incapacitated and it is impossible to know whether the jury relied on the mental incapacitation or physical helplessness elements of [the statute], in arriving at its verdict” (Ref. 37, p 643).

Worth noting in the court’s opinion in *Khalil* is the substantial analysis of grammar, subtleties of language, and potential confusion created by a missing comma in the written jury instructions. In addition to the district court’s erroneously instructing the jury that mental incapacity may also be due to voluntary intoxication, an imprecise written copy of the statute was made available to the jury. The instruction stated, “A person is mentally incapacitated if she lacks the judgment to give reasoned consent to sexual penetration due to the influence of alcohol, a narcotic, or any other substance administered without her agreement” (Ref. 37, p 631). The omitted comma between “any other substance” and “administered” may have led to confusion about whether “without her agreement” also applied to alcohol and narcotics. This reinforces the general importance of forensic psychiatrists’ paying attention to statutory language and seeking clarification from legal experts, particularly with these complex, nuanced laws.

Building on Teravskis and colleagues’ findings, future studies may consider whether courts, such as in a Missouri case they mention, have decided cases or interpreted statutes beyond mere plain reading of the definitions (e.g., voluntary versus involuntary intoxication may not be clearly distinguishable). Beyond sexual offense laws, how voluntary intoxication is considered in other areas of law involving consent, such as ability to enter or void a contract, may provide additional understanding of how courts have conceptualized this topic. Outcomes, such as differences in sentence severity when voluntary intoxication was present in victims, may also provide valuable insight into courts’ views toward victim intoxication. Similarly, in addition to appellate-level cases, understanding experiences from trial court decisions may

help forensic examiners further appreciate prevailing local cultures and legal interpretations. How recent statutes differ from older ones, or learning from international perspectives, may also help describe the evolution of these laws and might signal future directions.

Implications for the Defendant

Teravskis and colleagues conclude that “no person should be subjected to sexual intercourse if a person cannot...provide consent to that sexual intercourse,” (Ref. 4, p 607) regardless of whether the etiology of the impairment is volitional or not. This is in line with a general societal shift from dismantling victim blaming to empowering victims of sexual assault. Since the advent of #MeToo (2017) and the foundation of the MeToo movement (2006), the number of reported sexual assaults has increased by the millions.³⁹ The impact, however, of such public disclosures of sexual abuse on the incidence of sexual assault, victim well-being, and the judicial system are yet to be understood. One aspiration of the #MeToo movement was to ignite a shift from victim blaming to victim empathy and validation by recognizing victim vulnerabilities that may facilitate sexual abuse.⁴⁰ Similarly, recognizing the fact that a victim who voluntarily consumes alcohol may become vulnerable and incapacitated reflects a progression from stigmatization to a critical synthesis of sexual victimization. In addition to the inherent challenges in determining whether a voluntarily intoxicated victim is incapacitated, as detailed by Teravskis and colleagues and reviewed earlier, are questions that arise when the alleged perpetrator is also voluntarily intoxicated. In many cases of sexual assault, both victims and perpetrators are intoxicated.⁴¹ Identifying the unlawful behavior as well as which party is accountable is blurred when both parties voluntarily become incapacitated. These cases require a balance of protecting intoxicated victims and achieving a fair resolution for both parties involved.

The Role of Forensic Psychiatrists

To date, limited research explores the role of alcohol and other substances on decision-making capacity involving sexual consent.⁴² Given this, the role of the forensic psychiatrist should be guided by available research in the field. Such research-supported areas for forensic psychiatrists may involve educating the courts about the pharmacologic effects of alcohol or other

substances on an individual's functioning. As outlined by Teravskis and colleagues, opinions of forensic toxicologists or addiction specialists may be necessary to assist the forensic psychiatrist in understanding the pharmacokinetics of the substance in question. Without further guidance from the scientific community or the legal arena, we as forensic psychiatrists should be cautious of our role in such cases. Perhaps the most useful role we can serve is to educate the courts about the difficulties and, at times, inability to retrospectively determine an intoxicated individual's ability to consent to sex and the likely irrelevance, from a medical perspective, of whether the individual arrived at intoxication voluntarily or not. Given what research has shown about the relationship between juror misperceptions and attitudes toward voluntarily intoxicated victims, providing education may be the most instrumental role.

Finally, Teravskis and colleagues highlight the potential role of bias in forensic evaluations "given the pervasive rape myths in media and culture" (Ref. 4, p 608). Research has demonstrated the presence of cognitive bias in forensic evaluations, outlining irrelevant contextual information that influences opinions.⁴³ Although not specifically studied, one may hypothesize that bias is more evident in emotionally laden cases such as sexual offenses involving voluntarily intoxicated victims. An alternative hypothesis is that voluntary intoxication is so commonplace that faulty generalizations or availability biases may cloud objectivity. This is distinct from other types of forensic evaluations in which the forensic evaluator is unlikely to have encountered circumstances similar to the referral question. Although Teravskis and colleagues suggest utilizing various mitigating systematic approaches to reduce bias, these approaches need to be further studied as potential solutions to managing bias. Being aware of our nonprofessional opinions and experiences as they relate to forensic cases remains at the forefront of managing bias.

Conclusions

Blaming victims for becoming voluntarily intoxicated and vulnerable to sexual assault reflects stereotyped false beliefs that erode the integrity of the justice system. Unfortunately, many laws related to sexual offenses still use language that is not commensurate with contemporary knowledge of such behaviors. This is evident in the many states that impede prosecution of sexual assaults when victims are voluntarily intoxicated. We have reviewed the various problems that

arise in these cases and highlight how laws have conceptualized voluntary intoxication in matters such as criminal responsibility and capacity to consent. Adding to Teravskis and colleagues' study, we also identify potential areas for further academic investigation as well as considerations for forensic psychiatrists in these cases, particularly keeping in mind the frequent involvement of alcohol in both consensual and non-consensual sexual interactions. Forensic psychiatrists should recognize these challenges and carefully consider if and what role to serve in such cases.

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