

Victim Intoxication and Capacity to Consent in Sexual Assault Statutes across the United States

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Alcohol use is common in cases of sexual assault. These cases raise significant questions about a victim's capacity to consent to sexual intercourse. In many United States jurisdictions, intoxicated victims may be considered mentally incapacitated only if they have been administered alcohol or other substances involuntarily. A recent Minnesota Supreme Court case illustrated why reform is necessary in this area of criminal sexual conduct law. We present this case and the results of a review of felony criminal sexual conduct laws in the fifty states of the United States and the District of Columbia. We find that nearly half of the jurisdictions surveyed require that a victim must be involuntarily intoxicated to be considered incapacitated or impaired. We draw on Minnesota's experience with legislative reform of its sexual assault laws as well as judicially mediated reform mechanisms to present a roadmap for overcoming this voluntary intoxication caveat. Finally, we discuss the implications of these laws for victims of sexual assault and for the practice of forensic psychiatry in cases of criminal sexual conduct involving victim intoxication.

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Sexual assaults constitute a significant proportion of the violent crimes committed in the United States each year. According to the Bureau of Justice Statistics, there were over 300,000 reported cases of sexual assault in the United States in 2020;¹ hundreds of thousands of additional incidents occur but are not reported.² Research consistently demonstrates that either the victim, the perpetrator, or both had consumed alcohol in at least 50 percent of all sexual assaults.³⁻⁷ This number has been found to be as high as 72 percent among college students.⁸ This article focuses on sexual assault cases involving victim intoxication.

Despite their prevalence, sexual assaults are vastly under-reported for a variety of reasons; one main reason being that victims who were intoxicated at the

time of the assault perceive that they will be blamed, either explicitly or implicitly, for the assault.⁹⁻¹⁰ Of all reported sexual assaults, only 10 to 35 percent lead to an arrest.¹¹⁻¹² Compared with victims who were sober at the time of an assault, sexual assault victims who were intoxicated are less likely to report the offense to the police and charges are less likely to be brought against the assailant.¹³⁻¹⁴ Victims who are under the influence of substances may have impaired or incomplete memory of the events surrounding the assault;⁶ however, law enforcement officers as well as jurors and lawyers may overestimate the extent that alcohol affects the accuracy of victim testimony¹³⁻¹⁶ with potentially devastating consequences for victims seeking justice. Studies have shown that sexual assault cases are more likely to be dropped prior to trial and are less likely to be investigated or prosecuted when the victim used alcohol or drugs.¹⁷⁻¹⁸

Independent of legal outcomes, victims of sexual assault experience a variety of serious physical and psychological consequences. In the acute period following an assault, victims are at risk of physical and mental health problems.¹⁹⁻²⁰ In the long term, there is an increased risk of the development of psychiatric

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illnesses and substance use disorders.^{3,20} Sexual assault has been associated with increased risk for anxiety disorders, depressive disorders, eating disorders, post-traumatic stress disorder, and suicidal ideation.^{3,21} For victims who pursue legal action, psychological trauma may be compounded by trial participation and the cross-examination process.¹⁹

Given the high prevalence of recreational alcohol and substance use in these cases, most sexual assault laws are written to address the role of alcohol and other intoxicating substances. In most jurisdictions the criminalization of sexual assault hinges on lack of consent.²² Accordingly, jurisdictions must stipulate under what circumstances an individual can or cannot give consent to sexual contact. Laws in Minnesota provide a representative example: the state's definition of criminal sexual conduct specifies three conditions under which a complainant cannot legally consent to sexual contact: mentally impaired, physically helpless, or mentally incapacitated.^{23–24} Up until 2021, the legislative definition of “mentally incapacitated” only included intoxication caused by the involuntary administration of a substance to a complainant. That is, in cases in which a victim had voluntarily consumed alcohol, the victim would not be considered mentally incapacitated under the statute.²³ This distinction leads to a statutory caveat, sometimes termed the voluntary intoxication loophole,²⁵ in which an assailant cannot be convicted of criminal sexual conduct in the fourth degree or greater if the victim was too intoxicated to provide consent but consumed alcohol or other drugs voluntarily.

In this analysis and commentary, we first summarize a recent Minnesota Supreme Court opinion, *State v. Khalil*,²⁶ that clarified the statutory definition of “mentally incapacitated” and its application to a scenario in which such incapacity was the product of voluntary intoxication. Next, we present a survey of the laws in the fifty states of the United States and the District of Columbia that define mental incapacity in relation to consent to sexual contact and voluntary or involuntary intoxication. We then examine the reforms passed by the Minnesota State Legislature in the wake of the *Khalil* decision. Finally, we discuss the implications of these laws to the practice of forensic psychiatry.

State v. Khalil (Minn. 2021)

On the evening of May 13, 2017, the victim-complainant, Ms. JS, drank five shots of vodka and took a prescription narcotic pill.²⁶ She and her

friend, Ms. SL, then went to a bar in Minneapolis. Outside the bar, a bouncer denied the two women entry because Ms. JS was visibly intoxicated. Later, Francios Khalil, the defendant, invited the two women to a party. Mr. Khalil drove Ms. JS and SL to his house, but there was no party. Ms. JS testified that she “blacked out” immediately after entering Mr. Khalil's house. Ms. SL testified that she saw Ms. JS fall asleep on the living room couch. Ms. JS next recalled waking up to find Mr. Khalil “penetrating her vagina with his penis” (Ref. 26, p 630). She told him, “No, I don't want to” (Ref. 26, p 630). Mr. Khalil persisted. Ms. JS lost consciousness.²⁶

Ms. JS awoke the next morning partially undressed. During the ride back home from Mr. Khalil's house, Ms. JS told Ms. SL that she had been raped. Ms. JS reported the incident to the police four days later. The state charged Mr. Khalil with four counts of criminal sexual conduct including third-degree criminal sexual conduct involving a mentally incapacitated or physically helpless complainant.²⁶

At the time of the alleged offense, Minnesota statute defined third-degree sexual conduct involving a mentally incapacitated or physically helpless complainant as follows:

A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists: . . . the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless . . . (Ref. 27, § 609.344(1)).

“Mentally incapacitated” means

that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance administered to that person without the person's agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration (Ref. 23, § 609.341(7)(2)).

This definition also applies to first-, second-, and fourth-degree criminal sexual conduct.²⁸

During Mr. Khalil's trial, the jury asked the court for clarification on the meaning of “mentally incapacitated.” The trial judge replied that “you can be mentally incapacitated following consumption of alcohol that one administers to one's self . . . or separately something that's administered without someone's agreement” (Ref. 26, p 631). The jury returned a verdict of guilty on the count of third-degree criminal sexual conduct.²⁶

Mr. Khalil challenged the verdict on appeal arguing, among other things, that the trial court erred by

instructing the jury that a person can become mentally incapacitated by either voluntary or involuntary intoxication. The Minnesota Court of Appeals affirmed Mr. Khalil's conviction in a divided opinion.²⁹

Mr. Khalil appealed to the Minnesota Supreme Court. He argued that the trial court and the Minnesota Court of Appeals interpreted the statutory definition of "mentally incapacitated" incorrectly and that Ms. JS could only be mentally incapacitated under Minnesota law if she were given alcohol, a narcotic, or another intoxicating substance involuntarily. Because the trial court instructed the jury differently, Mr. Khalil argued that he was entitled to a new trial. In response, the State of Minnesota argued that the statute should be interpreted to mean that persons are mentally incapacitated even if they consumed alcohol or a narcotic voluntarily and that the phrase "administered without the person's consent" should not apply to alcohol based on the grammar and punctuation of the statute.²⁶

In its decision, the Minnesota Supreme Court first noted that during the trial the prosecution did not argue that "[Ms. JS] was under the influence of alcohol administered to [Ms. JS] *without* her agreement" (Ref. 26, p 632; emphasis in original) and that there was no evidence to support such a claim. Therefore, the question before the court was whether the statutory definition of "mentally incapacitated" included situations in which a person lacks the judgment to give a reasoned consent because the person voluntarily consumed alcohol. The court found that Ms. JS could only be mentally incapacitated due to alcohol intoxication under prevailing law if the alcohol was administered to her without her agreement. Because the trial court instructed the jury otherwise, Mr. Khalil was entitled to a new trial.²⁶

Effectively, in *Khalil*, the Minnesota Supreme Court construed the state's criminal sexual conduct statute to exculpate the assailant of an intoxicated victim in scenarios in which the intoxication was voluntary. To determine how widespread this voluntary intoxication caveat in sexual assault laws is, we looked first to the Model Penal Code and then conducted a comprehensive survey of criminal sexual conduct statutes in the fifty states and the District of Columbia.

Fifty-One Jurisdiction Statutory Review

Minnesota's statutory definition of mental incapacity is not without precedent. The Model Penal Code, first drafted in 1962, suggested similar language: "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" (Ref. 30, § 213.1(1)(b)). In the Commentaries to the Model Penal Code, the drafters reasoned:

Common-law authorities treated intercourse with an unconscious woman as rape and occasionally expanded this rule to cases [in which] the woman was not technically unconscious but was so incapacitated by alcohol or drugs as to be in a condition of utter insensibility or stupefaction. Most current statutes, however, differentiate unconsciousness from lesser impairment and require in the latter case that the drug or intoxicant be administered by or with the privity of the defendant in order to constitute the highest degree of forcible rape (Ref. 31, p 317).

The Model Penal Code serves only as a uniform template and guide to state legislators when drafting and amending the penal codes for their individual states; it is not binding law.³²

We identified three surveys from the past two decades that review statutes governing criminal sexual conduct with a victim who is voluntarily or involuntarily intoxicated. In 2002, one study found that of the fifty-six jurisdictions analyzed, twenty-three explicitly defined mental incapacitation; sixteen of those jurisdictions required that the victim be administered an intoxicating substance involuntarily.³³ In 2012, the Women's Law Project published a white paper estimating that thirty-four states and the District of Columbia distinguish between voluntary and involuntary intoxication to some degree.³⁴ Most recently, a 2015 survey found that twenty-five state statutes that criminalize sexual misconduct have definitions of incapacity that included incapacity due to intoxication; only seven of those state statutes contained definitions of incapacity that included victims who are voluntarily intoxicated.³⁵

We now update and extend this line of research. First, we look beyond definitions of mental incapacity to include other language that jurisdictions use to address the role of intoxication in cases of sexual assault. Second, we searched within statutory provisions outlawing specific sexual offenses for other locations at which state legislatures have addressed victim intoxication. Third, we analyzed how voluntary and involuntary victim intoxication relates to the degrees of felony sexual misconduct prohibited in each jurisdiction. Fourth, in jurisdictions that do not define mental incapacity, we looked at appellate case law

interpreting these statutes in relation to cases of sexual assault involving victim intoxication.

We searched the statutes or code of all fifty states and the District of Columbia to find provisions governing the criminalization of felony sexual conduct, rape, sexual abuse, sexual assault, or related sexual offenses in which victim incapacity is germane. We used Lexis+ (LexisNexis, New York City, New York) and Westlaw Edge (West, Eagan, Minnesota) to find state law provisions defining mental incapacity to consent to sexual conduct due to intoxication and categorized them based upon their plain language (see Appendix A online). In states without clear definitions of incapacity or equivalent, we searched appellate case law to determine the manner in which state courts treat questions of victim capacity in the setting of voluntary intoxication (see Appendix B online).

Of the fifty-one jurisdictions, all but three (Georgia, Massachusetts, and New Mexico) noted that mental incapacity is a reason a victim may lack capacity to consent to sexual contact (Appendix B). In the other jurisdictions, we found that legislatures utilize four general provisions when describing how intoxicants affect a victim's legal capacity to consent to sexual contact:

Twenty-four jurisdictions use language related to incapacity or inability

Ten jurisdictions focus on victim impairment

Two jurisdictions ask whether the victim lacks certain abilities because of substance administration or intoxication

Two jurisdictions only ask whether the perpetrator of the sexual offense furnished or delivered a substance to the victim (Table 1).

Additionally, six jurisdictions use a combination of mental incapacity or inability language:

Three jurisdictions (Montana, Nebraska, and Nevada) use the terms mentally incapacitated or mentally incapable but do not define them (Table 2; Appendix B).

The forty-five jurisdictions with substantive definitions of victim incapacity or equivalent can be divided into those with language similar to the Model Penal Code and the statute analyzed in *Khalil* that define a victim as mentally incapacitated only when

intoxicated involuntarily; and jurisdictions that have definitions of mental incapacity that can be read to include either voluntary or involuntary intoxication (Fig. 1). Twenty-one states have language mirroring or substantially similar to the 2019 Minnesota statute that was analyzed by the court in *Khalil*, that is, at least by their plain meaning, the laws only consider a victim to be mentally incapacitated if the victim was involuntarily intoxicated. Twenty-three states use language that indicates that mental incapacity can result from either voluntary or involuntary intoxication. Of these, seven (Alaska, Nebraska, Nevada, North Carolina, Oregon, and Virginia) make no distinction between intoxication and other potential causes of impairment (Table 2). All six states that do not mention or define mental incapacity or an equivalent condition have appellate case law supporting the proposition that voluntary or involuntary intoxication can lead to an incapacity to consent to sexual contact and can support a conviction under those states' felony sexual offense statutes (Appendix B).

Just because a state recognizes both voluntary and involuntary intoxication as a predicate cause of mental incapacity does not necessarily mean that the manner in which a person becomes intoxicated is immaterial. In Colorado, if the victim is voluntarily intoxicated, the state must show that the defendant "knows the victim is incapable of appraising the nature of the victim's conduct" but if involuntarily intoxicated the state must only prove that the defendant "substantially impaired" the victim's ability to appraise his or her conduct (Ref. 36; § 18-3-402 (1)(b) & (4)(d)). Arkansas and Rhode Island employ a similar statutory scheme (Table 3). Relatedly, other jurisdictions (for example the District of Columbia, Illinois, Louisiana, Ohio, and South Carolina) explicitly ascribe a greater degree of severity to criminal sexual conduct with a victim who is involuntarily intoxicated compared with one who is voluntarily intoxicated (Table 4).

States that define mental incapacity to include involuntary intoxication alone can be divided based on whether mental incapacity is an element of the offense or an aggravating factor. For example, while Indiana only considers intoxication relevant if it is involuntary, it is not an element of the offense; it only enhances the sentence if a jury finds that the victim was involuntarily intoxicated.³⁷ Furthermore, in some states in which incapacity requires involuntary intoxication, assailants may still be considered less

Table 1 Statutory Language Used to Describe the Effects of Intoxication on Victims of Sexual Offenses (citations listed in Appendix A online)

Jurisdiction	Intoxication Included	Operative Language	Jurisdiction	Intoxication Included	Operative Language
Alabama	Yes	Incapacitated	Montana	No	Mentally disordered or incapacitated
Alaska	No	Incapable	Nebraska	No	Mentally or physically incapable
Arizona	Yes	Incapacitated	Nevada	No	Mentally or physically incapable
Arkansas	Yes	Incapable	New Hampshire	Yes	Mentally incapacitates
California	Yes	Impairment	New Jersey	Yes	Mentally incapacitated
Colorado	Yes	Prevented	New Mexico	N/A	Incapable
Connecticut	Yes	Incapable	New York	N/A	N/A
Delaware	Yes	Impaired	North Carolina	Yes	Mentally incapacitated
District of Columbia	Yes	Mentally incapacitated	North Dakota	No	Incapable
Florida	Yes	Impaired	Ohio	Yes	Mentally incapacitated
Georgia	Yes	Incapable	Oklahoma	No	Impairs
Hawaii	N/A	Mentally incapacitated	Oregon	Yes	Administered
Idaho	Yes	Incapable	Rhode Island	No	Mentally incapacitated
Illinois	Yes	Unable	Pennsylvania	Yes	Incapable
Indiana	Yes	Unable	Rhode Island	Yes	Impaired
Iowa	Yes	Delivers	South Carolina	Yes	Mentally incapacitated
Kansas	Yes	Furnishing	South Dakota	Yes	Incapable
Kentucky	Yes	Mentally incapacitated	Tennessee	Yes	Mentally incapacitated
Louisiana	Yes	Incapable	Texas	Yes	Incapable
Maine	Yes	Impaired	Utah	Yes	Impaired
Maryland	Yes	Mentally incapacitated	Vermont	Yes	Impair
Massachusetts	N/A	Incapable	Virginia	No	Mental incapacity
Michigan	Yes	N/A	Washington	Yes	Prevents
Minnesota	Yes	Mentally incapacitated	West Virginia	Yes	Mental incapacity
Mississippi	Yes	Incapable	Wisconsin	Yes	Prevents
Missouri	Yes	Impaired	Wyoming	Yes	Mentally incapacitated

culpable if the assault was facilitated by victim intoxication. For example, in Kentucky, a charge of rape in the first degree cannot be supported when an assailant administered an intoxicant to a victim and had nonconsensual sexual intercourse with that victim (this fact pattern can only result in a conviction for rape in the second degree or lower).^{38–39}

In many states that require involuntary intoxication for mental incapacity, misdemeanor offenses (e.g., sexual battery) may be charged for nonconsensual sexual

contact with a voluntarily intoxicated victim.²³ Similarly, a voluntarily intoxicated victim may fit within statutory definitions of “physical helplessness” or “mental impairment;” however, a very high level of intoxication is required for courts to consider that victim to be physically helpless or mentally impaired.^{40,41–42} For example, some states have defined physical helplessness narrowly; they require that the complainant be “asleep or not conscious” when the sexual assault occurred.⁴³ By contrast, a

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Table 2 States That Do Not Explicitly Define Intoxication as a Reason a Victim May Lack Capacity to Consent to Sexual Contact or Intercourse

State	Statute	Pertinent Language
Alaska	Alaska Stat. § 11.41.470(2) (2021)	“[I]ncapacitated’ means temporarily incapable of appraising the nature of one’s own conduct or physically unable to express unwillingness to act”
Montana	Mont. Code Ann. § 45-5-501(b)(i) (2019)	No statutory definition of “mentally . . . incapacitated”
Nebraska	Neb. Rev. Stat. Ann. §§ 28-319 & -320 (2015)	No statutory definition of “mentally . . . incapable”
Nevada	Nev. Rev. Stat. Ann. § 200.366 (2021)	No statutory definition of “mentally . . . incapacitated”
North Carolina	N.C. Gen. Stat. § 14-27.20(2) (2019)	“Mentally incapacitated.– A victim who due to any act is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act”
Oregon	Or. Rev. Stat. Ann. § 163.305(3) (2021)	“‘Mentally incapacitated’ means that a person is rendered incapable of appraising or controlling the conduct of the person at the time of the alleged offense”
Virginia	Va. Code Ann. § 18.2-67.10(3) (2004)	“‘Mental incapacity’ means that condition of the complaining witness existing at the time of an offense under this article which prevents the complaining witness from understanding the nature or consequences of the sexual act involved in such offense and about which the accused knew or should have known”

Florida Court of Appeals construed the state’s definition of “physically helpless” and “physically incapacitated” to include a situation where the victim “was physically unable to communicate her unwillingness to the sex acts performed on her, and she was substantially limited in her ability to resist or flee” (Ref. 40, p 379). Indeed, some state courts have found substantial overlap between the definitions of mental incapacity and physical

helplessness.⁴⁴ In Minnesota, this analysis has changed given the legislature’s quick action to reform the state’s criminal sexual conduct laws in the wake of *State v. Khalil*.

Statutory Reform in Minnesota following *Khalil*

The Minnesota Supreme Court’s decision in *Khalil* generated widespread public outrage and both

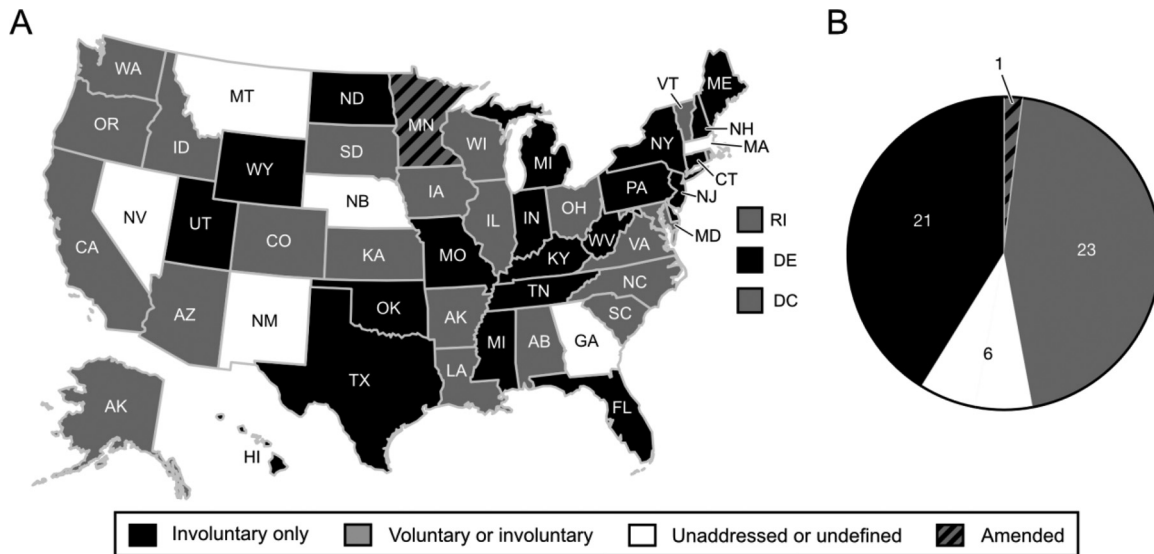


Figure 1. Plain language categorization of United States felony criminal sexual conduct statutes based on definitions of victim incapacity to consent due to voluntary or involuntary intoxication.

(A) Map demonstrating four categories of felony criminal statutes relating to victim impairment or incapacity to consent to sexual contact or intercourse. Black denotes state statutes that only consider victims to be impaired or incapacitated if they are involuntarily intoxicated. Gray indicates states and the District of Columbia that consider a victim to be incapable of consent because of either voluntary or involuntary intoxication. White illustrates states that either have no statutory text relating to mental impairment or incapacity or do not include a statutory definition of mental incapacity. Finally, diagonal stripes show that Minnesota amended its definition of mental incapacity to include victims who are both involuntarily and voluntarily intoxicated. Classification based on plain language analysis is reproduced in Appendix A online. (B) Pie chart illustrating the number of jurisdictions falling into each of the categories listed in (A). Note that state courts may construe similarly worded statutes differently regardless of their plain meaning as illustrated here.^{52,53} Figure constructed using JMP Pro 16, SAS Institute Inc. (Cary, North Carolina) and Affinity Designer, Sarif (Europe) Ltd. (West Bridgford, United Kingdom).

Table 3 Examples of States Requiring a Higher Degree of Intoxication Where Victims of Sexual Offenses Are Voluntarily Intoxicated Compared to Victims Who Are Involuntarily Intoxicated

State	Statutes	Required Condition Due to Voluntary Intoxication	Required Condition Due to Involuntary Intoxication
Arkansas	Ark. Code Ann. § 5-14-101(6) (2021)	“That renders the person unaware a sexual act is occurring”	“[T]emporarily incapable of appreciating or controlling the person’s conduct”
Colorado	Colo. Rev. Stat. § 18-3-402(1)(b), (4)(d); § 18-3-404(1)(b), (1)(d) (2022)	“[T]he victim is incapable of appraising the nature of the victim’s conduct”	“The actor has substantially impaired the victim’s power to appraise or control the victim’s conduct”
Rhode Island	R.I. Gen. Laws § 11-37-1(5) (1999)	“[I]s mentally unable to communicate unwillingness to an act”	“[I]ncapable of appraising or controlling his or her conduct”

national and local calls for reform.^{45,46} Others advocated for a more nuanced interpretation of the opinion, noting that the court’s decision did not mean “sexual assault of an intoxicated person is not illegal.”⁴⁷ Nonetheless, there was a general consensus among state legislators that “[v]ictims who are intoxicated to the degree that they are unable to give consent are entitled to justice.”⁴⁸

Spurred to action, in June 2021, the Minnesota State House and Senate passed a bill reforming the state’s criminal sexual conduct statute, which was signed into law shortly thereafter. The reformed statute reads as follows:

“Mentally incapacitated” means: (1) that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person’s agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration; or (2) that a person is under the influence of any substance or substances to a degree that renders them incapable of consenting or incapable of appreciating, understanding, or controlling the person’s conduct (Ref. 24, § 609.341(1)).

Under the reformed language, Minnesota’s criminal code ascribes the same degree of criminal culpability to an assailant regardless of whether the victim

is incapacitated because of voluntary or involuntary intoxication.

While Minnesota’s legislature reformed its voluntary intoxication caveat following the *Khalil* decision, not all recent legislative attempts in other states (for example, New York)⁴⁹ have been successful.⁵⁰ Judicial action in states can also serve as an engine of reform. For example, in Missouri, forcible rape requires forcible compulsion, which “includes the use of a substance administered without a victim’s knowledge or consent” (Ref. 51, § 566.030(1)). Despite the plain meaning of the statute, the Missouri Court of Appeals has construed the statute broadly such that evidence demonstrating a victim was impaired due to voluntary intoxication can support a finding of forcible compulsion under the statute.^{52,53}

The legislative action in Minnesota as well as the judicial action in Missouri provide roadmaps for how other legislators and litigators can reform their criminal sexual conduct statutes to eliminate the voluntary intoxication caveat. Nonetheless, the laws governing rape, sexual assault, or criminal sexual conduct in the jurisdictions surveyed have profound effects on victims of sexual assault and have ramifications for forensic

Table 4 Examples of Jurisdictions in Which Sexual Offenses Involving Involuntary Intoxication of the Victim Carry a Greater Penalty Than Cases in Which the Victim is Voluntarily Intoxicated

Jurisdiction	Involuntary Intoxication Offense	Statute	Voluntary Intoxication Offense	Statute
District of Columbia	First degree sexual abuse	D.C. Code § 22-3002 (2013)	Second degree sexual abuse	D.C. Code § 22-3003 (2013)
Illinois	Aggravated criminal sexual assault	720 Ill. Comp. Stat. Ann. 5/11-1.20 (2016)	Criminal sexual assault	720 Ill. Comp Stat. Ann. 5/11-1.20 (2016)
Louisiana	Second degree rape	La. Rev. Stat. Ann. § 14:42.1 (2020)	Third degree rape	La. Rev. Stat. Ann. § 14:43 (2015)
Ohio	Rape	Ohio Rev. Code Ann. § 2907.02 (2021)	Sexual battery	Ohio Rev. Code Ann. § 2907.03 (2019)
South Carolina	Criminal sexual conduct in the first degree	S.C. Code Ann. § 16-3-652 (2010)	Criminal sexual conduct in the third degree	S.C. Code Ann. § 16-3-654 (1977)

psychiatrists who are often asked to provide opinions in these complex cases.

Discussion

No person should be subjected to sexual intercourse if that person cannot, because of their physical or mental condition, provide consent to that sexual intercourse. The manner in which the individual becomes intoxicated does not change whether, after becoming intoxicated, the person possesses the capacity to consent. Laws that continue to buttress a meaningful distinction between voluntary and involuntary intoxication perpetuate victim-blaming and impede the process of holding assailants accountable. The law should not give legitimacy to distinctions that are not based on the fundamental question of capacity to consent.

Our fifty-one jurisdiction statutory review found that, as of 2021, nearly half of United States jurisdictions maintain laws that deem a victim can be mentally incapacitated only if involuntarily intoxicated (Fig. 1). These laws governing sexual assault hinder the prosecution of assailants in cases involving voluntary victim intoxication and add to the plethora of existing barriers that impede the administration of justice in these cases.

Forensic psychiatrists are frequently asked to offer expert opinions on cases of sexual assault in which the victim, assailant, or both had consumed alcohol. Both the prosecution and the defense may seek expert testimony from psychiatrists about whether an intoxicated victim had the capacity to consent to sexual intercourse. A forensic psychiatrist may also be asked to consider other intoxicating substances that the victim may have consumed and other mental conditions that alter the victim's capacity to consent. The prosecution often seeks to establish that the victim was too impaired to provide consent. The defense, on the other hand, often makes the arguments that the sexual contact was wanted, the victim consented but was unable to recall the events because of memory deficits, or the level of the victim's impairment was not apparent to the assailant.⁵⁴

When testifying in these cases, forensic psychiatrists must first be aware of the statutes and case law governing rape, sexual assault, or criminal sexual conduct in their jurisdiction. In particular, they should know the laws in their practicing state relating to both assailant and victim intoxication and consent. While this article focuses on victim intoxication, it

should be underscored that some state laws³⁴ also distinguish between cases in which the assailant is or is not intoxicated (Ref. 30, § 2.08).⁵⁵ In fact, whether this testimony benefits the prosecution's or defense's case and is relevant to the ultimate question is highly dependent upon sexual assault laws in the state of practice (Fig. 1, Appendix A).

Cases are often complicated by the presence of alcohol-induced amnesic episodes and the lack of corroborating evidence.⁵⁴ These amnesic episodes, referred to as blackouts, are caused by the differential effects of alcohol on memory and cognitive functions⁵⁶ and can add complexity to the forensic assessment. In such cases forensic psychiatrists are often asked to explain the difference between blacking out and passing out and how each relates to the victim's ability to consent.⁵⁷

The determination of whether the victim did or did not have the capacity to consent is ultimately the responsibility of the factfinder based upon the weighing of evidence, testimony, and the credibility of witnesses (including forensic psychiatrists) at trial. In many such cases, the factfinder's determination of whether the victim possessed the capacity to consent will be dispositive as to the ultimate issue at trial: whether the defendant is guilty of sexual assault. Judicial rules of evidence generally prohibit a consulting psychiatrist from offering an opinion as to the ultimate issue, especially when it hinges on the defendant's state of mind at the time of the alleged offense.⁵⁸ A psychiatrist can nevertheless be asked whether it is probable or possible that the victim's intoxication rendered the victim incapable of consenting. To avoid impermissibly testifying as to the ultimate issue in cases of sexual assault, psychiatrists should speak in terms of inference or opinion, should avoid using the language of the statute defining capacity to consent to sexual intercourse, and should emphasize the reasoning behind their opinion about capacity.⁵⁸ By articulating their rationale, forensic psychiatrists allow the factfinder to decide whether the reasons given are persuasive compared with those given by other expert witnesses rather than accepting the expert's views at face value (even if the psychiatrist's testimony embraces the ultimate issue at trial).⁵⁸

Factors informing a forensic psychiatrist's opinion include estimates of the victim's blood alcohol concentration and related behaviors at the time of the sexual act which may indicate impairment in

consciousness.⁵⁹ The testimony of a forensic psychiatrist may be accompanied by that of a toxicologist to explain the behavioral, cognitive, and physiological effects of alcohol or other intoxicating substances on the body.⁵⁴

Psychiatrists testifying in these cases should be well-versed in the neurobehavioral effects of alcohol intoxication, including disturbance in the level of consciousness, cognition, judgment, affect, or behavior, and specific impairments in perception, speech, balance, motor coordination, and memory.⁵⁴ Psychiatrists may also be asked to correlate these to other clinical signs of intoxication such as facial flushing, slurred speech, unsteady gait, euphoria, increased activity, volubility, disorderly conduct, slowed reactions, impaired judgment, motor incoordination, difficulty focusing, insensibility, or stupefaction.^{60,61} Similarly, consulting psychiatrists must be prepared to discuss other intoxicating substances that may have influenced the victim's capacity to consent as well as any underlying or acute mental conditions which could impair the victim's capacity.

Providing an informed opinion about the victim's ability to provide consent based on a retrograde analysis of events is a challenging task fraught with numerous potential pitfalls.⁵⁹ This is because many factors can influence the extent of acute alcohol intoxication.⁶² Besides the amount of alcohol ingested, individual body weight and tolerance to alcohol, the percentage of alcohol in the beverage, and the time period over which alcohol was ingested are particularly important.⁶³ Therefore, forensic psychiatrists involved in these cases must not only have a grasp of the neurobehavioral effects of alcohol and their relationship to blood alcohol levels, but also the pharmacokinetics of alcohol, including differential rates of metabolism and elimination by different population subgroups (for example gender and genotype differences).⁶²⁻⁶⁴ The forensic psychiatrist must make all efforts to corroborate information from as many sources as possible. While flawless reconstruction of any scenario is impossible, ethical practice demands that forensic psychiatrists base their opinions on the facts available to them and not engage in any speculation or extrapolation.⁶⁵ The complexity of providing an informed opinion in these cases underscores the critical importance of the opinions of forensic toxicologists to a consulting psychiatrist's testimony. Above all, forensic psychiatrists must be mindful that they provide clear and concise testimony that is grounded in scientific principles and avoids conclusory statements on

the ultimate issue.⁶⁶ This is imperative since "[a]ppellate cases illustrate that the experts' testimony may sometimes elucidate, sometimes obfuscate, and sometimes exceed professional expertise and invade the province of the factfinder" (Ref. 54, p 98).

Consulting psychiatrists are not immune to bias,⁶⁷ and, given the pervasive rape myths in media and culture,⁶⁸ may unconsciously shift blame from perpetrator to victim in cases in which a victim is voluntarily intoxicated. To help diminish their own biases, forensic psychiatrists can utilize various mitigating systematic approaches to help identify and reduce unconscious bias.^{69,70} For example, the CHES method requires cataloguing available evidence to support a preliminary opinion, evaluating the strength of the evidence, determining to what extent the evidence supports the preliminary opinion, and revising the opinion if appropriate.⁶⁹ Similarly, Goldyne offers a series of questions psychiatrists should ask themselves to uncover underlying motivations and emotions that may affect the testimony they give.⁷⁰ Forensic psychiatrists must also consciously seek to limit the manner in which trial, forensic examination, and forensic testimony contribute to the misassignment of blame to the victim.

Given our findings that many states do not consider victims who are voluntarily intoxicated to be mentally incapacitated, psychiatrists in these jurisdictions may question whether it is ethical to participate in these cases.⁷¹ When forensic psychiatrists are faced with such questions, we recommend examining whether testifying aligns with their personal value system while simultaneously recognizing that their role is limited and the verdict does not hinge solely on their testimony. Ultimately, psychiatrists are not obligated to participate in these cases and may decline them to avoid inadvertently assigning blame to the victim.

In sum, making a meaningful distinction between voluntary and involuntary intoxication is a harmful and misguided approach to cases of sexual assault, rape, and criminal sexual conduct. The core question is consent. Irrespective of the circumstances leading to intoxication, alcohol and other drugs change the ability of a victim to provide consent, and state laws should reflect this fact.

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APPENDIX A Reproduction of the Review, Plain Language Analysis, and Classification of Sexual Assault Statutes Relating to Victim Intoxication in the Fifty States of the United States and the District Of Columbia

Jurisdiction	Statute	Language	Assigned Category and Notes
Alabama	Ala. Code § 13A-6-60(2) (2019)	“Incapacitated. The term includes any of the following: . . . A person is temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or intoxicating substance and the condition was known or should have been reasonably known to the offender.”	Voluntary or involuntary
Alaska	Alaska Stat. § 11.41.470(2) (2021)	“‘incapacitated’ means temporarily incapable of appraising the nature of one’s own conduct or physically unable to express unwillingness to act”	Voluntary or involuntary
Arizona	A.R.S. § 13-1401(A)(7) (2021)	“‘Without consent’ includes any of the following: . . . The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant.”	Voluntary or involuntary
Arkansas	Ark. Code Ann. § 5-14-101(6) (2021)	“‘Mentally incapacitated’ means that a person is temporarily incapable of appreciating or controlling the person’s conduct as a result of the influence of a controlled or intoxicating substance: . . . Administered to the person without the person’s consent; or [t]hat renders the person unaware a sexual act is occurring”	Voluntary or involuntary
California	Cal. Penal Code § 261(a) (2022)	“Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: . . . 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.”	Voluntary or involuntary
Colorado	Colo. Rev. Stat. § 18-3-402(1), (4) (2022)	“Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if: . . . The actor knows that the victim is incapable of appraising the nature of the victim’s conduct[.] Sexual assault is a class 3 felony if it is attended by any one or more of the following circumstances: . . . The actor has substantially impaired the victim’s power to appraise or control the victim’s conduct by employing, without the victim’s consent, any drug, intoxicant, or other means for the purpose of causing submission.”	Voluntary or involuntary
Connecticut	Conn. Gen. Stat. § 53a-65(5) (2019)	“‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling such person’s conduct owing to the influence of a drug or intoxicating substance administered to such person without such person’s consent, or owing to any other act committed upon such person without such person’s consent.”	Involuntary only
Delaware	Del. Code Ann. tit. 11, § 761(k) (2021)	“‘Without consent’ means: . . . The defendant had substantially impaired the victim’s power to appraise or control the victim’s own conduct by administering or employing, without the other person’s knowledge or against the other person’s will, drugs, intoxicants or other means for the purpose of preventing resistance.”	Involuntary only

APPENDIX A Continued

Jurisdiction	Statute	Language	Assigned Category and Notes
District of Columbia	D.C. Code § 22-3002(a) (2013)	“A person shall be imprisoned for any term of years or for life . . . if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: . . . After administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.”	Voluntary or involuntary
Florida	D.C. Code § 22-3003 (2013) Fla. Stat. Ann. § 794.011(1)(c) (2017)	“A person shall be imprisoned for not more than 20 years . . . if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: . . . 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 . . .” “‘Mentally incapacitated’ means temporarily incapable of appraising or controlling a person’s own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered without his or her consent or due to any other act committed upon that person without his or her consent.”	Involuntary only
Georgia	Not statutorily defined, see <i>Appendix B</i>		
Hawaii	Haw. Rev. Stat. Ann. § 707-730(1) (2021)	“A person commits the offense of sexual assault in the first degree if: . . . The person knowingly subjects to sexual penetration another person who is mentally incapacitated or physically helpless as a result of the influence of a substance that the actor knowingly caused to be administered to the other person without the other person’s consent.” “In this chapter, unless a different meaning plainly is required: . . . ‘Mentally incapacitated’ means a person rendered temporarily incapable of appraising or controlling the person’s conduct as a result of the influence of a substance administered to the person without the person’s consent.”	Involuntary only
Idaho	Haw. Rev. Stat. Ann. § 707-700 (2021) Idaho Code § 18-6101 (2021)	“Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with a penis accomplished under any one (1) of the following circumstances: . . . Where the victim . . . is unable to resist due to any intoxicating, narcotic, or anaesthetic [sic] substance.”	Voluntary or involuntary
Illinois	720 Ill. Comp. Stat. Ann. 5/11-1.20(a) (2016)	“A person commits criminal sexual assault if that person commits an act of sexual penetration and: . . . knows that the victim is unable to understand the nature of the act or is unable to give knowing consent . . .”	Voluntary or involuntary

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Jurisdiction	Statute	Language	Assigned Category and Notes
	720 Ill. Comp. Stat. Ann. 5/11-1.30(a)–(b) (2016)	“A person commits aggravated criminal sexual assault if that person commits criminal sexual assault and any of the following aggravating circumstances exist during the commission of the offense: . . . the person delivers (by injection, inhalation, ingestion, transfer of possession, or any other means) any controlled substance to the victim without the victim’s consent or by threat or deception for other than medical purposes”	
Indiana	Ind. Code Ann. § 35-42-4-1 (2014)	“[A] person who knowingly or intentionally has sexual intercourse with another person or knowingly or intentionally causes another person to perform or submit to other sexual conduct . . . when . . . the other person is unaware that the sexual intercourse or other sexual conduct . . . is occurring . . . [c]ommits rape, a Level 3 felony.	Involuntary only
Iowa	Iowa Code § 709.1A(1) (1999)	An offense described in subsection (a) is a Level 1 felony if . . . the commission of the offense is facilitated by furnishing the victim, without the victim’s knowledge, with a drug . . . or a controlled substance . . . or knowing that the victim was furnished with the drug or controlled substance without the victim’s knowledge.”	Voluntary or involuntary
Kansas	Kan. Stat. Ann. § 21-5503(a) (2011)	“‘Mentally incapacitated’ means that 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.” “Rape is: . . . (2) Knowingly engaging in sexual intercourse with a victim when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender”	Voluntary or involuntary
Kentucky	Ky. Rev. Stat. § 510.010(5) (2021)	“Aggravated sexual battery is sexual battery . . . under any of the following circumstances: . . . 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, or was reasonably apparent to, the offender.”	Involuntary only
Louisiana	La. Rev. Stat. Ann. § 14:42.1(A) (2020)	“‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of an intoxicating substance administered to him or her without his or her consent or as a result of any other act committed upon him or her without his or her consent. . . .” “Second degree rape is rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances: . . . 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.”	Voluntary or involuntary

Jurisdiction	Statute	Language	Assigned Category and Notes
	La. Rev. Stat. Ann. § 14:43(A) (2015)	“Third degree rape is a rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of a victim because it is committed under any one or more of the following circumstances: . . . 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 and the offender knew or should have known of the victim’s incapacity.”	
Maine	Me. Rev. Stat. tit. 17-A, § 253(2) (2021)	“A person is guilty of gross sexual assault if that person engages in a sexual act with another person and: . . . The actor has substantially impaired the other person’s power to appraise or control the other person’s sexual acts by furnishing . . . administering or employing drugs, intoxicants or other similar means.”	Involuntary only
Maryland	Md. Code Ann., Crim. Law § 3-301(b) (2016)	“‘Mentally incapacitated individual’ means an individual who, because of the influence of a drug, narcotic, or intoxicating substance, or because of an act committed on the individual without the individual’s consent or awareness, is rendered substantially incapable of: (1) appraising the nature of the individual’s conduct; or (2) resisting vaginal intercourse, a sexual act, or sexual contact.”	Voluntary or involuntary
Massachusetts	Not statutorily defined, see <i>Appendix B</i>		
Michigan	Mich. Comp. Laws Serv. § 750.520a(k) (2014)	“‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.”	Involuntary only
Minnesota	Statute amended in June 2021, see accompanying article		
Mississippi	Miss. Code Ann. § 97-3-65(4)(a) (2017)	“Every person 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 . . .”	Involuntary only
	Miss. Code Ann. § 97-3-97(c) (1980)	“A ‘mentally incapacitated person’ is one rendered incapable of knowing or controlling his or her conduct, or incapable of resisting an act due to the influence of any drug, narcotic, anesthetic, or other substance administered to that person without his or her consent.”	
Missouri	Mo. Rev. Stat. § 566.030 (2017)	“A person commits the offense of rape in the first degree if he or she has sexual intercourse with another person who is incapacitated, incapable of consent, or lacks the capacity to consent, or by the use of forcible compulsion. Forcible compulsion includes the use of a substance administered without a victim’s knowledge or consent which renders the victim physically or mentally impaired so as to be incapable of making an informed consent to sexual intercourse.”	Involuntary only by plain text, but voluntary or involuntary by caselaw. <i>State v. Campbell</i> , 600 S.W.3d 780 (Mo. Ct. App. 2020); <i>State v. Hunter</i> , 626 S.W.3d 867 (Mo. Ct. App. 2021)

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APPENDIX A Continued	Jurisdiction	Statute	Language	Assigned Category and Notes
Montana	Mont. Code Ann. § 45-5-501(1)(b) (2019)	"[T]he victim is incapable of consent because the victim is: mentally disordered or incapacitated . . ."	There is no statutory definition of mentally incapacitated, see <i>Appendix B</i>	There is no statutory definition of mentally incapacitated, see <i>Appendix B</i>
Nebraska	Neb. Rev. Stat. Ann § 28-319(1) (2006)	"Any person who subjects another person to sexual penetration. . . who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct . . . is guilty of sexual assault in the first degree."	There is no statutory definition of mentally incapacitated, see <i>Appendix B</i>	There is no statutory definition of mentally incapacitated, see <i>Appendix B</i>
Nevada	Nev. Rev. Stat. Ann. § 200.366 (2021)	"A person is guilty of sexual assault if he or she: . . . [s]ubjects another person to sexual penetration, or forces another person to make a sexual penetration on himself or herself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct . . ."	There is no statutory definition of mentally incapacitated, see <i>Appendix B</i>	There is no statutory definition of mentally incapacitated, see <i>Appendix B</i>
New Hampshire	N.H. Rev. Stat. Ann. § 632-A:2(I) (2021)	"A person is guilty of the felony of aggravated felonious sexual assault if such person engages in sexual penetration with another person under any of the following circumstances: . . . When the actor, without the prior knowledge or consent of the victim, administers or has knowledge of another person administering to the victim any intoxicating substance which mentally incapacitates the victim."	Involuntary only	Involuntary only
New Jersey	N.J. Stat. § 2C:14-1(i) (2012)	"'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 . . ."	Involuntary only	Involuntary only
New Mexico	Not statutorily defined, see <i>Appendix B</i>			
New York	N.Y. Penal Law § 130.00(6) (2010)	"'Mentally incapacitated' means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent."	Involuntary only	Involuntary only
North Carolina	N.C. Gen. Stat. § 14-27.20(2) (2019)	"Mentally incapacitated. — A victim who due to any act is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act."	Voluntary or involuntary	Voluntary or involuntary
North Dakota	N.D. Cent. Code § 12.1-20-07(1) (2017)	"A person who knowingly has sexual contact with another person, or who causes another person to have sexual contact with that person, is guilty of an offense if: . . . That person or someone with that person's knowledge has substantially impaired the victim's power to appraise or control the victim's conduct, by administering or	Involuntary only	Involuntary only