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Alexandra Schiffrin
University of Michigan Law School

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JOURNAL of LAW REFORM ONLINE

COMMENT

**STOPPING STEUBENVILLE: REDUCING CASES OF
ADOLESCENT SEXUAL ASSAULT INVOLVING ALCOHOL**

Alexandra Schiffrin*

While the Steubenville Rape Case¹ garnered much attention for the role that social media played in initiating the prosecution and inciting national outrage, the underlying legal issue was the victim's incapacity to consent because of self-induced intoxication.² The case surrounded the August 12, 2012 sexual assault of an intoxicated sixteen-year-old girl by two high school football players, Trent Mays and Ma'lik Richmond, after a party in Steubenville, Ohio.³ Following the prominent coverage of the incident across social media channels and in the news, Mays and Richmond—who were charged with raping the sixteen-year-old girl—were often portrayed as the real victims; observers blamed the female victim for partying and putting herself in a position to be violated.⁴ Ultimately, the juvenile court held that the victim was so intoxicated that she was unable to give consent, finding Mays and Richmond guilty of rape. Judge Thomas Lipps, who presided over the trial, warned that the young men's behavior was a "cautionary lesson" in how adolescents conduct themselves in the presence of alcohol.⁵

The Steubenville Rape Case is but one of many incidents involving adolescents, alcohol, and sexual assault. This Comment

* J.D. Candidate, December 2014, University of Michigan Law School.

1. See generally Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES, Dec. 16, 2012, at D1, available at <http://www.nytimes.com/2012/12/17/sports/high-school-football-rape-case-unfolds-online-and-divides-steubenville-ohio.html?pagewanted=all&r=1&>.

2. See generally Richard A. Oppel, Jr., *Ohio Teenagers Guilty in Rape That Social Media Brought to Light*, N.Y. TIMES, Mar. 18, 2013, at A10, available at <http://www.nytimes.com/2013/03/18/us/teenagers-found-guilty-in-rape-in-steubenville-ohio.html?pagewanted=all&r=1&>.

3. Macur & Schweber, *supra* note 1.

4. *Id.*

5. Oppel, *supra* note 2.

proposes a new legal standard for consent in sexual assault cases involving minors using alcohol or drugs. The standard should be a strict liability regime where it is impermissible for minors to engage in sexual relations if one or both parties are under the influence of alcohol or drugs, regardless of how or whether intoxication was involuntary or voluntary. Intoxication undermines the capacity for valid consent and, with minors, should negate consent completely.

I. The Prevalence of Sexual Assault

Approximately forty-four percent of sexual violence victims are under eighteen-years-old,⁶ and seventy-eight percent of the victims knew the offender.⁷ About fifty-three percent of adolescents reported drinking or taking drugs and being sexually assaulted by someone known for less than twenty-four hours.⁸ Acquaintance rape involving drugs or alcohol is prevalent on college campuses. In a study conducted by psychologist Mary Koss, one-in-four college women had experienced rape or attempted rape.⁹ Roughly eighty-four percent were committed by a perpetrator known to the victim, and the majority involved alcohol or drugs.¹⁰ The study found that seventy-five percent of the males and fifty-five percent of the females involved in

6. *Who are the Victims?*, RAPE ABUSE AND INCEST NATIONAL NETWORK (2009), <http://www.rainn.org/get-information/statistics/sexual-assault-victims> (citing U.S. BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS, at iii, (1997), available at <http://www.bjs.gov/content/pub/pdf/SOO.PDF>).

7. U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF SEXUAL VIOLENCE 1994–2010 3–4 (2013), available at <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> (reporting that between 2005 and 2010, sexual violence was committed against females ages twelve to seventeen at a rate of 4.1 per 1,000 and against females ages eighteen to thirty-four at a slightly lower rate of 3.7 per 1,000).

8. Joanne Archambault, *Dynamics of Sexual Assault*, SEXUAL ASSAULT TRAINING & INVESTIGATIONS 1, 3, <http://www.mysati.com/joannepubs.htm> (last visited Sept. 12, 2013) (citing SUSAN PARKER LINDSAY, AN EPIDEMIOLOGIC STUDY OF THE INFLUENCE OF VICTIM AGE AND RELATIONSHIP TO THE SUSPECT ON THE RESULTS OF EVIDENTIARY EXAMINATIONS AND LAW ENFORCEMENT OUTCOMES IN CASES OF REPORTED SEXUAL ASSAULT (1998)).

9. Karen M. Kramer, Note, *Rule By Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 116 (1994) (citing Robin Warshaw, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE 11 (1988)).

10. *Id.*

acquaintance rape reported drinking or taking drugs prior to an attack.¹¹

Additionally, it is important to take into consideration the gendered nature of sexual assault. It is committed overwhelmingly, though of course not exclusively, by men, usually against women.¹² Eighteen to twenty-five percent of American women have been victims of an attempted or complete rape in their lifetimes.¹³ According to the U.S. Department of Justice Bureau of Justice Statistics, between 1995 and 2010, approximately ninety-one percent of all rape or sexual assault victims were women.¹⁴

Our society maintains a double standard toward men and women who drink: when a perpetrator is drunk, it reduces his culpability, while an intoxicated victim faces increased culpability.¹⁵ Studies of simulated and actual jury decisions demonstrate that jurors found intoxicated offenders less culpable than sober offenders and intoxicated women more blameworthy than sober women.¹⁶ Alcohol consumption is not an invitation to be exploited and violated, nor is it an excuse for men to use alcohol as a “weapon for sexual aggression.”¹⁷ Legal standards

11. *Id.* (citing ROBIN WARSHAW, *I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE* 44 (1988)).

12. *See, e.g.*, U.S. DEP’T OF JUSTICE, *FEMALE VICTIMS OF SEXUAL VIOLENCE*; U.S. DEPARTMENT OF JUSTICE 2003 NATIONAL CRIME VICTIMIZATION SURVEY 7 (2003), *available at* <http://www.bjs.gov/content/pub/pdf/cv03.pdf>. While recognizing it is an oversimplification, the Comment refers to victims as females and perpetrators as males because of the data supporting the contention that females are more often the victims and males are more often the perpetrators.

13. *Who are the Victims?*, *supra* note 6 (citing PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE & CENTERS FOR DISEASE CONTROL & PREVENTION, *PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN SURVEY 2* (1998), *available at* <https://www.ncjrs.gov/pdffiles/172837.pdf>); CATHARINE A. MACKINNON, *SEX EQUALITY* 753 (Foundation Press, 2d ed. 2007) (citing, e.g., MARY P. KOSS ET. AL., *NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY* 167–71 (1994) (collecting major studies on rape prevalence completed as of 1994, many showing approximately twenty percent of women raped)).

14. U.S. DEP’T OF JUSTICE, *supra* note 6, at 3.

15. Kramer, *supra* note 8, at 121.

16. *Id.* at 131.

17. *Id.* at 122–23 (“[S]ome men deliberately use alcohol as a weapon for sexual aggression. A 1986 study found that 75 percent of college men reported using alcohol or drugs in an attempt to obtain sex from an unwilling woman Similarly, a 1989 study concluded that “[t]he use of alcohol to obtain sex from women is pervasive [A]lcohol is the major tool used to gain sexual mastery over women.”) (citations omitted).

need to attempt to curb this systemic gender bias.

II. Existing Standards

The Model Penal Code (“MPC”) and most state penal codes do address alcohol-related sexual assaults.¹⁸ They contain provisions defining sexual assault to include situations in which the defendant has sexual intercourse with an unconscious person, the defendant administers intoxicants to the victim, or the victim’s ability to resist is substantially impaired by alcohol or drugs.¹⁹ However, these provisions are inadequate in protecting sexual assault victims, particularly adolescents, who have voluntarily drunk alcohol or taken drugs and are, therefore, incapable of consenting to sexual activity. The shortcomings of each provision will be discussed in turn.

A. Unconscious Victim

The MPC and most state statutes criminalize sexual conduct with an unconscious person,²⁰ and many state statutes²¹ and the MPC are explicit in their prohibition. The MPC states that a man is guilty of rape if he has sexual intercourse with an unconscious female.²² Idaho similarly lists one of the circumstances of rape “where [the victim] is at the time unconscious of the nature of the act.”²³ Other states ban sexual conduct with unconscious individuals by incorporating unconsciousness into the definition of physically helpless. For example, in New York, an individual is considered incapable of consent when he or she is mentally

18. *Id.* at 124–25; see Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 170 (2002) (forty-seven of the fifty-six jurisdictions in the United States explicitly mention intoxicants in one or more of their sexual offenses).

19. Kramer, *supra* note 8, at 124; Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 B.Y.U. L. REV. 57, 69 (2009).

20. Kramer, *supra* note 8, at 124–25.

21. See, e.g., OKLA. STAT. ANN. tit. 21, § 1111(A)(5) (West 2013) (“at the time unconscious of the nature of the act”); N.M. STAT. ANN. § 30-9-10(A)(4) (West 2013) (“victim is unconscious, asleep or otherwise physically helpless or suffers from a mental condition . . .”).

22. MODEL PENAL CODE § 213.1(c) (1962) (amended 1985).

23. IDAHO CODE ANN. § 18-6101 (West 2013) (The statute goes on to define “unconscious of the nature of the act” as “incapable of resisting because the victim . . . was unconscious or asleep [or] was not aware, knowing, perceiving, or cognizant that the act occurred”).

disabled, mentally incapacitated, or physically helpless,²⁴ where “physically helpless” means “a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.”²⁵

While the prohibitions on sexual conduct with unconscious individuals provide a bright line rule, they are not protective enough. Waiting until a victim has passed out completely—which evinces total incapacity—to trigger criminal conduct within the purview of the MPC and other criminal statutes is unreasonable. The law must protect victims who, although not completely incapacitated, are intoxicated to a point where they can no longer meaningfully consent to sexual conduct.

B. Administration of Intoxicant by Defendant

Sixteen jurisdictions and the MPC require the defendant to personally administer intoxicants to the victim before criminal liability for sexual conduct with the victim is triggered.²⁶ A few states stipulate that the defendant must administer the intoxicants without the victim’s knowledge or against the victim’s will before the defendant becomes criminally liable.²⁷

The administration requirement leaves victims who voluntarily drink or take drugs vulnerable unless they fall into an alternative category, like unconsciousness, which would then be independently sufficient to trigger criminal liability. However, some states, rightfully, do not require the administration element.²⁸ The California Penal Code removes the condition that the victim’s intoxication be involuntary. Rape occurs “[w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.”²⁹ Such language correctly deemphasizes the

24. N.Y. PENAL LAW § 130.05(3) (McKinney 2013).

25. N.Y. PENAL LAW § 130.00(7) (McKinney 2013).

26. Falk, *supra* note 17, at 168.

27. *Id.* at 169; *see, e.g.*, D.C. CODE § 22-3002(a)(4) (2013) (“by force, or threat of force, or without the knowledge or permission”), VT. STAT. ANN. tit. 13, § 3252(b) (West 2013) (“without the knowledge or against the will”).

28. Falk, *supra* note 17, at 169–70 (noting that eight jurisdictions do not require the administration element, and that three of these jurisdictions amended their rape statutes in the late 1980s and 1990s to eliminate the administration element).

29. CAL. PENAL CODE § 261(a)(3) (West 2013).

perpetrator's role in the victim's intoxication and permits the victim to be treated as impaired if he or she knowingly became intoxicated.

C. Substantial Impairment

In adjudicating rape, some jurisdictions take into consideration circumstances where a victim's ability to resist is substantially impaired by alcohol or drugs. For example, in Massachusetts, a trial judge is required to instruct the jury on capacity to consent "in any case where the evidence would support a finding that because of the consumption of drugs or alcohol or for some other reason . . . the complainant was so impaired as to be incapable of consenting to intercourse."³⁰ Other states have statutes that frame substantial impairment as incapacity to consent when the victim is unable to appraise or control her conduct or unable to communicate her unwillingness to act.³¹

Although a step better than the unconsciousness or administration varieties of rape statutes, substantial impairment is still an elusive concept; it is entirely too vague and challenging for juries to work with, which may lead to inconsistent results depending on the judge's jury instructions and jury's interpretation of when an individual has become too incapacitated to consent.³² It is difficult to describe a degree of intoxication in general and even more difficult to quantify the degree of intoxication that substantially impairs a particular individual's decision-making.

III. Proposed Legal Standard

While the MPC and state statutes strive to defend against alcohol-related sexual assaults, the unconscious, administration, and substantial impairment requirements narrow the protective

30. Commonwealth v. Blache, 880 N.E.2d 736, 743 (Mass. 2008).

31. Falk, *supra* note 17, at 195–96; *see, e.g.*, MD. CODE ANN., CRIM. LAW §3-301(c) (West 2013) (defining a mentally incapacitated individual as one who "because of the influence of a drug, narcotic, or intoxicating substance . . . 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").

32. *See, e.g., Blache*, 880 N.E.2d at 753 (Spina, J., concurring in part and dissenting in part) (explaining that a substantial impairment standard "needlessly complicates certain rape cases, and has great potential to produce unfair results for defendants and unwanted intrusions into the private affairs of complainants").

scope of these statutes to a limited number of circumstances and, therefore, do not adequately defend the entire adolescent victim population. The law needs to be reformed to adequately protect intoxicated adolescents from unwanted, nonconsensual sexual activity.

A minor's intoxication should always negate informed consent. Legally, consent is not equivalent to free choice. Sexual activity, when parties have been drinking alcohol or using drugs, may appear to be consensual. However, consent must be internal as well as external. It must be affirmative, freely-given, wanted, and communicated clearly.³³ These conditions cannot be met if either of the involved parties is under the influence of an intoxicant, making strict liability the appropriate standard.

In crafting a strict liability regime where it is impermissible for minors to engage in sexual relations if one or both parties are under the influence of alcohol or drugs, this Comment's proposed legal standard of consent for minors uses language from the 1992 amendment to the Canadian Criminal Code³⁴ and Karen Kramer's modification of consent from the Canadian Criminal Code, put forth in her Note entitled the *Rule By Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*.³⁵

The proposed standard of consent for minors provides:

(1) No consent is obtained where:

- (a) The complainant was wholly or intermittently unconscious;
- (b) The complainant was asleep;
- (c) The accused administered or provided an intoxicant to the complainant; or

33. Catharine A. MacKinnon, *A Sex Equality Approach to Sexual Assault*, 989 ANNALS N.Y. ACAD. SCI. 265, 270 (2003).

34. An Act to Amend the Criminal Code (Sexual Assault), S.C. 1992, c. 38, §§ 273.1-2 (Can.) (redefining the legal standard for consent and the mistaken belief in consent defenses).

35. Kramer, *supra* note 8, at 152-54.

(d) The complainant and/or the accused consumed an intoxicant.

(2) It is not a defense that:

(a) The complainant expressed, by words or conduct, an agreement to engage in the sexual activity;

(b) The complainant expressed, by words or conduct, an agreement to engage in the sexual activity before becoming intoxicated;

(c) The complainant remained silent during the sexual activity;

(d) The accused believed the complainant consented to the activity; or

(e) The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was intoxicated. It will be assumed that the accused did not take reasonable steps, if the complainant was visibly intoxicated, displaying:

(i) Observable physical weakening (including but not limited to inability to stand, difficult sitting or walking, disorientation, lethargy, and vomiting);

(ii) Diminished comprehension or perception, loss of memory, or confusion; or

(iii) Impaired verbal ability (including but not limited to slurring or uncharacteristic outbursts).

The proposed standard expands the concept of incapacitation to include those who are both wholly and intermittently unconscious as well as those with any level of intoxication. This framework catches the myriad conditions that may occur as a result of intoxication and inhibit a person's ability to consent, including those uncovered by the unconsciousness, administration, and substantial impairment elements of current criminal statutes.

IV. Defending A Strict Liability Regime

A. Adolescents are in Special Need of Protection

Some would contend that such a policy demeans, not enhances, consent. It is common knowledge that people's varying alcohol tolerances lead to significant differences in an individual's capacity to give legitimate consent. However, adolescents are often just beginning to experiment with alcohol and drugs. "Alcohol and drugs distort reality, cloud judgment, and slow reactions, causing men and women to expose themselves to dangers or disregard social constraints that might otherwise influence them."³⁶ These consequences may be amplified for adolescents who do not know their own tolerances or the effect alcohol or drugs will have on their behavior.³⁷ This makes the necessity of a strict-liability regime in these circumstances even more pressing.

B. Changing Adolescent Behavior

The proposed standard does not seek to clamp down on adolescent sexual behavior. However, requiring adolescents to be sober in order to engage in sexual conduct may lead to positive externalities from better decision-making, including reduction in sexually transmitted infections and teenage pregnancy. It may be argued that the strict liability approach is paternalistic. However, it is our duty as a society to address prevalent problems and protect vulnerable sectors of the population, and we have already done so through other policies such as statutory rape laws, prohibitions on underage drinking, and zero tolerance laws for drinking and driving for minors.

In addition to offering more robust legal protection for adolescent victims, the zero-tolerance approach to intoxication addresses alcohol myopia, which causes intoxicated perpetrators

36. Valerie M. Ryan, Comment, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 CAL. W. L. REV. 407, 412 (2004) (quoting ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE 44 (1988)).

37. See, e.g., *Why 21*, MOTHERS AGAINST DRUNK DRIVING, <http://www.madd.org/underage-drinking/why21/> (last visited Oct. 11, 2013) ("Teens get drunk twice as fast as adults, but have more trouble knowing when to stop. Teens naturally overdo it and binge more often than adults.").

to feel less conflicted about engaging in socially unacceptable behavior, such as sexually aggressive conduct, and, therefore, more likely to engage in it.³⁸ Alcohol causes perpetrators to become less aware of a victim's consent, more forceful, and more violent than when sober.³⁹

Additionally, the bright line rule of consumption of any quantity or amount of an intoxicant ensures that perpetrators do not have to make a judgment call, particularly when they may be intoxicated as well. Perpetrators will not bear the burden of assessing a victim's condition and determining if he or she is intoxicated to the point of incapacitation. They will, however, have to assume the risk of committing sexual assault if they do not determine whether or not a victim has consumed an intoxicant, which in many cases will be easily observed. If a perpetrator is unsure, he or she simply has to ask.

There is always the possibility that one of the parties will lie and deny intoxication, making enforcement difficult. Additionally, this strict liability standard certainly places a high burden on an adolescent who is himself intoxicated, and it may therefore hold liable some whom society may see as the least culpable type of offender. However, these should be the outliers, and adolescents should learn to be more cautious in situations where alcohol is available. If the perpetrator has any doubt, he or she should refrain from pursuing sex. The standard will promote better communication between adolescents before engaging in sexual activity and might positively shape future sexual relations.

C. Effectiveness of Strict Liability Regimes

Strict liability regimes certainly create their own set of problems; they are not a panacea, but with such a pervasive concern as sexual assault, the benefits outweigh the costs. While it is possible that the proposed legal standard will lead to a significant increase in arrests, it may instead not be enforced. Additionally, courts may be filled with many first-time offenders who may be viewed as less of a threat to the public than other perpetrators, such as serial rapists or child molesters. Adolescents will face serious personal consequences associated with being

38. Goodman, *supra* note 18, at 84–85.

39. *Id.*

prosecuted and convicted as a “sex offender” for the rest of their lives. Nonetheless, current societal attitudes do not take into consideration the seriousness of the crime of sexual assault and its broader implications. Sexual assault is a serious crime and deserves a serious punishment, and the legal system must respond more forcefully.

Existing state “zero tolerance” laws should instill confidence that strict liability can be not only workable but also successful. Since the 1980s, numerous states have enacted zero tolerance statutes, making the operation of a motor vehicle by an intoxicated minor a criminal offense.⁴⁰ For example, New York State’s zero tolerance law penalizes persons under the age of twenty-one who operate a motor vehicle with a blood alcohol level of 0.02 percent to 0.07 percent.⁴¹ According to the United States Department of Transportation, zero tolerance laws have reduced youth drinking and driving.⁴² “They likely did so for two reasons: by deterring youth through the fear of losing their driver’s license if they drive after drinking, and also by reinforcing the broad community disapproval of driving after drinking.”⁴³ Therefore, strict liability standards can deter behavior and shape attitudes.

V. Conclusion

This Comment’s proposal protects voluntarily intoxicated adolescents—who have largely been neglected by current statutes—from sexual assault, eliminates miscommunications among adolescents, and disincentivizes perpetrators from using alcohol as a weapon to remove a victim’s reluctance to engage in a sexual activity. It is irrelevant how a victim has become intoxicated. A woman should not have to assume the risk of sexual assault if she is voluntarily intoxicated, and a man should

40. Marjorie A. Shields, *Validity, Construction, and Application of State “Zero Tolerance” Laws Relating to Underage Drinking and Driving*, 34 A.L.R.6th 623 (2008).

41. N.Y. VEH. & TRAF. LAW § 1192-a (McKinney 2013) (setting the minimum blood alcohol content at 0.02 not 0 because certain products, such as cough syrups and mouthwashes, contain alcohol, and some families permit consumption of small amounts of alcohol for religious or family functions).

42. J.H. HEDLUND, R.G. ULMER AND D.F. PREUSSER, U.S. DEPT OF TRANSP., DOT HS 809 348, DETERMINE WHY THERE ARE FEWER YOUNG ALCOHOL-IMPAIRED DRIVERS (2001) available at <http://www.nhtsa.gov/people/injury/research/feweryoungdrivers/index.htm#toc> (citing studies showing reductions of youth alcohol-related crashes from eleven to twenty-four percent).

43. *Id.*

not be allowed to exploit a woman's intoxication as an excuse for sexual aggression.