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## The Model Penal Code's New Approach to Rape and Intoxication

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# The Model Penal Code’s New Approach to Rape and Intoxication

Erin Price\*

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*“Rape is unique. No other violent crime is so fraught with controversy, so enmeshed in dispute and in the politics of gender and sexuality.”*<sup>1</sup>

## I. INTRODUCTION

Two freshmen get ready for an exciting Saturday night at their new college.<sup>2</sup> The man, John, started drinking earlier in the day as part of a freshman initiation.

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\* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2017; B.A., Political Science, California State University, Chico, 2013. I want to extend my deepest thanks to Distinguished Professor Michael Vitiello for his ubiquitous guidance in this Comment and in my legal education. I also want to thank the Board of Editors of Volume 47 & 48 of *The University of the Pacific Law Review*—you have all taught me so much and will always be an inspiration to me. Last, but not least, I thank my best friend Chloe for always being my rock.

1. JON KRAKAUER, MISSOULA (Penguin Random House, 2015) (quoting DAVID LISAK, LORI GARDINIER, SARAH C. NICKSA & ASHLEY M. COTE, FALSE ALLEGATIONS OF SEXUAL ASSAULT, VIOLENCE AGAINST WOMEN (2010)).

The bonding ritual involved consuming large amounts of alcohol, resulting in stumbling and slurred words. Later describing his intoxication, John said it was, “the drunkest [he had] ever been.”<sup>3</sup>

The woman, Jane, took shots of vodka and drank numerous screwdrivers in her friend’s dorm room in an effort to get rid of the previous night’s hangover.<sup>4</sup> The drinks led to her falling down. A friend then helped her back to her dorm room, which was in John’s building.<sup>5</sup> While heading to her room, Jane met John’s roommate and she followed him to John’s room.<sup>6</sup> Soon enough, John and Jane were engaged in what observers described as “something sexual.”<sup>7</sup> Jane’s friends took her home before anything further occurred, but not until after Jane gave John her number.<sup>8</sup>

John and Jane later met up at the campus quad where they had sex that same night.<sup>9</sup> A couple walking through the quad spotted them and notified campus security and police. John was then arrested and charged with rape.<sup>10</sup> The next morning, John and Jane had little memory of the events.<sup>11</sup>

The night of their sexual encounter, John and Jane both had blood alcohol levels above the legal limit, and possibly, far above the legal limit.<sup>12</sup> Like the example of John and Jane’s, circumstances in which both participants are intoxicated and engage in sexual intercourse are more prevalent on college

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2. The following hypothetical is a compilation of the facts from a civil case, the events of which occurred at Occidental College, and a criminal case from Davis, CA. See Richard Dorment, *Occidental Justice: The Disastrous Fallout When Drunk Sex Meets Academic Bureaucracy*, ESQUIRE (Mar. 25, 2015), available at <http://www.esquire.com/news-politics/a33751/occidental-justice-case/> (on file with *The University of the Pacific Law Review*) (discussing a civil action from Occidental College between two freshman students who had a drunken sexual encounter, and the male was subsequently expelled); Lauren Keene, *Jury acquits Davis man of rape charges*, THE DAVIS ENTERPRISE (Feb. 3, 2013), available at <http://www.davisenterprise.com/local-news/crime-fire-courts/jury-acquits-davis-man-of-rape-charges/> (on file with *The University of the Pacific Law Review*) (discussing the acquittal of a 21-year-old Davis man charged with rape after witnesses saw him having sex with a woman near the Amtrak station when both he and the woman had .23 and .17 BAC levels, respectively).

3. Dorment, *supra* note 2.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. See Keene, *supra* note 2 (discussing the acquittal of a 21-year-old Davis man charged with rape after witnesses saw him having sex with a woman near the Amtrak station when both he and the woman had 0.23 and 0.17 BAC levels, respectively).

11. Dorment, *supra* note 2.

12. See *id.* (discussing that while the parties’ blood-alcohol levels were unknown, both had little-to-no memory of the sexual encounter); see also Keene, *supra* note 2 (discussing how the man’s and woman’s blood-alcohol content was 0.17 and 0.23, respectively).

campuses now than in the past.<sup>13</sup> This raises the question of how the criminal law deals with situations where both the male and female are heavily intoxicated and engage in sexual intercourse but only one is accused of sexual assault.

Statutes and social attitudes regarding rape have changed throughout our nation's history.<sup>14</sup> In contrast, the relevance of intoxication as a defense to rape has not changed.<sup>15</sup> Adopted in 1962, Section 2.08 of the Model Penal Code (MPC) established the long-standing law of intoxication as a defense.<sup>16</sup> But at least some members of the American Law Institute (ALI) believe that the relevance of intoxication as a defense to rape should change.<sup>17</sup>

In a movement to alter the law, the ALI constructed a new tentative draft for the MPC that eliminates Section 2.08 applicability to the Sexual Assault and Related Offenses provisions.<sup>18</sup> This proposed change would be a drastic shift in the law of intoxication and rape.<sup>19</sup> This Comment argues that the ALI should adopt this proposed rule because it will level the disparity of consequences for voluntary intoxication between the sexes and make them equal under the law, leading to fewer injustices in the now prevalent occurrence of mutually intoxicated sexual intercourse on college campuses.<sup>20</sup>

Part II of this Comment provides background information on the traditional law of intoxication and then on the related provisions of the 1962 MPC.<sup>21</sup> It will also examine how John could be criminally prosecuted under current law.<sup>22</sup> Part II then discusses the MPC's proposed changes to Section 2.08 and its effect on the Sexual Assault and Related Offenses provisions, Sections 213.1 through 213.8.<sup>23</sup>

Part III discusses the practical implications of the proposed changes in the law, both generally and in cases of mutually intoxicated sexual intercourse on college campuses.<sup>24</sup> Eliminating § 2.08 would alter the principle of culpability, and Part III examines why intoxication should be viewed significantly as it is in the proposed draft by explaining the prevalence of college-aged drinking and the

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13. SEXUAL ASSAULT ON CAMPUSES: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT, U.S. DEP'T OF JUST. 2 (Dec. 2005), available at <https://www.ncjrs.gov/pdffiles1/nij/205521.pdf> (on file with *The University of the Pacific Law Review*).

14. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 567–74 (Matthew Bender & Company, Inc., 6th ed. 2012) (discussing changes from traditional to reform rape statutes and changes from the original perspective to the modern perspective regarding rape).

15. *Id.* at 568.

16. MODEL PENAL CODE § 2.08 (1985).

17. DRESSLER, *supra* note 14, at 568.

18. MODEL PENAL CODE § 213.0(4) (AM. LAW INST., Preliminary Draft No. 5 2015).

19. *Id.*

20. *Infra* Part IV.

21. *Infra* Part II.

22. *Infra* Part II.

23. *Infra* Part II.

24. *Infra* Part III.

effects of alcohol on the mental processes.<sup>25</sup> Lastly, Part III poses questions concerning the effectiveness of the proposed changes, the challenges the proposals present, and the remaining gaps in this area of the law.<sup>26</sup> Part IV concludes that the proposed changes, if adopted, would produce fairer results and would rightfully address the issue of mutually intoxicated sexual assault.<sup>27</sup>

## II. BACKGROUND INFORMATION

### A. *The Traditional Approach to Intoxication*

The use of intoxication as a defense has been quite limited in our nation's history.<sup>28</sup> The early common law provided zero forgiveness for an intoxicated offender, regardless of whether the intoxication was gross or minimal.<sup>29</sup> Some commentators, including Blackstone, argued that intoxication was an aggravating circumstance.<sup>30</sup> However, efforts to make intoxication an aggravating circumstance were unfruitful until the supporters of the prevailing rules exhibited doubts about the strictness of the current law.<sup>31</sup> The supporters' ideological changes radically modified the law in the nineteenth century, which relaxed the rules towards a "more humane direction."<sup>32</sup>

An 1819 murder case first suggested that voluntary intoxication might demonstrate a lack of premeditation, but could not be a complete defense.<sup>33</sup> In *Montana v. Egelhoff*, Justice Scalia stated that during the nineteenth century "courts carved out an exception to the common law's traditional across-the-board condemnation of the drunken offender, allowing a jury to consider a defendant's intoxication when assessing whether he possessed the mental state needed to commit the crime charged, where the crime was one requiring a 'specific intent,'" but not when charged with a general intent crime.<sup>34</sup> If the distinction is sound, Chief Justice Traynor stated in *People v. Hood* that:

[A] drunk man is capable of forming intent to do something simple, such as strike another, unless he is so drunk that he has reached the stage of unconsciousness. What he is not capable as a sober man of doing is

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25. *Infra* Part III.

26. *Infra* Part IV.

27. *Infra* Part IV.

28. Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1046 (1944).

29. *Id.*

30. *Id.*

31. *Id.* at 1048.

32. *Id.*

33. *Id.*

34. *Montana v. Egelhoff*, 518 U.S. 37, 46 (1996).

exercising judgment about the social consequences of his acts or controlling his impulses toward anti-social acts.<sup>35</sup>

General intent refers to any offense in which the only *mens rea* required is a blameworthy state of mind, while specific intent refers to an offense that expressly requires proof of the explicit mental state.<sup>36</sup> Therefore, a drunk man is capable of forming the mental state required for a general intent crime such as battery, but may not be capable of forming the mental state required for common law burglary, which requires the specific intent of “*intent to commit a felony therein*.”<sup>37</sup>

The exception most importantly impacted murder charges.<sup>38</sup> A sufficiently intoxicated offender might be spared the death penalty because intoxication prevented him from forming the requisite *mens rea* for first-degree murder.<sup>39</sup> Regarding rape or sexual assault, however, an offender’s intoxication provided no defense.<sup>40</sup> Rape, as defined at common law, was a general intent offense.<sup>41</sup> As a result, evidence of the offender’s intoxication was irrelevant and, therefore, inadmissible.<sup>42</sup>

The historic hesitation to allow an offender to rely on evidence of intoxication as a defense is easy to understand.<sup>43</sup> One of the main concerns was “the easiness of counterfeiting the disability.”<sup>44</sup> Additionally, permitting intoxication as a defense was imprudent because statistics showed that intoxication caused most homicides and other crimes.<sup>45</sup> Lastly, intoxication could be used as a shield for avoiding responsibility.<sup>46</sup>

Despite strong concerns about allowing an intoxication defense, scholars pointed out the injustices that may result from the traditional view on alcohol.<sup>47</sup>

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35. *People v. Hood*, 1 Cal. 3d 444, 458 (1969).

36. DRESSLER, *supra* note 14, at 138.

37. *Id.* (emphasis added).

38. *See* Hall, *supra* note 28, at 1051 (discussing the impact of the exception on various crimes).

39. *Id.* For the remainder of the Comment, I will use “he” to describe an offender. Statistics show that males are the predominant perpetrators of rape and sexual assault. *See Sexual Assault Statistics, ONE IN FOUR* (last visited July 15, 2016), available at <http://www.oneinfourusa.org/statistics.php> (on file with *The University of the Pacific Law Review*).

40. *See id.* at 1061–66 (distinguishing between the use of the exculpatory doctrine in specific intent crimes versus general intent crimes).

41. DRESSLER, *supra* note 14, at 567.

42. *Id.* at 322.

43. Hall, *supra* note 28, at 1047 (quoting HALE, HISTORY OF THE CROWN 32 (1736)).

44. *Id.*

45. *Id.*

46. *Id.*

47. MODEL PENAL CODE, § 2.08 cmt. at 352 (1985).

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This created a dichotomy of views that the drafters of the 1962 MPC had to address.<sup>48</sup>

B. *The 1962 Model Penal Code*

Criminal law is premised on the notion that one should only be held criminally responsible for the harm that he causes.<sup>49</sup> A person can only cause the harm and be convicted of an offense when he has the requisite *mens rea*.<sup>50</sup> As scholar Sanford H. Kadish noted, “it is deeply rooted in our moral sense of fitness that punishment entails blame and that, therefore, punishment may not justly be imposed where the person is not blameworthy.”<sup>51</sup> The *mens rea*, therefore, relates to blame.<sup>52</sup> For example, a defendant can cause harm without having a culpable mental state (e.g., John in the hypothetical).<sup>53</sup>

The drafters of the 1962 MPC followed this basic principle of criminal law in implementing Section 2.02, which states, “unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained.”<sup>54</sup> The MPC abandoned the common law distinction between general and specific intent crimes and replaced it with four terms of culpability: purposely, knowingly, recklessly, and negligently.<sup>55</sup> If a statute does not include the culpability required to establish a material element, then that element is established if, at a minimum, the person acted recklessly.<sup>56</sup> The MPC states that a person acts recklessly if “he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”<sup>57</sup>

Intoxicated actors create difficulty in the *mens rea* analysis because intoxicants distort judgment by reducing the actor’s ability to control his feelings, impulses, and conduct, leading to an inability to form intent.<sup>58</sup> The MPC permits actors to use intoxication as a defense in two circumstances:<sup>59</sup> if the actor’s

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48. See *id.* (discussing opponent’s view of the concept that intoxication should not be considered as a defense).

49. DRESSLER, *supra* note 14, at 3.

50. *Id.* at 117.

51. Sanford H. Kadish, *Why Substantive Criminal Law—A Dialogue*, 29 CLEV. ST. L. REV. 1, 10 (1980).

52. DRESSLER, *supra* note 14, at 3.

53. *Supra* Part I (discussing the John and Jane hypothetical).

54. MODEL PENAL CODE, § 2.02 cmt. at 229 (1985).

55. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 160 (Thompson Reuters, 6th ed. 2012).

56. MODEL PENAL CODE § 2.02(3) (1985).

57. MODEL PENAL CODE § 2.02(2)(c) (1985).

58. DRESSLER, *supra* note 14, at 317.

59. *Id.* at 330.

intoxication is severe enough to negate an element of the offense<sup>60</sup> or if the intoxication was not self-induced.<sup>61</sup>

Section 2.08 lays out these two exceptions for when a person faces prosecution for a crime that requires recklessness to establish criminal liability.<sup>62</sup> Section 2.08 states that if a person “due to self-induced intoxication is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.”<sup>63</sup> Therefore, when the offense requires recklessness, the law irrefutably presumes that an actor has the requisite *mens rea* when he is voluntarily intoxicated.<sup>64</sup> This, in effect, equates the actor’s decision to get drunk with the particular risk that he took (e.g., that he would engage in sexual intercourse without consent—two acts that do not obviously go hand in hand).<sup>65</sup>

The MPC tackles this issue head-on in its comments and provides its justifications for the adoption of Section 2.08.<sup>66</sup> The commentary balances the social value of intoxication against the potential dangers and difficulties of litigating an intoxicated actor’s state of mind.<sup>67</sup> The commentary’s decision relies on its finding that, “Drunkenness usually does import recklessness, and, anyhow, it creates difficulties of proof to allow the issue to be litigated.”<sup>68</sup> The MPC further justifies its position by stating that it is fair to equate the risk of becoming drunk with the risk of committing a crime is fair because the risks of excessive drinking are now so prevalent in society that everyone is aware of them.<sup>69</sup>

What does this mean for John? John was aware of the risks created by his conduct while intoxicated, and is presumed reckless under the MPC.<sup>70</sup> This presumption has monumental effects for an eighteen-year-old accused of rape.<sup>71</sup>

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60. *Id.*

61. *Id.*

62. *Id.* at 330–31.

63. MODEL PENAL CODE § 2.08(2) (1985).

64. DRESSLER, *supra* note 14, at 331.

65. MODEL PENAL CODE, § 2.08 cmt. at 359 (1985).

66. *Id.* at 352.

67. *Id.* at 359.

Becoming so drunk as to destroy temporarily the actor’s powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. . . . Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes and the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence.

*Id.*

68. Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 600 (1963) (citing MODEL PENAL CODE § 2.08 cmt. 3 at 8–9 (AM. LAW INST., Tent. Draft No. 9, 1959)).

69. MODEL PENAL CODE, Comment to § 2.08, at 359 (1985). (“Awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that it is not unfair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk.”) *Id.*

70. MODEL PENAL CODE § 2.08 cmt. at 359 (1985).

71. *Id.*

Assume that John is charged with rape. Traditionally, the law defined rape as a male engaging in sexual intercourse with a female, not his wife, without her consent.<sup>72</sup> After a wave of reform, many states now divide the offense into degrees and redefine the offense in gender-neutral terms.<sup>73</sup> Several states, including New York, adopted statutes based on the MPC.<sup>74</sup> New York law states that a person is guilty of rape in the first degree if he “engages in sexual intercourse with another person by forcible compulsion; or who is incapable of consent by reason of being physically helpless; or who is less than eleven years old; or who is less than thirteen years old and the actor is eighteen years old or more.”<sup>75</sup>

Similar to the MPC, New York’s rape statute does not specify a *mens rea* requirement.<sup>76</sup> As a result, under Section 2.02(3), a court would read in the *mens rea* term of recklessness.<sup>77</sup> Under Section 2.08, John is presumed reckless because of his voluntary intoxication and, thus, would be guilty of first-degree rape if the *actus reus*, voluntary act, is proven.<sup>78</sup> Therefore, although John was not aware of how his intoxication would affect his conduct, the MPC sacrifices his “rare” circumstance for the perceived benefit in avoiding the difficulty in litigating a particular offender’s unawareness.<sup>79</sup> The result of this sacrifice is that John could face 1.5 to 25 years imprisonment, registration as a sex offender for 20 years to life, and required treatment either in jail or prison.<sup>80</sup>

The offender’s unawareness could take various forms. For example, John may have been intoxicated but still understood that Jane did not consent, in which case he would not have a defense.<sup>81</sup> Or, John may have been so drunk that he did not recognize that Jane was too drunk to give consent.<sup>82</sup> Another possibility is that John never consumed that much alcohol before and was unaware of its effects; he might not have understood that consuming that much

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72. DRESSLER, *supra* note 14, at 568.

73. *Id.*

74. PAUL H. ROBINSON & MARKUS DIRK DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 3 (Mar. 12, 1999), available at <https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf> (on file with *The University of Pacific Law Review*).

75. N.Y. PENAL LAW § 130.35 (2001).

76. *See id.* (defining rape in the first degree).

77. MODEL PENAL CODE § 2.02(3) (1985).

78. MODEL PENAL CODE § 2.08 (1985); DRESSLER, *supra* note 14, at 85.

79. *See* MODEL PENAL CODE, § 2.08 cmt. at 359 (1985) (describing the rationale for adopting the rule in order to avoid difficulties in litigating the foresight of a particular actor engaging in voluntary intoxication).

80. *New York Sexual Assault Laws*, FINDLAW (last visited July 15, 2016), <http://statelaws.findlaw.com/new-york-law/new-york-sexual-assault-laws.html> (on file with *The University of the Pacific Law Review*); *FAQ*, DIVISION OF CRIMINAL JUSTICE SERVICES (last visited July 15, 2016), <http://www.criminaljustice.ny.gov/nsor/faq.htm> (on file with *The University of the Pacific Law Review*).

81. *See* MODEL PENAL CODE § 2.08 at 358–59 (1985) (comparing the state of mind required in other crimes, such as burglary, to show the impact of intoxication in determining an accused’s state of mind).

82. *Infra* Part III.A.2.b.

alcohol would cause him to participate in harmful sexual behavior.<sup>83</sup> In its current form, the MPC does not allow for considerations of these subtle distinctions between the offender's unawareness; the offender is both intoxicated and reckless, or he is not.<sup>84</sup>

The law further protects the female and her mental state, which exacerbates the injustice John faces when he is denied the opportunity to rebut his presumed recklessness.<sup>85</sup> Under New York law, a person is guilty of second-degree rape "when 'being eighteen years old or more, he or she engages in sexual intercourse with another person less than fifteen years old; or . . . with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated.'"<sup>86</sup>

Jane is protected by the language "mentally incapacitated."<sup>87</sup> Jane's intoxication legally renders her mentally incapacitated and shielded by the law, while John's intoxication subjects him to criminal liability and punishment.<sup>88</sup> Regardless of the fact that Jane and John were mutually and, arguably, equally intoxicated, the law protects Jane and condemns John.<sup>89</sup> Consequently, the MPC and those states that adopt similar provisions contribute to a gender imbalance in cases that prosecute only one side of a double-sided intoxication.<sup>90</sup>

### *C. The Model Penal Code's Proposed Changes*

The ALI is currently amending the MPC's provisions on Sexual Assault and Related Offenses.<sup>91</sup> In the current proposal, Section 213.0(4) states, "the provisions of Model Penal Code Section 2.08(2) shall not apply to this Article."<sup>92</sup> The "Article" mentioned is Article 213, which is the Sexual Assault and Related Offenses provision.<sup>93</sup>

The proposed draft, in effect, rejects the premise that an offender is automatically reckless because he became voluntarily intoxicated.<sup>94</sup> Instead, it would require that liability for the offenses in Sections 213.1 through 213.8 be proven by evidence of the offender's actual subjective awareness for each

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83. *Id.*

84. MODEL PENAL CODE § 2.08 (1985).

85. *See id.*

86. N.Y. PENAL LAW § 130.30 (2001).

87. *Id.*

88. *Id.*

89. *Id.*

90. *See generally*, MODEL PENAL CODE § 2.08 (1985); N.Y. PENAL LAW § 130.30 (2001).

91. *Model Penal Code*, THE AM. L. INST. (last visited Jan 4, 2016), <https://www.ali.org/publications/show/model-penal-code/> (on file with *The University of the Pacific Law Review*).

92. MODEL PENAL CODE § 213.0(4) at 1 (AM. LAW INST., Preliminary Draft No. 5, 2015).

93. *Id.*

94. MODEL PENAL CODE § 213.0(4) at 190 (AM. LAW INST., Preliminary Draft No. 5, 2015).

material element.<sup>95</sup> If the offender lacks the subjective awareness required for the material element, i.e. due to voluntary intoxication, he cannot be held liable.<sup>96</sup>

The drafters explain the change by referencing a situation similar to John and Jane's situation.<sup>97</sup> They pose a hypothetical in which a college student at a fraternity party drinks a couple of beers and then a shot of whiskey.<sup>98</sup> In the process of swallowing the whiskey, he is surely aware of the substantial risk of becoming intoxicated, and also surely aware of the substantial risk that he could engage in typical drunken behavior such as falling down, running into objects, shouting, or even breaking items.<sup>99</sup> However, unlike the current version of Section 2.08, the proposed draft does not equate the college student's awareness of consuming whiskey with the awareness of a substantial risk that he will commit rape.<sup>100</sup>

While the proposed draft eliminates Section 2.08's application to the Sexual Assault and Related Offenses provisions, it keeps the protection for victims who are "incapable of expressing unwillingness due to intoxication" intact.<sup>101</sup> The draft justifies retaining this safeguard because voluntary intoxication should not be equated with a victim waiving his or her right to "autonomous choice and bodily integrity."<sup>102</sup>

However, the draft also acknowledges two things: (1) college-aged victims often are assaulted by people they know; and (2) in those circumstances, "[t]ypically the victim has not been duped but rather has voluntarily chosen to drink."<sup>103</sup> While voluntary intoxication does not waive bodily integrity and does not constitute consent in itself, the draft states that voluntary intoxication also does not preclude a person from giving consent.<sup>104</sup> The draft does not permit an offender to set out to purposely intoxicate a victim, become intoxicated himself, and then use intoxication as a defense.<sup>105</sup> For instance, if John purposely got Jane drunk, and then had sex with her, he would not be able to use his intoxication as a defense.

Generally, date-rape drug cases would come out the same under the current law and the proposed law because the offender's *mens rea* existed before he got intoxicated; he purposely set out to intoxicate the victim in order to commit the offense and cannot claim he failed to appreciate the victim's mental state.<sup>106</sup> In

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95. *Id.*

96. *Id.*

97. *Id.* at 189.

98. *Id.*

99. *Id.*

100. *Id.*

101. MODEL PENAL CODE § 213.3(2)(c) cmt. at 85 (AM. LAW INST., Preliminary Draft No. 5 2015).

102. *Id.* at 86.

103. *Id.* at 85–86.

104. *Id.* at 86.

105. MODEL PENAL CODE, § 213.5 cmt. at 190 (AM. LAW INST., Preliminary Draft No. 5 2015).

106. *Id.* at 189.

these situations, the prosecution could still prove that the accused was aware of the victim's inability to consent because of his actions prior to his intoxicated state.<sup>107</sup>

The recent case at Stanford University provides a good example of how a prosecutor might still gain a conviction even in an instance in which the offender has been drinking.<sup>108</sup> In early January 2015, witnesses observed Stanford student Brock Turner standing over an unconscious female lying on the ground next to a dumpster.<sup>109</sup> In responding to a sexual assault claim against him, Turner later told police that he left a fraternity house with the victim.<sup>110</sup> Turner stated that he and the victim then kissed and ended up on the ground where he digitally penetrated her for five minutes, but he did not remove his pants or expose his penis.<sup>111</sup> Turner smelled of alcohol when he was handcuffed and doctors stated the victim had an estimated blood alcohol concentration of .22% at the time of the assault.<sup>112</sup> Despite having consumed "about seven cans of Rolling Rock beer and a couple of swigs of Fireball," Turner admitted that he remembered everything that happened and that he consciously decided to engage in sexual activity with the victim.<sup>113</sup> Thus, even though he was intoxicated, Turner did not claim such mental impairment that he failed to realize what he was doing.<sup>114</sup> Additionally, the prosecutor could rebut any claim of lack of familiarity with the effects of drugs and alcohol by reference to Turner's prior experience demonstrating his familiarity with drugs and alcohol.<sup>115</sup>

Overall, the draft presents an innovative approach to rape prosecutions by recognizing that a standard that penalizes any sexual activity with an intoxicated individual is inappropriate.<sup>116</sup> If adopted, the proposal permits admitting evidence of both the victim's and the accused's mental state.<sup>117</sup> Consequently, if John were charged with rape, he would have the opportunity to introduce evidence of his, as well as Jane's, intoxication in order to disprove his subjective awareness.<sup>118</sup> Although the protection of victims under the law remains largely the same, the

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107. *Id.* at 190.

108. See Ray Sanchez, *Stanford Rape Case: Inside the Court Documents*, CNN (June 11, 2016, 5:00 PM), <http://www.cnn.com/2016/06/10/us/stanford-rape-case-court-documents/> (discussing the court documents in the case involving Brock Turner).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Felony Complaint Case Summary, *People v. Turner*, No. 15-018-0019U, PR 029 (2015), <https://assets.documentcloud.org/documents/1532973/complaint-brock-turner.pdf> (on file with *The University of Pacific Law Review*)

114. *Id.*

115. Sanchez, *supra* note 108.

116. MODEL PENAL CODE, § 213.5 cmt. at 190 (AM. LAW INST., Preliminary Draft No. 5 2015).

117. MODEL PENAL CODE § 213.3(2)(c) cmt. at 86 (AM. LAW INST., Preliminary Draft No. 5 2015).

118. *Id.*

progressive recommendations in the *mens rea* requirement provide more equal protection for John and Jane, two equal participants in a drunken sexual encounter.

### III. IMPLICATIONS OF THE PROPOSED CHANGES TO THE MODEL PENAL CODE

This section addresses what could occur if the ALI adopts the tentative draft and its changes.<sup>119</sup>

#### A. *How the Proposed Change Will Improve on the Current Code*

The proposed change will improve upon the current code by leveling culpability and liability,<sup>120</sup> by accommodating mutually intoxicated sexual assault scenarios,<sup>121</sup> and by eliminating gender-biased protection.<sup>122</sup>

##### 1. *Culpability*

One reason for adopting the proposed rule lies in the basic meaning of *mens rea* in criminal law: culpability.<sup>123</sup> Prominent criminal law scholar Glanville Williams, among other scholars, pointed out the injustice that would result from the MPC's original stance on intoxication.<sup>124</sup> Williams observed, "if a man is punished for doing something when drunk that he would not have done when sober, is he not in plain truth punished for getting drunk?"<sup>125</sup>

While allowing intoxication to rebut the *mens rea* of purpose or knowledge, the MPC does not allow the same rebuttal for the *mens rea* of recklessness or negligence.<sup>126</sup> If the *mens rea* required is recklessness or negligence, the MPC comments state that a situation involving either of these *mens rea* raises "no problem of importance in the ordinary case where drink . . . induced a temporary change in personality, impairing judgment or reducing inhibition or control."<sup>127</sup> Drunkenness, the MPC commentary claims, is not "logically relevant to the existence or nonexistence of any element of the offense and, if all elements of the offense are established, conviction should follow in spite of intoxication."<sup>128</sup>

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119. *Infra* Part III.A.–B.

120. *Infra* Part III.A.1.

121. *Infra* Part III.A.2.

122. *Infra* Part III.A.3.

123. DRESSLER, *supra* note 14, at 118.

124. MODEL PENAL CODE, § 2.08 cmt. at 352 (1985).

125. *Id.*

126. *Id.* at 354.

127. *Id.* at 351.

128. *Id.*

Not only is considering intoxication in offenses requiring recklessness or negligence logically irrelevant in the current MPC but it is also consistent with the position taken in the common law.<sup>129</sup> The common law regards intoxication as a “simple infirmity of impaired control,” which offers “no stronger a basis for formal adjustments in the grading offenses or for complete exculpation than do infirmities produced by a variety of other causes.”<sup>130</sup>

The members of the Advisory Committee for the 1962 MPC did not unanimously agree on isolating “recklessness” as a *mens rea* element irrefutable by evidence of intoxication.<sup>131</sup> Judge Learned Hand and other members saw no significant reason for carving out this special rule.<sup>132</sup> Judge Hand was of the view that if, as defined in Section 2.02(2)(c), recklessness requires that a person “consciously disregard a risk,”<sup>133</sup> then evidence of severe drunkenness should be permitted to negate the actor’s consciousness of the risk.<sup>134</sup> Since awareness of the risk is the root of moral culpability, when that awareness is absent the result is a liability much higher than the degree of culpability.<sup>135</sup>

Although opponents of the current MPC stance, including Williams and Judge Hand, urged to eliminate any special rule and instead advocated that the law should require proving what the actor foresaw at the time of alcohol consumption, the MPC ultimately adopted the special rule.<sup>136</sup> This special rule placed John, and those similarly situated to him, in an unjust position. Offenders who did not have the ability to form intent presumably reject the notion that severe intoxication is legally irrelevant. They presumably reject the notion that they were consciously aware of the result that consuming alcohol would have on them and their actions. Lastly, they surely reject the notion that their intoxication automatically establishes their *mens rea*. All of these notions lend to a liability disproportionate to culpability.<sup>137</sup>

Adopting the proposed change in the MPC draft would remedy the disproportion between liability and culpability.<sup>138</sup> As noted in the draft’s commentary, assuming that John, who was most likely aware of the substantial risk of becoming drunk since it was not his first time drinking, was also aware of a substantial risk that he would commit rape is illogical.<sup>139</sup> A college student like John may have been consciously aware that taking shots would result in a change

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129. *Id.* at 352.

130. *Id.*

131. *Id.* at 357.

132. *Id.*

133. *Id.*

134. *Id.* at 357 n.24.

135. *Id.* at 358–59.

136. *Id.* at 352.

137. *Id.*

138. MODEL PENAL CODE § 213.5 cmt. at 189–90 (AM. LAW INST., Preliminary Draft No. 5 2015).

139. *Id.* at 189.

in his behavior and loss in bodily control, but his moral choice in consuming alcohol is not the equivalent of the moral choice he makes when he commits a crime.<sup>140</sup>

By removing Section 2.08 as applied to Sections 213.0 through 213.11, the proposed draft treats John's awareness of becoming drunk and awareness of committing rape as separate concepts; he is only liable if there is proof of his culpability.<sup>141</sup> The draft eliminates the disproportion because if John's culpability were proven, he would receive the appropriate liability; conversely, if his culpability were not proven, he would not be liable.<sup>142</sup>

Additionally, Section 2.08 is contrary to the MPC's structure.<sup>143</sup> The MPC rests on the principle that specific levels of fault are attributed to each element of an offense.<sup>144</sup> Yet, it carved out a special rule for intoxication by using a balancing analysis, thus thwarting its own fundamental concept.<sup>145</sup> Adopting the proposed change would eliminate this anomaly and restore the MPC to its doctrine of proportional liability to culpability.<sup>146</sup> In addition to leveling culpability and liability, the proposed change will also accommodate mutually intoxicated sexual assault scenarios.<sup>147</sup>

## 2. *Accommodation for Mutually Intoxicated Sexual Assault Scenarios*

The law should accommodate mutually intoxicated sexual assault scenarios because of the prevalence of college-aged drinking<sup>148</sup> and because of the serious effects of alcohol on the mental processes.<sup>149</sup>

### a. *Prevalence of College-Aged Drinking*

The proposed changes to the MPC focusing on intoxication may lead one to wonder why the drafters are altering the law in this area now? Referring to the

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140. *Id.*

141. See MODEL PENAL CODE § 213.5 cmt. at 189 (AM. LAW INST., Preliminary Draft No. 5 2015) (discussing how an "aggressor, as a result of intoxication, fails to appreciate that the complainant's mental state is compromised, the subsequent activity is not fairly labeled criminal on the basis of those circumstances alone").

142. See *id.* at 190 (discussing the application of the *mens rea* standard in Article 213 "that defines in specific, concrete terms the facts that will be sufficient to establish nonconsent or absence of positive consent.").

143. MODEL PENAL CODE, § 213.5 cmt. at 188 (AM. LAW INST., Preliminary Draft No. 5 2015).

144. Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 698 (2002–2003) (citing MODEL PENAL CODE § 2.02 (AM. LAW INST., Proposed Official Draft 1962)).

145. MODEL PENAL CODE § 2.08 cmt. at 359 (1985).

146. MODEL PENAL CODE, § 213.5 cmt. at 188 (AM. LAW INST., Preliminary Draft No. 5 2015).

147. *Id.* at 190.

148. *Infra* Part III.A.2.a.

149. *Infra* Part III.A.2.b.

hypothetical about the college student posed in the commentary to Section 2.08, it suggests that an ordinary self-induced intoxicated actor now raises a “problem of importance.”<sup>150</sup>

When the accused is an alcoholic, the 1962 Code commentary refers to cases where courts mitigated prison terms and allowed discussion of the accused’s intoxication for crimes, such as being drunk in public.<sup>151</sup> While the Code recognizes alcoholic offenders as a class that deserves special treatment, it does not recognize heavy social drinkers as a class that should receive special treatment under the criminal law.<sup>152</sup>

At the same time, the Code commentary states that the consequences of excessive drinking are so plain that claiming ignorance should not preclude deeming an offender criminally reckless.<sup>153</sup> While claiming the consequences are known to all society, the Code comments do not appreciate the societal norm of excessive drinking, especially among college-aged people.<sup>154</sup>

Alcohol-related problems on college campuses are now a major public concern.<sup>155</sup> Drinking settings include fraternity parties, athletic events, residence halls, off-campus housing areas with a high-proportion of students, and off-campus bars.<sup>156</sup> The National Institute on Alcohol Abuse and Alcoholism (NIAAA) was founded about 40 years ago on the premise that alcoholism was an adult disease.<sup>157</sup> With more research, data, and insights, the NIAAA increased its focus on young adult and underage drinking.<sup>158</sup>

Through national, large-scale surveys conducted over 20 years, data indicates that alcohol dependence is highest among ages 18–20 and second highest among

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150. *But see* MODEL PENAL CODE, § 2.08 cmt. at 351 (1985) (stating that a self-induced intoxicated actor “raises no problem of importance in the ordinary case where drink . . . have at most induced a temporary change in personality, impairing judgment or reducing inhibition and control.”).

151. *See id.* at 352 n.6 (1985) (citing *People v. Walcher*, 42 Ill.2d 159, 246 N.E.2d 256 (1969), where the Supreme Court of Illinois considered that the offender was an alcoholic in evaluating the circumstances of the crime); *Id.* at 355 n.15 (1985) (citing the Supreme Court’s decision in *Powell v. Texas*, 392 U.S. 514 (1968), which was based in part on the decision in *Robinson v. California*, 370 U.S. 660 (1962)).

152. *See generally* MODEL PENAL CODE, § 2.08 cmt. at 350–56 (1985) (discussing heavily intoxicated actors and deciding the minimal significance of ordinary self-induced intoxicated actors in the criminal context).

153. *Id.* at 359.

154. *See generally id.* at 159 (acknowledging the widespread knowledge of the consequences of excessive drinking, while not directly addressing how widespread excessive drinking is in society).

155. Kathryn Stewart, *Facts and Myths About College Drinking: A Serious Problem with Serious Solutions*, PREVENTION RESOURCE CTR. 1 (May 2013), available at <http://resources.prev.org/documents/FactsMythsCollegeDrinking.pdf> (on file with *The University of the Pacific Law Review*).

156. *Id.*

157. Michael Windle & Robert A. Zucker, *Reducing Underage and Young Adult Drinking: How to Address Critical Drinking Problems During This Developmental Period*, NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, (June 30, 2016), available at <http://pubs.niaaa.nih.gov/publications/arh40/29-44.htm> (on file with *The University of the Pacific Law Review*).

158. *Id.*

ages 21–24.<sup>159</sup> Over time, the NIAAA found that college drinking is “extremely widespread.”<sup>160</sup> The Centers for Disease Control and Prevention (CDC) found that people ages 18–24 have the highest prevalence of binge drinking at 28.2 percent, and that age group also drinks the most excessively, consuming an average of “9.3 drinks on occasion.”<sup>161</sup>

The NIAAA found that four out of five college students drink alcohol.<sup>162</sup> One-half of those students binge drink.<sup>163</sup> The NIAAA defines binge drinking as “a pattern of drinking that brings blood alcohol concentration (BAC) levels to 0.08 g/dL. This typically occurs after 4 drinks for women and 5 drinks for men—in about 2 hours.”<sup>164</sup> One step below binge drinking is heavy drinking, which constitutes drinking “5 or more drinks on the same occasion on each of 5 or more days in the past 30 days.”<sup>165</sup> A step below heavy drinking is moderate alcohol consumption, which is considered consuming one drink per day as a woman and up to two drinks per day as a man.<sup>166</sup> Therefore, according to the NIAAA, one-half of the female college students who drink alcohol consume four drinks in two hours, and one-half of the male college students consume five drinks in two hours.<sup>167</sup> So, why does this matter?

The problem with binge-drinking is that college students experience a multitude of adverse consequences, whether they participate in the drinking or not.<sup>168</sup> These consequences include health problems, injury, death, academic problems, assault, and sexual abuse.<sup>169</sup> A 2001 Harvard study examining the secondhand effects of alcohol among underage students found the following effects, among others: insults/humiliation, serious arguments/quarrels, property damage, pushing, hitting/assaults, unwanted sexual advances, and sexual assault or date rape.<sup>170</sup>

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159. *Id.*

160. *College Drinking*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM (Jan. 2, 2016), available at <http://www.niaaa.nih.gov/alcohol-health/special-populations-co-occurring-disorders/college-drinking> (on file with *The University of the Pacific Law Review*).

161. CTRS. FOR DISEASE CONTROL AND PREVENTION, VITAL SIGNS: BINGE DRINKING PREVALENCE, FREQUENCY, AND INTENSITY AMONG ADULTS—UNITED STATES, 2010, MORBIDITY AND MORALITY WEEKLY REPORT 61(1), 14–19 (Jan. 30, 2016), available at [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6101a4.htm?s\\_cid=mm6101a4\\_w](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6101a4.htm?s_cid=mm6101a4_w) (on file with *The University of the Pacific Law Review*).

162. *College Drinking*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, *supra* note 160.

163. *Id.*

164. *Drinking Levels Defined*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM (Jan. 2, 2016), available at <http://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/moderate-binge-drinking> (on file with *The University of the Pacific Law Review*).

165. *Id.*

166. *Id.*

167. *College Drinking*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, *supra* note 160.

168. *Id.*

169. *Id.*

170. Henry Wechsler et al., *Underage College Students' Drinking Behavior, Access to Alcohol, and the Influence of Deterrence Policies*, 50 J. OF AM. C. HEALTH 223, 228 (2002).

Included in a variety of the studies is the consequence of sexual assault.<sup>171</sup> The NIAAA states that more than 97,000 students between the ages of 18–24 are victims of alcohol-related sexual assault.<sup>172</sup> Other college student surveys found that approximately 50 percent of college women have been sexually assaulted.<sup>173</sup> Data from other studies show that around three percent of college women are victims of rape, which translates into nearly 35 allegations or instances of rape out of every 1,000 female students.<sup>174</sup> However, women are not the only victims.<sup>175</sup> Other studies show that one percent of male students also reported experiencing attempted sexual penetration without their consent.<sup>176</sup>

Statistics on this subject are not comprehensive because sexual assaults are often unreported.<sup>177</sup> However, statistics are consistent in stating that at least 50 percent of sexual assaults are associated with alcohol use.<sup>178</sup> Additionally, when alcohol is consumed before a sexual assault, it is usually consumed by both parties.<sup>179</sup> Out of the alcohol-related sexual assaults that are reported, both parties consumed alcohol roughly 81 percent of the time.<sup>180</sup> Another study discovered even more staggering numbers<sup>181</sup>—it found that 55 percent of the sexual assaults reported by college women involved alcohol, and in 97 percent of those assaults, both the victim and the perpetrator consumed alcohol.<sup>182</sup>

While there are movements across the United States to create programs for alcohol awareness and prevention of underage drinking on college campuses,<sup>183</sup> sexual assault involving intoxication by both parties remains omnipresent.<sup>184</sup> The

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171. *College Drinking*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, *supra* note 160; Wechsler, *supra* note 170, at 228.

172. *College Drinking*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, *supra* note 161.

173. Antonia Abbey, et al., *Alcohol and Sexual Assault*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, available at <http://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm> (on file with *The University of the Pacific Law Review*).

174. SEXUAL ASSAULT ON CAMPUSES: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT, U.S. DEP'T OF JUST. 2 (Dec. 2005), available at <https://www.ncjrs.gov/pdffiles1/nij/205521.pdf> (on file with *The University of the Pacific Law Review*).

175. *Sexual Violence on College Campuses*, EMORY UNIVERSITY, OFFICE OF HEATH PROMOTION (Nov. 14, 2015), available at [http://studenthealth.emory.edu/hp/respect\\_program/sexual\\_violence\\_on\\_college\\_campuses.html](http://studenthealth.emory.edu/hp/respect_program/sexual_violence_on_college_campuses.html) (on file with *The University of the Pacific Law Review*).

176. *Id.*

177. Abbey et al., *supra* note 173.

178. *Id.*

179. *Id.*

180. *Id.* at 199.

181. *Id.*

182. *Id.*

183. Beth Howard, *How Colleges Are Battling Sexual Violence*, U.S. NEWS & WORLD REPORT (Aug. 28, 2015), available at <http://www.usnews.com/news/articles/2015/08/28/how-colleges-are-battling-sexual-violence> (on file with *The University of the Pacific Law Review*).

184. Amanda Hess, *How Drunk Is Too Drunk To Have Sex?*, SLATE, [http://www.slate.com/articles/double\\_x/doublex/2015/02/drunken\\_sex\\_on\\_campus\\_universities\\_are\\_struggling\\_to\\_determine\\_when\\_intoxicate.html](http://www.slate.com/articles/double_x/doublex/2015/02/drunken_sex_on_campus_universities_are_struggling_to_determine_when_intoxicate.html) (last visited Oct. 30, 2016) (on file with *The University of the Pacific Law Review*).

law should accommodate this now all-too-familiar occurrence. An accused offender should not be disadvantaged under the law because he was intoxicated when the alleged victim may have been in an equal or enhanced intoxicated condition. Under the 1962 MPC, however, that is regrettably the case.<sup>185</sup> Adopting the proposed changes to the MPC would concede that mutually intoxicated sexual assault frequently occurs, that it occurs among a staggering number of the nation's young adults, much like alcoholism affects a staggering number of adults,<sup>186</sup> and that the law should accommodate the situation so that the intoxicated condition of both parties is legally relevant.<sup>187</sup>

Adopting the draft could result in fewer convictions of men who commit sexual assault by claiming they were intoxicated and, thus, did not have the requisite *mens rea* for the offense.<sup>188</sup> While it is possible that an offender may escape conviction the first time, the likelihood that a repeat offender could deny awareness of the risk of becoming intoxicated more than once is incredibly low.<sup>189</sup>

If John, for the first time, set out to get Jane drunk in order to have sex with her, he may be able to claim he was unaware of the risk in getting drunk and unaware that it would cause him to engage in improper sexual behavior.<sup>190</sup> He may be acquitted if able to prove this.<sup>191</sup> Yet, it would still be difficult to prove unawareness because the prosecutor could introduce evidence of the offender's behavior through witness testimony.<sup>192</sup> Therefore, the risk of a first-time offender using alcohol as an excuse remains moderately low.<sup>193</sup>

However, if acquitted and he then intentionally gets Sally drunk and has sex with her, a judge and jury would surely be unconvinced that he was unaware yet again of the risk in getting drunk.<sup>194</sup> Thus, he would only be able to use his intoxication as a defense once, at most.<sup>195</sup>

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185. MODEL PENAL CODE, § 213.5 cmt. at 189 (AM. LAW INST., Preliminary Draft No. 5 2015).

186. See *Alcohol Facts and Statistics*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM (Jan. 4, 2016), available at <http://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-facts-and-statistics> (on file with *The University of the Pacific Law Review*) (discussing the statistics of alcoholism in the United States, and stating that 16.6 million adults ages 18 and over have Alcohol Use Disorders, AUDs).

187. MODEL PENAL CODE, § 213.5 cmt. at 189 (AM. LAW INST., Preliminary Draft No. 5 2015).

188. *Id.* at 190.

189. See generally *id.* (discussing the proof required to show an actor's unawareness).

190. *Id.*

191. *Id.*

192. *Id.*

193. See *id.* (discussing the ability for prosecutors to introduce evidence regarding an accused's intoxicated state, as well as any clear indicators of consent or lack thereof).

194. See *id.* (describing the persuasive evidence that might convince a jury of an accused's awareness).

195. Cf. *id.* (explaining the factors that would be indicative of an accused's awareness, which if were presented along with a prior accusation of sexual assault, would likely lead the jury to conclude the accused was aware of the risk of potential harm).

b. *Effects of Alcohol on Mental Processes*

The 1962 MPC commentary acknowledges that nearly everyone knows the consequences of excessive drinking on human behavior.<sup>196</sup> It notes however, that a problem arises “when the actor’s intoxication is adduced to disprove an element of the offense with which he is charged and is relevant to do so, but when its admissibility for such purpose has been restricted by the law.”<sup>197</sup> The 1962 MPC comment authors later attempted to argue why there is no problem by pinpointing the precise issue of disallowing evidence of an accused’s intoxication for crimes with a *mens rea* of recklessness.<sup>198</sup>

The effects of alcohol on behavior and mental processes is highlighted in a footnote to a paragraph, which states the issue with disallowing evidence of an accused’s intoxicated state.<sup>199</sup> “As a matter of logic, the fact of acute alcoholic intoxication may be ground an inference that the actor did not act with knowledge or purpose or recklessness required as an element of the crime.”<sup>200</sup> Because alcohol is a depressant, it can alter a person’s “perceptive capacity and mental powers.”<sup>201</sup>

This statement is not conjecture but is grounded in science.<sup>202</sup> The CDC lists the effects of alcohol on the human body at various blood alcohol concentrations.<sup>203</sup> For example, John from the above hypothetical is a male who engaged in binge drinking—therefore according to NIAAA statistics, he may have consumed five drinks in two hours.<sup>204</sup> If John consumed five drinks in two hours, under the CDC standards, he would have had a blood alcohol concentration at 0.10 percent.<sup>205</sup> At 0.10 percent, John would suffer from deterioration of reaction time and control, slowed thinking, slurred speech, and poor coordination.<sup>206</sup> After only five drinks, presumably less than he actually consumed due to his description of the night, his mental processes were altered.<sup>207</sup> If John was not comatose or vomiting, his BAC could have been

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196. MODEL PENAL CODE § 2.08 cmt. at 359 (1985).

197. *Id.* at 352.

198. *See* MODEL PENAL CODE § 2.08 cmt. at 352 n.7 (1985) (discussing why it is not an issue to disallow evidence of intoxication for crimes with a *mens rea* of recklessness).

199. *Id.*

200. *Id.*

201. *Id.*

202. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, IMPAIRED DRIVING: GET THE FACTS, BAC EFFECTS (May 13, 2016), available at [http://www.cdc.gov/motorvehiclesafety/impaired\\_driving/impaired-driv\\_factsheet.html](http://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-driv_factsheet.html) (on file with *The University of the Pacific Law Review*) (discussing the effects of alcohol on the body at various blood alcohol concentrations).

203. *Id.*

204. *College Drinking*, NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, *supra* note 160.

205. CTRS. FOR DISEASE CONTROL & PREVENTION, IMPAIRED DRIVING: GET THE FACTS, BAC EFFECTS, *supra* note 203.

206. *Id.*

207. *Id.*

around 0.20 percent.<sup>208</sup> At 0.20 percent, John would feel dazed, confused, or disoriented.<sup>209</sup> He would need help standing or walking, and would likely experience a blackout.<sup>210</sup>

The ALI draft has not fully developed the issue of how intoxicated an actor must be in order to use evidence of his intoxicated state to rebut his recklessness.<sup>211</sup> A person passing in and out of consciousness would meet the requirement, but whether anything less than that would suffice is unclear.<sup>212</sup> Would a 0.10 percent BAC resulting in an alteration of mental processes be enough for John to rebut his recklessness? Or would John's BAC need to be higher, say at 0.20 percent where he is likely experiencing a blackout? The tentative draft left this unanswered.

Jane, a binge-drinking female, according to NIAAA statistics, may have consumed four drinks in two hours.<sup>213</sup> If Jane consumed four drinks in two hours, under the CDC's standards, she would have a blood alcohol concentration of 0.08 percent.<sup>214</sup> At 0.08 percent, Jane's muscle coordination would have been poor, her judgment would have been impaired, her self-control would have been impaired, and her reasoning and memory would have been impaired.<sup>215</sup> After only four drinks, presumably less than she actually drank according to her to recount of events that night, her mental processes would have been compromised.<sup>216</sup> Similar to John, if Jane was not comatose or vomiting, it is possible she had a BAC of 0.20 percent.<sup>217</sup> If Jane had a BAC of 0.20 percent, she would suffer from confusion, disorientation, inability to stand or walk, and a blackout.<sup>218</sup>

The ALI also does not fully develop the issue of how intoxicated a participant must be in order to be considered incapacitated and, thus, incapable of consent.<sup>219</sup> The ALI notes the challenges in drawing the line of incapacitation, including that intoxication causes different effects and not every person is affected equally by the same amount of alcohol.<sup>220</sup> Therefore, even if a specific BAC level were adopted, such as 0.10 or 0.20, there would be no definitive

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208. *Effects At Specific B.A.C. Levels*, B.R.A.D. 21, available at [http://www.brad21.org/effects\\_at\\_specific\\_bac.html](http://www.brad21.org/effects_at_specific_bac.html) (last visited Feb. 16, 2016) (on file with *The University of the Pacific Law Review*).

209. *Id.*

210. *Id.*

211. MODEL PENAL CODE § 213.5 cmt. at 190 (AM. LAW INST., Preliminary Draft No. 52015).

212. *Id.* at 90.

213. *College Drinking*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, *supra* note 160.

214. CTRS. FOR DISEASE CONTROL & PREVENTION, IMPAIRED DRIVING: GET THE FACTS, BAC EFFECTS, *supra* note 203.

215. *Id.*

216. *Id.*

217. B.R.A.D. 21, *supra* note 208.

218. *Id.*

219. MODEL PENAL CODE § 213.3 cmt. at 90 (AM. LAW INST., Preliminary Draft No. 5 2015).

220. *Id.*

answer based on the BAC level alone as to how the level actually affected the victim during the event at issue; especially if the offender's BAC was not measured immediately after the alleged assault occurred.<sup>221</sup>

Even by a modest estimate of the amount of alcohol that Jane and John consumed on the night of their sexual encounter, both parties certainly had altered mental and physical processes.<sup>222</sup> If they both had higher levels of BAC, then each could have experienced a blackout.<sup>223</sup> Yet, under current law, John cannot introduce his intoxicated mental state to rebut the presumption that he consciously disregarded the risk of sexual assault, while Jane can state that her intoxication rendered her incapable of consent.<sup>224</sup>

Adopting the proposed changes would align science with law.<sup>225</sup> Studies show that at five drinks, John is mentally impaired,<sup>226</sup> but the law states that he was consciously aware regardless of that evidence.<sup>227</sup> While the ALI has not resolved the issues concerning the level of intoxication required for both parties, the proposed draft focuses on two inquiries: (1) "whether the degree of intoxication was so extreme as to effectively preclude the expression of unwillingness"<sup>228</sup> on the part of the victim; and (2) whether the actor knew (or recklessly disregarded) that the other party was intoxicated to that degree.<sup>229</sup> Both inquiries permit either party to introduce extrinsic evidence of intoxication.<sup>230</sup> The proposed changes would allow John to argue the physical and physiological effects of his level of intoxication in order to disprove the *mens rea* by allowing evidence relevant to his recklessness, as is allowed for purpose and knowledge.<sup>231</sup> Consciousness could then be altered through intoxication in the eyes of the law as it is altered through intoxication in the eyes of science.

### 3. Elimination of Gender-Biased Protection

As mentioned in Part II.C.,<sup>232</sup> the tentative draft retains the protection for voluntarily intoxicated victims.<sup>233</sup> The most basic reason for this is that each

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221. *Id.*

222. CTRS. FOR DISEASE CONTROL & PREVENTION, IMPAIRED DRIVING: GET THE FACTS, BAC EFFECTS, *supra* note 202.

223. B.R.A.D. 21, *supra* note 208.

224. MODEL PENAL CODE § 2.08 (1985).

225. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, IMPAIRED DRIVING: GET THE FACTS, BAC EFFECTS, *supra* note 203 (science indicates that someone like John was mentally impaired).

226. CTRS. FOR DISEASE CONTROL & PREVENTION, IMPAIRED DRIVING: GET THE FACTS, BAC EFFECTS, *supra* note 202.

227. MODEL PENAL CODE § 2.08(2) (1985).

228. MODEL PENAL CODE § 213.3 cmt. at 91 (AM. LAW INST., Preliminary Draft No. 5 2015).

229. *Id.*

230. MODEL PENAL CODE § 213.0(4) cmt. at 91 (AM. LAW INST., Preliminary Draft No. 9 2015).

231. MODEL PENAL CODE § 213.3 cmt. at 91 (AM. LAW INST., Preliminary Draft No. 5 2015).

232. *Supra* Part II.C.

individual has a right to autonomous choice, including whether to drink or to engage in sexual activity.<sup>234</sup> However, one idea in American culture is that if you allow yourself to drink to the point of blacking out or passing out, then you are “inviting inappropriate conduct upon yourself.”<sup>235</sup> This cultural idea has spread to juries, causing them to believe a voluntarily intoxicated victim was either partially or fully responsible for his or her sexual assault.<sup>236</sup>

The phenomenon of victim blaming may be explained through various stigma.<sup>237</sup> One stigma is that women who voluntarily consume alcohol are more sexually promiscuous.<sup>238</sup> Men then interpret their sexual promiscuity as consent to sexual activity.<sup>239</sup> The stigma may also be the result of a voluntarily intoxicated victim failing to conform to societal gender norms.<sup>240</sup> Alcohol intoxication is traditionally viewed as a male activity in which women should not participate.<sup>241</sup> If they do, they contradict the gender norm and are judged more severely than if men engage in the behavior.<sup>242</sup>

The stigmas surrounding women and voluntary intoxication show that women are susceptible to sexual assault in situations involving alcohol and why the law should provide full protection for victims like Jane.<sup>243</sup> According to current law, Jane has done nothing culpable by getting drunk.<sup>244</sup> Yet, if Jane simply engaged in voluntary intoxication, which the law says is not criminal, why should John be at fault for the very same conduct?

The simple answer is that he should not. If restricted to the facts of John and Jane's case, then there is no other theory of culpability other than John's choice to become intoxicated.<sup>245</sup> He did not have the requisite *mens rea* prior to the offense by getting Jane drunk in order to have sex with her, and he was not aware that his drinking would result in harmful sexual conduct.<sup>246</sup> Therefore, the only distinction between the victim and the accused is gender.

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233. MODEL PENAL CODE § 213.3 cmt. at 86 (AM. LAW INST., Preliminary Draft No. 5 2015).

234. *Id.* at 86.

235. Maggie Tennis, *Rape and the Intoxicated Victim*, HUFFINGTON POST, [http://www.huffingtonpost.com/the-brown-daily-herald/rape-and-the-intoxicated-victim\\_b\\_4989242.html](http://www.huffingtonpost.com/the-brown-daily-herald/rape-and-the-intoxicated-victim_b_4989242.html) (last visited Oct. 30, 2016).

236. Regina A. Schuller & Anne-Marie Wall, *The Effects of the Defendant and Complainant Intoxication on Mock Jurors' Judgments of Sexual Assault*, 22 PSYCHOL. WOMEN Q. 555, 568 (1998).

237. Clare Carlson, “*The Bitch Got Drunk and Did This to Herself: Proposed Evidentiary Reforms to Limit “Victim Blaming” and “Perpetrator Pardoning” in Rape by Intoxication Trials in California*,” 29 WIS. J. L. GENDER & SOC'Y 285, 300–01 (2014).

238. *Id.*

239. *Id.*

240. *Id.* at 301.

241. *Id.*

242. *Id.*

243. See generally *id.* at 300–01 (discussing the stigmas surrounding women who become voluntarily intoxicated).

244. MODEL PENAL CODE § 213.3(3) cmt. at 86 (AM. LAW INST., Preliminary Draft No. 52015).

245. *Supra* Part II.A.1 (discussing the current law in the MPC).

246. *Supra* Part I (discussing the John and Jane hypothetical).

Consider what happens if a man claims that a woman engaged in unwanted sexual behavior.<sup>247</sup> Although rape is the least reported of all violent crimes,<sup>248</sup> the claim that male victimization is uncommon is faulty.<sup>249</sup> The minimization of male victimization occurs because of underreporting and scant legal action concerning male victims.<sup>250</sup> The causes of underreporting include: the emphasis placed on female victimization, the notion that females are more vulnerable to sexual assault, the belief that men are unlikely victims that perpetuates an expectation of masculinity on men, and the portrayal of male victimization as harmless.<sup>251</sup> This preexisting male discourse creates obstacles for victimized males, including the notion that “real men” can protect themselves and aroused men want the sexual encounter.<sup>252</sup>

The discourse harms males victimized by both women and by men.<sup>253</sup> Additionally, victimized homosexual men are accused of “ask[ing] for it.”<sup>254</sup> The traditional paradigm that women are sexual victims and males are invincible downplays male victimization.<sup>255</sup> Perpetuating the concept of “masculinized dominance and feminized subordination” hinders understanding of sexual victimization of all people.<sup>256</sup> The fact is, despite underreporting, sexual assault occurs across both genders.<sup>257</sup>

Therefore, because sexual assault involving intoxication of both offenders is so prevalent and because sexual assault is gender-neutral, the law should reflect an unbiased treatment of offenders.<sup>258</sup> The proposed draft eliminates this disparate treatment by allowing both parties to introduce evidence of their intoxication, which permits the jury to analyze the actual mental processes of the parties to determine who is culpable.<sup>259</sup> Thus, instead of the jury convicting based on traditional sexual biases, the focus in mutually intoxicated sexual assaults is whether the offender had a culpable mindset despite the intoxication, a fact which is influenced by science not prejudice.<sup>260</sup>

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247. Lara Stemple & Ilan H. Myer, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 6 AM. J. OF PUB. HEALTH 19, 21 (2014).

248. JENNIFER L. TRUMAN, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2014, U.S. DEP'T. OF JUST. 7 (Aug. 2015).

249. Stemple & Myer, *supra* note 247.

250. *Id.*

251. *Id.*

252. *Id.* at 20.

253. *Id.* at 21.

254. *Id.* at 20.

255. *Id.* at 21.

256. *Id.* at 25.

257. See Stemple & Myer, *supra* note 247, at 22 (charting statistics of sexual victimization prevalence among male victims and female victims).

258. *Id.*

259. MODEL PENAL CODE § 213.5 cmt. at 190 (AM. LAW INST., Preliminary Draft No. 5 2015).

260. *Id.*

Consequently, John would have the opportunity to present evidence that he was unaware of the risk of getting drunk and unaware that the risk of getting drunk would result in harmful sexual activity.<sup>261</sup> Or if the facts were reversed, and John claimed Jane sexually assaulted him, Jane would have the opportunity to present evidence that she was unaware of the risk of getting drunk and unaware that the risk of getting drunk would result in harmful sexual activity.<sup>262</sup> If the jury believes the evidence, then either party could be acquitted of the criminal charges.<sup>263</sup>

#### 4. *Remaining Questions*

With the promise of advancements, the proposed draft raises many questions. First, why should a sexual aggressor who deliberately becomes drunk in order to claim lack of awareness be able to use intoxication as a defense? While this is a legitimate concern, assume that the prosecutor discovered that John routinely gets drunk with his fraternity friends in order to sexually assault females like Jane. Even if John were calculated enough to do so, a prosecutor would likely be able to contradict his lack of awareness. If the law allows John to make the claim once that he lacked awareness of the risk that drinking alcohol would lead to sexual aggression, then he would have, at most, one opportunity to claim that he was unaware of the effects of alcohol.

This leads to a second question: why should the offender be able to use the defense even once? There is no debate that allowing even one sexual assault to go unprosecuted is unacceptable. While there is a risk that a sexual aggressor could use the defense once, the decision remains in hands of the jury to determine whether the evidence surrounding the offender's intoxication supports the defense.<sup>264</sup> The proposed change only allows the evidence of intoxication to be introduced and considered; it does not create a presumptive conclusion that the offender was unaware of the risk in becoming intoxicated simply because he claims it.<sup>265</sup> Consequently, the sexual assault will still be prosecuted if the evidence does not support the offender's claim.<sup>266</sup>

Another concern mentioned in the 1962 MPC commentary is how a prosecutor can secure a conviction.<sup>267</sup> In a case involving the *mens rea* of purpose or knowledge, a prosecutor often has evidence to rebut a defendant's claim that

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261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *See generally id.* (discussing how the jury makes the ultimate decision of whether to believe the accused's self-serving assertion that he was unaware).

266. *Id.*

267. MODEL PENAL CODE, § 2.08 cmt. at 352–53 (1985).

he did not have purpose or knowledge.<sup>268</sup> For example, if the state must prove that an offender knowingly sold stolen property and the offender claims he did not know the goods were stolen, the prosecutor may be able to rebut the offender's claim with evidence that the offender paid far less than market value for the property.<sup>269</sup>

Similarly, in the intoxication context, a prosecutor may be able to rebut what the accused claims his mental state was at the time of the crime with witnesses who observed his behavior. Witnesses could support evidence that the accused did not seem particularly intoxicated or that he spoke clearly after the crime.<sup>270</sup>

While some of the concerns surrounding the proposed draft can be answered and alleviated, other moral questions remain. The 1962 MPC commentary stated that becoming severely intoxicated has little, if no, social value.<sup>271</sup> By changing the law of intoxication, is the proposed draft in essence stating that becoming severely intoxicated now has social value? In addition, by legally acknowledging that mutually intoxicated sexual acts occur so frequently, is the proposed draft condoning this behavior? Are intoxicated offenders who commit sexual assault gaining more leniency than they should be? Lastly, should the law adapt to changing social attitudes towards intoxication in the same way it adapted to same-sex marriage and other social movements?

The response to all of those questions is simple: the goal of the proposed draft and the potential new law is to reserve the criminal law for culpable conduct.<sup>272</sup> If that culpable conduct includes copious alcohol consumption and sexual activity that occurs between mutually intoxicated parties, then the criminal law should respond to those activities.<sup>273</sup> As far as leniency for intoxicated offenders who commit sexual assault, the choice to convict or acquit those offenders remains in the hands of the jury.<sup>274</sup> The proposed draft changes what evidence is permitted, but not the burden of proof required for conviction.<sup>275</sup>

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268. *Id.*

269. See Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. OF CRIMINAL LAW 487, 490 (2012).

270. See MODEL PENAL CODE § 213.3 general cmt. fn. 239 at 85 (AM. LAW INST., Preliminary Draft No. 5 2015) (describing a case where third-party witnesses were able to testify that the victim had been slurring her words due to intoxication prior to the incident; similarly, third-party witnesses could testify as to the intoxicated state of the accused under those circumstances).

271. MODEL PENAL CODE, § 2.08 cmt. at 359 (1985).

272. See MODEL PENAL CODE, Introduction to Preliminary Draft No. 5 (2015) (describing how critics have difficulty adjusting the scope of the criminal law to adequately punish those accused of sexual assault offenses).

273. MODEL PENAL CODE, § 213.3 cmt. at 90 (1985).

274. See MODEL PENAL CODE § 213.4 general cmt. at 119 (AM. LAW INST., Preliminary Draft No. 5 2015) (explaining the reason for legal prophylaxis in sexual assault cases is to safeguard against unreliability of jury decisions).

275. *Supra* Part III.A.1 (discussing the proposed changes to the MPC).

Therefore, the decision to be lenient or not remains with the same people and within the same parameters.<sup>276</sup>

One pivotal legal question lingers under the current proposed draft: how intoxicated must an offender be to negate his *mens rea*? Can John negate his *mens rea* with a 0.10 blood alcohol concentration after five drinks? Again, the answer lies in his culpability. If his intoxicated conduct was culpable, then he may not negate his *mens rea*; but if his intoxicated conduct was not culpable, then he may negate his *mens rea*.<sup>277</sup> On balance, the possible results of the proposed changes are more optimistic than problematic.<sup>278</sup>

#### IV. CONCLUSION

The proposed changes to the MPC aim to navigate the law away from the rigid confines of the traditional approach to intoxication and calibrate it to address the contemporary issues involving intoxication across the United States.<sup>279</sup> The proposed draft has the potential to: restore the uniformity of culpability proportionate to liability in nearly all provisions of the MPC; place mutually intoxicated parties on an even keel when a sexual assault is alleged; and permit science and behavior to inform whether an individual was aware and consciously disregarded a risk in getting drunk and engaging in harmful sexual behavior.<sup>280</sup>

Only time and adopting these changes will definitively address the plethora of remaining moral and legal questions. Until then, thousands of other college students accused of assault, like John, are unable to produce evidence of their intoxication in court, despite the fact that the alleged victim was equally intoxicated and heavy drinking is “a normal part of college life.”<sup>281</sup>

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276. See MODEL PENAL CODE § 213.4 general cmt. at 119 (AM. LAW INST., Preliminary Draft No. 5 2015) (explaining the reason for legal prophylaxis in sexual assault cases is to safeguard against unreliability of jury decisions).

277. *Supra* Part III.A.1 (discussing how the proposed change will remedy the disproportion between liability and culpability).

278. *Supra* Part III.A.2–A.3 (discussing why the proposed changes are needed due to the prevalence of binge-drinking and how the proposed changes could remedy gender-bias).

279. MODEL PENAL CODE § 213.5 cmt. at 188 (AM. LAW INST., Preliminary Draft No. 5 2015).

280. *Supra* Part III.A.2.b (discussing how the proposed changes will align science and the law in the area of rape and intoxication).

281. Stewart, *supra* note 155, at 2.