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A Perpetrator's Paradise: Outdated Sexual Assault Statutes Provide Minimal Protection to Survivors who are Victimized in Common Sexual Assault Scenarios

Becky Farley

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COMMENT

A Perpetrator’s Paradise: Outdated Sexual Assault Statutes Provide Minimal Protection to Survivors who are Victimized in Common Sexual Assault Scenarios

*Becky Farley**

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* University of Wyoming College of Law, J.D., 2018.

I. INTRODUCTION

—“My daughter died in a car crash.”

—“Well, that’s what she gets for not taking the bus.”

—“Hey, that guy stole my wallet.”

—“Are you sure you didn’t just give him your wallet, and now you regret it?”¹

These types of questions and statements seem peculiar in the context of other crimes. However, when reporting a sexual assault, survivors often face these types of victim-blaming questions and insensitivity.² Victim blaming, fear of the criminal justice system and apprehension that law enforcement will not adequately respond are a few reasons why survivors of sexual assault rarely report their attacks.³ A 2005 report noted only 35.1% of survivors reported sexual assaults to law enforcement, and a 2014 report detailed that only 33.6% of survivors reported sexual assaults.⁴ In addition to low reporting rates, it is difficult to prosecute and obtain convictions for sexual assault.⁵

¹ *Start by Believing*, END VIOLENCE AGAINST WOMEN INTERNATIONAL, <https://rvap.uiowa.edu/assets/Uploads/Start-by-Believing-Brochure-PDF> (last visited Aug. 21, 2016); Nina Bahadur, *If People Talked About Stolen Wallets The Way People Talk About Rape*, THE HUFFINGTON POST (Nov. 11, 2014, 10:35 AM), http://www.huffingtonpost.com/2014/11/20/caitlin-kelly-if-rape-were-a-wallet_n_6191588.html.

² Rebecca Campbell, Sharon M. Wasco, Courtney E. Aherns, Tracy Sefl & Holly E. Barnes, *Preventing the “Second Rape” Rape Survivors’ Experiences with Community Service Providers*, 16 J. OF INTERPERSONAL VIOLENCE 1239, 1240 (2001).

³ MICHAEL PLANTY ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 240655, VICTIMS OF SEXUAL VIOLENCE 1994–2010, at 7 (2013).

⁴ JENNIFER L. TRUMAN & LYNN LANGTON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 248973, CRIMINAL VICTIMIZATION 2014, at 7 (2015). Due to the low reporting rates, it is difficult to ascertain an accurate statistic of the prevalence of sexual assaults; particularly in relation to male survivors.

⁵ Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault*, 41 AKRON L. REV. 957, 960 (2008) (discussing that defense attorneys are aware the convictions by juries are rare in sexual assault cases); e.g., Wendy Larcombe, *Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law*, 19 FEMINIST LEGAL STUDIES 27, 28 (2011) (discussing Australia’s low prosecution rates and low conviction rates for sexual assaults compared to other crimes); see Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18(2) VIOLENCE AGAINST WOMEN 145, 155 (2012). The Lonsway and Archambault article discusses that even though there is data suggesting that 54% of sexual assault charges lead to a felony conviction (but not necessarily a sexual assault conviction), the accurate data can only be found in the individual agencies. *Id.* This is because the currently available data is not based on all the sexual assault reports law enforcement receives, but rather, the data is tracked once a charge has been filed in court. *Id.* However, most of the police and prosecutorial discretion has already occurred prior to charges being filed. *Id.* Police officers can decide not to arrest or refer charges to the prosecuting authority. *See id.* Even if the case is referred, the prosecutor can still decide not to charge the case. *See* Zachary S. Price, *Enforcement Discretion and Duty*, 67.3 VANDERBILT L. REV. 671, 682 (2014).

National social scientific research suggests that out of every 100 forcible rapes that occur, only 0.2 to 2.9 will result in a felony conviction.⁶ There are many reasons why sexual assaults are difficult to prosecute, including, delayed reporting, the influence of rape myths, and a lack of corroborating physical evidence.⁷ Corroborating evidence of the actual assault is typically lacking because there are generally only two witnesses to the crime,⁸ the perpetrator and the survivor, who often have conflicting accounts.⁹ Further, when alcohol is involved, the survivor's memory of the assault may be impaired, and jurors often struggle with the survivor's seemingly counterintuitive behavior.¹⁰ Any of these factors may frustrate prosecution efforts. If approximately one out of six women and one out of thirty-three men will be the victim of a completed or attempted sexual assault during their life, having a conviction rate of approximately 7% means a significant number of perpetrators are free to continue victimizing society.¹¹

In response to the extreme disparity between the number of sexual assaults that occur nationwide and the small percentage of perpetrators convicted of felonies, this comment argues that current statutory language is insufficient to adequately address sexual assaults in Wyoming.¹² Further, the Wyoming Legislature should amend Wyoming Statutes §§ 6-2-302 and 6-2-303 to add language to encompass common sexual assault scenarios, such as non-consent and alcohol-facilitated.¹³ In the first section, this comment will provide an explanation of terminology

⁶ Lonsway et al., *supra* note 5, at 157. After looking at various sources, Lonsway and Archambault summarize the data surrounding forcible rapes in the criminal justice system. *See id.* at 156–57. Out of 100 forcible rapes that occur, “approximately 5 to 20 will be reported, 0.4 to 5.4 will be prosecuted, and 0.2 to 5.2 will result in a conviction. Only 0.2 to 2.9 will yield a felony conviction.” *Id.* at 157. While arriving at a solid statistic is difficult, “it is clear that only a very small minority of sexual assault cases end in a prosecution, conviction, and a sentence of incarceration.” *Id.*

⁷ Jennifer Temkin, *Prosecuting and Defending Rape: Perspectives From the Bar*, 27 J. OF L. & SOC'Y 219, 222, 224–25 (2000).

⁸ Teresa P. Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault*, OFFICE ON VIOLENCE AGAINST WOMEN 1, 16 (2007).

⁹ *The Defense of Consent in Criminal Sexual Conduct Cases Fact Sheet*, SEXUAL VIOLENCE JUSTICE INSTITUTE, MINNESOTA COALITION AGAINST SEXUAL ASSAULT (2012).

¹⁰ Scalzo, *supra* note 8, at 3; *See* Temkin, *supra* note 7, at 225. Jurors can hold beliefs about how they think they would act if they were sexually assaulted, such as fighting off the perpetrator. Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, 2007 NAT'L DISTRICT ATT'YS ASS'N 8. However, in reality many survivors act in different ways that don't conform to the beliefs of jurors, and thus seem counterintuitive. *See* Scalzo, *supra* note 8, at 29.

¹¹ PATRICIA TJADEN & NANCY THOENNES, PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, NAT'L INSTITUTE OF JUSTICE & CENTERS FOR DISEASE CONTROL, at 3 (1998).

¹² *See infra* notes 154–223 and accompanying text.

¹³ *See infra* notes 154–223, Appendix A; WYO. STAT. ANN. §§ 6-2-302 & 6-2-303 (2017).

utilized throughout this comment.¹⁴ Next, this comment will provide an overview of the national problem of sexual assault and focus on explaining common sexual assault scenarios.¹⁵ Specifically, this comment will address non-consensual and alcohol-facilitated sexual assaults.¹⁶ Next, this comment will offer insight in to how Wyoming and other states construct their statutes to address non-consensual and alcohol-facilitated sexual assaults.¹⁷ In the next section, the focus will be on Wyoming's ability to address sexual assault issues and analyze Wyoming's sexual assault statutes specifically.¹⁸ Finally, this comment will argue that Wyoming should amend the current statutory language in Wyoming Statutes §§ 6-2-302 and 6-2-303 to address holes in those statutes, in order to better protect survivors from common sexual assault.¹⁹ Appendix A of the comment will provide particular statutory drafting suggestions.²⁰

II. BACKGROUND

Varying terminology when discussing a concept or topic tends to create ambiguity and misunderstanding.²¹ Therefore, in acknowledging the importance of precise language, it is important to understand the terminology that will be used and the limits of this comment's content.²² Once comprehended, the semantics surrounding sexual assault can aid in the better understanding of the topic in general and the suggested changes to Wyoming's statutory language.

¹⁴ See *infra* notes 23–30 and accompanying text.

¹⁵ See *infra* notes 31–98 and accompanying text.

¹⁶ See *infra* notes 31–98 and accompanying text.

¹⁷ See *infra* notes 99–152 and accompanying text.

¹⁸ See *infra* notes 153–183 and accompanying text.

¹⁹ See *infra* notes 153–223 and accompanying text; WYO. STAT. ANN. §§ 6-2-302 & 6-2-303.

²⁰ See discussion *infra* Appendix A.

²¹ Frans Møller Christensen, Ole Andersen, Nijis Jan Duijm & Poul Harremoës, *Risk Terminology – a platform for common understanding and better communication*, 103 J. HAZARDOUS MATERIALS 181, 182 (2003).

²² See *infra* notes 23–30 and accompanying text. In acknowledging differences between prosecuting sexual assaults involving adults and those concerning minors, this comment is not discussing Wyoming Statutes Sections 6-2-314 to -317, which target offenses involving sexual abuse of minors. WYO. STAT. ANN. §§ 6-2-314 to -317 (2017). The Wyoming Supreme Court has repeatedly held that the defense of consent is not available to a defendant charged with an offense involving sexual abuse of a minor. *Marfil v. State*, 2016 WY 12, ¶ 23, 366 P.3d 969, 975 (Wyo. 2016) (*citing* *Phillips v. State*, 2007 WY 25, ¶ 16, 151 P.3d 1131, 1136 (Wyo. 2007)). In contrast, adult sexual assault charges often turn into a “he said, she said” situation with consent being the crux of the case. SEXUAL VIOLENCE JUSTICE INSTITUTE, MINNESOTA COALITION AGAINST SEXUAL ASSAULT, *supra* note 9. Ultimately, sexual offenses involving minors require certain age differences or relationships between the victim and perpetrator and proof that the sexual contact or intrusion occurred. WYO. STAT. ANN. §§ 6-2-314 to -317.

A. Explanation of the Scope of and Terminology Used in this Comment

Across the United States, each state uses various terms when discussing unwanted sexual contact.²³ This comment uses terminology consistent with the language in the current Wyoming Statutes. “Sexual assault” refers to nonconsensual sexual contact or sexual intrusion.²⁴ Wyoming Statute § 6-1-104 categorizes sexual assault as a violent felony.²⁵ As used in Wyoming Statutes pertaining to sexual assault, “sexual intrusion” is defined under § 6-2-301 and includes:

[a]ny intrusion, however slight, by any object or any part of a person’s body, except the mouth, tongue or penis, into the genital or anal opening of another person’s body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification or abuse; or [s]exual intercourse, cunnilingus, fellatio, analingus or anal intercourse with or without emission.²⁶

Wyoming Statute § 6-2-301 defines “sexual contact” as “touching, with the intention of sexual arousal, gratification, or abuse, of the victim’s intimate parts by the actor, or of the actor’s intimate parts by the victim, or of the clothing covering the immediate area of the victim’s or actor’s intimate parts.”²⁷ Therefore, unless otherwise noted, when this comment uses any of the above stated terms, the term will refer to the definition provided in the Wyoming Statutes.

This comment also utilizes the term survivor to refer to someone who has experienced a completed sexual assault or an attempted sexual assault. Survivor has a connotation of overcoming a traumatic event and reclaiming one’s life.²⁸ Using the term victim defines the person “by the harm that has come to them,” whereas a survivor can regain power and agency in their life after the victimization.²⁹ Additionally, this comment uses the term perpetrator when referencing the actor who commits or attempts to commit a sexual assault, rather than use the term

²³ *Key Terms and Phrase*, RAPE, ABUSE, & INCEST NATIONAL NETWORK, <https://www.rainn.org/articles/key-terms-and-phrases> (last visited Oct. 23, 2016).

²⁴ U.S. DEP’T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN (last visited Oct. 23, 2016), <https://www.justice.gov/ovw/sexual-assault>.

²⁵ WYO. STAT. ANN. § 6-1-104(a)(xii) (2017).

²⁶ WYO. STAT. ANN. § 6-2-301(a)(vii) (2017).

²⁷ *Id.* § 6-2-301(a)(vi).

²⁸ WE END VIOLENCE, *The Language We Use: Victim and Survivor* (last visited Oct. 23, 2016), <http://www.weendviolence.com/blog/2013/06/04/the-language-we-use-victim-and-survivor/>.

²⁹ Sarah Wood, *Victim vs. Survivor, And Why It Matters* (last visited Sept. 23, 2016), <http://sarahwoodtherapy.com/victim-vs-survivor-and-why-it-matters/>.

defendant, as a majority of the people who commit sexual assaults do not go through the criminal justice system.³⁰

B. Common Sexual Assault Scenarios

Similar to national statistics, Wyoming seems to have low arrest rates of reported sexual assault cases.³¹ The Wyoming Division of Criminal Investigation's Uniform Crime Report, which the Division released in 2014, evidences these low arrest rates.³² Specifically, the report categorizes crimes and provides information regarding the number of reported offenses and the number of offenses that were cleared in each category.³³ For example, in Wyoming in 2014, there were twelve reported murders and nine of those murders were cleared, making the clearance rate for murder 75%.³⁴ For aggravated assault, the clearance rate was 74.9%.³⁵ However, the clearance rate for forcible rape was only 33.5%.³⁶ Wyoming categorizes forcible rape as a violent felony along with murder and aggravated assault.³⁷ Even though forcible rape is a violent felony, Wyoming's clearance rate for forcible rape was closer to the clearance rate for property crimes, which is substantially lower than the clearance rate for other violent felonies.³⁸

The Uniform Crime Report also breaks down clearance rates by county.³⁹ For example, in Albany County, there were eleven forcible rapes reported to law enforcement in 2014.⁴⁰ Of those eleven reported forcible rapes, only two of those resulted in the arrest of the perpetrator.⁴¹ That means only 18% of the forcible rapes reported to Albany County law enforcement agencies that year resulted in an

³⁰ FEDERAL BUREAU OF INVESTIGATION, NATIONAL INCIDENT-BASED REPORTING SYSTEM, 2012-2014 (2015).

³¹ See *infra* text accompanying notes 34–42.

³² DIVISION OF CRIM. INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN WYOMING (2014), <http://wyomingdci.wyo.gov/dci-criminal-justice-information-systems-section/uniform-crime-reporting>.

³³ *Id.* at 7. This report considers an offense “cleared when 1) a law enforcement agency has identified the offender, 2) there is sufficient evidence to charge the offender, and 3) the offender is actually taken into custody.” *Id.* at 13.

³⁴ *Id.* at 14.

³⁵ *Id.*

³⁶ *Id.* This report defines forcible rape as “[p]enetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” *Id.* at 8.

³⁷ WYO. STAT. ANN. § 6-1-104(a)(xii) (2017).

³⁸ DIVISION OF CRIM. INVESTIGATION, *supra* note 32, at 14. The clearance rate for all property crimes in 2014 was reported to be approximately 28%. *Id.*

³⁹ *Id.* at 47–103.

⁴⁰ *Id.* at 47.

⁴¹ *Id.*

arrest.⁴² The Uniform Crime Report does not account for the percentage of arrests that result in actual prosecution, let alone conviction rates.⁴³ Even if a survivor reports his or her assault to law enforcement, in Wyoming, it is ultimately at the discretion of the prosecutor to charge the perpetrator.⁴⁴

Even though sexual assaults are underreported, researchers have still been able to notice some commonalities among the perpetration of the crimes reported.⁴⁵ For example, contrary to common societal beliefs, sexual assault is not a crime of passion or a man's inability to curb his sexual desire.⁴⁶ Instead, sexual assault generally, is a crime of control, power, and violence.⁴⁷ Further, males reportedly perpetrate over 90% of sexual assaults.⁴⁸ Women are also more likely than men to be sexually assaulted, and it is estimated that approximately 16% of women will experience an attempted or completed rape in their lifetime.⁴⁹ Individuals between the ages of twelve and thirty are more likely to be sexually assaulted than any other age group.⁵⁰ These typical characteristics of the general crime also permeate across different common sexual assault scenarios, such as alcohol-facilitated and non-consensual sexual assaults.

1. *Alcohol-Facilitated Sexual Assaults Have Inherent Difficulties to Successful Prosecutions*

Since college-aged females in the presence of alcohol are the group of people most vulnerable to experiencing an attempted or completed sexual assault,

⁴² *Id.* at 47–103. Other counties had similar results. For example, Campbell County had approximately 15% of the reported forcible rapes end in an arrest. *Id.* at 53. Sweetwater County arrested only approximately 14% of the 36 reported forcible rapes in 2014. *Id.* at 94. However, Natrona County arrested 53% of the perpetrators of reported forcible rapes. *Id.* at 79.

⁴³ *See id.* at 7.

⁴⁴ *Hirsch v. State*, 2006 WY 66, ¶ 11, 135 P.3d 586, 591 (Wyo. 2006) (*quoting* *DeLeon v. State*, 896 P.2d 764, 768 (Wyo. 1995) (providing that “[t]he prosecutor is vested with the exclusive power to determine who to charge with a crime and with what crime to charge them.”)).

⁴⁵ *See infra* text accompanying notes 46–50.

⁴⁶ Nina Burrowes, *Responding to the challenge of Rape Myths in court: A guide for prosecutors*, NB RESEARCH LONDON 6 (2013).

⁴⁷ *Id.*

⁴⁸ U.S. DEP'T OF JUSTICE, SEX OFFENSES REPORTED VIA NIBRS IN 2013, at 1 (2015); LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ-163392, SEX OFFENSES AND OFFENDERS, at 21 (1997).

⁴⁹ NAT'L INSTITUTE OF JUSTICE & CENTERS FOR DISEASE CONTROL, *supra* note 11, at 13. As used in this particular study, rape was defined as “an event that occurred without the victim's consent, that involved the use or threat of force to penetrate the victim's vagina or anus by penis, tongue, fingers, or object, or the victim's mouth by penis. The definition included both attempted and completed rape.” *Id.*

⁵⁰ GREENFELD, *supra* note 48, at 11; NAT'L INSTITUTE OF JUSTICE, NIJ Grant No. 2004-WGBX-0010, THE CAMPUS SEXUAL ASSAULT STUDY, at 1–2 (2007).

college campuses provide numerous opportunities for this kind of behavior.⁵¹ A 2002 study determined that approximately 69.6% of the full-time college-aged students surveyed consumed at least one alcoholic beverage in the previous thirty-days.⁵² Further, the study focused on heavy drinking, which was defined as having five or more alcoholic drinks in a row, and found that 40% of the college students reported heavy drinking on at least one occasion in the prior two weeks.⁵³ It is estimated that approximately half of all sexual assaults involve alcohol consumption by either the victim or the perpetrator.⁵⁴ As mentioned, alcohol consumption on college campuses is common, and often excessive.⁵⁵ In addition to the presence of alcohol, approximately 90% of survivors, who were sexually assaulted on college campuses, reported knowing the perpetrator prior to the assault; approximately half who reported being assaulted, described the assault as occurring in a dating situation.⁵⁶ The most common locations for a sexual assault are a man or woman's residence, such as a dormitory or apartment, in the context of a date or party.⁵⁷

Even though alcohol-facilitated sexual assaults are common, the scenario presents difficult obstacles for successful prosecution.⁵⁸ Alcohol impairs cognitive functions, such as knowing, thinking, learning, and judging, and also psychomotor skills like voluntary movement.⁵⁹ Due to these impairments, intoxicated men and women are less likely, than their sober counterparts, to realize that the perpetrator is trying to commit a sexual assault.⁶⁰ Further, the perpetrator may not need to use as much physical force to overcome someone who is intoxicated, so there is less physical evidence, such as injuries or ripped clothing.⁶¹ Since survivors of sexual

⁵¹ See Antonia Abbey, *Alcohol-Related Sexual Assault: A Common Problem among College Students*, 14 J. OF STUD. ALCOHOL 118, 124 (2002).

⁵² Patrick O' Malley & Lloyd Johnston, *Epidemiology of Alcohol and Other Drug Use Among American College Students*, 14 J. OF STUD. ALCOHOL 23, 25 (2002).

⁵³ *Id.*

⁵⁴ Abbey, *supra* note 51, at 120 (Self-intoxication is only a defense for the defendant if the crime is a specific intent crime). An attempt to commit first-degree sexual assault is a specific intent crime, however, first-degree sexual assault (a completed act) is a general intent crime. *Compton v. State*, 931 P.2d 936, 941 (Wyo. 1997) (*citing* *Seeley v. State*, 715 P.2d 232, 239 (Wyo. 1986)). In Wyoming, self-induced intoxication would only be a defense for a defendant accused of attempted first-degree sexual assault. See WYO. STAT. ANN. § 6-1-202 (2017).

⁵⁵ Abbey, *supra* note 51, at 120.

⁵⁶ NAT'L INSTITUTE OF JUSTICE, NIJ Grant No. 2004-WGBX-0010, THE CAMPUS SEXUAL ASSAULT STUDY 2-3, 2-4 (2007).

⁵⁷ *Id.* at 1-2.

⁵⁸ Scalzo, *supra* note 8, at 1.

⁵⁹ *Id.* at 3.

⁶⁰ *Id.*

⁶¹ *Id.*

assault frequently delay in reporting, the report is often made once the survivor is no longer under the influence of alcohol, making it difficult to assess the survivor's level of intoxication at the time of the assault.⁶²

A common side effect of alcohol consumption is memory loss.⁶³ In addition to impairing other functions, "alcohol produces detectable memory impairments beginning after just one or two drinks."⁶⁴ As alcohol consumption increases, the effects of memory impairment also increase.⁶⁵ Memory impairment can increase to a condition commonly known as a blackout, where alcohol can completely disrupt the intoxicated person's ability to form new memories.⁶⁶ A blackout can be a difficult obstacle for a prosecutor to overcome as the survivor often does not remember the actual assault or the events leading up to the assault.⁶⁷ Even though alcohol-facilitated sexual assaults are relatively common, the very nature of the crime creates hurdles for law enforcement and prosecutors to obtain convictions.⁶⁸ A proper sexual assault statute should address the difficulties and common attributes of an alcohol-facilitated sexual assault in order to help facilitate the charging and successful prosecution of these situations.

2. *Societal Misconceptions Regarding Survivor Behavior Often Plague Non-Consensual Sexual Assaults*

A commonly contested aspect of sexual assault prosecutions is whether the sexual intercourse was consensual or not.⁶⁹ The survivor's credibility is often at issue in these cases.⁷⁰ As such, the jurors' assessment of the survivor's credibility highly influences the outcome of the case.⁷¹ Typical members of society are frequently unable to comprehend common survivor behavior and, instead, insert their own assumptions.⁷² The jury's ability to accurately judge a survivor's

⁶² *Id.* at 4.

⁶³ T. Heffernan, R. Clark, J. Bartholomew, J. Ling & S. Stephens, *Does binge drinking in teenagers affect their everyday prospective memory?*, 109 *DRUG & ALCOHOL DEPENDENCE* 73, 73 (2010).

⁶⁴ Aaron M. White, *What happened? Alcohol, Memory Blackouts, and the Brain*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM (2004).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Scalzo, *supra* note 8, at 7.

⁶⁸ *Id.* at 1.

⁶⁹ Burrowes, *supra* note 46, at 7.

⁷⁰ Telephone Interview with Angela C. Dougherty, Campbell County Attorney's Office (Mar. 22, 2017) [hereinafter *Interview*].

⁷¹ Burrowes, *supra* note 46, at 7; *Interview*, *supra* note 70.

⁷² Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, NAT'L DISTRICT ATT'YS ASS'N 8 (2007).

credibility is hindered if the jury cannot understand the survivor's behavior before and after the assault.⁷³ The jurors may regard strange behavior as evidence of the survivor's unreliability, regardless of how common the survivor's response is.⁷⁴

Numerous rape myths plague our society and affect the jury's perceptions of the survivor's credibility.⁷⁵ Rape myths are collective beliefs and misconceptions society holds about survivor behavior, perpetrators, and the crime of sexual assault in general.⁷⁶ These misconceptions often lead to victim blaming, a belief that the survivor is at fault for the assault,⁷⁷ and assist in the perpetuation of sexualized violence.⁷⁸ Jurors are representatives of the community and ultimately acquit or convict the perpetrator; therefore, it is important to acknowledge the prevalence of rape myths in society.⁷⁹

An example of a common rape myth is that society and the media often emphasize and sensationalize stranger danger sexual assaults, fueling the myth that most perpetrators are strangers.⁸⁰ However, multiple studies have shown that the vast majority of survivors (some as high as 90%) know their perpetrators.⁸¹ Additionally, many people inaccurately believe that if the survivor does not scream, fight or try to run away, he or she was not sexually assaulted.⁸² Therefore, society often believes a survivor should have physical injuries consistent with the use of a weapon or fighting off the attacker.⁸³ In reality, survivors may fear for their life and, therefore, do not resist the attacker, or survivors perceive the threat and

⁷³ Jennifer G. Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, NAT'L CENTER FOR PROSECUTION VIOLENCE AGAINST WOMEN 2 (2004).

⁷⁴ Long, *supra* note 72, at 17–18.

⁷⁵ Katie M. Edwards, Jessica A. Turchik, Christina M. Dardis, Nicole Reynolds & Christine A. Gidycz, *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761, 762 (2011).

⁷⁶ See Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 14–15 (2011).

⁷⁷ See *id.*

⁷⁸ Edwards et al., *supra* note 75, at 761.

⁷⁹ See Shen, *supra* note 76, at 7–8.

⁸⁰ *Id.* at 44.

⁸¹ Abbey, *supra* note 51, at 119 (finding that approximately 90% of campus sexual assault survivors knew the perpetrator and approximately half of the survivors reported some kind of dating situation with the perpetrator); Cf. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *National Crime Victimization Survey 2010–2014* (2015) (stating that approximately 72% of perpetrators are known to the victim prior to the assault and that only approximately 21% of sexual assaults are perpetrated by strangers).

⁸² Burrowes, *supra* note 46, at 6; Edwards et al., *supra* note 75, at 769.

⁸³ Burrowes, *supra* note 46, at 6.

simply freeze.⁸⁴ Also, many people assume that non-consensual intercourse leaves visible and physical signs on the survivor's body or genitals.⁸⁵ Yet, few survivors physically resist their perpetrators.⁸⁶ In 2013, the Department of Justice provided data showing that of the people who reported a sexual assault, 71.9% reported that they did not sustain physical injuries.⁸⁷ Further, of the injuries reported, 73.5% of survivors described them as minor.⁸⁸ Often people think that if they, themselves, were subjected to a sexual assault, they would fight and resist the attacker.⁸⁹ Therefore, the presence of a weapon may help reconcile the survivor's seemingly strange behavior.⁹⁰ However, only approximately 11% of the sexual assaults reported involved a weapon, such as a knife or a gun.⁹¹

Due to the existence of rape myths, a dichotomy exists between how people think survivors should act and the common ways that survivors actually behave before and after the assault.⁹² Therefore, jurors may have difficulty comprehending a common sexual assault scenario where the victim knows the perpetrator and simply freezes during the attack, and does not show any physical signs of trauma.⁹³ Ultimately, rape myths and society's misconceptions about sexual violence and survivor behavior affect the jury's perception of the crime and often lead to an acquittal.⁹⁴ Rape myths also influence jurors and sexual assault prosecutions in Wyoming.

Angela Dougherty, a prosecutor in the Campbell County Attorney's Office, categorized sexual assaults as some of the most difficult cases to prosecute.⁹⁵ Ms. Dougherty attributed some of the difficulty to the existence of rape myths and the

⁸⁴ *Id.* at 18–19. Many people know that when threatened the body may “fight or flight” but forget that “freeze” is another common response to trauma. *Id.* “[T]he brain's response to a life threatening situation can be to parlay[z]e the body – going into a rigid freeze or a relaxed flop. This primitive response is what our brains calculate to be our best hope for surviving the experience. At this point the victim is physically unable to resist their attacker.” *Id.* at 19.

⁸⁵ *Id.* at 6.

⁸⁶ *Id.* at 18.

⁸⁷ U.S. DEP'T OF JUSTICE, SEX OFFENSES REPORTED VIA NIBRS IN 2013, at 1 (2015).

⁸⁸ *Id.*

⁸⁹ See Zöe D. Peterson & Charlene L. Muehlenhard, *Was it Rape? The Function of Women's Rape Myth Acceptance and Definitions of Sex in Labeling Their Own Experiences*, 51 SEX ROLES 129, 131 (2004).

⁹⁰ See NAT'L CRIME VICTIM L. INST., VIOLENCE AGAINST WOMEN BULL., 2–3 (2014).

⁹¹ MICHAEL PLANTY ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 240655, FEMALE VICTIMS OF SEXUAL VIOLENCE 1994-2010, at 5 (2013).

⁹² See Patricia L. Fanflick, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?*, 2007 NAT'L DISTRICT ATT'YS ASS'N 18; see Peterson et al., *supra* note 89, at 130.

⁹³ See *supra* text accompanying notes 71–91.

⁹⁴ Long, *supra* note 72, at 8.

⁹⁵ *Interview*, *supra* note 70.

fact that the survivor's credibility is ultimately on trial.⁹⁶ While Ms. Dougherty did specify that prosecution success might vary across the different districts in Wyoming, she stressed the importance of training prosecutors to understand the complexities of sexual assault prosecution.⁹⁷ Prosecutors need to be able to educate jurors on the rape myths associated with these common sexual assault scenarios.⁹⁸ Another way to address the issue of rape myths influencing sexual assault prosecutions, in addition to education and training, is to draft criminal statutes that accurately encompass these sexual assaults scenarios and allow for common survivor responses.

C. *Explanation of Current Wyoming Sexual Assault Statutes*

The Wyoming Statutes that address sexual assault are located under the chapter titled *Offenses Against the Person*.⁹⁹ The offense is divided into different degrees: first-degree, second-degree, and third-degree sexual assaults.¹⁰⁰ The varying degrees carry different penalties upon conviction.¹⁰¹ Wyoming Statutes also provide for a possible misdemeanor conviction under Sexual Battery.¹⁰² The first, second, and third-degree sexual assault statutes describe distinctive prohibited sexual assault scenarios.¹⁰³

Wyoming Statute § 6-2-302 is the first-degree sexual assault provision, the sexual offense carrying the highest penalty.¹⁰⁴ First-degree sexual assault requires proof of either actual force, threat of force, or that the perpetrator knows or reasonably should know that the victim is incapable of consent.¹⁰⁵ Wyoming still requires a survivor to use force or resistance or have the lack of capacity to consent.¹⁰⁶ Currently, Wyoming does not have a provision or subsection addressing

⁹⁶ Interview, *supra* note 70.

⁹⁷ Interview, *supra* note 70.

⁹⁸ Interview, *supra* note 70.

⁹⁹ WYO. STAT. ANN. §§ 6-2-302 to -304 (2017).

¹⁰⁰ *Id.*

¹⁰¹ WYO. STAT. ANN. § 6-2-306(a)(i)–(iii) (2017).

¹⁰² WYO. STAT. ANN. § 6-3-313 (2017) (provides for a misdemeanor punishable by imprisonment for not more than one year).

¹⁰³ WYO. STAT. ANN. §§ 6-2-302 to -304. Wyoming Statute § 6-2-301 is a general provision that provides definitions of terms to be applied in Wyoming Statutes §§ 6-2-301 to -320. *See* WYO. STAT. ANN. § 6-2-301 (2017).

¹⁰⁴ WYO. STAT. ANN. § 6-2-302.

¹⁰⁵ *Id.*

¹⁰⁶ *See* WYO. STAT. ANN. §§ 6-2-302 to -304; *see also* John F. Decker & Peter G. Baroni, "No" Still Means "Yes": the Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1085–86 (2011).

non-consensual sexual assaults.¹⁰⁷ However, Wyoming Statutes do address alcohol and drug consumption in the context of sexual assaults.¹⁰⁸

Currently, the Wyoming Statutes offer two options for how prosecutors charge cases of alcohol-facilitated sexual assaults.¹⁰⁹ First, according to Wyoming Statute § 6-2-303:

[a]ny actor who inflicts sexual intrusion on a victim commits sexual assault in the second degree if . . . [t]he actor administers, or knows that someone else administered to the victim, without the prior knowledge or consent of the victim, any substance which substantially impairs the victim's power to appraise or control his conduct.¹¹⁰

This statute does cover situations in which the survivor is impaired by substances to the point that he or she cannot control conduct.¹¹¹ The provision covers situations involving involuntary intoxication.¹¹² Involuntary intoxication denotes occurrences when the recipient is given alcohol or drugs against his or her will or without knowledge.¹¹³

The second charging option available for prosecutors for alcohol-facilitated sexual assaults involves a “physically helpless” survivor.¹¹⁴ Pursuant to Wyoming Statute § 6-2-302, “[a]ny actor who inflicts sexual intrusion on a victim commits a sexual assault in the first degree if: . . . [t]he victim is physically helpless, and the actor knows or reasonably should know that the victim is physically helpless and that the victim has not consented”¹¹⁵ Statutorily defined, “physically helpless” means “unconscious, asleep or otherwise physically unable to communicate unwillingness to act.”¹¹⁶ While Wyoming statutes do offer some options for prosecuting sexual assault cases, other states have statutes that encompass a broader range of sexual assault scenarios.

¹⁰⁷ See WYO. STAT. ANN. §§ 6-2-302–304.

¹⁰⁸ See *infra* text accompanying notes 109–116.

¹⁰⁹ See WYO. STAT. ANN. § 6-2-303(a)(iii) (2017); see also WYO. STAT. ANN. § 6-2-302(a)(iii). The author is assuming there was no force, deceit or position of authority used to coerce the survivor into sexual intercourse.

¹¹⁰ WYO. STAT. ANN. § 6-2-303(a)(iii).

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ Peterson v. State, 586 P.2d 144, 153 n.9 (Wyo. 1978), *abrogated by* Crozier v. State, 723 P.2d 42 (Wyo. 1986).

¹¹⁴ See WYO. STAT. ANN. § 6-2-302(a)(iii).

¹¹⁵ *Id.*

¹¹⁶ WYO. STAT. ANN. § 6-2-301(a)(iii) (2017).

D. How Other States Handle Alcohol-Facilitated and Non-Consensual Sexual Assaults Statutorily

The common law definition of rape provided the basis for most modern sexual assault statutes.¹¹⁷ For example, under the common law in Wyoming, a man could be prosecuted for “having had carnal knowledge of a woman forcibly and against her will.”¹¹⁸ The language of the former Wyoming statute indicated only a male could perpetrate and only a female could be a victim of a sexual assault.¹¹⁹ Fortunately, many states updated their statutes to include gender-neutral terminology to allow prosecution of sexual assaults perpetrated on male survivors.¹²⁰

The language “against her will” was a force requirement that continues to underlie many current sexual assault statutes.¹²¹ Many states still require proof of force, or a threat to use force, or that the victim lacked the capacity to consent in order to qualify the act as a sexual assault.¹²² However, some states are amending their statutes to allow for the prosecution of “non-consent” sexual assaults.¹²³ A “true non-consent state” is a state that has at least one sexual offense where the perpetrator can be convicted by showing that the victim did not consent to the sexual act and does not require proof that the perpetrator threatened or used force.¹²⁴ Currently, only eleven states allow proof of non-consent without force for non-penetration or sexual contact offenses, while seventeen states offer the same option for penetration offenses.¹²⁵

For example, Tennessee Code § 39-13-503 provides:

[r]ape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances . . . (2) The sexual penetration is accomplished without the consent of the victim and the defendant *knows or has reason to know* at the time of the penetration that the victim did not consent.¹²⁶

¹¹⁷ Christina Tchen, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518, 1520 (1983).

¹¹⁸ Kennedy v. State, 470 P.2d 372, 376 (Wyo. 1970).

¹¹⁹ See *id.*

¹²⁰ Patricia Novotny, *Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance*, 1 SEATTLE J. FOR SOC. JUST. 743, 744 (2003).

¹²¹ See Tchen, *supra* note 117, at 1518; e.g., Decker et al., *supra* note 106, at 1083.

¹²² Decker & Baroni, *supra* note 106, at 1083; see e.g., ARK. CODE ANN. § 5-14-103 (2017).

¹²³ Decker & Baroni, *supra* note 106, at 1086.

¹²⁴ *Id.* at 1084.

¹²⁵ See MONT. CODE ANN. § 45-5-502 (2017); see e.g., NEB. REV. STAT. §§ 28-319, -320 (2017).

¹²⁶ TENN. CODE ANN. § 39-13-503 (2017) (emphasis added).

Tennessee's statute allows prosecution of a non-consensual sexual assault, but requires that the perpetrator knew or had reason to know that the victim did not consent.¹²⁷ In a trial, the focus remains on the survivor and how he or she communicated non-consent to the perpetrator and whether the perpetrator actually knew or should have known that he or she did not have consent.¹²⁸ Prosecution could use evidence such as the survivor's resistance, the perpetrator's use of a weapon, or the survivor sustaining injuries to support the theory of non-consent, but would not be required.¹²⁹ While Tennessee's construction still puts the focus on the survivor's actions, it does allow the prosecutor to charge a non-consensual sexual assault charge where the survivor does not physically resist and the perpetrator does not use or threaten to use force.¹³⁰

In New Hampshire,

a person is guilty of the felony of aggravated felonious sexual assault if such person engages in sexual penetration with another person under any of the following circumstances . . . When at the time of the sexual assault, the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act.¹³¹

While this statute still focuses on the actions, speech, and conduct of the survivor during the assault, it does not require proof that the perpetrator subjectively knew or objectively should have known that he or she did not have consent, unlike Tennessee's above-mentioned statute.¹³² Tennessee and New Hampshire both offer charging options for situations where the survivor did not give consent to the sexual act but was not forced or threatened.¹³³ In contrast, only two states, Illinois and Wisconsin, put the responsibility on the perpetrator to receive affirmative consent.¹³⁴ Affirmative consent has been defined as "an affirmative, conscious, and voluntary agreement to engage in sexual activity."¹³⁵

¹²⁷ *Id.*

¹²⁸ *See id.*; *See also* State v. Marsh, 2000 WL 555231, at *3 (Tenn. Crim. App. 2000) (stating that the victim told the defendant she did not want to have sex on prior occasions, that she refused to perform oral sex and told the defendant to stop kissing her all supported the jury's conclusion that the defendant knew or should have known that the victim did not consent to the sexual acts).

¹²⁹ *See* TENN. CODE ANN. §§ 39-13-501–503 (2017).

¹³⁰ *See* TENN. CODE ANN. § 39-13-503 (2017).

¹³¹ N.H. REV. STAT. § 632-A:2(m) (2017).

¹³² *Compare* N.H. REV. STAT. § 632-A:2(m), *with* TENN. CODE ANN. § 39-13-503.

¹³³ *See* TENN. CODE ANN. § 39-13-503; *See* N.H. REV. STAT. § 632-A:2(m).

¹³⁴ Decker & Baroni, *supra* note 106, at 1085.

¹³⁵ S.B. 967, 2013-2014 Leg. Sess. (Ca. 2004). California has changed the standards of consent at the collegiate level in Senate Bill No. 967. *See id.* While this does not affect the criminal statutes, affirmative consent is defined as "affirmative, conscious, and voluntary agreement to engage

Illinois statutes define “consent” as “a freely given agreement to the act of sexual penetration or sexual conduct in question.”¹³⁶ The statutes explain that submission of the victim and how the survivor was dressed at the time of the offense do not mean the act was consensual.¹³⁷ In Illinois, consent depends on what the defendant “knew or reasonably should have known” regarding the survivor’s capacity to consent or willingness to consent to the sexual act.¹³⁸

Wisconsin also utilizes affirmative consent and defines consent as “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.”¹³⁹ As defined in Wisconsin, consent “requires an affirmative indication of willingness” to participate and it is not considered consent when the survivor fails to say “no” or does not resist.¹⁴⁰ To supplement the definition of consent, the statute also provides a list of people who are presumed incapable of giving consent.¹⁴¹ This concept of affirmative consent provides prosecutors with an effective option to charge a perpetrator with sexual assault where the survivor freezes and therefore does not expressly deny consent and does not use physical resistance. A survivor’s ability to consent may also be impaired by the use or consumption of alcohol and drugs.¹⁴²

States also vary their treatment of the role intoxicating drugs and alcohol play in sexual assaults.¹⁴³ Some states require that the survivor’s intoxication must have been involuntary,¹⁴⁴ while other states have statutory provisions covering

in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.” S.B. 967 Ch. 748 § 1(a)(1), 2013-2014 Leg. Sess. (Ca. 2004).

¹³⁶ ILL. COMP. STAT. ANN. 5/11-1.70(a) (West 2017).

¹³⁷ *Id.*

¹³⁸ *People v. Roldan*, 2015 IL App (1st) 131962, ¶ 19, 42 N.E.3d 836, 840

¹³⁹ WIS. STAT. ANN. § 940.225(4) (West).

¹⁴⁰ *Wis. v. Long*, 2009 WI 36, ¶ 31, 317 Wis. 2d 92, 765 N.W.2d 557, 565.

¹⁴¹ WIS. STAT. ANN. § 940.225(4) (West).

¹⁴² See discussion *supra* Section II.B.1.

¹⁴³ See *infra* text accompanying notes 144–148.

¹⁴⁴ See *e.g.*, WYO. STAT. ANN. § 6-2-303(a)(iii) (2017); Currently, there are thirty-seven jurisdictions, including Guam, Puerto Rico, federal, and the military, that have statutes covering sexual assaults where the victim became intoxicated involuntarily. Jennifer Long, Charlene Whitman-Barr, & Viktoria Kristiansson, *Alcohol- and Drug-Facilitated Sexual Assault: A Survey of the Law*, AEQUITAS 3 (2016).

situations where the survivor voluntarily ingested the alcohol or drugs.¹⁴⁵ Other states address drug and alcohol-facilitated sexual assaults in a separate subsection that allows for prosecution when the survivor voluntarily consumed the alcohol or drugs.¹⁴⁶ While other states, such as Hawaii, address the effects of alcohol by including intoxicated individuals in the definition of people who lack the ability to give consent.¹⁴⁷ Some jurisdictions may instead require that the survivor is unconscious or unable to communicate consent.¹⁴⁸ Across the United States there are a variety of statutory provisions that aim to cover sexual assaults involving alcohol or drugs.¹⁴⁹

Historically, Wyoming, along with other states, modeled their sexual assault statutes after common law definitions.¹⁵⁰ Fortunately, the statutes have evolved over time to expand the sexual assault definition to address different common sexual assault situations.¹⁵¹ While these changes were welcomed and necessary, gaps still exist in the current statutory language that need to be addressed and updated to better protect survivors.¹⁵²

III. ANALYSIS

A. Wyoming Has Addressed Some Crucial Issues Regarding Sexual Assault

Wyoming has passed criminal statutes and offers a civil remedy that greatly benefits survivors.¹⁵³ For example, in 2007, the Wyoming Legislature enacted the current version of the statutes, which specifically prohibit actions constituting sexual assault of minors.¹⁵⁴ Further, Wyoming does offer charging options for

¹⁴⁵ See e.g., MONT. CODE ANN. § 45-2-101(41) (2017). In the context of voluntary intoxication, there are currently twenty-seven jurisdictions that “explicitly reference intoxication” in their sexual assaults statutes. Jennifer Long et al., *supra* note 144, at 2.

¹⁴⁶ See e.g., KAN. STAT. ANN. § 21-5503(a)(2) (2017) (providing that rape is “[k]nowingly engaging in sexual intercourse . . . when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender”).

¹⁴⁷ See e.g., HAW. REV. STAT. § 702-235(2) (2017) (providing that consent is not a defense if “[i]t is given by a person who by reason of . . . intoxication is manifestly unable or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct alleged”).

¹⁴⁸ See WYO. STAT. ANN. §§ 6-2-302(a)(iii) & 6-2-301(a)(iii) (2017).

¹⁴⁹ See *supra* text accompanying notes 143–148.

¹⁵⁰ See *supra* text accompanying note 117.

¹⁵¹ See *supra* text accompanying notes 117–120.

¹⁵² See discussion *infra* Section III.B–C.

¹⁵³ See *infra* text accompanying notes 154–164.

¹⁵⁴ WYO. STAT. ANN. §§ 6-2-314–317 (2017).

survivors who lack the capacity to consent, such as those who are unconscious or have a mental illness.¹⁵⁵ Departing from the common law definition, Wyoming has also statutorily mandated that marriage is not a defense to sexual assault.¹⁵⁶ If a perpetrator is convicted of a sexual assault crime in Wyoming, the statutes offer hefty penalties.¹⁵⁷ For example, a person convicted of a first-degree sexual assault may be imprisoned for a minimum of five years and up to a maximum of fifty years.¹⁵⁸ The Wyoming Statutes offer other protections for survivors besides simply criminal statutes.

Wyoming does not have a statute of limitations for criminal offenses, which would prevent the charging of a crime committed after the passing of a specific time period.¹⁵⁹ This means that whenever the survivor discloses the assault, the option to prosecute is technically available.¹⁶⁰ Also, Wyoming Statute § 6-2-319 protects minor sexual assault victims by restricting the disclosure of their names to the public.¹⁶¹ Finally, on July 1, 2015, Wyoming Governor Matt Mead signed a bill that made sexual assault protection orders available in Wyoming.¹⁶² When the Wyoming Legislature modified §§ 7-3-506 to 7-3-512, Wyoming became the twenty-ninth state to provide a civil remedy for survivors of sexual assault.¹⁶³ Despite these statutory modifications, which better serve survivors, there are still various problems that need to be addressed.¹⁶⁴

B. Current Gaps in the Wyoming Sexual Assault Statutes

Since enacting the current Wyoming Statutes addressing sexual assault in 1982,¹⁶⁵ Wyoming has not substantially progressed in the realm of providing better protections for survivors.¹⁶⁶ The statutes fail to address the common sexual assault scenarios addressed earlier, specifically, those involving alcohol and lack of consent.¹⁶⁷ For example, there are no provisions that adequately cover

¹⁵⁵ See WYO. STAT. ANN. § 6-2-302(a)(iii)–(iv) (2017).

¹⁵⁶ WYO. STAT. ANN. § 6-2-307 (2017).

¹⁵⁷ See WYO. STAT. ANN. § 6-2-306 (2017).

¹⁵⁸ *Id.* § 6-2-306 (a)(i).

¹⁵⁹ *Remmick v. State*, 2012 WY 57, ¶ 16, 275 P.3d 467, 470 (Wyo. 2012).

¹⁶⁰ *See id.*

¹⁶¹ WYO. STAT. ANN. § 6-2-319(b) (2017).

¹⁶² H.B. 0017, 2015 Leg., Reg. Sess. (Wyo. 2015); WYO. STAT. ANN. §§ 7-3-507–512 (2017).

¹⁶³ *Sexual Assault Protection Orders (CPOs) By State*, A.B.A. (2015), http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Charts/SA%20CPO%20Final%202015.authcheckdam.pdf

¹⁶⁴ *See infra* text accompanying notes 165–211.

¹⁶⁵ See WYO. STAT. ANN. §§ 6-2-301–304 (2017).

¹⁶⁶ *See id.*

¹⁶⁷ *See discussion supra* Section II.C & *infra* text accompanying notes 168–183.

sexual assault scenarios where the survivor freezes or just verbally resists.¹⁶⁸ Similarly, Wyoming still requires that the perpetrator used or threatened force or that the survivor resisted the assault.¹⁶⁹ Wyoming Statutes also do not provide a definition of consent, although case law and statutes indirectly address what constitutes consent by focusing on the categories of people who are incapable of giving consent.¹⁷⁰ Considering how common these situations are, Wyoming's prosecutors are lacking tools to hold a number of perpetrators accountable.¹⁷¹ The current Wyoming Statutes also lack provisions that effectively address alcohol-facilitated sexual assaults.¹⁷²

The Wyoming Statutes only offer two options for how prosecutors charge cases of alcohol-facilitated sexual assaults.¹⁷³ One charging option is for an assault that involves the survivor's involuntary intoxication.¹⁷⁴ As previously mentioned, alcohol is associated with approximately half of all sexual assaults.¹⁷⁵ Alcohol is recognized as a weapon perpetrators use to incapacitate the survivor and to discredit the survivor should he or she choose to report the assault to law enforcement.¹⁷⁶ The current Wyoming statutory language does not allow for successful prosecution of scenarios where the survivor voluntarily ingests alcohol or recreational drugs.¹⁷⁷ This lack of prosecution due to the victim's conduct further fosters victim-blaming and rape myths that focus on the victim's actions prior to the assault.¹⁷⁸

¹⁶⁸ See WYO. STAT. ANN. §§ 6-2-302–304. See *supra* text accompanying notes 104–107.

¹⁶⁹ See WYO. STAT. ANN. § 6-2-302(a)(i)–(ii).

¹⁷⁰ *Wilson v. State*, 655 P.2d 1246, 1258 (Wyo. 1982) (providing that “sexual intercourse is without consent when, for any reason, the victim is not in a position to exercise independent judgment about the matter.”) (citation omitted); WYO. STAT. ANN. § 6-2-308 (2017) (capacity to consent in Wyoming starts at 16 years of age); WYO. STAT. ANN. § 6-2-302(a)(iv) (mental incapacity and developmental disability); WYO. STAT. ANN. § 6-2-302(a)(iii) (physically helpless and victim has not consented).

¹⁷¹ See discussion *supra* Section II.B.1–2.

¹⁷² See *infra* text accompanying notes 173–183.

¹⁷³ See WYO. STAT. ANN. § 6-2-303(a)(iii) (2017); see also WYO. STAT. ANN. § 6-2-302(a)(iii). The author is assuming there was no force, deceit or position of authority used to coerce the survivor into sexual intercourse; See *supra* text accompanying notes 109–116.

¹⁷⁴ WYO. STAT. ANN. § 6-2-303(a)(iii); See *supra* text accompanying notes 111–113.

¹⁷⁵ *Abbey*, *supra* note 51, at 120; See discussion *supra* Section II.B.1.

¹⁷⁶ Corey Adwar, “Alcohol is a Weapon” – Inside the Military's New Tactic to Combat Sexual Assault, TASK AND PURPOSE, <http://taskandpurpose.com/alcohol-weapon-inside-militarys-new-tactic-combat-sexual-assault/> (last accessed Aug. 21, 2016).

¹⁷⁷ See Antonia Abbey, Tina Zawacki, Philip O. Buck, A. Monique Clinton & Pam McAuslan, *Alcohol and Sexual Assault*, 25 ALCOHOL RES. & HEALTH 43, 43 (2001).

¹⁷⁸ *Id.*

The other option, covers situations where the survivor is “physically helpless.”¹⁷⁹ This subsection could theoretically be used for someone impaired after voluntarily ingesting substances, such as alcohol or controlled substances.¹⁸⁰ However, this definition only protects someone who has passed out or becomes unconscious from alcohol consumption.¹⁸¹ It does not cover the typical scenario where alcohol has simply impaired the mobility and cognitive functions of the survivor.¹⁸² If the survivor can communicate that he or she does not consent to sexual acts, or physically resists in any manner, the assault should not be prosecuted under this subsection.¹⁸³ In order to resolve these issues with the statutory language, the Wyoming Legislature should revisit the statutes and add new provisions to encompass more sexual assault situations.

C. Suggested Amendments to Wyoming Statutes

The following section of this comment will offer suggested amendments and deletions to the current statutory language of Wyoming Statutes §§ 6-2-302 to 6-2-304.¹⁸⁴ The author’s suggested proposed legislation is located in Appendix A in its complete form.¹⁸⁵ The author fashioned these suggestions from concepts, statutory structure and language from statutes addressing non-consensual and alcohol-facilitated sexual assaults from states such as New Hampshire, Tennessee, and Nebraska.¹⁸⁶ To promote coherency in the statutes, the author attempted to utilize similar terminology to reflect the Wyoming Legislature’s style. While the ultimate decision about whether to charge and move forward with prosecution rests with the prosecuting attorney,¹⁸⁷ these suggested changes would allow Wyoming prosecutors more flexibility in prosecuting sexual assault cases.

1. WYO. STAT. ANN. § 6-2-302: Sexual Assault in the First Degree

The Legislature should amend Wyoming Statute § 6-2-302 to address situations where the perpetrator inflicts sexual intrusion on a victim without the

¹⁷⁹ See WYO. STAT. ANN. § 6-2-302(a)(iii) (2017); See *supra* text accompanying notes 114–116.

¹⁸⁰ See WYO. STAT. ANN. § 6-2-301(a)(iii) (2017).

¹⁸¹ See *id.*

¹⁸² See WYO. STAT. ANN. § 6-2-302(a)(iii).

¹⁸³ See WYO. STAT. ANN. § 6-2-301(a)(iii).

¹⁸⁴ See *infra* Appendix A; WYO. STAT. ANN. §§ 6-2-301 to -304 (2017).

¹⁸⁵ See *infra* Appendix A; WYO. STAT. ANN. §§ 6-2-301 to -304.

¹⁸⁶ See NEB. REV. STAT. §§ 28-318, -319(1) (2015); N.H. REV. STAT. § 632-A:2(m) (2017); TENN. CODE ANN. § 39-13-503 (2017); KAN. STAT. ANN. § 21-5503(a)(2) (2017); OHIO REV. CODE ANN. § 5924.120(B)(5) & (L)(2)(a) (West 2017).

¹⁸⁷ See *supra* text accompanying note 44.

consent of the victim.¹⁸⁸ Section 6-2-302 needs to cover several scenarios: when the victim does not consent, when force is used, when force is threatened, and when the victim cannot give consent. Currently, section 6-2-302 starts with “any actor who inflicts sexual intrusion on a victim commits a sexual assault in the first degree if”¹⁸⁹ Then, it provides different sexual assault scenarios that are prohibited in the subsections.¹⁹⁰

To better address non-consensual sexual assaults, the statutes need a subsection that states, “the actor is without the consent of the victim.”¹⁹¹ In order for this additional language to be effective, Wyoming ought to provide a statutory definition of “without consent.” The concept of “without consent” would require the incorporation of existing subsections that cover the perpetrator utilizing force and threats of force to obtain sexual intercourse along with two new subsections explaining that “without consent of the victim means: (i) the victim expressed a lack of consent through words, or (ii) the victim expressed a lack of consent through conduct”¹⁹² This non-consensual statutory statement, coupled with further statutory clarification, would allow a greater possibility for the prosecution of cases where the victim expresses non-consent to the perpetrator through words or conduct.

Additionally, a section explaining that “the victim need only resist, either verbally or physically, so as to make the victim’s lack of consent genuine and real so as to reasonably make known to the actor the victim’s refusal to consent” is necessary.¹⁹³ This addition would provide greater protection to the accused by requiring that the non-consent was reasonably made known. This would be instead of creating an affirmative consent definition, which puts the responsibility on the perpetrator to obtain verbal consent prior to initiating sexual contact.¹⁹⁴

The subsections in § 6-2-302 that apply to physically helpless victims and victims with mental deficiencies do not require any alterations.¹⁹⁵ Those

¹⁸⁸ WYO. STAT. ANN. § 6-2-302.

¹⁸⁹ *Id.* § 6-2-302(a).

¹⁹⁰ *Id.*

¹⁹¹ Compare WYO. STAT. ANN. § 6-2-302, with TENN. CODE ANN. § 39-13-503(a)(2).

¹⁹² Compare WYO. STAT. ANN. § 6-2-302, with NEB. REV. STAT. § 28-318 (2017).

¹⁹³ NEB. REV. STAT. § 28-318; See *State v. Pankey*, 276 N.W.2d 233, 235 (Neb. 1979). The language proposed is simply a suggestion in order to better address the gaps in protections for survivors of sexual assault.

¹⁹⁴ See *supra* text accompanying notes 134–141. Some critics of affirmative consent have argued that this framing of consent “shifts the burden of proof, stripping the defendant of his presumption of innocence.” Chandler Delamater, Comment, *What “Yes Means Yes” Means for New York Schools: The Positive Effects of New York’s Efforts to Combat Campus Sexual Assault through Affirmative Consent*, 79.2 ALBANY L. REV. 591, 611 (2015).

¹⁹⁵ WYO. STAT. ANN. § 6-2-302(iii)-(iv).

subsections are necessary to protect a group of survivors who are incapable of giving consent.¹⁹⁶ While the protections afforded to helpless victims and victims with mental deficiencies remain, the statutory language needs to also encompass those who cannot consent due to intoxication.¹⁹⁷ Expansion of this protection requires an additional subsection that provides, “the actor knows or reasonably should know that the victim, because of the effect of any alcohol, drugs, controlled substance or other substance, is substantially impaired or incapable of appraising the nature of the victim’s conduct or incapable of resisting.”¹⁹⁸ By adding this subsection to protect those unable to consent due to intoxication, there is greater flexibility for prosecution of alcohol-facilitated sexual assaults where the victim is not completely unconscious. In order to obtain a conviction, this subsection would still require that the perpetrator knew or should have known that the effects of alcohol or drugs substantially impaired the victim.

To ensure that it is obvious which subsections of § 6-2-302 encompass situations where the person is incapable of giving consent, and therefore a consent defense should not be permitted, Wyoming should add a subsection to state, “a victim under § 6-2-302(a)(ii) through (iv) is deemed incapable of giving consent.”¹⁹⁹ All of these suggested additions and changes would provide better charging options for prosecutors that will hopefully result in more convictions. However, since the degrees of sexual assault cover different sexual assault scenarios and cross-reference the other statutes, more additions are necessary to promote uniformity and coherence.

2. *Wyoming Statute § 6-2-303: Sexual Assault in the Second Degree*

The majority of the suggested additions in this comment occur under Wyoming Statute § 6-2-302; yet, there are some alterations that the Legislature ought to make to Wyoming Statute § 6-2-303.²⁰⁰ If the portions covering non-consensual and alcohol-facilitated sexual assaults are added to the first-degree sexual assault statute, then current sections (ii) and (iii) can be removed from § 6-2-303.²⁰¹ The current second-degree sexual assault statute starts with, “any

¹⁹⁶ *See Id.*

¹⁹⁷ *See supra* text accompanying notes 173–183.

¹⁹⁸ This addition contains similar language as used in the current Wyoming Statute § 6-2-302(a)(iii) dealing with mental deficiencies and the current Wyoming Statute § 6-2-303(a)(iii) dealing with involuntary intoxication. *See* WYO. STAT. ANN. §§ 6-2-302(a)(iii) (2017) & 6-2-303(a)(iii) (2017).

¹⁹⁹ As suggested by this comment, subsection (ii) would cover “physically helpless,” subsection (iii) would cover “mental deficiency,” and subsection (iv) would cover “alcohol-facilitated.”

²⁰⁰ WYO. STAT. ANN. §§ 6-2-302–303 (2017).

²⁰¹ WYO. STAT. ANN. § 6-2-303(a)(ii)–(iii) (2017).

actor who inflicts sexual intrusion on a victim commits sexual assault in the second degree if, under circumstances not constituting sexual assault in the first degree.²⁰² The statute then describes different scenarios including subsection (ii), “[t]he actor causes submission of the victim by any means that would prevent resistance by a victim of ordinary resolution.”²⁰³ This subsection should be deleted if the above-suggested additions are made, as force and physical resistance would no longer be required to prove every sexual assault case.

Also, subsection (iii) should be removed.²⁰⁴ Subsection (iii) provides, “[t]he actor administers, or knows that someone else administered to the victim, without the prior knowledge or consent of the victim, any substance which substantially impairs the victim’s power to appraise or control his conduct.”²⁰⁵ This statement only covers sexual assaults involving involuntary intoxication. However, if the suggested amendments are made, this situation is covered under the proposed § 6-2-302(a)(iv): “the actor knows or reasonably should know that the victim, because of the effect of any alcohol, drugs, controlled substance or other substance, is substantially impaired or incapable of appraising the nature of the victim’s conduct or incapable of resisting.” Providing or forcing the victim to take alcohol or drugs would be evidence of the perpetrator’s knowledge of the victim’s inability to consent due to the impairment of drugs or alcohol. These proposed changes would compliment the suggested alterations in Wyoming Statute § 6-2-302 and would provide a more comprehensive statutory scheme to prohibit sexual assaults.

3. *Other Miscellaneous Necessary Statute Amendments*

In order to promote consistency and possible stylistic preferences, if Wyoming Statutes §§ 6-2-302 and 6-2-303 are amended as suggested, there would be a few minor changes required in other statutes.²⁰⁶ In the third-degree sexual assault statute, subsection (iii) would need to be changed in order to reflect the two deleted subsections.²⁰⁷ Section 6-2-304(iii) would instead provide that sexual assault in the third degree occurs if “[t]he actor subjects a victim to sexual contact under any of the circumstances of W.S. 6-2-302(a)(i) through (iv) or 6-2-303(a)(i) through (v) without inflicting sexual intrusion on the victim and without causing serious bodily injury to the victim.”²⁰⁸

²⁰² *Id.* § 6-2-303(a).

²⁰³ *Id.* § 6-2-303(a)(ii).

²⁰⁴ *Id.* § 6-2-303(a)(iii).

²⁰⁵ *Id.*

²⁰⁶ WYO. STAT. ANN. § 6-2-301–304(a)(iii) (2017).

²⁰⁷ See *supra* text accompanying note 201; WYO. STAT. ANN. § 6-2-304 (2017).

²⁰⁸ See *infra* Appendix A.

The Wyoming Legislature could add the definition of “without consent” to the general definitions provision in § 6-2-301 rather than add it to § 6-2-302 as provided below in the proposed legislation.²⁰⁹ Further, if accepted, these alterations would affect the sexual battery statute, due to the wording of the sexual battery statute.²¹⁰ Thus, sexual battery occurring in a non-consensual and alcohol-facilitated manner would also be prohibited.²¹¹

D. Issues and Difficulties That Would Persist

While these changes would be an effective progression towards better protecting Wyomingites from sexual assault, some difficulties may persist.²¹² First, using the phrasing “the actor knows or reasonably should know” that the victim is intoxicated could allow perpetrators to introduce voluntary intoxication of the perpetrator as a defense in certain situations.²¹³ While Wyoming currently only allows evidence of a defendant’s voluntary intoxicated state to negate the *mens rea* of a specific intent crime,²¹⁴ the defense could argue that intoxication of the defendant is evidence of lack of knowledge of the victim’s level of intoxication.

Second, defining lack of consent in terms of what the victim expressed through words and conduct still puts the focus on the survivor and the actions he or she took.²¹⁵ While the survivor may communicate that he or she does not consent, the jury may still look for objective signs of non-consent, such as resistance and use of force.²¹⁶ A possible alternative is to require affirmative consent and define consent as more of an agreement between two parties.²¹⁷ Ultimately, consent would still be the main issue of these cases, generally there would still only be two witnesses, and the credibility of the survivor and the perpetrator could determine the case.

Next, the suggested amendments do not add protections to those falsely accused of perpetrating sexual assaults. Studies vary immensely on the number of sexual assaults that are false reported.²¹⁸ False reporting statistics range from

²⁰⁹ See WYO. STAT. ANN. § 6-2-301 (2017).

²¹⁰ See WYO. STAT. ANN. § 6-2-313 (2017).

²¹¹ *Id.*

²¹² See *infra* text accompanying notes 213–223.

²¹³ See *infra* text accompanying note 198 and note 54.

²¹⁴ WYO. STAT. ANN. § 6-1-202 (2017).

²¹⁵ See *supra* text accompanying notes 191–192.

²¹⁶ See *supra* text accompanying notes 71–94.

²¹⁷ See *supra* text accompanying notes 134–141 and note 135.

²¹⁸ Cassia Spohn, Clair White & Katharine Tellis, *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports*, 48 L. AND SOCIETY REV. 161, 162 (2014).

claiming that 2% of reported sexual assaults are false²¹⁹ to as high as 40%.²²⁰ This disparity in the false reporting statistics may be due to the difficulty of defining false allegations and law enforcement's misclassification of an uncorroborated crime as a false allegation.²²¹ Regardless of the accuracy or inaccuracy of false reporting statistics, the author's suggestions do not aim to have an effect on filtering out sexual assault allegations that are false.

Finally, amending the statutes to cover more sexual assault scenarios does not change the fact that society still believes a lot of the rape myths.²²² Jurors are representatives of the surrounding communities; therefore, the jurors will also suffer from believing rape myths.²²³ Once prosecutors have decided to charge a particular case, they still need to effectively present the evidence and case, keeping rape myths in mind, and educate the jury pool whenever possible. If Wyoming prosecutors could secure more sexual assault convictions after trials, the word would spread that our community does not tolerate sexual violence of any kind. In doing so, hopefully reporting rates in Wyoming will increase, as survivors will feel safer coming forward and reporting their assaults.

IV. CONCLUSION

Abysmal reporting, arrest and conviction rates in sexual assault cases are a nationwide problem.²²⁴ Sexual assaults are some of the toughest cases to prosecute in Wyoming as well.²²⁵ Wyoming should amend current statutory language to allow for more opportunities to prosecute common sexual assault scenarios, such as non-consensual and alcohol-facilitated sexual assaults.²²⁶ Sexual violence is an important issue, as sexual assaults go unpunished in our community, it not only hurts the survivors and their healing process, but also harms our community. In order to effectuate societal change, Wyoming should begin by amending the current statutory language of the sexual assault statutes.²²⁷ The suggested

²¹⁹ See David Lisak, Lori Gardinier, Sarah C. Nicksa, & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1322–23 (2010). This article discusses various studies that have attempted to quantify the number of false allegations of sexual assault. *Id.* at 1319–20. This article calls into question the validity of a study conducted that alleges that only 2% of sexual assaults are falsely reported. *Id.* at 1322–23.

²²⁰ See *id.* at 1323. This article also criticizes a study purporting that 40% of sexual assault allegations are false because the study failed to provide information as to the methodologies used in the study. *Id.*

²²¹ Spohn et al., *supra* note 218, at 163–66; See Lisak et al., *supra* note 219 at 1319–21.

²²² See *supra* text accompanying notes 75–79.

²²³ See *supra* text accompanying notes 75–79.

²²⁴ See *supra* text accompanying notes 4–6.

²²⁵ Interview, *supra* note 70.

²²⁶ See *supra* text accompanying notes 166–211.

²²⁷ See *supra* text accompanying notes 153–223.

alterations and deletions to the statute will provide prosecutors with better tools to achieve convictions in sexual assault prosecutions, which demonstrates to our community and survivors that Wyoming does not condone sexual violence.

APPENDIX A: PROPOSED LEGISLATION

The following includes the author's suggested changes to Wyoming's sexual assault statutes.²²⁸ The words that are underlined indicate wording and sections to be added to the current statute. The words that have a line striking out the text designate portions of the current statutory language that should be deleted.

§ 6-2-302: Sexual Assault in the First Degree

(a) any actor who ~~inflicts~~ engages in sexual intrusion on a victim commits a sexual assault in the first degree if:

(i) the actor is without the consent of the victim; or

(ii) the victim is physically helpless, and the actor knows or reasonably should know that the victim is physically helpless ~~and that the victim has not consented;~~ or

(iii) the actor knows or reasonably should know that the victim through a mental illness, mental deficiency or developmental disability is incapable of appraising the nature of the victim's conduct or incapable of resisting; or

(iv) the actor knows or reasonably should know that the victim, because of the effect of any alcohol, drugs, controlled substance or other substance, is substantially impaired or incapable of appraising the nature of the victim's conduct or incapable of resisting;

(b) as used in § 6-2-302(a)(i), without consent of the victim means:

(i) the victim expressed a lack of consent through words, or

(ii) the victim expressed a lack of consent through conduct, or

(iii) the actor causes submission of the victim through the actual application, reasonably calculated to cause

²²⁸ WYO. STAT. ANN. §§ 6-2-302 to -304 (2017).

submission of the victim, of physical force or forcible confinement; or

(iv) the actor causes submission of the victim by threat of death, serious bodily injury, extreme physical pain or kidnapping to be inflicted on anyone and the victim reasonably believes that the actor has the present ability to execute these threats;

(c) in § 6-2-302(a)(i), the victim need only resist, either verbally or physically, so as to make the victim's lack of consent genuine and real so as to reasonably make known to the actor the victim's refusal to consent; or

(d) a victim under § 6-2-302(a)(ii) through (iv) is deemed incapable of giving consent.

WYO. STAT. ANN. § 6-2-302 (2017).

§ 6-2-303: Sexual Assault in the Second Degree:

(a) any actor who inflicts sexual intrusion on a victim commits sexual assault in the second degree if, under circumstances not constituting sexual assault in the first degree:

(i) the actor causes submission of the victim by threatening to retaliate in the future against the victim or the victim's spouse, parents, brothers, sisters or children, and the victim reasonably believes that actor will execute this treat. "To retaliate" includes threats of kidnapping, death, serious bodily injury or extreme physical pain;

~~(ii) The actor causes submission of the victim by any means that would prevent resistance by a victim of ordinary resolution;~~

~~(iii) The actor administers, or knows that someone else administered to the victim, without the prior knowledge or consent of the victim, any substance which substantially impairs the victim's power to appraise or control his conduct;~~

~~(iv)~~(ii) The actor knows or should reasonably know that the victim submits erroneously believing the actor to be the victim's spouse;

~~(v)~~ (iii) the actor is in a position of authority over the victim and uses this position of authority to cause the victim to submit;

~~(vii)~~ (iv) the actor is an employee, independent contractor or volunteer of a state, county, city or town, or privately operated adult or juvenile correctional system, including but not limited to jails, penal institutions, detention centers, juvenile residential or rehabilitative facilities, adult community correctional facilities or secure treatment facilities and the victim is known or should be known by the actor to be a resident of such facility or under supervision of the correctional system; or

~~(viii)~~ (v) the actor inflicts sexual intrusion in treatment or examination of a victim for purposes or in a manner substantially inconsistent with reasonable medical practices.

(b) A person is guilty of sexual assault in the second degree if he subjects another person to sexual contact and causes serious bodily injury to the victim under any of the circumstances listed in W.S. 6-2-302(a)(i) through (iv) or paragraphs (a)(i) through (v) of this section.

(c) Repealed by Laws 1997, ch. 135, § 2.

WYO. STAT. ANN. § 6-2-303 (2017).

§ 6-2-304 Sexual assault in the third degree

(a) An actor commits sexual assault in the third degree if, under circumstances not constituting sexual assault in the first or second degree:

(i), (ii) Repealed by Laws 2007, ch. 159, § 3.

(iii) The actor subjects a victim to sexual contact under any of the circumstances of W.S. 6-2-302(a)(i) through (iv) or 6-2-303(a)(i) through ~~(vii)~~ (v) without inflicting sexual intrusion on the victim and without causing serious bodily injury to the victim.

WYO. STAT. ANN. § 6-2-304 (2017).