June 6, 2024

Re: Opposition to A.1065A/S4555B

The National Association of Criminal Defense Lawyers joins with Brooklyn Defenders, Queens Defenders, The Legal Aid Society, New York County Defender Services, New York State Association of Criminal Defense Lawyers, Bronx Defenders, Neighborhood Defender Service or Harlem, and Chief Defenders Association of New York in strongly opposing A.1065A/S4555B, which would create a category of sex crimes that are unconstitutionally vague. The proposed law fails to give adequate notice of what conduct is prohibited under the law and would lead to unjust application and arbitrary prosecutions and convictions that can lead to a host of lifelong consequences.

NACDL is the nation's preeminent organization advancing the interests of the nation's criminal defense bar, to ensure justice and due process for persons accused of crime or wrongdoing. With more than 10,000 members across the country, and 90 state, regional, and local affiliate organizations with tens of thousands more members, we represent defense lawyers from all parts of the criminal legal system, including private criminal defense lawyers, public defenders, military defense counsel, law professors, judges, and others who share our vision for a rational and humane criminal justice system. Critical to our mission are our efforts to identify and reform flaws and inequities in the criminal legal system and address systemic racism and its impact on the administration of justice.

New York Law Already Outlaws Non-consensual Sex Due to Intoxication

Under current New York law, a person commits a sex crime (e.g., rape, criminal sexual act) by subjecting another person to sexual conduct without that person's consent. A person who is intoxicated or impaired by drugs to the point of being "physically helpless" is deemed incapable of consenting to sexual activity. Penal Law § 130.05 (3)(d). "Physical helplessness" is precisely defined to mean that "a person is unconscious or for any other reason is physically unable to communicate unwillingness to act." Penal Law § 130.00 (7). This definition includes situations where a person, although conscious, is "unable to communicate unwillingness to an act." *People v. Dunham*, 172 A.D.3d 1462 (3d Dept. 2019). Moreover, New York courts have held that

voluntary intoxication can lead to physical helplessness.[1]

A.1065A/S.4555B is Unconstitutionally Vague and Denies New Yorkers Due Process

The proposed amendments to the penal law fail to account for the role that voluntary intoxication might play in consensual sexual encounters. As it currently reads, this bill imposes criminal liability for engaging in sexual conduct with another person who "is under the influence of any drug, intoxicant or other substance to a degree which renders such person temporarily incapable of appraising or controlling his or her conduct and that such condition is known or reasonably should be known to a person in the [defendant's] situation." The phrase "temporarily incapable of appraising or controlling his or her conduct" creates an ambiguity as to how to assess that level of incapability. It is not clear what an ability to "appraise" one's conduct means under this bill. This unconstitutionally vague language could subject persons who have consensual sex with an intoxicated partner liable to criminal prosecution. Critically, this bill fails to incorporate, or even consider, a test or standard for determining when a person is incapable of appraising his or her conduct.[2]

The inescapable consequences that accompany even a mere accusation of rape are devastating to a person, their family, their job, their relationships, and their community. The law must be as clear as possible in defining what conduct is prohibited, especially in sex offense cases, where the penalties include not only mandatory minimum prison sentences, but the life-altering prospect of sex offender registration. New York law already protects against non-consensual sex, including where intoxication results in a person being unable to give consent to engage in sex.

This legislation, however, would expand what constitutes a sex crime to include sexual contact where a person is "incapable of appraising conduct."A.1065A/S.4555B would create a situation where a person would be made responsible for determining the future state of mind of their intended sexual partner, i.e., their partner may be consenting in the moment, but may later feel that they were too intoxicated to have adequately appraised their own conduct. It would be nearly impossible for a partner to make that kind of distinction. Moreover, courts are ill equipped to distinguish between sexual encounters that a person merely "regrets" because they were intoxicated and sexual encounters where a person was incapable of consenting because they were so intoxicated.

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[1] People v. Cirina, 143 A.D.2d 763 (2*nd* Dept. 1988) app. den. 73 N.Y. 854 (The substantial testimony regarding the complainant's **voluntary** intoxication enabled the trier of fact to infer that she lacked capacity to consent due to her generally weakened condition (see, People v. Teicher, 52 N.Y.2d 638, 646–649 (1981); People v. Dunham, 172 A.D.3d 1462, 1463 (3*rd* Dept. 2019) lv app den. 33 N.Y.3d 1068 (victim was physically incapable of giving consent after testifying "to having several drinks before the wedding and, after a brief ceremony, several more at the reception")

[2] Am. Law. Inst., Model Penal Code § 213.3 Rape or Sexual Penetration of a Vulnerable Person.

A.1065A/S.4555B Fails to Define a Standard for Intoxication

This legislation does not even attempt to establish a standard of intoxication that is measurable and admissible in court. Under the proposed legislation, the prosecution would be required to prove that a person was "under the influence" of a drug, intoxicant or other substance "to a degree which renders [that person] temporarily incapable of appraising or controlling" their own conduct. For example, in a driving while intoxicated (DWI) case, the court (and the jury) would look to results of standardized field sobriety tests, chemical tests that determine blood alcohol level, and other indicia of impairment such as driving manifestations (failure to maintain lane, failure to stop at a stop sign, or a motor vehicle accident). There would be no similar method for the type of sexual encounters involving intoxication that would be prohibited under this bill. A court, or a jury for that matter, would be incapable of ascertaining the level of intoxication that might render a person temporarily incapable of appraising or controlling their own conduct.

Moreover, one party would have no way of knowing when the other party's consent was "invalid" simply because of intoxication. A penal statute must "define [a] criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A.1065A/S.4555B fails this test on both grounds. The bill seeks to impose criminal liability in far more situations involving intoxication or impairment than current law allows. But it gives no one fair notice of where the new line of demarcation between entirely lawful and criminal conduct is.

We strongly recommend rejection of the bill.

Sincerely,

Michael P. Heiskell
President, NACDL