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INTOXICATING ENCOUNTERS: ALLOCATING RESPONSIBILITY

IN THE LAW OF RAPE

by Valerie M. Ryan

INTRODUCTION

“So she’s had a few drinks; but she said yes; and you think that’s consent. Think again. It’s not legal consent if she’s drunk.”¹ All too often this position—that the man is automatically guilty of rape if he engaged in sexual intercourse with an intoxicated woman—is promoted by colleges and rape counseling centers.² But is this really all there is to the inquiry of whom to hold responsible for this type of sexual encounter?

There is more to understand regarding the circumstances of a particular sexual encounter, especially when the parties were in an intoxicated fog, before deciding that a rape occurred. Take, for example, a situation where two college students, a male and a female, become intoxicated while celebrating the woman’s twenty-first birthday.³ The male student takes the female student to his dormitory and they engage in sexual intercourse in the shower.⁴ Some witnesses assert that the woman seemed much more intoxicated than the man and was probably incapable of giving consent.⁵ After the man is expelled from school and charged criminally, he says, “[f]or the same behavior, for two intoxicated individuals . . . they took action against me but not her . . . I’m responsible for her behavior, instead of just my own.”⁶

Without knowing more about the incident, is it fair to assign all responsibility to the man for this sexual encounter? Given these limited facts, it is difficult to determine that what took place in the dorm shower was rape. Considering the witnesses’ statements about the woman’s drunken appearance and the likelihood of severe intoxication accompanying a twenty-first birthday celebration, was she in any position to consent to sex? What made the witnesses think she was not? Even if she did consent, can her deci-

1. Michelle Brutlag, *Date Rape*, EVANSVILLE COURIER & PRESS, Sept. 6, 2002, at M1, available at 2002 WL 13700645. This newspaper article later quotes a victim support specialist with a similar message: “Hooking up with a drunk chick at a party, (men should know) she’s not legally able to give consent . . .” *Id.*

2. Telephone Interview with Joanne Archambault, Training Director, Sexual Assault Training & Investigations, Inc. (Oct. 17, 2003); see also KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* 53-54, 58-60 (1993).

3. Jim Phillips, *Man Acquitted of Campus Sex Charge Not Finished with Legal Battle*, ATHENS NEWS, Nov. 3, 2003, at 32, available at http://www.athensnews.com/issue/article.php3?story_id=14553 (last visited Mar. 18, 2004).

4. *Id.*

5. *Id.*

6. *Id.*

sion be respected if she did not understand what she was doing? How much alcohol did the man consume? Did he think the woman wanted to have sex or did he take advantage of her intoxicated condition? Was the woman physically capable of standing up and supporting herself in the shower or did the man prop her up against the shower wall when he penetrated her? These questions demonstrate that there is probably more to the story that must be discovered before deciding that the sexual encounter was rape.

This Comment is concerned with accusations of acquaintance rape where the parties⁷ involved were mutually and voluntarily intoxicated.⁸ Within this sphere of shared risk-taking,⁹ who is, and who should be, held responsible is explored.

Part I discusses the background of acquaintance rape and the relationship between intoxication and rape. First, this section distinguishes acquaintance rape from stranger rape and considers some of the barriers to successfully prosecuting acquaintance-rape cases. Next, this section addresses the close relationship between alcohol consumption and acquaintance rape by discussing the effects of intoxication on the body, the expectancies that arise when alcohol is consumed, and the unfavorable perceptions of intoxicated women.

Part II explores the legal perspective of which party is held responsible when there is an allegation of acquaintance rape and both parties were mutually and voluntarily intoxicated, by comparing the different approaches of two states, California and New Jersey. First, this section examines how the law perceives the voluntarily intoxicated woman as the victim and explores whether her intoxication inculpates or exculpates the man accused of rape-by-intoxication. Next, this section examines how the law views the voluntarily intoxicated man as the perpetrator and explores whether his intoxication is a defense to a rape allegation. These assessments will lead to a determination of whom the law deems responsible for rape accusations when both of the parties were intoxicated. Finally, the difference between how the law is defined and how it may be practically applied by a jury in a rape-by-intoxication case is discussed.

Part III categorizes and evaluates some of the applicable academic and legal commentary that addresses who should be held responsible when both parties were voluntarily intoxicated. Finally, this Comment concludes with a determination that a law holding either the woman or the man entirely responsible for rape allegations when the parties were mutually and voluntarily intoxicated, without understanding the context of the particular sexual encounter, is unsatisfactory.

I. THE ROLE OF INTOXICATION IN ACQUAINTANCE RAPE

Deciding whom to hold responsible when there is a rape allegation and both parties were intoxicated should be evaluated against the background of the special difficulties and barriers that accompany an al-

7. Because the vast majority of rape victims are women, this Comment is only concerned with female victims and male perpetrators. RAPE ABUSE & INCEST NAT'L NETWORK (RAINN), RAINN STATISTICS (noting that in 2002, seven out of eight victims of rape were female, while only one out of eight victims were male (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY (2002))), at <http://www.rainn.org/statistics.html> (last visited Mar. 18, 2004).

8. Voluntary intoxication refers to self-induced intoxication. See MODEL PENAL CODE § 2.08(5)(b) (West 2003) (defining "self-induced intoxication" as "intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know. . .").

9. The term "risk-taking" is used because intoxication of the parties increases the risk that something will go wrong in this type of situation. "[D]rinking in potential sexual situations increases women's risk of being sexually assaulted, both because sexually assaultive men may view them as easy targets and because the women may be less able to resist effectively." Antonia Abbey et al., *Alcohol and Sexual Assault*, 25 ALCOHOL RES. & HEALTH 43, 47 (2001), available at http://www.thehealth.com/Practitioner/ceduc/alc_assault.html (last visited Mar. 18, 2004). Alternatively, sexual intentions can be misread, especially when the parties are intoxicated, and a man who proceeds to have intercourse under these circumstances risks committing sexual assault. *Id.*

legation of rape when the perpetrator is an acquaintance of the victim, especially when alcohol is involved. Therefore, this Part will distinguish acquaintance rape from stranger rape and discuss why acquaintance rape is less likely to be successfully prosecuted. Further, it is important to understand the close relationship between alcohol consumption and acquaintance rape. Consequently, this Part also discusses the effects of intoxication on the body, the particular expectancies that arise when alcohol is consumed, and the negative perceptions of intoxicated women used to justify rape.

A. Acquaintance Rape

Rape is a crime of violence, a denial of sexual freedom, and a privacy violation.¹⁰ “[It] is a sexual invasion of the woman’s body, in which her ‘private personal inner space’ is violated without her consent.”¹¹ Therefore, rape law should protect a woman’s sexual integrity and autonomy against unwanted intercourse.¹² Most modern statutes describe rape as “nonconsensual sexual penetration obtained by physical force, or by threat of bodily harm, or when the victim is incapable of giving consent.”¹³ Notably, the law does not distinguish between strangers and acquaintances.¹⁴

Although rape is traditionally perceived as a crime committed by strangers, most rapes are perpetrated by acquaintances of the victim,¹⁵ which includes “lovers, dates, co-workers, neighbors, relatives, and so on.”¹⁶ An oft-cited study, performed by Mary P. Koss, Ph.D., found that one in four women surveyed had experienced attempted or completed rape and of that group, eighty-four percent knew their perpetrator.¹⁷ The U.S. Department of Justice has made similar findings regarding the prevalence of acquaintance rape.¹⁸ However, despite its pervasiveness,¹⁹ acquaintance rape is generally under-reported.²⁰ The difference in how stranger-rape cases and acquaintance-rape cases are treated is one way to account for this anomaly.²¹

10. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 573 (3d ed. 2001).

11. *Id.* (citing SUSAN BROWNMILLER, AGAINST OUR WILL 376 (1975)).

12. Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 187 (2002); accord Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1785 (1992) (defining sexual autonomy as “the freedom to refuse to have sex with any one for any reason . . .”); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 15 (1998) (stating that, although reverence for sexual autonomy includes preventing violations of sexual privacy, it also demands that the freedom to engage in intercourse with willing partners be protected as well).

13. David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1202 (1997).

14. *Id.*

15. SUSAN ESTRICH, REAL RAPE 12 (1987).

16. Bryden & Lengnick, *supra* note 13, at 1202.

17. ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE 11 (HarperPerennial 1994) (1988) (including Mary P. Koss’s survey of acquaintance rape, funded by the National Institute of Mental Health); David G. Curtis, *Perspectives on Acquaintance Rape*, AM. ACAD. OF EXPERTS IN TRAUMATIC STRESS (1997), at <http://www.aets.org/arts/art13.htm> (last visited Mar. 18, 2004); see also Abbey, *supra* note 9, at 44.

18. See HIGHER EDUC. CTR. FOR ALCOHOL & OTHER DRUG PREVENTION, U.S. DEP’T OF EDUC., SEXUAL ASSAULT, HARASSMENT, AND ALCOHOL AND OTHER DRUG USE (2002) (findings from The National College Women Sexual Victimization study, sponsored by the U.S. Department of Justice in 1996, showed that 20-25% of women attending college were victims of rape or attempted rape and 90% of the time, the victim knew the perpetrator), at http://www.edc.org/hec/pubs/factsheets/fact_sheet1.html (last visited Mar. 18, 2004); see also BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SUMMARY FINDINGS (2002), at http://www.ojp.usdoj.gov/bjs/cvict_c.htm (last visited Mar. 18, 2004) [hereinafter SUMMARY FINDINGS] (explaining that during 2002, “[m]ore than six in ten rape or sexual assault victims stated the offender was an intimate, other relative, a friend or an acquaintance.”).

19. It has been argued that the one-in-four statistic is exaggerated. See ROIPHE, *supra* note 2, at 52-55 (referencing Neil Gilbert’s criticism of the Koss survey to argue that acquaintance rape is not as prevalent as the survey numbers indicate).

20. Abbey, *supra* note 9, at 43.

21. See ESTRICH, *supra* note 15, at 4 (comparing her own stranger-rape experience to that of an acquaintance-rape victim where “the law’s abhorrence of the rapist in stranger cases like mine has been matched only by its distrust of the victim who claims to have been raped by a friend or neighbor or acquaintance.”); accord Courtenay Edelhart, *Twice Victimized*, INDIANAPOLIS STAR, Aug. 8, 2003, at 1E (quoting a victim of acquaintance rape who did not report the crime because she did not

While it is easier to identify the perpetrator when he is someone the victim knows, it is less probable that the familiar perpetrator will be arrested, prosecuted, and convicted.²² Although a majority of reported sexual assaults are committed by acquaintances of the victim, law-enforcement practices are still slanted toward responding to stranger-rape cases.²³ Police officers, sexual-assault examiners and prosecutors continue to search for the type of evidence used to identify a stranger-perpetrator.²⁴ As a result, they miss the opportunity to gather or concentrate on evidence necessary to support the victim's lack of consent,²⁵ essential to an acquaintance-rape prosecution.²⁶ Acquaintance rape also tends not to be successfully prosecuted when the victim ignored what are considered traditional and moral standards, by engaging in acts such as drinking heavily and taking drugs.²⁷ Under these circumstances, she will generally be blamed for the rape.²⁸ Further, where it appears that there was a misunderstanding between the parties as to consent, the woman's moral behavior will affect jury perceptions in deciding who was to blame for the misunderstanding.²⁹ Finally, law-enforcement officials, judges and juries have expectations about how a victim should behave after an alleged rape and, in many situations, they do not believe the victim because she "just didn't act like a rape victim."³⁰

B. The Intoxicating Effect of Alcohol

The prevalence of acquaintance rape must be understood in context of the close relationship between alcohol use and sexual assault.³¹ In general, alcohol is a factor in violent crimes.³² Researchers have determined that approximately half of all sexual-assault victims and half of all sexual-assault perpetrators drink alcohol before an offense occurs.³³ Specifically in the context of acquaintance rape, alcohol is usu-

think she would be believed when "it would have been 'he said, she said'").

22. ESTRICH, *supra* note 15, at 4-5 (citing a study of American juries by Professors Harry Kalven & Hans Zeisel, which found that juries were four times more willing to convict the perpetrator in an aggravated stranger-rape case than in an acquaintance-rape case).

23. Joanne Archambault, *Dynamics of Sexual Assault*, at 2, at <http://www.mysati.com/joanepubs.htm> (last visited Mar. 18, 2004).

24. *Id.* (listing the type of evidence sought, such as: "fingerprints, trace evidence (hair and fiber), biological evidence (semen and saliva), foot prints, tire marks, etc. . .").

25. Joanne Archambault & Suzanne Lindsay, *Responding to Non-Stranger Sexual Assault*, at 13, at <http://www.mysati.com/joanepubs.htm> (last visited Mar. 18, 2004).

26. Archambault, *supra* note 23, at 2.

27. Bryden & Lengnick, *supra* note 13, at 1205-06.

28. *Id.* at 1203-04.

29. *Id.* at 1204.

30. Archambault, *supra* note 23, at 2.

31. WARSHAW, *supra* note 17, at 43; *accord* Abbey, *supra* note 9, at 44 (noting that despite the correlation between alcohol consumption and sexual assault, alcohol does not cause sexual assault).

32. SUMMARY FINDINGS, *supra* note 18 (finding that, based on victims' reports, approximately 30% of violent crimes involved a perpetrator who had consumed alcohol and in approximately 20% of those cases victims perceived that the perpetrator was also using drugs).

33. "Depending on the sample studied and the measures used, the estimates for alcohol consumption among perpetrators have ranged from 34 to 74 percent." Abbey, *supra* note 9, at 44 (citations omitted). "[E]stimates [of sexual-assault victims drinking alcohol] rang[e] from 30 to 79 percent." *Id.*

ally involved.³⁴ The consumption of alcohol “tends to be a shared activity” within a social context, so it is not surprising that when one party is consuming alcohol, the other party is consuming it as well.³⁵

The individual effect of alcohol varies, especially between victims and perpetrators.³⁶ “Alcohol and drugs distort reality, cloud judgment, and slow reactions, causing men and women to expose themselves to dangers or disregard social constraints that might otherwise influence them.”³⁷ Many people experience an increase in aggressive behavior due to the consumption of alcohol.³⁸ An intoxicated man may become less attuned to the woman’s desires while becoming more forceful and violent than he would generally act if sober.³⁹ Some studies demonstrate that the man’s consumption of alcohol significantly increases the probability that he will attempt to rape his companion.⁴⁰ Another study discovered that, as a contributing factor to this danger, intoxicated women who were raped “reported that their intoxication made them take risks that they normally would avoid.”⁴¹

Notwithstanding the physiological effect, particular expectancies that arise from drinking alcohol have also been tied to rape.⁴² Alcohol is perceived as increasing sexual arousal and men “expect to feel more powerful, disinhibited, and aggressive after drinking . . .”⁴³ These expectancies may make it easier to force intercourse, while later providing men with an excuse because the alcohol was to blame.⁴⁴ Also, some men drink alcohol to minimize reservations they may have about forcing women to have unwanted sex.⁴⁵ However, sometimes acquaintance rape results from miscommunication. “The fact that sexual assault often happens in situations in which consensual sex is a possible outcome means that a man’s interpretation of the situation can influence his responses.”⁴⁶ Vague and indirect cues utilized to communicate sexual intentions may be misinterpreted, especially if the ability to communicate is impaired by intoxication.⁴⁷ Further, if a man wants to have sex and thinks the woman is also interested in having sex, he will acknowledge signals that meet his belief and ignore signals that are inconsistent with his belief, which can lead to sexual assault.⁴⁸

It is noteworthy that there has been less focus on assessing the effect of alcohol on women’s sexual behavior, which may be explained by society’s unfavorable view of women who become intoxicated and have sex.⁴⁹ Due to these negative perceptions, “women’s expectancies about alcohol’s sexual effects are less positive than men’s expectancies, because the social costs associated with alcohol use and sexual behavior are greater for women.”⁵⁰ Further, negative perceptions of intoxicated women are also used to justify rape.⁵¹ When a woman drinks alcohol, she is generally viewed as more willing to engage in sex than a

34. See WARSHAW, *supra* note 17, at 44 (approximately 75% of the men and 55% of the women involved in acquaintance rapes had been consuming alcohol prior to the encounter).

35. Abbey, *supra* note 9, at 44.

36. *Id.*

37. WARSHAW, *supra* note 17, at 44.

38. PETER FINN, HIGHER EDUC. CENTER FOR ALCOHOL AND OTHER DRUG PREVENTION, PREVENTING ALCOHOL-RELATED PROBLEMS ON CAMPUS: ACQUAINTANCE RAPE (2000), at <http://www.edc.org/hec/pubs/acqrape.html#2c> (last visited Mar. 18, 2004).

39. WARSHAW, *supra* note 17, at 45.

40. Bryden & Lengnick, *supra* note 13, at 1350 (citations omitted).

41. Abbey, *supra* note 9, at 48 (providing examples, such as women accepting rides from men they did not know or allowing intoxicated men into their homes).

42. *Id.* at 46.

43. *Id.*

44. *Id.*; FINN, *supra* note 38.

45. FINN, *supra* note 38.

46. Abbey, *supra* note 9, at 47.

47. *Id.*

48. *Id.*

49. *Id.* at 48.

50. *Id.*

51. *Id.* at 46 (citations omitted); see also WARSHAW, *supra* note 17, at 45 (“[T]he fact that a woman is drinking, even if she is not drunk, is often believed by men to be justification for rape (since ‘good girls’ aren’t supposed to drink).”).

woman who does not drink.⁵² Therefore, women who drink excessive amounts of alcohol are frequently considered responsible for the behavior of men in the context of a sexual encounter.⁵³ Intoxicated women also become targets for men seeking a sexual victim.⁵⁴ Yet, despite the higher risk of rape for women who have been drinking, police are less willing to press charges, prosecutors are less willing to prosecute, and juries are less willing to convict if rape allegations involve intoxicated women.⁵⁵ Many times, law enforcement and prosecutors do not think rape cases with intoxicated victims can be successfully prosecuted because juries are less likely to hang a rape conviction on the defendant when the victim engages in this type of risky behavior.⁵⁶

II. WHO IS RESPONSIBLE FOR STAYING SOBER?

Although there are many barriers faced by an intoxicated victim of acquaintance rape, the law allows for a rape prosecution depending on the particular requirements of the rape-by-intoxication statutory provision. How the law views the intoxicated parties establishes who is held responsible for rape allegations and, consequently, who is responsible for staying sober during sexual encounters. However, the way in which the law technically governs rape-by-intoxication cases may be different from the way in which these cases are actually resolved.

A. Intoxication of the Victim

If a woman is “mentally incapacitated” or “rendered incapable of effectually resisting” due to intoxication, then the man who engaged in sexual activity with the woman may be guilty of rape.⁵⁷ Under these circumstances, the intoxicated woman is considered incapable of giving legal consent to intercourse because her ability to exercise reasonable judgment is impaired.⁵⁸ Almost every state has adopted legislation that in some way prohibits the use of alcohol to facilitate unlawful sexual intercourse.⁵⁹

Rape that occurs when the victim is intoxicated can be divided into two offenses: (1) administration of alcohol to the victim, causing her incapacity, followed by nonconsensual sex; and (2) voluntary intoxication of the victim, which causes her incapacity, followed by nonconsensual sex.⁶⁰ Approximately two-thirds of states require that a perpetrator, who engages in sexual intercourse with an intoxicated victim, administer the intoxicating substance to the victim before assigning criminal liability for rape,⁶¹ which

52. Abbey, *supra* note 9, at 46 (citations omitted).

53. Archambault, *supra* note 23, at 4 (citations omitted).

54. WARSHAW, *supra* note 17, at 45.

55. Lynn Henderson, *Getting To Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 49 (1993) (citing Gary LaFree’s study of rape prosecutions in Indianapolis); *see also* WARSHAW, *supra* note 17, at 45.

56. Telephone Interview with Nancy O’Malley, Chief Assistant District Attorney, Alameda County District Attorney’s Office (Nov. 11, 2003); *cf.* Editorial, *When “No” Means “No,”* DENV. POST, June 15, 2002, at B7 (explaining that a district attorney did not pursue sexual assault charges against university football recruits after a woman, who drank eight beers and consumed two shots of rum, alleged she was raped at a party thrown for the recruits because “the chances of obtaining a conviction were poor”), available at 2002 WL 6569537.

57. 75 C.J.S. *Rape* § 101 (West 2003).

58. *Id.* § 25.

59. Falk, *supra* note 12, at 156.

60. *Id.* at 133-34.

61. *See id.* at 139 (providing a comprehensive survey of intoxication provisions included in rape statutes for fifty-six jurisdictions, including: the fifty states, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, the Uniform Code of Military Justice, and the federal system).

means that only one-third of the states afford protection to victims who voluntarily become intoxicated and are subsequently raped. In other words, the majority of states assign the risk of rape to the woman when she is voluntarily intoxicated. Because the majority of states hold that nonconsensual sexual intercourse with a voluntarily intoxicated woman does not constitute rape, she is responsible for remaining sober during sexual encounters. Only a minority of the states assign the risk of committing rape to the man when he engages in nonconsensual sex with a voluntarily intoxicated woman.

1. The Woman's Responsibility

New Jersey is an example of a state that follows the majority approach and assigns responsibility to the woman when there is an allegation of rape-by-intoxication. The applicable provision states, “[a]n actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person . . . [when t]he victim is one whom the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated.”⁶² Here, the term “mentally incapacitated” is defined as

that condition in which a person is rendered temporarily incapable of understanding or controlling [her] conduct due to the influence of a narcotic, anesthetic, intoxicant, or other substance administered to that person without [her] prior knowledge or consent, or due to any other act committed upon that person which rendered that person incapable of appraising or controlling [her] conduct . . .⁶³

Consequently, in New Jersey, although the perpetrator need not be the person who administers the intoxicant to the victim, it is clear that administration is nonetheless required.⁶⁴ The voluntarily intoxicated woman is not considered “mentally incapacitated.”⁶⁵ Based on this language, a woman who was voluntarily intoxicated could not use this provision as the basis for a rape allegation. This is true even if the man knew or would be expected to know that she was incapacitated due to intoxication.⁶⁶ From this perspective, the woman’s self-induced intoxication rescues the man accused of rape-by-intoxication because he cannot be prosecuted. Therefore, the woman assumes the risk of rape if she is voluntarily intoxicated.

2. The Man's Responsibility

California’s rape statute is representative of the minority approach, which assigns responsibility to the man when there is an allegation of nonconsensual sexual intercourse with an intoxicated woman. The rape-by-intoxication provision states that “[r]ape is an act of sexual intercourse accomplished . . . [w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.”⁶⁷ This provision prohibits sexual intercourse with a victim incapable of providing legal consent as a result of intoxication, regardless of whether actual consent was given.⁶⁸ Therefore, the main issue is whether the victim had the capacity to exercise the reasonable judgment required to give legal consent.⁶⁹ If “the level of intoxication and the resulting mental impairment [was] so great that the alleged victim could no longer exercise reasonable judgment[,]” then the victim was prevented from resisting.⁷⁰ The statute does not require that a victim become so intoxicated that she is physically unable to speak or display a lack of actual

62. N.J. STAT. ANN. § 2C:14-2a(7) (West 2003).

63. *Id.* § 2C:14-1(i). Intoxication of the victim is only explicitly captured by the definition of “mentally incapacitated.” Compare *id.*, with N.J. STAT. ANN. § 2C:14-1(g) (defining “physically helpless”), and N.J. STAT. ANN. § 2C:14-1(h) (defining “mentally defective”).

64. N.J. STAT. ANN. § 2C:14-1(i).

65. *Id.*

66. *Id.* § 2C:14-2a(7).

67. CAL. PENAL CODE § 261(a)(3) (West 2003).

68. *People v. Giardino*, 82 Cal. Rptr. 2d 315, 321 (Ct. App. 2000).

69. *Id.*

70. CALIFORNIA JURY INSTRUCTIONS, CRIMINAL § 1.23.2 (West 2003).

consent.⁷¹ However, mere intoxication “to some degree,” or intoxication that “reduced the [woman’s] sexual inhibitions” is not sufficient.⁷² As one California prosecutor explained from her experience prosecuting rape-by-intoxication cases, the intoxicated victim must be so “out of it” that she does not understand what she is doing or what is going on around her.⁷³ It is not a situation where the victim just “had too much to drink.”⁷⁴

Under this statutory scheme, a woman who is voluntarily intoxicated may use this provision to raise an allegation of rape. The jury then determines whether the victim met the requisite level of intoxication to render herself incapacitated.⁷⁵ Therefore, from the minority perspective, the woman’s severe intoxication inculcates the man accused of rape. The man assumes the risk of responsibility for rape when he engages in sexual intercourse with a voluntarily intoxicated woman.

B. Intoxication of the Perpetrator

Generally, voluntary intoxication does not excuse criminal behavior.⁷⁶ Under English common law, voluntary intoxication was perceived “as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour.”⁷⁷ However, exceptions to this general rule began to emerge in the nineteenth century,⁷⁸ and voluntarily intoxicated perpetrators experienced decreased liability for criminal offenses.⁷⁹ More recently, the trend has been to increase criminal liability for intoxicated perpetrators as society acknowledges that drinking alcohol to the point of intoxication is a dangerous, voluntary decision.⁸⁰ Excluding intoxication as a mitigating factor signifies a policy that “an individual who knowingly casts off the restraint and judgment of sobriety does not deserve to plead that he would not have committed the harm when sober.”⁸¹

It is worth mentioning the close relationship between the intoxication defense and the mistake of fact defense, both of which represent a failure to prove the mental state required by the criminal offense.⁸² A mistake of fact could be caused by the perpetrator’s voluntary intoxication.⁸³ For example, a man may be mistaken⁸⁴ as to whether or not the woman consented to sexual intercourse due to his voluntary consump-

71. *Giardino*, 82 Cal. App. 4th at 464.

72. CALIFORNIA JURY INSTRUCTIONS, CRIMINAL § 1.23.2.

73. Telephone Interview with Nancy O’Malley, *supra* note 56. Ms. O’Malley has been with the Alameda County District Attorney’s Office for nineteen years. *Id.* Other than her responsibilities as Chief Assistant District Attorney, she is also the current chair of the Sexual Assault Committee for the California District Attorney’s Association (CDA). *Id.*

74. Email from Nancy O’Malley, Chief Assistant District Attorney, Alameda County District Attorney’s Office, to author (Oct. 7, 2003, 07:58:04 PST) (on file with author).

75. *See Giardino*, 82 Cal. App. 4th at 470 (citing *People v. Griffin*, 117 Cal. 583, 585 (1897)); *cf.* Telephone Interview with Nancy O’Malley, *supra* note 56 (explaining that, in reality, if a woman is intoxicated the prosecutor needs independent corroboration of the woman’s level of intoxication to get a conviction, though it is not a legal requirement).

76. DRESSLER, *supra* note 10, at 322.

77. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 25-26 (Univ. of Chi. Press 1979) (1769); DRESSLER, *supra* note 10, at 322-23 (citing BLACKSTONE, *supra*).

78. DRESSLER, *supra* note 10, at 323.

79. Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 490 (1997).

80. *Id.* at 491-92.

81. *Id.* at 499.

82. *Id.* at 497.

83. *Id.* at 497-98 (citations omitted).

84. *See generally* Daniel Yeager, A Plea for “A Plea for Excuses”: Exculpation and the Explication of Responsibility 123-59

tion of alcohol. Nevertheless, there is an important distinction between these two defenses because the person who voluntarily produces the condition that brings about the unreasonable act is considered more culpable than the person who fails to assess the situation correctly because of factors outside of his control.⁸⁵

Regardless of recent trends, in most states, an offender who becomes voluntarily intoxicated could still be relieved of criminal liability if he lacked the requisite mental state defined by the crime, although this rule only applies to certain types of crimes.⁸⁶ These states follow either of two approaches for governing the defense of intoxication: (1) the specific-intent versus general-intent approach, and (2) the Model Penal Code approach.⁸⁷

1. General-Intent versus Specific-Intent Approach

The common law distinguishes between general-intent crimes and specific-intent crimes as a compromise to deal with the issue of an intoxicated perpetrator.⁸⁸

When a definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.⁸⁹

Voluntary intoxication is not a defense to general-intent offenses, though it is for specific-intent offenses.⁹⁰ Rape is considered a general-intent offense, which means that the perpetrator need only have the intent to engage in sexual intercourse without the woman's consent.⁹¹ It follows that a man's voluntary intoxication cannot serve as a defense to rape.⁹² A modern justification for the rule is that most people now recognize the effect alcohol has on our ability to judge a situation and control our actions, so that in choosing to become intoxicated, we understand that potential harm to others may follow.⁹³ However, this approach has been criticized because drawing a distinction between general-intent and specific-intent crimes does not make sense when the offender's level of intoxication and ability to form a culpable mental state as a result of the intoxication is the same in both cases.⁹⁴

Most states follow the common-law approach that voluntary intoxication is not a defense to rape.⁹⁵ In California, a general-intent offense committed by a voluntarily intoxicated individual is not considered

(2004) (unpublished manuscript, on file with author) (discussing the criteria of mistakes and finding that, in many cases, the term "mistake" is used too loosely to describe misfired actions; often, actions that are claimed to be mistakes, in an attempt to excuse responsibility, are really not mistakes because the criteria have not been met).

85. Keiter, *supra* note 79, at 498.

86. DRESSLER, *supra* note 10, at 323.

87. Keiter, *supra* note 79, at 492 (explaining that thirty-seven states follow one of the two major approaches).

88. *Id.* at 492-93 (citing *People v. Hood*, 462 P.2d 370, 377 (Cal. 1969)); DRESSLER, *supra* note 10, at 323-24 (citing *Hood*, 462 P.2d at 377).

89. *People v. Linwood*, 105 Cal. App. 4th 59, 70 (2003) (quoting *Hood*, 462 P.2d at 378); Keiter, *supra* note 79, at 493 (quoting *Hood*, 462 P.2d at 378).

90. DRESSLER, *supra* note 10, at 324.

91. *Linwood*, 105 Cal. App. 4th at 70.

92. *People v. Potter*, 77 Cal. App. 3d 45, 51 (1978).

93. DRESSLER, *supra* note 10, at 324.

94. *Id.* at 325-26 (explaining the difficulty in distinguishing general intent from specific intent by providing an example of an offender who, assuming the level of intoxication is the same in both cases, cannot raise the intoxication defense for the general-intent crime of rape, but who can use the intoxication defense for the specific-intent crime of "assault with intent to rape").

95. Keiter, *supra* note 79, at 519-20 (including a list of states that only allow intoxication as a defense for specific-intent crimes).

any less criminal because of the intoxicated condition.⁹⁶ Because rape is a general-intent crime, the man's inability to form a specific intent to commit rape due to intoxication is not a defense.⁹⁷

Further, as discussed above, mistake of fact as to actual consent is not available as a defense to sexual intercourse with an intoxicated woman because actual consent is considered irrelevant in cases where the incapacity of the victim and her ability to give legal consent is the governing issue.⁹⁸ Yet, "[a]n honest and reasonable but mistaken belief that a sexual partner is not too intoxicated to give legal consent to sexual intercourse *is* a defense to rape by intoxication."⁹⁹ This language is consistent with the requirement that the victim's incapacity must be "known, or reasonably should have been known by the accused."¹⁰⁰ However, California case law has established that if the perpetrator was voluntarily intoxicated, a belief that the woman actually consented to sexual intercourse would not be considered reasonable or in good faith.¹⁰¹ This implies that a belief by an intoxicated man that an intoxicated woman had the legal capacity to consent to sexual intercourse would not constitute a valid mistake of fact defense because the mistaken belief would not be considered honest or reasonable.

Thus, it appears that the voluntary intoxication of the man does not relieve him of responsibility when he is accused of rape-by-intoxication. Although the woman is alleviated of responsibility for her severe, self-induced intoxication, the man is not; he is prevented from using intoxication or mistake of fact as a legal defense. Consequently, in California, the man assumes the risk of committing rape when the parties are mutually and voluntarily intoxicated and they engage in sexual intercourse. In other words, the man is responsible for ensuring that the woman stays sober, or at least does not become heavily intoxicated, during sexual encounters.

2. *The Model Penal Code Approach*

Because of the difficulty in delineating general intent from specific intent, the authors of the Model Penal Code developed a different approach, which does not distinguish between these two types of offenses.¹⁰² Under the Model Penal Code, intoxication is a defense if it negates an element of the criminal offense,¹⁰³ unless recklessness is an element and the voluntarily intoxicated individual is not aware of a risk that he would have been aware of if he was sober.¹⁰⁴

New Jersey is an example of a state that has adopted the Model Penal Code approach. Intoxication of the perpetrator "is not a defense unless it negates an element of the offense."¹⁰⁵ Although the New Jersey statute governing self-induced intoxication as a defense eliminated the distinction between specific-intent and general-intent offenses, the principles based on that distinction did not change, which means that specific-intent offenses correspond to offenses that require purpose or knowledge and general-intent offenses correspond to offenses that require recklessness or criminal negligence.¹⁰⁶ Hence, intoxication is

96. CALIFORNIA JURY INSTRUCTIONS, CRIMINAL § 4.20 (West 2003) (jury instruction entitled "Voluntary Intoxication—Not a Defense to General Intent Crimes").

97. *People v. Gunthreau*, 102 Cal. App. 3d 436, 443 (1980).

98. *People v. Giardino*, 82 Cal. App. 4th 454, 460 (2000).

99. *Id.* at 472 (emphasis added).

100. CAL. PENAL CODE § 261(a)(3) (West 2003).

101. *Potter*, 77 Cal. App. 3d at 51.

102. See DRESSLER, *supra* note 10, at 332.

103. MODEL PENAL CODE § 2.08(1) (2003).

104. *Id.* § 2.08(2).

105. N.J. STAT. ANN. § 2C:2-8a (West 2003).

106. *State v. Cameron*, 514 A.2d 1302, 1307 (N.J. 1986).

only a defense to crimes that require a mental state of purpose or knowledge, but not recklessness or negligence.¹⁰⁷

Further, the defense is only applicable when the level of intoxication is extremely high, which requires a standard of “prostration of faculties.”¹⁰⁸ The factors to determine whether this standard has been met include: (1) the amount of intoxicant consumed, (2) the passage of time between consumption of the intoxicant and the act, (3) others’ perceptions of the individual’s conduct, (4) the odor of intoxicants on the individual, (5) blood-alcohol content test results, and (6) the ability of the individual to remember important events.¹⁰⁹ Nevertheless, because rape does not require purpose or knowledge, intoxication is not available as a defense.¹¹⁰

As a result, in New Jersey, the man’s self-induced intoxication does not relieve him of responsibility for rape because he cannot use his intoxication as a defense. However, because the woman is held entirely responsible when she is voluntarily intoxicated, her intoxication bars a rape-by-intoxication prosecution. Therefore, when the woman is voluntarily intoxicated, the man’s voluntary intoxication is not a factor at all because the woman’s intoxication rescues him from being prosecuted for rape. As a result, when the parties are mutually and voluntarily intoxicated, the woman assumes the risk of responsibility for rape; she is responsible for staying sober during sexual encounters.

3. *The Reality of the Intoxication Defense*

An expert in sexual-assault investigations revealed that how the law governs allegations of rape-by-intoxication through its statutory scheme can be irrelevant to how this type of case is actually resolved in the courtroom.¹¹¹ The dichotomy between how the law is defined and how it is used exists, in part, because many prosecutors do not know how to appropriately apply the statutory provisions for rape-by-intoxication.¹¹² Specifically in California, the problem of application is the result of a recently revised provision¹¹³ that is not often tested because neither prosecutors nor juries “like” rape-by-intoxication cases.¹¹⁴ Prosecutors find rape-by-intoxication cases difficult to prove because the intoxicated victim’s memories of the sexual encounter are blurred by alcohol.¹¹⁵ This adds an additional layer of complexity above the existing challenge of proving acquaintance rape.¹¹⁶ Further, jurors already place blame on the *sober*

107. *Id.*

108. *Id.* at 1309 (explaining that “prostration of faculties” is used to describe a level of intoxication that causes the individual to be “incapable of purposeful or knowing conduct”); *State v. Keys*, 752 A.2d 368, 375-76 (N.J. Super. Ct. Law Div. 1998).

109. *Cameron*, 514 A.2d at 1309.

110. *See State v. Stasio*, 396 A.2d 1129, 1136 (N.J. 1979) (superseded by statute as stated in *Cameron*, 514 A.2d at 1309, but statement regarding sexual assault remains valid). Voluntary intoxication is an available defense for many criminal offenses in New Jersey, including but not limited to: burglary, criminal trespass, arson, robbery, theft, and murder. *Id.*

111. Telephone Interview with Joanne Archambault, *supra* note 2. Ms. Archambault is a retired sergeant, who worked for the San Diego Police Department (SDPD) for twenty-three years and supervised the Sex Crimes Unit during the last ten years she was with SDPD. *Id.* Ms. Archambault has developed sexual assault training curriculum for law enforcement officials both locally and nationally. *See Sexual Assault Training & Investigations, Inc. (SATI), About SATI*, at <http://www.mysati.com/about.htm> (last visited Mar. 18, 2004).

112. Telephone Interview with Joanne Archambault, *supra* note 2 (noting that in her experience training prosecutors across the country, she has found that approximately ninety percent of prosecutors often confuse when it is appropriate to use the forcible rape provision instead of the rape-by-intoxication provision).

113. CAL. PENAL CODE § 261(a)(3) (West 2003) (amended in 1994 to remove the requirement of administration of the intoxicant to the victim by the defendant).

114. Telephone Interview with Joanne Archambault, *supra* note 2.

115. *Id. See, e.g., Associated Press, Key West Rape Charges Dropped Against Deerfield Beach Man*, BRADENTON HERALD, Nov. 21, 2003, <http://www.bradenton.com/mld/bradenton/7315713.htm> (last visited Mar. 18, 2004) (explaining that charges were dropped against a man who allegedly raped an intoxicated woman, because the woman’s severe intoxication and her failure to clearly recall the events accurately would have made it hard to prove that the man raped her).

116. Telephone Interview with Joanne Archambault, *supra* note 2.

victim for an alleged acquaintance rape, which means that they are more suspicious and judgmental of the *intoxicated* victim of an alleged acquaintance rape.¹¹⁷

Realistically, for a successful conviction of a perpetrator under a rape-by-intoxication provision, the prosecutor must not only demonstrate that the victim was severely incapacitated due to intoxication and that the perpetrator knew of the intoxicated victim's condition, but must also prove that the perpetrator was not severely intoxicated.¹¹⁸ The prosecutor must clearly demonstrate that the perpetrator was making decisions and had power and control over the situation, otherwise the jury will not convict the perpetrator because they blame the victim for her self-induced incapacitation.¹¹⁹

For instance, in a typical scenario where a man and a woman meet at a bar, drink together, leave together, and the woman later alleges rape, the prosecutor can demonstrate the perpetrator's lack of severe intoxication by offering evidence of various acts of control, such as: (1) paying the bar tab, (2) assisting or carrying the woman out of the bar, (3) driving from the bar to a different location, (4) holding the woman's hair back while she vomited, (5) undressing the woman and putting her to bed, and (6) maintaining an erection during sexual intercourse.¹²⁰ If it is not absolutely apparent that the victim was heavily intoxicated and the perpetrator was not, then generally these cases are not prosecuted or do not attain convictions.¹²¹ From this standpoint, if the woman and the man are mutually and heavily intoxicated, then both are victims or neither are victims.¹²² Therefore, despite the law's preventing intoxication as a defense for the man accused of rape, in reality, whether intoxication practically constitutes a defense depends on the individual facts and the man's level of intoxication.¹²³

An experienced prosecutor, who is the former head of a Sexual Assault Unit, agrees that although intoxication is not a formal defense to rape-by-intoxication, the man's intoxication does play a role in rape-by-intoxication cases.¹²⁴ The defendant may challenge the prosecution's evidence that he knew of the woman's incapacity, which is an element of the prosecution's case.¹²⁵ In other words, although the general-intent crime of rape precludes the defense of intoxication, evidence of the man's intoxicated condition is nonetheless admissible at trial.

Once the man's intoxicated condition is admitted into evidence, it may make little difference that jurors are not instructed on the intoxication defense. If a jury will not convict a man who failed to demonstrate power and control during a sexual encounter due to his severe intoxication, then the argument that he was unaware of the woman's incapacitation because he was also intoxicated may resonate with the jury. Jurors may view the man's intoxication as interfering with his ability to appreciate whether the woman had the capacity to consent. The jury may not want to hold the defendant to the same standards of attentiveness when his ability to abide by those standards was impaired. As a result, once evidence of intoxica-

117. *Id.*

118. *Id.*

119. *Id.*; accord ESTRICH, *supra* note 15, at 4-5 (explaining that Professors Kalven & Zeisel found in their study of American juries that if the alleged rape victim engaged in "contributory behavior" . . . juries were willing to go to extremes in their leniency toward the defendant, even in cases where judges considered the evidence sufficient to support a conviction for rape") (citations omitted); Bryden & Lengnick, *supra* note 13 (stating that research indicates that when there is a rape allegation and both parties are drinking, the social inclination is to blame the woman).

120. Telephone Interview with Joanne Archambault, *supra* note 2.

121. *Id.*

122. *Id.*; cf. Telephone Interview with Nancy O'Malley, *supra* note 56 (stating that if both parties meet the requisite level of intoxication, then they are not even "having sex").

123. Telephone Interview with Joanne Archambault, *supra* note 2.

124. Telephone Interview with Nancy O'Malley, *supra* note 56.

125. *Id.*

tion is proffered and then accepted by the jury as true, an uncertain but presumably significant number of defendants are acquitted because they did not know and could not have been expected to know that they were engaging in nonconsensual sexual intercourse. Therefore, intoxication does function as a defense to rape-by-intoxication, even though it is supposed to be legally precluded from being used in this way. On the other hand, jurors may also reject the defendant's plea because they do not believe that he was too intoxicated to appreciate the woman's incapacity, or because they find that the defendant's intoxication makes him more, not less, blameworthy. The latter reason corresponds to the justification discussed earlier for prohibiting intoxication as a defense to criminal behavior.

Whether the jury uses evidence of the man's intoxication to excuse or compound his responsibility, it is difficult to understand how his intoxication is relevant at all if it is not allowed as a legal defense. If a defendant in a rape-by-intoxication case is not entitled to have the jury instructed that intoxication can be a complete defense to liability, then what role is the man's intoxication supposed to play at trial? How is his intoxicated condition being used if not as a defense? Put another way, how is this evidence even admissible? Unfortunately, no evidence code or appellate case provides answers to these particular questions. Ultimately, regardless of how the law is written, the man's intoxication is admissible at trial and may make it more difficult for a prosecutor to convict him of rape-by-intoxication.

III. WHO SHOULD BE HELD RESPONSIBLE FOR STAYING SOBER?

The law holds either the woman or the man entirely responsible when both parties are intoxicated. This answers the question of who *is* held legally responsible when there is an allegation of rape-by-intoxication, but not who *should* be held responsible. This section categorizes and assesses some of the academic commentary on the issue of who should be held responsible for sexual encounters when both parties were mutually and voluntarily intoxicated.

A. Women Are Responsible for Their Choices

Katie Roiphe, author of the controversial book *The Morning After*, who criticizes feminists for creating what she perceives to be a myth regarding the prevalence of acquaintance rape,¹²⁶ believes that women should be held responsible for their decisions when they choose to drink alcohol.¹²⁷ A woman can have sex when she is intoxicated without that act constituting rape.¹²⁸ Roiphe's view appears to be directed at preventing the law from converting women into passive, helpless victims if they are not held accountable for their choices.¹²⁹ Roiphe is also concerned with attacking the perception of men as lustful creatures and women as merely innocent bystanders during sexual encounters.¹³⁰ For Roiphe, the message is that women have sexual desires and can decide, regardless of their intoxication, whether to engage in sex.

Robin Warshaw, author of the well-known *I Never Called It Rape*, is a critic of this "rape-denial"¹³¹ approach and argues that when a woman chooses to drink to the point of intoxication, she is responsible for consequences such as becoming ill or causing harm to others, but she is not responsible for being raped.¹³² A woman does not "deserve" to be raped if she becomes intoxicated.¹³³ However, Roiphe's approach hardly suggests that a woman deserves rape by simply stating that engaging in sex with an intoxicated woman is not *always* rape. That being said, Roiphe does not explain if or when she would agree that a rape occurred when the woman was intoxicated.

126. See generally ROIPHE, *supra* note 2.

127. *Id.* at 53.

128. *Id.* at 54.

129. *Id.* at 53-54.

130. See *id.* at 59-60.

131. WARSHAW, *supra* note 17, at xxii (using this terminology to describe Katie Roiphe's views, as well as similar views of other critics).

132. *Id.* at xxiv.

133. *Id.*

The gap between these two perspectives may have more to do with how rape-by-intoxication is defined and whether a rape actually occurred under the applicable definition. In other words, the two views do not appear to be in direct conflict. Both views may recognize that an intoxicated woman can decide to have sex and actually have sex without it being rape, while also recognizing that there is a certain level of severe intoxication when the woman is no longer making a choice—in which case it is rape. However, when the woman is voluntarily intoxicated, Warshaw presupposes that a rape occurred, whereas Roiphe assumes that a rape did not occur.¹³⁴ Therefore, to understand the difference in these perspectives, it would be helpful to know whether Roiphe acknowledges rape-by-intoxication and, if so, how her criteria for determining whether a rape occurred when intoxication was involved compares with Warshaw's criteria.

A similar perspective that holds a woman responsible for her decisions is when an intoxicated woman provides affirmative consent to engage in sexual intercourse.¹³⁵ Because both consensual and nonconsensual sex often involve drinking, when there is an allegation of rape, it is difficult to assess whether a woman who had been drinking understood what she was doing during the sexual encounter.¹³⁶ Professor David Bryden believes that focus can be directed away from a subjective interpretation of the victim's behavior by requiring an affirmative signal of consent.¹³⁷ Professor Alan Wertheimer construed this affirmative-consent approach to mean that when the victim's intoxication is self-induced, her consent should be treated as valid, especially if the man will be held responsible for his own intoxicated conduct.¹³⁸ In other words, the woman is held responsible when she is voluntarily intoxicated and gives her affirmative consent.¹³⁹ Professor Wertheimer criticizes the affirmative-consent approach because intoxicated consent should not always be treated as valid.¹⁴⁰ The important question is whether the woman's intoxicated verbal consent makes it acceptable for the man to engage in sexual intercourse with her.¹⁴¹

If a woman chooses to drink, there is a higher risk that she will consent to sex that she might otherwise reject.¹⁴² However, this does not mean that the woman's intoxicated behavior "makes it permissible for [the man] to take advantage of her intoxicated consent, especially if it is likely to be harmful to her."¹⁴³ Consequently, although the woman's affirmative consent should be considered when there is an allegation of rape-by-intoxication, it is not determinative of whether or not she was raped; sometimes, her consent should not be respected as valid due to her severe intoxication.

B. Don't Ruin the Mood

The commentary to the Model Penal Code illustrates the perspective that designating as rape sexual intercourse with a woman who is incapacitated due to intoxication is not a satisfactory approach because it does not adequately consider the important social role of alcohol in the dance of seduction.¹⁴⁴

134. Compare *id.*, with ROIPHE, *supra* note 2, at 53-54.

135. See David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 401-02 (2000).

136. *Id.* at 401.

137. *Id.* at 401-02.

138. Alan Wertheimer, *What is Consent? And is it Important?*, 3 BUFF. CRIM. L. REV. 557, 580 (2000).

139. *Id.* at 580.

140. *Id.* at 580-81.

141. *Id.* at 578-79.

142. *Id.* at 583.

143. *Id.*

144. AM. LAW INST., MODEL PENAL CODE AND COMMENTARIES 315 (1980).

Liquor and drugs may be potent agents of incapacitation, but they are also common ingredients of the ritual of courtship. The traditional routine of soft music and wine or the modern variant of loud music and marijuana implies some relaxation of inhibition. With continued consumption, relaxation blurs into intoxication and insensibility. Where this progression occurs in a course of mutual and voluntary behavior, it would be unrealistic and unfair to assign to the male total responsibility for the end result.¹⁴⁵

Therefore, it would “ruin the mood” to hold the man responsible when the man and the woman were mutually and voluntarily intoxicated. If the woman’s incapacitation is the result of self-induced (and not administered) intoxication, then she is responsible and cannot allege rape-by-intoxication.¹⁴⁶ From this standpoint, it would be *extravagant* to hold the man responsible because it is much too hard for him to evaluate the woman’s level of intoxication and determine if she has the capacity to consent, where drinking followed by consensual sexual intercourse is a common result of this type of interaction.¹⁴⁷ Of course this is a difficult assessment when the woman has had a few drinks, but it is hardly extravagant to demand that the man evaluate the woman’s capacity to consent to sex when she becomes sick, is unable to stand or sit up, or passes in and out of consciousness.¹⁴⁸ Why should the man not bear the burden of responsibility under these circumstances? Professor Stephen Schulhofer aptly wrote:

A woman too drunk to stand up should not be expected to resist physically or protest explicitly—even if she downed all the drinks of her own accord and knew exactly what was in them. But do we say the same about any woman who has had two or three beers, or too many drinks to drive a car safely? Should we conclude that a woman’s consent is invalid if she said “yes” because she was feeling relaxed and uninhibited after having a glass of wine? The law’s willingness to find consent in cases of severe alcohol impairment should be considered intolerable, but a standard that suggests rape anytime alcohol plays a part in sexual consent would be intolerable as well.¹⁴⁹

Under Professor Schulhofer’s view, the level of the woman’s intoxication, and not whether her intoxication was self-induced or administered, would be the significant factor in determining if a rape occurred. Although Professor Schulhofer acknowledges the social function of alcohol in intimate settings deemed so important by the Model Penal Code commentary, he also implies that a severely intoxicated woman *should* “ruin the mood” because it would be unacceptable for a man to engage in sexual intercourse with a woman in that condition.

C. Rape-By-Intoxication Is Still Rape

According to Warshaw, acknowledging that in some cases, the woman might have prevented the rape by making a different decision (avoiding intoxication) does not mean that the woman is responsible for the rape.¹⁵⁰ Because “responsibility for crime falls on those who commit it[,]” men who are intoxicated when they commit rape are responsible for the offense, even if the woman was voluntarily intoxicated.¹⁵¹ Men may also be held responsible if they take advantage of an intoxicated woman, even if she provided verbal consent.¹⁵² Therefore, the woman’s incapacity due to voluntary intoxication does not change the fact that she was raped and that the rapist is responsible.

However, as Professor Bryden points out, this argument assumes that a rape actually transpired and the only issue that remains is whether to excuse it.¹⁵³ Because the man generally asserts a consent defense

145. *Id.*

146. *See id.* at 316.

147. *Id.* at 318 (emphasis added to highlight specific term used by the Model Penal Code commentary).

148. *Cf.* SCHULHOFER, *supra* note 12, at 7-8 (describing a case of rape where the woman was demonstrably intoxicated, but the jury acquitted the defendants anyway).

149. *Id.* at 14-15.

150. WARSHAW, *supra* note 17, at 21.

151. *Id.* at xxiv.

152. Wertheimer, *supra* note 138, at 583.

153. Bryden & Lengnick, *supra* note 13, at 1348.

in most acquaintance-rape cases, whether consensual or nonconsensual sex occurred is the key issue.¹⁵⁴ If the woman was drinking, but not incapacitated, her drinking is relevant because it increases the likelihood that she consented to sex; yet, it also increases the likelihood that she was raped.¹⁵⁵ “[I]n the context of heavy drinking, consent is less a condition of the drinker’s mind than a reaction in the observer’s mind. The point at which pre-coital libations invalidate what would otherwise be consensual conduct cannot be resolved by any merely empirical observation.”¹⁵⁶ In other words, intoxication increases the complexity of deciding whether a rape occurred because the man cannot assess when the requisite level of intoxication that renders the woman incapable of consenting to sex is met. However, as explained in Part III.B., it seems reasonable to demand that the man ascertain the woman’s capacity to consent to sexual intercourse when the level of intoxication is so severe that she displays physical manifestations of her incapacity.

D. Intoxicated Men Assume the Risk of Rape

Professor Susan Estrich recognizes that men and women may perceive sexual encounters differently, but sometimes this difference results in serious injury to women.¹⁵⁷ Therefore, it is proper for the law to demand that men act reasonably in sexual situations and to reprimand them when they do not.¹⁵⁸ Although a severely intoxicated man may be honestly mistaken as to a woman’s consent to engage in sex, “a man who voluntarily sheds his capacity to act and perceive reasonably should not be heard to complain here—any more than with respect to other crimes—that he is being punished in the absence of choice.”¹⁵⁹ Professor Wertheimer agrees with the argument that an intoxicated man assumes the risk of liability for conduct that he would not have engaged in if sober, which includes the risk of committing rape-by-intoxication.¹⁶⁰ For Professor Wertheimer, it is acceptable for the man to bear a greater legal burden from intoxication so long as the imbalance is justified.¹⁶¹ The justification for demanding that men assume the greater legal burden and be held responsible when there is an allegation of rape may be that, in almost all cases of rape, women are the victims and men are the perpetrators.

One criticism of insisting that men assume the risk of rape is the concern for false reporting. This concern was infamously raised by Sir Matthew Hale when he stated, “it must be remembered, that [rape] is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent.”¹⁶² Although there is a consensus among legal scholars that only two percent of rape accusations are false,¹⁶³ there are large differences in estimates from various studies that range from zero percent to ninety-eight percent.¹⁶⁴ Some of the reasons cited for a false accusation of acquaintance rape include: hasty accusations from an angry girlfriend having an affair with a married man, a teenager who

154. *Id.*

155. *Id.* at 1348-49.

156. *Id.* at 1348.

157. Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1104 (1986).

158. *Id.*

159. *Id.* (citing MODEL PENAL CODE § 2.08(2) (1980)).

160. Wertheimer, *supra* note 138, at 583.

161. *Id.*

162. BLACKSTONE, *supra* note 77, at 215 (quoting Sir Matthew Hale from 1 Hal. P.C. 635).

163. Edward Greer, *The Truth Behind Legal Dominance Feminism’s “Two Percent False Rape Claim” Figure*, 33 *LOY. L.A. L. REV.* 947, 949 (2000) (citing Bryden & Lengnick, *supra* note 13, at 1298).

164. Joanne Archambault, *False/Unfounded Sexual Assault Allegations*, at <http://www.mysati.com/services.htm> (last visited Mar. 18, 2004).

does not want her parents to find out that she decided to have sex,¹⁶⁵ or a woman who regrets her decision after having sex.¹⁶⁶ Indeed, Edward Greer has suggested that as many as twenty-five percent of men facing rape allegations are innocent.¹⁶⁷ In his opinion, the two-percent fiction has created an unsupported justification to shift more of the burden to the man accused of rape.¹⁶⁸ Nevertheless, it is hard to know if rape has a higher false reporting rate than other crimes.¹⁶⁹ Considering the tremendous barriers to an acquaintance-rape case being tried, especially when the parties were intoxicated, the concern for false reporting could be overstated. Therefore, maybe men, who generally are the perpetrators of rape, should assume the risk of responsibility for rape. However, when both parties are voluntarily drinking alcohol, taking risks they might not otherwise take, or making decisions they might not otherwise make while sober, it is not fair to automatically hold the man responsible when there is an allegation of rape-by-intoxication. This is not to say that an intoxicated woman is responsible for being raped; clearly she is not responsible. It is only to suggest that when both parties are intoxicated, the dynamics of a specific sexual encounter must be evaluated before determining that a rape occurred because alcohol plays a significant role in both consensual and nonconsensual sexual encounters.

CONCLUSION

In light of the law and pertinent commentary, a statutory scheme that holds either the woman or the man entirely responsible in cases of mutual and voluntary intoxication, without understanding the circumstances of a particular sexual encounter, is not a satisfactory approach. Although a woman should be held responsible for her choices, this does not mean that she should assume the risk of responsibility for rape when she is rendered incapacitated due to severe intoxication and a man takes advantage of her condition, regardless of how the woman became intoxicated. Moreover, an intoxicated woman's verbal consent to engage in sexual intercourse should be an important factor when determining if a rape actually occurred, but depending on the specific situation, her actual consent should not necessarily be respected as valid if the facts suggest that her level of intoxication was so severe that she did not have the legal capacity to consent. Further, the important social role alcohol plays in consensual sexual encounters need not be threatened by demanding that a man evaluate an intoxicated woman's capacity to consent when she displays obvious signs of severe intoxication. Yet, because it can be difficult to assess where the line is drawn between a woman who is *merely* intoxicated and one who is *severely* intoxicated, especially when alcohol consumption often leads to consensual sex, it does not seem fair to automatically hold the man responsible for rape.

Therefore, when the parties are voluntarily intoxicated, the law should be interested in evaluating both sides of the story to understand the context of the sexual encounter before deciding whether the man committed rape. It appears that the most significant factor in this determination is the level of the woman's intoxication and whether or not her severe intoxication was apparent. If the woman displayed physical manifestations of her incapacity, then it seems reasonable to hold the man responsible, even if his own intoxication clouded his perception of the situation. However, if the intoxicated woman does not actually demonstrate her severe intoxication, then the man cannot be expected to evaluate the woman's ability to provide legal consent. Under this latter scenario, it does not seem reasonable to hold the man responsible for rape, especially if the woman verbally consented to sexual intercourse. Consequently, the individual circumstances of a sexual encounter must be understood and evaluated before holding either the man or the woman responsible for a rape allegation when both parties were voluntarily intoxicated.

165. John D. Lueck, *Defending the Charge of Rape*, FINDLAW, Mar. 2000, at http://library.lp.findlaw.com/criminallaw_1_403_1.html (last visited Mar. 18, 2004).

166. WARSHAW, *supra* note 17, at xx (explaining how "backlash rape-denial" theory criticizes findings of the prevalence of acquaintance rape).

167. Greer, *supra* note 163, at 949.

168. *Id.* at 948.

169. See Bryden & Lengnick, *supra* note 13, at 1298 (referring to the two-percent figure for false rape reports as equivalent to other major crimes).

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