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COMMENTS

“THIS BITCH GOT DRUNK AND DID THIS TO HERSELF:” PROPOSED EVIDENTIARY REFORMS TO LIMIT “VICTIM BLAMING” AND “PERPETRATOR PARDONING” IN RAPE BY INTOXICATION TRIALS IN CALIFORNIA

*By Clare Carlson**

INTRODUCTION	286
I. RAPE BY INTOXICATION IN CALIFORNIA	292
II. THE PROBLEM: JURORS USE EVIDENCE OF THE VOLUNTARY NATURE OF A VICTIM’S INTOXICATION AND EVIDENCE OF THE DEFENDANT’S VOLUNTARY INTOXICATION TO BLAME THE VICTIM AND PARDON THE PERPETRATOR	295
A. Jurors Hold a Voluntarily Intoxicated Victim Partially Responsible for her Sexual Assault.	295
B. Jurors Hold a Voluntarily Intoxicated Defendant Less Responsible for his Criminal Behavior.	301
C. The Problem	303
III. PROPOSED REFORM: EVIDENTIARY RULES SHOULD EXCLUDE OR SIGNIFICANTLY RESTRICT THE ADMISSIBILITY OF EVIDENCE THAT DEMONSTRATES THE VOLUNTARY NATURE OF A VICTIM’S INTOXICATION AS UNDULY PREJUDICIAL, AND EXCLUDE EVIDENCE OF THE DEFENDANT’S VOLUNTARY INTOXICATION AS IRRELEVANT.	307
A. Evidence of the Voluntary Nature of a Victim’s Intoxication.....	308

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B. Evidence of the Defendant’s Voluntary Intoxication	310
IV. AN APPLICATION OF THE PROPOSED REFORMS: WHAT WOULD A CIVIL OR CRIMINAL TRIAL LOOK LIKE?.....	311
CONCLUSION.....	314

INTRODUCTION

In March of 2007, Jessica Gonzalez, a seventeen-year-old high school student, attended a party held by the De Anza Community College men’s baseball team in San Jose, California.¹ Jessica remembers bringing beer to the party² and drinking at least ten shots of vodka early in the evening.³ However, she subsequently “blacked out.”⁴ The next thing she remembers was waking up in the hospital and being treated for alcohol poisoning and sexual assault.⁵

Two months later, Lauren Chief Elk and April Grolle, members of the De Anza women’s soccer team and fellow partygoers, came forward with their accounts of the evening.⁶ Both women stated they were leaving the party when they realized that Jessica was in a back bedroom of the house.⁷ When they tried to enter the bedroom, a baseball player confronted them, telling them to “[m]ind [their] own business; she wants to be in [there,]” and slamming the door in their faces.⁸ “What they saw through a crack in the door[,]” however, “horrified them.”⁹ As Elk remembers, ““When I looked in, I saw about ten pairs of legs surrounding a girl, lying on the mattress on the floor and a guy on top of her with his pants down and his hips thrusting on top of her And when I saw that I knew immediately something wasn’t right. It just didn’t look

1. Karina Rusk, *Accuser in De Anza Rape Case Talks to ABC7*, ABC7 (Aug. 10, 2011), http://abclocal.go.com/kgo/story?section=news/local/south_bay&id=8300480.

2. *Id.*

3. Tracey Kaplan, *De Anza Trial Begins with Question: Was Woman Gang-Raped or a Seductress?*, SAN JOSE MERCURY NEWS (Feb. 26, 2011, 10:06 PM), http://www.mercurynews.com/ci_17487365.

4. Rusk, *supra* note 1. “Blacking out”— also referred to as “alcohol-related amnesia”— is a term denoting memory loss caused by alcohol consumption “in which long term memory creation is impaired” or there is “a complete inability to recall the past Blackouts are frequently described as having effects similar to that of anterograde amnesia, in which the subject cannot recall any events after the event that caused amnesia.” *Blackout (drug-related amnesia)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Blackout_\(alcohol-related_amnesia\)](http://en.wikipedia.org/wiki/Blackout_(alcohol-related_amnesia)) (last updated Jan. 22, 2014, 1:58PM).

5. Deborah Roberts et al., *Alleged Gang Rape Ends with No Criminal Charges but Civil Suit Pending*, ABC NEWS (June 5, 2009), <http://abcnews.go.com/2020/story?id=7757324>; Rusk, *supra* note 1.

6. *Witnesses to Alleged De Anza Rape Speak Out*, KTVU.COM (May 22, 2007, 10:10 PM), <http://www.ktvu.com/news/news/witnesses-to-alleged-de-anza-rape-speak-out/nKTyT/>.

7. *Id.*

8. *Id.*

9. *Id.*

right.”¹⁰ Elk, Grolle, and another teammate then burst through the door to find Jessica “not moving.”¹¹ They described the scene as follows:

“She had vomit dribbling down her face. We had to scoop vomit out of her mouth [and] lift her up. Her pants were completely off her body . . . She had her one shoe one [sic], her jeans were wrapped around one of her ankles and her underwear was left around her ankles. To the left of the bed there was some condom thrown on the ground.”¹²

When the women “lifted her head up, her eyes moved[,] and she said ‘I’m sorry.’”¹³ When the women began to carry Jessica out of the room, one of the young men in the bedroom responded, “‘This is her fault’”¹⁴ “‘This bitch got drunk and did this to herself.’”¹⁵

Despite an extensive investigation by the Santa Clara Sheriff’s Department and the District Attorney’s Office and a presentation of evidence to a grand jury, Santa Clara County District Attorney Dolores Carr declined to criminally prosecute the young men for sexual assault due to insufficient evidence.¹⁶ “‘Some bad things happened in that room,’” Carr explained, “‘[b]ut we can’t prove a crime.’”¹⁷ Carr’s decision not to prosecute sparked public outrage, infuriating both investigators and Jessica’s friends and family, and prompting California Attorney General Jerry Brown to review Carr’s decision.¹⁸ Nearly a year later, however, Brown affirmed Carr’s initial decision.¹⁹ Due to the “‘wildly conflicting accounts’ . . . [of] witnesses whose memories were . . . clouded by alcohol, and . . . a lack of ‘consistent, useful

10. *Id.*

11. *Id.*

12. *Witnesses to Alleged De Anza Rape Speak Out*, KTVU.COM (May 22, 2007, 10:10 PM), <http://www.ktvu.com/news/news/witnesses-to-alleged-de-anza-rape-speak-out/nKTyT/>.

13. *Id.*

14. *Id.*

15. Tracey Kaplan, *De Anza Civil Trial Blog March 2: Woman Pressing Rape Allegations Against Former Baseball Players*, SAN JOSE MERCURY NEWS (Mar. 2, 2011, 8:39 AM), http://www.mercurynews.com/crime-courts/ci_17519573.

16. Jim Herron Zamora, *State to Review De Anza Rape Case/Attorney General to Look into DA’s Decision Not to Prosecute*, SFGATE (June 6, 2007, 4:00 AM), <http://www.sfgate.com/bayarea/article/STATE-TO-REVIEW-DE-ANZA-RAPE-CASE-Attorney-2573272.php>.

17. C.W. Nevius, *D.A. Under Fire for Decision Not to Prosecute De Anza Case*, SFGATE (June 1, 2007, 5:26 PM), <http://www.sfgate.com/default/article/D-A-under-fire-for-decision-not-to-prosecute-De-2590122.php>.

18. Zamora, *supra* note 16.

19. John Coté, *State: Evidence Lacking in De Anza Rape Case*, SFGATE (May 3, 2008, 4:00 AM), <http://www.sfgate.com/bayarea/article/State-Evidence-lacking-in-De-Anza-rape-case-3285316.php>.

identifications.”²⁰ Brown concluded that the State could not “ethically pursue a prosecution.”²⁰

Following the State’s decision not to prosecute, Jessica filed a civil suit against ten of the young men who sexually assaulted her.²¹ In her complaint, she alleged “negligence, battery, sexual battery, false imprisonment, invasion of privacy, conspiracy, unlawful intercourse, rape of an unconscious woman, rape of an intoxicated woman, and intentional infliction of emotional distress.”²² She claimed that the men sexually assaulted her while she was highly intoxicated and incapable of giving legal consent to sexual activity, and sought more than \$25,000 in damages for emotional distress.²³

During the trial, however, defense counsel argued that Jessica was neither as intoxicated, nor the victim, she claimed to be.²⁴ Defense counsel (to add insult to injury, a woman herself) painted Jessica as the seductress, a willing and active sexual participant.²⁵ Defense counsel introduced evidence that Jessica was not significantly intoxicated until hours *after* the alleged assault, and that she was able to remember her name and recognize her mother at the hospital.²⁶ She argued that Jessica consented to sexual activity, introducing testimony that she performed a lap dance for the boys,²⁷ kissed one of them,²⁸ approached another and “rubbed up against him, grabbed his genitals, told him he was “so hot,” [and] backed him into the bedroom[,]”²⁹ told several of them to “(expletive deleted) [her],”³⁰ and “had ‘the weirdest smile [during sexual intercourse], like she liked it.”³¹ Defense counsel also introduced photographs of Jessica from the party offering a partygoer a drink “by nestling a shot glass full of liquor in her exposed cleavage” and “making a hand gesture signaling

20. *Id.*

21. John Coté, *Woman Sues Ex-De Anza Players in Alleged Rape*, SFGATE (Mar. 6, 2008, 4:00 AM), <http://www.sfgate.com/default/article/Woman-sues-ex-De-Anza-players-in-alleged-rape-3292098.php>.

22. *DA Declines to File Charges in De Anza Baseball Team Rape Case*, CBS SF BAY AREA (Oct. 14, 2011, 11:48 PM), <http://sanfrancisco.cbslocal.com/2011/10/14/da-declines-to-file-charges-in-de-anza-baseball-team-rape-case/>.

23. Coté, *supra* note 21.

24. Cara Kulwicki, *De Anza Rape Trial Filled with Victim Blaming, Slut Shaming*, CURVATURE (Mar. 10, 2011), <http://thecurvature.com/2011/03/10/de-anza-rape-trial-filled-with-victim-blaming-slut-shaming/> (quoting Kaplan, *supra* note 3).

25. *See id.*

26. *Id.*

27. *Id.*

28. Tracey Kaplan, *De Anza Civil Trial Blog March 8: Fifth Amendment—Against Self-Incrimination—Invoked by Defendant*, SAN JOSE MERCURY NEWS (Mar. 8, 2011, 9:26 AM), http://www.mercurynews.com/crime-courts/ci_17565180.

29. Kulwicki, *supra* note 24.

30. Kaplan, *supra* note 28.

31. Tracey Kaplan, *De Anza Civil Trial Blog March 3: Witnesses Testifying About the Party*, SAN JOSE MERCURY NEWS (Mar. 3, 2011, 9:17 AM), http://www.mercurynews.com/crime-courts/ci_17529947.

oral sex on a female.”³² In her closing argument, she asserted that Jessica’s conduct “[led] any reasonable person to believe she was capable of consent and indeed *desirous* of contact[.]” and, in fact, *Jessica* was responsible for her alleged assault.³³ “Her conduct was the sole and exclusive cause of everything that happened that day,” and the lawsuit only demonstrated that “[s]he ‘doesn’t want to face the truth of what she did that night.’”³⁴

The jury agreed, returning a verdict for the defendants on April 7, 2011.³⁵ One juror commented that “[s]he came there kind of looking for it”³⁶ Another explained: “I don’t think she was comatose She was just having a good time—they were all having a good time.”³⁷ One defendant’s mother, too, supported the jury’s decision, stating at the conclusion of the trial that “[t]he truth prevailed in the courthouse. By her actions[,] [Jessica] . . . brought this on herself and then cried wolf”³⁸

Despite newly elected Santa Clara District Attorney Jeffrey Rosen’s publicly stated commitment to reopen the case prior to his election in 2008,³⁹ Rosen officially announced in October 2011 that he would not do so.⁴⁰ “What happened on March 3, 2007 [to Jessica Gonzalez], . . . was reprehensible. It was unexcusable [sic],” Rosen said. . . . “However, the job of the District Attorney’s Office is first and foremost to determine whether conduct is criminal and whether the criminal conduct can be proven to a jury beyond a reasonable doubt.”⁴¹ He further explained:

“While sexual assault cases are very difficult to prove, sexual assaults involving highly intoxicated people are . . . [even more] difficult to prove By their very nature, these types of cases

32. *Risque Photos of Plaintiff Revealed at De Anza Gang-Rape Civil Trial*, ONTD POLITICAL (Mar. 16, 2011, 4:12 PM), <http://ontd-political.livejournal.com/7900042.html> [hereinafter *Risque Photos of Plaintiff*].

33. Kulwicki, *supra* note 24 (emphasis added).

34. *Id.*

35. Karina Rusk, *De Anza Students Not Liable in Rape Case*, ABC7 (Apr. 07, 2011), http://abclocal.go.com/kgo/story?section=news/local/south_bay&id=8058991.

36. Tracey Kaplan & Tracy Seipel, *No Defendants Found Liable in De Anza Rape Trial, No Damages Awarded*, SAN JOSE MERCURY NEWS (Apr. 7, 2011, 9:38 AM), http://www.mercurynews.com/top-stories/ci_17793153.

37. *Id.*

38. Rusk, *supra* note 35.

39. See Jessica Lussenhop, *Rosen Joins Former De Anza Students to Press for Reopening Rape Case*, SAN JOSE INSIDE (June 1, 2010), http://www.sanjoseinside.com/news/entries/rosen_joins_former_de_anza_students_to_press_for_reopening_rape_case/. Rosen stated that though District Attorney “Carr considers the case closed, I do not When I’m elected district attorney, we will carefully and thoroughly review the case, examine and test all of the evidence, and decide whether to file charges.” *Id.*

40. Susie Fowkes, *DA: De Anza Rape Suspects Will Not Face Criminal Charges*, EXAMINER.COM (Oct. 14, 2011), <http://www.examiner.com/article/da-de-anza-rape-suspects-will-not-face-criminal-charges>.

41. *Id.*

involve witnesses whose perceptions and memories are questionable because they were under the influence of drugs or alcohol. These cases are rarely successfully prosecuted without an eyewitness or some other compelling evidence What happened to Jessica was not her fault. The suspects' behavior was not acceptable conduct in a civilized society. However, the District Attorney's Office cannot prove that a crime occurred on March 3, 2007 and therefore will not file criminal charges."⁴²

Thus, Jessica was left entirely without justice. Both the criminal and civil justice systems had failed her, and the young men who sexually assaulted her were ultimately only temporarily suspended from De Anza college athletics—the very definition of a “slap on the wrist.”⁴³

Despite the local and national attention Jessica's case received and the public outrage it sparked, Jessica's case is far from exceptional—instead, her case is the unfortunate norm. California defines rape by intoxication⁴⁴ as sexual intercourse with a person so intoxicated that she cannot legally consent, regardless of the means of her intoxication—whether involuntary or voluntary.⁴⁵ Further, California law does not require that the defendant have *actual* knowledge of the victim's intoxication and incapacity to consent; it is sufficient that an objectively reasonable person *should have known* of her intoxicated condition, thus preventing both a voluntary intoxication and mistake of fact as to consent, or *Mayberry*, defense.⁴⁶ Such statutory construction demonstrates that the legislature does not intend the victim's voluntary intoxication to serve as a basis to attribute *any* responsibility to her for her sexual assault, and does not intend the defendant's voluntary intoxication to act as an exculpatory factor to diminish his responsibility for his criminal behavior.

Practically, however, social psychology studies demonstrate that jurors regularly use evidence of the victim's and defendant's voluntary intoxication to make legally impermissible attributions of responsibility that contradict legislative intent.⁴⁷ That is, jurors hold a voluntarily intoxicated victim partially responsible for her sexual assault, and a voluntarily intoxicated defendant less responsible for his criminal behavior.⁴⁸ Thus, prosecutors often decline to

42. *Id.* The author attempted to contact Santa Clara District Attorney Jeffrey Rosen for comment, but he declined.

43. Diana Walsh, *Eight De Anza Ballplayers Suspended in Rape Investigation*, SFGATE (Mar. 06, 2007, 4:09 PM), <http://www.sfgate.com/default/article/Eight-De-Anza-ballplayers-suspended-in-rape-2571872.php>. The school also cancelled baseball practices and games for one week. *Id.*

44. For a detailed survey of rape-by-intoxication statutes nationwide, see Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131 (2002).

45. *See infra* Part I.

46. *Id.*

47. *See infra* Part II.

48. *See infra* Part II.A.

prosecute these cases due to the decreased likelihood of conviction, and in the rare case they are prosecuted, jurors are less likely to convict, leaving sexual assault victims like Jessica without any avenue of legal relief.⁴⁹

Some scholars have proposed possible reforms to combat this problem, recommending that trial lawyers utilize increased awareness of such victim blaming and perpetrator pardoning to more effectively conduct *voir dire*.⁵⁰ Others have advocated for the implementation of educational programs targeted at law enforcement, the judicial system, and medical professionals to increase awareness about the prevalence of “victim blaming” and other legally impermissible attributions of responsibility.⁵¹ A more realistic and effective solution, however, is to reform the very evidentiary rules that allow jurors to hear evidence of a victim’s and a defendant’s voluntary intoxication, and thus allow them to engage in such victim blaming and perpetrator pardoning. Specifically, reformed evidentiary rules would exclude, or at the very least, significantly restrict the admissibility of, evidence that demonstrates the voluntary nature of a victim’s intoxication as unduly prejudicial, and exclude evidence of the defendant’s voluntary intoxication as irrelevant. In Jessica’s case, these reforms would have prevented a jury from hearing unduly prejudicial evidence that Jessica was voluntarily intoxicated and irrelevant evidence that the young men who sexually assaulted her were also voluntarily intoxicated, limiting the jury’s ability to make legally impermissible attributions of responsibility and reach an improper verdict.

Part I of this Comment details the statutory definition and common law interpretations of rape by intoxication in California, concluding that both demonstrate the legislature’s intent that the victim’s voluntary intoxication may not serve as a basis to attribute *any* responsibility to her for her sexual assault, and the defendant’s voluntary intoxication may not serve as an exculpatory factor to diminish his responsibility for his criminal behavior. Part II establishes that jurors instead often use evidence of a victim’s and defendant’s voluntary intoxication to make legally impermissible attributions of responsibility that contradict legislative intent, holding a victim partially responsible for her sexual assault and a defendant less responsible for his criminal behavior. Part III proposes various evidentiary reforms to limit this victim blaming and perpetrator pardoning. Such evidentiary reforms would exclude or significantly restrict the admissibility of evidence that demonstrated the victim’s voluntary intoxication as unduly prejudicial, and would exclude evidence of the defendant’s voluntary intoxication as irrelevant. Part IV applies these evidentiary reforms to a hypothetical criminal (or civil) trial of Jessica’s rapists, contending that these reforms would have resulted in the introduction of

49. See *infra* Part II.C.

50. Karla J. Stormo et al., *Attributions About Acquaintance Rape: The Role of Alcohol and Individual Differences*, 27 J. APPLIED SOC. PSYCHOL. 279, 301 (1997); Ashley A. Wenger & Brian H. Bornstein, *The Effects of Victim’s Substance Use and Relationship Closeness on Mock Jurors’ Judgments in an Acquaintance Rape Case*, 54 SEX ROLES 547, 552 (2006).

51. Stormo et al., *supra* note 50, at 301-02.

drastically different types of evidence at trial, and resulted in a different and more favorable outcome for Jessica. Part V concludes this Comment.

I. RAPE BY INTOXICATION IN CALIFORNIA

California defines rape by intoxication, as “an act of sexual intercourse . . . [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.”⁵² Rape by intoxication “is punishable by imprisonment . . . for three, six, or eight years.”⁵³ Thus, rape by intoxication in California has two elements.⁵⁴ First, a victim must be “prevented from resisting by any intoxicating . . . substance . . .”⁵⁵ A victim is prevented from resisting by an intoxicating substance when she is so intoxicated that she is unable to understand not only “the physical nature of the act, [but] its moral character, and [its] probable consequences” as well.⁵⁶ When a victim lacks this ability, she is incapable “of exercising the degree of judgment a person must have in order to give legally cognizable consent[,]” and thus unable to legally consent to sexual activity.⁵⁷ Even a victim’s *actual* consent is not a defense to rape by intoxication. As the California Court of Appeals held in *People v. Giardino*, “if . . . the victim lacked the capacity to give legal consent . . . actual consent is irrelevant . . .”⁵⁸

In order to satisfy this demanding standard, a victim’s intoxication must be extreme. As the *Giardino* court held, “[i]t is not enough that the victim was intoxicated to some degree, or that the intoxication reduced the victim’s sexual inhibitions.”⁵⁹ Indeed, “[i]mpaired mentality may exist and yet the individual may be able to exercise reasonable judgment with respect to the particular matter presented to his or her mind.”⁶⁰ Rather, “the level of intoxication and the resulting mental impairment must have been so great that the victim could no longer exercise reasonable judgment concerning that issue.”⁶¹ As former Alameda County Assistant District Attorney and chair of the Sexual Assault Committee for the California District Attorney’s Association (CDAA) noted,

52. CAL. PENAL CODE § 261(a)(3) (West 2008). It is important to note that I will refer to the victim as “she” and the perpetrator as “he” throughout this article due to the fact that the vast majority of rape victims are women. *Who are the Victims?* RAINN: RAPE, ABUSE & INCEST NAT’L NETWORK, <http://www.rainn.org/get-information/statistics/sexual-assault-victims> (last visited Mar. 7, 2014) (reporting that nine of every ten rape victims were female in 2003).

53. PENAL § 264(a).

54. *Id.* § 261(a)(3).

55. *Id.*

56. CAL. JURY INSTR.—CRIM. 1002 (2012).

57. *People v. Giardino*, 98 Cal. Rptr. 2d 315, 321 (2000).

58. *Id.* at 320; *see also infra* Part IV.

59. *Giardino*, 98 Cal. Rptr. 2d at 324.

60. *Id.* (quoting *People v. Peery*, 26 Cal. App. 143, 145-46 (1914)).

61. *Id.*; *see also* CAL. JURY INSTR.—CRIM. 1002 (2014); 4 CAL. CRIM. PRACTICE: MOTIONS, JURY INSTR. & SENT. § 51:90 (3d ed. 2013).

“the intoxicated victim must . . . [have been] so ‘out of it’ that she does not understand what she is doing or what is going on around her. It is not a situation where the victim just ‘had too much to drink.’”⁶²

Notably, criminal liability in California is not dependent upon the *source* of the victim’s intoxication.⁶³ Unlike majority jurisdictions in which an offender is only criminally liable for rape by intoxication when the victim’s intoxication is achieved *against her will or without her consent*,⁶⁴ California criminalizes rape by intoxication regardless of the source of the victim’s intoxication.⁶⁵ A perpetrator is legally responsible whether the victim’s intoxication is involuntary *or* voluntary.⁶⁶ Essentially, the focus is not on the source of the victim’s intoxication, but rather her *capacity* to give legal consent to sexual activity.

Second, the offender must have actual or constructive knowledge of the victim’s intoxication.⁶⁷ The victim’s intoxicated condition must have been “known, or reasonably should have been known, by the accused.”⁶⁸ It is important to note that the disjunctive statutory language means that a defendant’s *actual* knowledge of the victim’s intoxication and incapacity to give legal consent is not required. It is sufficient that an *objectively reasonable person should have known* of her intoxicated condition.⁶⁹ Such statutory construction prevents a defendant from raising two possible affirmative defenses. First, as the Court of Appeals held in *People v. Potter*,⁷⁰ because rape is a general intent crime, “inability by reason of intoxication to form specific intent . . . [is not] a defense.”⁷¹ Thus, a defendant is prevented from raising a voluntary intoxication defense.

A defendant is also prevented from raising a mistake of fact as to consent defense, or a *Mayberry* defense. A *Mayberry* defense is characterized by a reasonable, good faith belief that a person consented to sexual activity.⁷² It has both a subjective and objective component.⁷³ In order to satisfy the subjective

62. Valerie M. Ryan, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 CAL. W. L. REV. 407, 416 & n.73 (2004) (citing Telephone Interview with Nancy O’Malley, Chief Assistant Dist. Attorney, Alameda County Dist. Attorney’s Office (Nov. 11, 2003); Email from Nancy O’Malley, Chief Assistant District Attorney, Alameda County District Attorney’s Office, to Valerie M. Ryan (Oct. 7, 2003, 07:58:04 PST) (on file with Valerie M. Ryan)).

63. *See id.* at 416.

64. *Id.* at 415-16.

65. *Id.* For a more detailed description and comparison of rape-by-intoxication statutes in majority and minority jurisdictions and suggestions for reform, see Falk, *supra* note 44.

66. Ryan, *supra* note 62, at 415-16.

67. CAL. PENAL CODE § 261(a)(3) (West 2008).

68. *Id.*

69. *Id.*

70. 77 Cal. App. 3d 45 (1978)

71. *Id.* at 51.

72. *People v. Williams*, 4 Cal. 4th 354, 360-61 (1992).

73. *Id.*

component, the Supreme Court of California has held that the mistake regarding the victim's consent must have been made "honestly and in good faith . . ."⁷⁴ In order to satisfy the objective component, the mistake regarding the victim's consent must have been "reasonable under the circumstances."⁷⁵ In other words, "regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable . . ."⁷⁶ A defendant's voluntary intoxication, then, will generally prevent a *Mayberry* defense because his mistaken belief as to consent was not "formed under circumstances society will tolerate as reasonable"—he was drunk.⁷⁷ As the *Potter* court held, if a defendant believed that a victim was consenting to sexual intercourse as a result of his self-induced intoxication, his belief is neither reasonable nor in good faith, and he is not entitled to raise such a defense.⁷⁸

Fundamentally, the statutory definition and common law interpretations of rape by intoxication demonstrate two basic legislative intentions. First, by defining rape by intoxication as sexual intercourse with a person so intoxicated that she cannot legally consent to sexual activity, the legislature has expressed its intent that it is the victim's *capacity* to consent, and not the *source* of her intoxication, that is of central importance. Essentially, the victim's voluntary intoxication may not serve as a basis to attribute *any* responsibility to her for her sexual assault. Second, by requiring that an offender have only constructive knowledge rather than actual knowledge of the victim's intoxicated condition and incapacity to consent, the legislature expresses its intent that the defendant's voluntary intoxication may not serve as an exculpatory factor to diminish his culpability.

74. *Id.*

75. *Id.* at 361.

76. *Id.*

77. *Id.*

78. California courts have also held that a defendant may not raise a mistake of fact as to consent *Mayberry* defense regarding the victim's level of intoxication. As the California Court of Appeals noted in *People v. Ramirez*:

[T]he jury [was required] to find that . . . [the defendant] *knew, or reasonably should have known, that . . . [the victim] was unable to resist due to her intoxication.* It would not be consistent for a jury to find that . . . [the defendant] "reasonably should have known" that . . . [the victim's] level of intoxication prevented her from resisting, and at the same time find that Ramirez held a "reasonable belief" that she was able to resist or give consent. A belief that the victim was able to resist could not be reasonable if the perpetrator "reasonably should have known" that the victim was unable to resist.

People v. Ramirez, 50 Cal. Rptr. 3d 110, 123 (2006).

II. THE PROBLEM: JURORS USE EVIDENCE OF THE VOLUNTARY NATURE OF A VICTIM'S INTOXICATION AND EVIDENCE OF THE DEFENDANT'S VOLUNTARY INTOXICATION TO BLAME THE VICTIM AND PARDON THE PERPETRATOR

Despite legislative intentions, rape by intoxication trials in California are affected by a host of extralegal factors. Social psychology studies demonstrate that jurors use evidence of the victim and perpetrator's voluntary intoxication to make legally impermissible attributions of responsibility that contradict these intentions: jurors hold a voluntarily intoxicated victim partially responsible for her sexual assault and a voluntarily intoxicated defendant less responsible for his criminal behavior.⁷⁹ While jurors view the victim's intoxication "as sufficient grounds for her partial condemnation," jurors view the "perpetrator[']s intoxication . . . as a mitigating circumstance warranting at least some clemency in judging his behavior."⁸⁰ "Whereas the bottle may grant a pardon to the perpetrator, it tends to hold greater blame for the victim."⁸¹

A. *Jurors Hold a Voluntarily Intoxicated Victim Partially Responsible for her Sexual Assault.*

While the California legislature has expressed its intent that a victim's voluntary intoxication may not serve as a basis to attribute *any* responsibility to her for her sexual assault, social psychology studies demonstrate that jurors do just that. These studies demonstrate that jurors routinely use evidence of the voluntary nature of a victim's intoxication to "blame the victim," and hold a voluntarily intoxicated victim at least partially responsible for her sexual assault.⁸²

Initial social psychology studies examined only the general intoxication of a sexual assault victim and its effect on (1) attributions of responsibility to victim and defendant, and (2) determinations of a defendant's guilt or innocence.⁸³ Importantly, these studies made no distinction between the voluntary or involuntary nature of the victim's intoxication. In their seminal study, professors Deborah Richardson and Jennifer Campbell found that a victim's intoxication had a significant effect on attributions of responsibility to the parties; simply stated, a victim was held more responsible for her sexual assault when she was drunk.⁸⁴ Subsequent studies corroborated these results.

79. See *infra* Part II.A.

80. Stormo et al., *supra* note 50, at 303.

81. *Id.* at 299.

82. See *supra* notes 80-81 and accompanying text; *infra* Part II.A.

83. See *infra* notes 84-85 and accompanying text.

84. Deborah Richardson & Jennifer L. Campbell, *Alcohol and Rape: The Effect of Alcohol on Attributions of Blame for Rape*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 468, 472 (1982). In Richardson and Campbell's study, participants were given a description of a sexual assault in which a woman was intoxicated and approached by an acquaintance who offered to help her clean her apartment after a party. *Id.* at 470. He initiated sexual advances, and when she did not reciprocate, he forcefully raped her. *Id.* Within the description of the sexual assault, the intoxication of the offender and victim were varied so that either the

Professors Calvin Sims, Nora Noel, and Stephen Maisto similarly found that intoxicated victims of sexual assault were held “more . . . [responsible] when alcohol was present than when it was not[.]” that is, “participants were . . . more willing to blame the . . . [victim] for . . . [her] sexual assault when she . . . [consumed] alcohol.”⁸⁵ Professors Ashley Wenger and Brian Bornstein also found that participants were less likely to find a defendant guilty of sexual assault when the victim was intoxicated.⁸⁶ Finally, professor Gloria Fischer conducted a simulated sexual assault trial to examine participants’ assessment of responsibility and blame in the context of perpetrator and victim intoxication.⁸⁷ Fischer found that students considered alcohol consumption by the victim to be a relevant factor contributing to the sexual assault.⁸⁸ Indeed, the lowest frequency of guilty verdicts occurred in cases where the victim was intoxicated, and the mock jurors who voted not guilty commented that the sexual assault was ““as much her fault as his.””⁸⁹

Some studies have found that only *significantly* intoxicated victims are attributed responsibility. For example, professors Karla Stormo, Alan Lang, and Werner Stritzke found that only moderately or highly intoxicated victims were attributed increased responsibility for their sexual assaults.⁹⁰ Similarly, professors Regina Schuller and Anne-Marie Wall’s study found that mock

offender, victim, both, or neither were intoxicated. *Id.* Participants then answered questions about the description of sexual assault and the parties, and made different attributions, including attributions of relative blame, responsibility, and a rating of the party’s traits. *Id.*

85. Calvin M. Sims, Nora E. Noel, & Stephen A. Maisto, *Rape Blame as a Function of Alcohol Presence and Resistance Type*, 32 ADDICTIVE BEHAV. 2766, 2773 (2007). In this study, participants were instructed to read a written vignette in which they were asked to play the role of an emergency counselor speaking with a sexual assault victim. *Id.* at 2770. The vignettes were varied so that the victim was sober or intoxicated. *Id.* Participants then answered questions about the victim’s responsibility for the assault, and marked on a continuous line each party’s responsibility for the sexual assault. *Id.* at 2771.

86. Wenger & Bornstein, *supra* note 50, at 551-52.

87. Gloria J. Fischer, *Effects of Drinking by the Victim or Offender on Verdicts in a Simulated Trial of an Acquaintance Rape*, 77 PSYCHOL. REP. 579 (1995).

88. *Id.* at 584.

89. Interestingly, however, Fischer’s study found that neither perpetrator nor victim intoxication had a statistically significant effect on the verdicts. *Id.* at 585. Fischer hypothesized that the difference in results may be attributed to changed attitudes about drinking among college students. *Id.* at 586.

90. Stormo et al., *supra* note 50, at 299. In this study, participants were instructed to read a description of a sexual assault case in which the victim and defendant met at a party. *Id.* at 285. After talking, the defendant offered the victim a ride home and they decided to leave the party together. *Id.* When they arrived at the victim’s residence, the defendant asked to use the bathroom and they began to kiss. *Id.* When the defendant attempted to initiate sexual activity, the victim physically and verbally resisted, but the defendant ultimately forcefully raped her. *Id.* The descriptions were varied so that either the victim, offender, both, or neither were intoxicated. *Id.* at 285-86. Participants then answered questions about the parties’ responsibility and blame for the sexual assault. *Id.* at 286.

jurors were less likely to find a defendant guilty of sexual assault only when the victim was *moderately*, as opposed to mildly, intoxicated.⁹¹

The former studies are of limited value, however, as they do not distinguish between a victim's voluntary and involuntary intoxication and its effect on jurors' attributions of responsibility to victim or defendant, or determinations of a defendant's guilt. More recently, studies have focused on the importance of this distinction, concluding that jurors hold a *voluntarily* intoxicated victim far more responsible than her involuntarily intoxicated counterpart. Law professors Emily Finch and Vanessa Munro's seminal juror studies, though based in the United Kingdom, found that when a victim voluntarily consumed alcohol, mock jurors agreed that she bore partial responsibility for her sexual assault.⁹² Interestingly, mock jurors "recognized that voluntary intoxication can have a dramatic impact on the victim's ability to engage in rational thought and her ability to offer meaningful consent to [sexual] intercourse[.]"⁹³ and, moreover, "recognized that the actual effect of intoxication on the victim . . . [was] the same, regardless of the means by which she became intoxicated . . ."⁹⁴ They even recognized that holding the victim responsible "was an anomalous position and that the focus ought to be on the victim's state of mind rather than the means by which the intoxicant was administered . . ."⁹⁵ Nonetheless, they adamantly maintained that the victim's voluntarily intoxication necessitated a higher degree of responsibility.⁹⁶ That is, though mock jurors were cognizant of the effects of intoxication on a victim's ability to consent *regardless* of the means of this intoxication, jurors continued to hold a voluntarily intoxicated victim responsible for her sexual assault.⁹⁷

91. Regina A. Schuller & Anne-Marie Wall, *The Effects of Defendant and Complainant Intoxication on Mock Jurors' Judgments of Sexual Assault*, 22 PSYCHOL. WOMEN Q. 555, 565 (1998) [hereinafter *Mock Jurors' Judgment*]. But see Anne-Marie Wall & Regina A. Schuller, *Sexual Assault and Defendant/Victim Intoxication: Jurors' Perception of Guilt*, 30 J. APPLIED SOC. PSYCHOL. 253, 263 (2000) [hereinafter *Jurors' Perception of Guilt*] (explaining that mock jurors found a defendant most likely to be guilty when both he and the victim reached moderate intoxication level but participants were not more likely to hold a victim less responsible for the sexual assault). For a discussion of the contradictory findings of this study with regards to attributions of responsibility and blame to voluntarily intoxicated defendants see *id.* at 270-71.

92. Emily Finch & Vanessa E. Munro, *Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants*, 45 BRIT. J. CRIMINOLOGY 25, 30-31 (2005). In Finch and Munro's studies, participants first participated in a focus group, where they discussed various descriptions of sexual assault, varying in the level of victim and defendant intoxication, the type of intoxicant, and the means of the victim's intoxication, and determined whether these descriptions constituted sexual assault. *Id.* at 30. Participants then acted as mock jurors in different mock trials, which similarly varied in the level of victim and defendant intoxication, the type of intoxicant, and the means of the victim's intoxication. *Id.* Participants then deliberated and determined a verdict as to the defendant's guilt. *Id.*

93. *Id.* at 31.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

A more recent study conducted by professor Kellie Lynch and her colleagues replicates Finch and Munro's results, finding that mock jurors were much more likely to acquit when the victim was intoxicated, based on an inference that she was not a credible witness.⁹⁸ More important, the study differentiated between guilty and not-guilty verdicts depending on *who* bought the drinks.⁹⁹ Again, jurors were much more likely to acquit the defendant when the victim bought the drinks herself—that is, when she was voluntarily intoxicated.¹⁰⁰

Alarming, Finch and Munro's mock juror studies found that jurors often hold an *involuntarily* intoxicated victim to be somewhat responsible for her sexual assault.¹⁰¹ Finch and Munro found that when a victim knowingly consumed alcohol or accepted drinks under significant pressure from the perpetrator, mock jurors criticized the victim for "failing to stand her ground."¹⁰² One mock juror noted, "If somebody gives you a drink[,] then [you should say], 'I'm sorry, I don't wish to drink,' [or only have] maybe one, but then you [should] make sure you don't drink much of it and when you come to the second drink, you [should] say, 'no thanks, I've still got my first.'"¹⁰³ Mock jurors held a victim responsible for her sexual assault in even *less* voluntary situations. When presented with a hypothetical scenario in which a victim consumed an alcoholic beverage that had been "surreptitiously strengthened," another mock juror commented: if she "really knew she didn't want to sleep with this guy and she didn't really want to get drunk, then she would have got[ten] the drinks herself . . ."¹⁰⁴

It is important to note that these studies identified one significant exception to the general trend of victim blaming. When there was a significant disparity between victim and perpetrator intoxication, specifically when a victim was extremely intoxicated and a perpetrator was sober or only minimally intoxicated, mock jurors did *not* hold a victim responsible for her sexual assault, and were more likely to find a defendant guilty or characterize his actions as sexual assault.¹⁰⁵ Professors Jeannette Norris and Lisa Cubbins's study found that participants were most likely to believe a sexual assault occurred when the offender was sober and the victim intoxicated.¹⁰⁶ As they explained, "[I]f only a woman has been drinking, the man may be viewed as

98. Kellie Rose Lynch et al., *Who Bought the Drinks? Juror Perceptions of Intoxication in a Rape Trial*, 28 J. INTERPERSONAL VIOLENCE 3205, 3205, 3216 (2013).

99. *Id.* at 3210.

100. *Id.* at 3214.

101. Emily Finch & Vanessa E. Munro, *The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants*, 16 SOC. & LEGAL STUD. 591, 599 (2007).

102. *Id.*

103. *Id.*

104. *Id.* at 601.

105. See *infra* notes 106-115 and accompanying text.

106. Jeannette Norris & Lisa A. Cubbins, *Dating, Drinking, and Rape: Effects of Victim's and Assailant's Alcohol Consumption on Judgments of Their Behavior and Traits*, 16 PSYCHOL. WOMEN Q. 179, 185 (1992).

taking advantage of a woman who is in a vulnerable or weakened condition.”¹⁰⁷ Similarly, Finch and Munro’s studies found that a disparity in intoxication between defendant and victim rendered mock jurors more likely to label the sexual encounter as a sexual assault.¹⁰⁸ As one mock juror reasoned: “[H]e was in a fairly sober state of mind, so you know, he should have been able to judge; if he’d been fairly drunk as well, then I don’t think it would be a question of rape.”¹⁰⁹

Moreover, when a defendant’s actions evinced an intent to incapacitate a woman for the purpose of sexual intercourse, or where “the defendant deliberately undertook a course of action that could have no other motivation than to incapacitate the complainant for the purposes of intercourse[,] . . .”¹¹⁰ mock jurors in Finch and Munro’s studies were similarly less likely to hold a woman responsible for her sexual assault.¹¹¹ Lynch’s study reached a similar conclusion; when the perpetrator bought the drinks, jurors were more likely to convict.¹¹² The authors similarly cited the defendant’s apparent motive as an explanation,¹¹³ as well as the “sexual social exchange theory.”¹¹⁴ “Jurors may have attributed the defendant’s actions . . . to the defendant’s belief that he was entitled to have sex with the victim in return for purchasing the drinks” and thus this *quid-pro-quo* mentality demonstrated his malicious intentions.¹¹⁵

There are a number of different explanations for jurors’ legally impermissible attributions of responsibility to voluntarily intoxicated victims, or what has been termed the phenomenon of “victim blaming.” Defensive attribution theory, for example, may explain victim blaming. According to this theory, an observer attributes responsibility to a victim based on her perceived similarity to the victim and her perceived likelihood of her *own* victimization.¹¹⁶ Defensive attribution theory predicts that a victim’s blameworthiness will decrease as similarity and likelihood of victimization increases—“this being a defense mechanism to protect the observer from being blamed themselves if a similar fate should befall . . . her in the future.”¹¹⁷ Counterfactual reasoning may also explain victim blaming. Counterfactual reasoning is characterized by one’s creation of hypothetical alternatives that would have produced a different and more positive outcome for the victim.¹¹⁸

107. *Id.* at 189.

108. Finch & Munro, *supra* note 101, at 601.

109. *Id.*

110. *Id.* at 604.

111. *Id.*

112. Lynch et al., *supra* note 98, at 3217-18.

113. *Id.* at 3218.

114. *Id.*

115. *Id.*

116. Amy Grubb & Emily Turner, *Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity, and Substance Use on Victim Blaming*, 17 *AGGRESSION & VIOLENT BEHAV.* 443, 444 (2012).

117. *Id.*

118. Finch & Munro, *supra* note 101, at 600.

Thus, in rape by intoxication cases, observers assume (perhaps falsely) that the sexual assault would not have occurred absent the victim's intoxication, and therefore attribute sole responsibility to the victim's voluntary intoxication for the adverse outcome.¹¹⁹ Finally, the "just world theory" may explain victim blaming.¹²⁰ According to the just world theory, observers have a basic need to believe that the world is a fundamentally just place and that behavioral outcomes are deserved; people get what they deserve.¹²¹ To believe that "bad things . . . happen to good people"¹²² would jeopardize this fundamental belief and threaten an observer's sense of control. Consequently, "blaming the victim" and holding her partially responsible for her sexual assault mitigates this cognitive dissonance and preserves a belief in a "just world."¹²³

Psychological alcohol-related expectancies may also explain victim blaming, as studies have consistently demonstrated that women who voluntarily consume alcohol are generally believed to be more sexually available and promiscuous.¹²⁴ Psychology professor W. George and his colleagues conducted a study in which participants were instructed to evaluate the perceived sexual availability of both intoxicated and sober women.¹²⁵ They found that when a woman was intoxicated, she "was rated as more responsive to a sexual come-on, easier . . . to seduce, . . . more liking of being seduced, and as more willing."¹²⁶ George and his colleagues confirmed these results in a subsequent study, which likewise found that men, as opposed to women, "ascribed more sexual responding to [a] . . . drinking woman" than to her nondrinking counterpart.¹²⁷

A phenomenon of victim blaming, then, may be a result of these psychological alcohol-related expectancies. As Stormo and her colleagues hypothesize, "[b]ecause the drinking woman is judged to be more sexually promiscuous, she may be viewed as having in a sense 'consented' to sexual

119. *Id.*

120. *Id.* at 606; Grubb & Turner, *supra* note 116, at 444.

121. Finch & Munro, *supra* note 101, at 606.

122. *Id.*

123. Grubb & Turner, *supra* note 116, at 444. For a more detailed discussion of the just world hypothesis, see Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030 (1978); Melvin J. Lerner, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL QUESTION (1980).

124. For a more detailed description of these psychological alcohol-related expectancies and their contribution to sexual assault, see Antonia Abbey et al., *Sexual Assault Perpetration by College Men: The Role of Alcohol, Misperception of Sexual Intent, and Sexual Beliefs and Experiences*, 17 J. SOC. & CLINICAL PSYCHOL. 167 (1998); Finch & Munro, *supra* note 101; Antonia Abbey, et al., *Alcohol and Sexual Assault*, NAT'L INSTITUTION ON ALCOHOL ABUSE & ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm> (last visited Apr. 3, 2014).

125. William H. George et al., *Perceptions of Postdrinking Female Sexuality: Effects of Gender, Beverage Choice, and Drink Payment*, 18 J. APPLIED SOC. PSYCHOL. 1295, 1301 (1988).

126. *Id.* at 1308 (statistical data omitted).

127. William H. George et al., *Self-Reported Alcohol Expectancies and Postdrinking Sexual Inferences About Women*, 25 J. APPLIED SOC. PSYCHOL. 164, 178-79 (1995).

activity.”¹²⁸ Mock jurors in Finch and Munro’s studies confirmed the existence of these social norms more explicitly: “[I]f . . . [the victim] was drunk, she was more likely than not flirting a lot.”¹²⁹ Another mock juror reasoned: “drink makes people behave very differently [S]he behaved out of character, . . . [so she has] to really live with . . . [her] mistake.”¹³⁰

Finally, victim blaming may be a result of a voluntarily intoxicated victim’s more general failure to conform to traditional gender norms. Alcohol consumption, especially excessive alcohol consumption, is generally still considered to be a traditionally male activity.¹³¹ Women who voluntarily consume alcohol to the point of intoxication deviate from these commonly-held gender norms, and studies suggest they are judged more harshly than men who engage in the same behavior.¹³² As Richardson and Campbell hypothesize, jurors may make these attributions of responsibility “because female drunkenness is considered a violation of appropriate sex-role norms.”¹³³ Similarly, Sims, Noel, and Maisto speculate that “[p]erhaps women who step out of traditional roles . . . [are] seen in a more unfavorable light.”¹³⁴ Thus, these attributions of responsibility to voluntarily intoxicated victims may be explained more simply by a woman’s choice to engage in traditionally unfeminine behaviors, and society’s harsh judgment of her choice.¹³⁵

B. Jurors Hold a Voluntarily Intoxicated Defendant Less Responsible for his Criminal Behavior.

While the California legislature has expressed its intent that a defendant’s voluntary intoxication may not serve as an exculpatory factor diminishing his

128. Stormo et al., *supra* note 50, at 281 (noting that “[a]ttributions about responsibility and blame for rape may be . . . influenced by more general expectancies about alcohol[.] . . .” including the general expectancy that persons, especially women, will become more sexually inhibited when they are intoxicated); *see also* Sims, Noel & Maisto, *supra* note 85, at 2773 (theorizing that attributions of responsibility to an intoxicated victim “may have been influenced by thinking that the woman was more sexually available to the male” as a result of her consumption of alcohol).

129. Finch & Munro, *supra* note 101, at 599.

130. *Id.* at 599.

131. *Id.* at 594.

132. *Id.* For a more detailed discussion of women’s consumption of alcohol as a deviation from traditional gender norms, see generally ALCOHOL PROBLEMS IN WOMEN: ANTECEDENTS, CONSEQUENCES, AND INTERVENTIONS (Sharon C. Wilsnack et al eds., 1984); Hope Landrine, Stephen Bardwell, & Tina Dean, *Gender Expectations for Alcohol Use: A Study of the Significance of the Masculine Role*, 19 SEX ROLES 703 (1988); Barbara C. Leigh, *A Thing So Fallen, and So Vile: Images of Drinking and Sexuality in Women*, 22 CONTEMP. DRUG PROBS. 415 (1995); Edith S. Lisansky Gomberg, *Historical and Political Perspective: Women and Drug Use*, 38 J. SOC. ISSUES 9 (1982).

133. Richardson & Campbell, *supra* note 84, at 475 (citation omitted).

134. Sims, Noel & Maisto, *supra* note 85, at 2774.

135. For an interesting analysis of gender differences in victim blaming in this context, *see* Marc A. Klippenstine, Regina A. Schuller & Ann-Marie Wall, *Perceptions of Sexual Assault: The Expression of Gender Differences and the Impact of Target Alcohol Consumption*, 37 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 11 (2007).

culpability, social psychology studies also demonstrate, albeit less unanimously, that jurors use evidence of a defendant's voluntary intoxication to make legally impermissible attributions of responsibility that contradict this legislative intent. These studies demonstrate that jurors hold a voluntarily intoxicated defendant *less* responsible for his criminal behavior. Essentially, they pardon the perpetrator. Richardson and Campbell's seminal study not only found that an intoxicated victim was held somewhat responsible for her sexual assault, but also found that an intoxicated perpetrator was held *less* responsible.¹³⁶ Norris and Cubbins similarly found that participants were less likely to find a defendant guilty of sexual assault when he was intoxicated.¹³⁷ Finally, Stormo, Lang, and Stritzke's study concluded that a moderately or highly intoxicated perpetrator was attributed significantly less responsibility for his criminal behavior.¹³⁸

It is important to note that other studies have reached different and contrary results. For example, Schuller and Wall's study found that mock jurors were *more* likely to find a voluntarily intoxicated defendant guilty of sexual assault,¹³⁹ as they were more likely to perceive voluntarily intoxicated defendants as less self-regulated and less credible.¹⁴⁰ The discrepancy in results may perhaps be explained by what Schuller and Wall term "a growing disapproval of drunkenness and an objection to 'intoxicated excuses' for unacceptable behavior."¹⁴¹ "[T]olerance for alcohol-related undesirable behavior is culturally and socially constrained [and] . . . fluctuates over time."¹⁴² While Schuller and Wall argue that their findings are supported by a societal "objection to 'intoxicated excuses' for unacceptable behavior[,]" the difference in findings establishes contradictory results demonstrate that voluntary intoxication may serve both exculpatory *and* inculpatory functions,¹⁴³

136. Richardson & Campbell, *supra* note 84, at 472.

137. Norris & Cubbins, *supra* note 106, at 185. In this study, participants were instructed to read a description of a sexual assault case in which a man and a woman went on date. *Id.* at 181. The man drove the woman home and accompanied her to her residence. *Id.* They began to kiss and he attempted to initiate sexual activity, but the woman resisted. *Id.* After attempting to verbally coerce her, the man forcefully raped her. *Id.* Within the description of the sexual assault, the intoxication of the offender and victim were varied so that the offender, victim, both, or neither were intoxicated. *Id.* at 181-82. Participants then answered questions relating to the offender and victim's character traits, the offender and victim's responsibility, and whether or not the sexual intercourse constituted rape. *Id.* at 184-85.

138. Stormo et al., *supra* note 50, at 299.

139. See Schuller & Wall, *Mock Jurors' Judgment*, *supra* note 91, at 565.

140. *Id.* at 568.

141. Wall & Schuller, *Jurors' Perception of Guilt*, *supra* note 91, at 270-71.

142. *Id.* at 270.

143. *Id.* at 270-71; cf. Beatriz Aramburu & Barbara Critchlow Leigh, *For Better or Worse: Attributions About Drunken Aggression Toward Male and Female Victims*, 6 VIOLENCE & VICTIMS 31 (1991) (finding both intoxicated aggressors and victims more blameworthy than their sober counterparts); Barbara C. Leigh & Beatriz Aramburu, *Responsibility Attributions for Drunken Behavior: The Role of Expectancy Violation*, 24 J.

and a voluntarily intoxicated perpetrator may well be held less responsible for his criminal behavior.

There are a number of explanations for jurors' legally impermissible attributions of responsibility to voluntarily intoxicated defendants. The malevolence assumption, for instance, or "the impulse to blame the alcohol, rather than the individual, for negative, socially unacceptable behaviour[,] . . . [may be especially] strong in the case of defendants in sexual assault scenarios."¹⁴⁴ Richardson and Campbell note that "[i]t appears that . . . [participants] reassigned blame to the situation when the offender was intoxicated, assuming perhaps that the 'alcohol made him do it.'"¹⁴⁵

The normalization of alcohol and socio-sexual interactions may also explain attributions of lesser responsibility to voluntarily intoxicated offenders.¹⁴⁶ As mock jurors in Finch and Munro's studies noted, "[the defendant] did admit he wanted [to have] sex with her and one of the ways you get sex with a woman is to get her drunk."¹⁴⁷ Another mock juror commented on the ubiquity of such encounters: "[T]his is exactly the kind of situation in which drunk people do have sex . . . it's just that, you know, this is how things go at parties . . ."¹⁴⁸ Or, "if our man Steve is found guilty, so must hundreds of thousands of others, probably tonight."¹⁴⁹ Several mock jurors recognized that the perpetrator's behavior was perhaps not gentlemanlike or chivalrous, but nonetheless did not constitute criminal behavior.¹⁵⁰ According to one mock juror, "it's very ungentlemanly to take advantage of a woman who is obviously drunk, . . ." but such behavior rendered him "unanimously guilty of being a git[,] . . ." not a rapist.¹⁵¹ Thus, the widespread acceptance of alcohol as a social lubricant or a way to "loosen up" otherwise reluctant sexual partners¹⁵² may significantly contribute to attributions of decreased or diminished responsibility to voluntarily intoxicated perpetrators.

C. *The Problem*

Jurors' use of evidence of a victim and defendant's voluntary intoxication is highly problematic.¹⁵³ In holding a voluntarily intoxicated victim partially

APPLIED SOC. PSYCHOL. 115 (1994) (finding that alcohol use led to increased attributions of blame and responsibility for the victim and the aggressor).

144. Finch & Munro, *supra* note 101, at 593.

145. Richardson & Campbell, *supra* note 84, at 474.

146. Finch & Munro, *supra* note 101, at 603.

147. *Id.* (first alteration in original).

148. *Id.* (second alteration in original).

149. *Id.*

150. *Id.*

151. *Id.* (citations omitted).

152. *Id.* at 604.

153. It is important to note a significant limitation of these social psychological studies—even the mock juror studies—they do not account for the *voir dire* process. While they are perhaps representative of the general population, they do not account for the fact

responsible for her sexual assault and a voluntarily intoxicated defendant less responsible for his criminal behavior, jurors make legally impermissible attributions of responsibility that contradict expressed legislative intent. Blaming the victim and pardoning the perpetrator decrease the likelihood that a jury will convict and thus is a significant contributing factor to the injustice that Jessica's story represents.

These legally impermissible attributions of responsibility have more widespread effects beyond the verdict, however. For one, they affect the initial "founding" decision and decision to arrest and, more generally, the treatment of the case by the police. One author describes this troubling phenomenon: "Police determine how rape victims and cases are treated by the criminal justice system After giving a valid rape report and fully cooperating with the police, a woman may find herself 'in the unexpected and bewildering predicament of having come to the police for aid . . . only to have the door slammed firmly in her face.'"¹⁵⁴

Professors Regina Schuller and Anna Stewart conducted a study in which they assessed "police officers' judgments of credibility, their attributions of blame, and their evaluations of a claim of sexual assault" based on a vignette in which victim and perpetrator alcohol consumption and intoxication varied.¹⁵⁵ They found that "the more intoxicated the officers perceived the complainant to be, the less credible she was viewed, the more interested she was in sexual intercourse, the more likely she was to have communicated that she was interested, the more responsible she was, and, given how far things had progressed, the more unreasonable it was for her to expect the assailant to stop."¹⁵⁶ While the *perpetrator's* alcohol consumption and intoxication did not have a significant effect on officers' assessment of the sexual assault, the victim's perceived credibility and the likelihood of conviction played a major role in the officer's actions.¹⁵⁷ Thus, it follows that they were less likely to follow-up with a sexual assault complaint in the case of an intoxicated victim.¹⁵⁸ Professors Cassia Spohn and Katharine Tellis similarly note that officers often "unfound" complaints of alcohol-facilitated sexual assault—that

that a competent attorney would likely eliminate jurors with significant biases against the victim or towards the perpetrator.

154. Julie Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 HARV. WOMEN'S L.J. 59, 89 (1987) (quoting THOMAS W. MCCAILL ET AL., *THE AFTERMATH OF RAPE* 103 (1979)).

155. Regina A. Schuller & Anna Stewart, *Police Responses to Sexual Assault Complaints: The Role of Perpetrator/Complainant Intoxication*, 24 L. & HUM. BEHAV. 535, 538 (2000).

156. *Id.* at 547.

157. *Id.* at 547-48.

158. Megan Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525, 527 (2012).

is, they label the complaint illegitimate and terminate further investigation.¹⁵⁹ Professors Alderden and Ullman also found that both the founding decision and the arrest decision were affected by a number of extra-legal factors. A victim's moral character and her engagement in risk-taking behaviors, for example, negatively affected her perceived truthfulness and credibility, and thus was less likely to result in a "founding" or arrest.¹⁶⁰

In addition, victim blaming and perpetrator pardoning affects the likelihood that a jury will even *hear* a case, as it can have a significant impact on the prosecutor's initial, discretionary charging decision. Research demonstrates that only 40 percent of sexual assault cases result in arrest, and only 50 percent result in felony charges.¹⁶¹ Prosecutors make their charging decision based on the "convictability" of the case, creating what some have termed a "'downward orientation . . .—that is, an anticipation and consideration of how others (i.e., jury and defense) will interpret and respond to a case.'"¹⁶² Prosecutors consider many extralegal or legally irrelevant factors in the convictability assessment,¹⁶³ the most important being "perceived victim credibility," often defined as whether the victim was engaging in "risk-taking" behaviors at the time of the sexual assault. These risk-taking behaviors can vary, but generally refer to "using alcohol or illegal drugs at the time of the incident, being in a bar alone at night, walking alone late at night, hitchhiking, willingly accompanying the suspect to his residence, and inviting the suspect to her residence."¹⁶⁴

The National District Attorney Association's how-to handbook (The Handbook), entitled "Prosecuting Alcohol-Facilitated Sexual Assault," provides significant insight into the effect of a victim's voluntary intoxication on the prosecutor's discretionary charging decision.¹⁶⁵ Particularly relevant is the discussion of "victim likeability" as a factor affecting this decision.¹⁶⁶ "[A] victim who goes to a bar and drinks to the point of vomiting and unconsciousness will be an easy target for a predator."¹⁶⁷ The Handbook notes

159. Cassia Spohn & Katharine Tellis, *The Criminal Justice System's Response to Sexual Violence*, 18 VIOLENCE AGAINST WOMEN 169, 172-75 (2012).

160. Alderden & Ullman, *supra* note 158, at 526-28.

161. *Id.* at 525.

162. Dawn Beichner & Cassia Spohn, *Modeling the Effects of Victim Behavior and Moral Character on Prosecutors' Charging Decisions in Sexual Assault Cases*, 27 VICTIMS & VIOLENCE 3, 4 (2012).

163. Alderden & Ullman, *supra* note 158, at 528.

164. Beichner & Spohn, *supra* note 162, at 7.

165. Teresa P. Scalvo, *Prosecuting Alcohol-Facilitated Sexual Assault*, 2007 NAT'L DIST. ATTORNEYS ASS'N 1, 5-12, available at http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf. A clarifying note is necessary. In discussing the prosecutorial charging decision, I do not assert that prosecutors hold these views themselves. Instead, The Handbook provides evidence for the existence of these "victim characteristic" factors, and, more important, my assertion that prosecutors consider these factors into account when deciding whether to file criminal charges.

166. *Id.* at 20.

167. *Id.*

that such a “victim may be viewed with “skepticism or dislike[;]” the jury may conclude “that she put herself in danger with her behavior[,] . . . that she assumed the risk[;]” or that her “behavior translated into a ‘yes’ and was equivalent to consent”¹⁶⁸

A 1997 study of Detroit prosecutorial charging decisions in sexual assault cases confirms the importance of “victim characteristics,” distinguishing between “real rapes” and “genuine victims” and, presumably, those rapes and victims that are not so “real” or “genuine.”¹⁶⁹ When there were questions as to the victim’s character, behavior, or credibility, prosecutors were less likely to file charges.¹⁷⁰ The authors explained: “Prosecutors may assume that jurors will not regard as a credible or genuine victim of sexual assault a woman who abuses drugs, who has numerous sexual partners, or who goes to bars by herself.”¹⁷¹ These same researchers conducted a similar study of prosecutorial charging decisions in sexual assault cases in Miami-Dade County, and came to similar conclusions.¹⁷² Questions about a victim’s moral character were frequently cited as a justification for a failure to prosecute—namely, the fact that a victim engaged in “risky behavior” prior to the sexual assault. In many instances, this risky behavior took the form of voluntary intoxication.¹⁷³ Finally, Professors Megan Alderden and Sarah Ullman’s study of the case processing of sexual assault cases in the Chicago Police Department demonstrates that “[c]ases involving victims portrayed as having questionable moral character or who had been engaged in risk-taking behaviors were less likely to result in felony charges.”¹⁷⁴

Perhaps the most compelling research not only identifies the effect of a victim’s risk-taking behavior on the prosecutor’s charging decision, but also identifies *specific types of risk-taking behavior* and their impact on this decision.¹⁷⁵ Professors Dawn Beichner and Cassia Spohn collected data from three urban jurisdictions to examine the effect of specific types of risk-taking behavior and their effects on prosecutorial charging decisions.¹⁷⁶ Beichner and Spohn found that the victim’s use of alcohol at the time of the incident significantly decreased the probability of the initiation of a criminal

168. *Id.*

169. Jeffrey W. Spears & Cassia C. Spohn, *The Effect of Evidence Factors and Victim Characteristics on Prosecutors’ Charging Decisions in Sexual Assault Cases*, 14 JUST. Q. 501, 519 (1997).

170. *Id.*

171. *Id.*

172. Cassia Spohn, Dawn Beichner & Erika Davis-Frenzel, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the “Gateway to Justice”*, 48 SOC. PROBS. 206 (2001).

173. *Id.* at 227-28.

174. Alderden & Ullman, *supra* note 158, at 544.

175. Dawn Beichner & Cassia Spohn, *Modeling the Effects of Victim Behavior and Moral Character on Prosecutors’ Charging Decisions in Sexual Assault Cases*, 27 VIOLENCE & VICTIMS 3 (2012).

176. *Id.* at 4.

prosecution.¹⁷⁷ They hypothesized that this was due to prosecutors' concerns about victim "behavior that conflicts with traditional notions of appropriate female behavior"¹⁷⁸ Voluntary intoxicated victims are simply not perceived as credible – not only by juries, but by police and prosecutors as well.

III. PROPOSED REFORM: EVIDENTIARY RULES SHOULD EXCLUDE OR SIGNIFICANTLY RESTRICT THE ADMISSIBILITY OF EVIDENCE THAT DEMONSTRATES THE VOLUNTARY NATURE OF A VICTIM'S INTOXICATION AS UNDULY PREJUDICIAL, AND EXCLUDE EVIDENCE OF THE DEFENDANT'S VOLUNTARY INTOXICATION AS IRRELEVANT.

In order to limit these improper attributions of responsibility, reform is necessary. Indeed, several scholars have already proposed reform. Both Stormo and Wegner, for example, urge trial lawyers to utilize an increased awareness of jurors' victim-blaming and perpetrator-pardoning to more effectively conduct *voir dire*.¹⁷⁹ Stormo also proposes the implementation of rape education programs "[t]argeted at individuals in law enforcement, the judicial system, and the medical profession[,] . . . to increase awareness of factors, such as [a victim's] alcohol intoxication, that may contribute to . . . inaccurate" attributions of responsibility to the victim.¹⁸⁰ A more realistic and likely more effective way to limit jurors' legally impermissible attributions of responsibility, however, is to reform the evidentiary rules governing the admissibility of evidence of the source of a victim's intoxication (namely, its voluntary or involuntary nature) and evidence of the defendant's voluntary intoxication. These proposed evidentiary reforms would exclude, or at least significantly restrict, the admissibility of evidence of the source of a victim's intoxication as unduly prejudicial, and would exclude evidence of the defendant's voluntary intoxication as irrelevant.

177. *Id.* at 19 (Beichner and Spohn noted that a victim's consumption of alcohol only affected charging decisions in simple rape cases, not aggravated rape cases.)

178. *Id.* at 18.

179. Stormo et al., *supra* note 50, at 302; Wenger & Bornstein, *supra* note 50, at 552.

180. Stormo et al., *supra* note 50, at 301-02. Others have suggested encouraging young women to decrease their alcohol consumption as a preventative measure. *See, e.g.*, Emily Yoffe, *College Women: Stop Getting Drunk*, SLATE (Oct. 15, 2013, 11:55 PM), http://www.slate.com/articles/double_x/doublex/2013/10/sexual_assault_and_drinking_teach_women_the_connection.html. In one particularly controversial article, *Slate* author Emily Yoffe declared that the best rape prevention is to tell college women to "stop getting drunk." *Id.* She argues that "a misplaced fear of blaming the victim has made it somehow unacceptable to warn inexperienced young women that when they get wasted, they are putting themselves in potential peril." *Id.* Yoffe essentially advocates for pragmatism. A true feminist message is not one that champions a woman's ability to "match men drink for drink," but one that has her best interest at heart and educates her as to the risk of sexual assault while intoxicated. *Id.* "That's not blaming the victim; that's trying to prevent more victims." *Id.*

A. Evidence of the Voluntary Nature of a Victim's Intoxication

Evidence that demonstrates the voluntary nature of a victim's intoxication could be excluded or its admissibility could be significantly restricted based on either *existing* or *reformed* evidentiary rules.¹⁸¹ Existing California Rule of Evidence 352 provides that “[t]he court[,] in its discretion[,] may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice”¹⁸² In rape by intoxication trials, the trial court could determine that the minimal probative value of evidence demonstrating the voluntary nature of the victim's intoxication is substantially outweighed by its prejudicial effect—the significant risk that a jury would misuse this evidence to blame the victim for her sexual assault. This is especially so given the alternative means to introduce evidence of the victim's intoxication—namely, evidence of her blood alcohol content and other physical manifestations of her intoxication.¹⁸³

Such evidence could also be admitted for the limited purpose of proving that the victim was so intoxicated that she could not legally consent, and an objectively reasonable person should have known of her intoxication and incapacitation. Pursuant to California Rule of Evidence 355, the trial court would have a duty to “restrict the evidence to its proper scope and instruct the jury . . .”¹⁸⁴ that “certain evidence was admitted for a limited purpose” and that they “may consider that evidence only for that purpose and for no other.”¹⁸⁵ Such a limitation would likely be ineffective, but would perhaps temper the most egregious instances of juror prejudice.

Evidence that demonstrates the voluntary nature of the victim's intoxication could also be subject to a discretionary balancing test with a presumption of inadmissibility, or a “reverse 403” or “reverse 352” test.¹⁸⁶

181. It is important to note that significantly restricting the admissibility of evidence or excluding evidence of the means of a victim's intoxication would likely not entirely eliminate juror prejudice. As studies above demonstrated, even an involuntarily intoxicated victim may be held responsible for her victimization, suggesting jurors' skepticism for intoxicated victims in general. See Finch & Munro, *supra* note 101, at 606. However, evidentiary restrictions or exclusions would likely lessen these erroneous attributions of responsibility. See *infra* Part IV.

182. CAL. EVID. CODE § 352 (West 2011).

183. Several federal appellate courts have held that in interpreting Federal Rule of 403 (the analogous federal discretionary balancing test) and in exercising discretion to determine if the prejudicial effect substantially outweighs probative value, a trial court should consider the availability of alternative means of proof. See *United States v. Yazzie*, 188 F.3d 1178, 1191 (10th Cir. 1999); *United States v. Rivera*, 83 F.3d 542, 546-47 (1st Cir. 1996); *United States v. Guerrero*, 803 F.2d 783, 786 (3d Cir. 1986); *United States v. King*, 713 F.2d 627, 631 (11th Cir. 1983); *United States v. Lebovitz*, 669 F.2d 894, 902 (3d Cir. 1982) (Adams, J., concurring); *United States v. Spletzer*, 535 F.2d 950, 956 (5th Cir. 1976); *Knight v. Otis Elevator Co.*, 596 F.2d 84, 91 (3d Cir. 1979); *United States v. Libby*, 467 F. Supp. 2d 1, 7 (D.D.C. 2006).

184. CAL. EVID. CODE § 355 (2011).

185. CAL. JURY INSTR.—CRIM. 303 (2013).

186. Federal Rule of Evidence 403 provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the

Such a discretionary balancing test would mirror Federal Rule of Evidence 609, which governs the admissibility of evidence of a defendant's prior criminal convictions,¹⁸⁷ and Federal Rule of Evidence 412(b)(2), which governs evidence of a plaintiff's prior sexual conduct in a civil sexual assault proceeding.¹⁸⁸ Federal Rule of Evidence 609 provides that evidence of the defendant's prior criminal convictions will "be admitted in a criminal case in which the witness is a defendant, *if the probative value of the evidence outweighs its prejudicial effect to that defendant . . .*"¹⁸⁹ Similarly, Federal Rule of Evidence 412(b)(2) provides that "the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition *if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.*"¹⁹⁰ In these two circumstances, evidentiary rule-makers recognize the significant risk that a jury will use this evidence for an improper purpose—as probative of a defendant's propensity for criminal behavior rather than a character for untruthfulness, or as probative of a victim's promiscuity. Therefore, rule-makers subject this evidence to a discretionary balancing test with a presumption of inadmissibility; such evidence is inadmissible unless "the probative value . . . outweighs its prejudicial effect . . ."¹⁹¹

Evidence of a victim's voluntary intoxication could be subject to a similar discretionary balancing test with a presumption of inadmissibility. Like evidence of a defendant's prior convictions and evidence of victim's prior sexual behavior, there is a significant risk that a jury will misuse evidence of a victim's self-induced intoxication to hold her partially responsible for the sexual assault. Thus, evidence demonstrating the voluntary nature of a victim's intoxication would be inadmissible unless the probative value of the evidence outweighs its prejudicial effect.

Finally, this type of evidence could be subject to a "rape-shield-like" statutory provision. Rape shield laws exclude evidence of a sexual assault victim's prior sexual conduct in sexual assault proceedings in which consent is

following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. EVID. CODE § 403. California Rule of Evidence 352 similarly provides, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." EVID. § 352.

187. FED. R. EVID. 609.

188. FED. R. EVID. 412(b)(2).

189. FED. R. EVID. 609 (emphasis added). Federal Rule of Evidence 609 is similar to Federal Rule of Evidence 403 and California Rule of Evidence. However, while these evidentiary rules are similar in that they grant discretion to the judge to admit or exclude relevant evidence based on considerations of prejudice, these evidentiary rules are different in that they presume admissibility. Federal Rule of Evidence 609 and my proposal for an evidentiary rule limiting the admissibility of evidence of a victim's means of intoxication would presume *inadmissibility*; thus, only a showing of significant probative value would rebut this presumption and render this evidence admissible.

190. FED. R. EVID. 412(b)(2) (emphasis added).

191. FED. R. EVID. 609.

at issue. Recognizing the limited probative value and highly prejudicial effect of this evidence, Federal Rule of Evidence 412 provides that “evidence offered to prove that a victim engaged in other sexual behavior . . . or . . . evidence offered to prove a victim’s sexual predisposition” is not admissible in a criminal sexual assault proceeding.¹⁹² Similarly, California Rule of Evidence 1103(c)(1) provides that “in any prosecution . . . [for sexual assault], opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness’ sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.”¹⁹³

Evidence of the voluntary nature of intoxication could be subject to a similar statutory provision. Evidence that proves the victim was too intoxicated to consent and the defendant possessed actual or constructive knowledge of her intoxicated condition and incapacity to consent would be admissible. Evidence that demonstrates the voluntary nature or the source of her intoxication, however, would be excluded.

B. Evidence of the Defendant’s Voluntary Intoxication

Evidence of the defendant’s voluntary intoxication could be excluded on basic relevancy grounds. California Rule of Evidence 350 provides that “[n]o evidence is admissible except relevant evidence.”¹⁹⁴ Relevant evidence is then defined as “evidence . . . having any tendency in reason to prove or disprove any disputed fact that is *of consequence* to the determination of the action.”¹⁹⁵

The relevance, and thus admissibility, of evidence of the fact of the defendant’s voluntary intoxication would vary depending on the prosecution’s theory of the case, however. Remember that California’s rape by intoxication statute contains disjunctive language with regard to the perpetrator’s knowledge—he may either have actual or constructive knowledge of her intoxicated condition and inability to consent.¹⁹⁶ When the State elects to proceed solely on a theory that the defendant *should have known* of the victim’s intoxicated condition and inability to consent to sexual activity (i.e. constructive knowledge), evidence of the defendant’s voluntary intoxication could be excluded as irrelevant. This is so because a defendant’s *actual* knowledge of the victim’s intoxicated condition and inability to consent is not an element of rape by intoxication in this context, and a voluntarily intoxicated

192. FED. R. EVID. 412. The rule, however, identifies three exceptions in a criminal trial, providing that “[t]he court may admit the following evidence in a criminal case: (A) evidence of specific instances of a victim’s sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of a victim’s sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and (C) evidence whose exclusion would violate the defendant’s constitutional rights.” *Id.*

193. CAL. EVID. CODE § 1103(c)(1) (West 2011).

194. *Id.* § 350.

195. *Id.* § 210 (emphasis added).

196. *See supra* Part I.

defendant is prevented from raising an affirmative voluntary intoxication or *Mayberry* defense. Thus, the defendant's voluntary intoxication would neither disprove an element of the offense or further a permissible affirmative defense. The defendant's voluntary intoxication would therefore have no tendency to "prove or disprove any disputed fact . . . of consequence to the determination of the action . . . [,]" and would be irrelevant and inadmissible.¹⁹⁷ In fact, another author has questioned the admissibility of such evidence on relevance grounds as well:

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? How is his intoxicated condition being used if not as a defense? Put another way, *how is this evidence even admissible?*¹⁹⁸

When the State elects to proceed on a theory that the defendant had *actual* knowledge of the victim's impairment, however, the defendant's voluntary intoxication would be admissible. Here, the defendant's actual knowledge of the victim's intoxicated condition and inability to consent *is* an element of rape by intoxication. Thus, the defendant's voluntary intoxication may disprove an element of the offense, rendering the evidence relevant and admissible.

IV. AN APPLICATION OF THE PROPOSED REFORMS: WHAT WOULD A CIVIL OR CRIMINAL TRIAL LOOK LIKE?

Had existing evidentiary rules been more effectively utilized, or had the above proposed evidentiary reforms been in effect, the evidence introduced in Jessica's case would likely have been drastically different. Not only would the Santa Clara District Attorney's Office have been much likely to prosecute Jessica's rapists, but jurors in the civil trial would also likely have reached a different verdict. A summary of the likely evidence admitted and excluded demonstrates this point. Essentially, jurors in both the criminal and civil trials would not have heard evidence of Jessica and her rapists' voluntary intoxication, thus limiting their ability to make legally impermissible attributions of responsibility, and limiting their ability to reach an improper verdict.

For its part, the State would have introduced evidence to prove that Jessica was so intoxicated that she could not legally consent to sexual activity, and the defendants possessed *constructive* knowledge of her intoxicated condition and incapacity to consent. Specifically, the State would likely have presented

197. EVID. § 210.

198. Ryan, *supra* note 62, at 422-23 (emphasis added).

documentary and testimonial evidence that Jessica's blood alcohol content peaked at .27, almost four times the legal limit;¹⁹⁹ and testimony that Jessica was unconscious and covered in vomit when witnesses found her.²⁰⁰ Notably, the State would likely *not* present any evidence that demonstrated the self-induced or voluntary nature of Jessica's intoxication, or evidence of the defendants' voluntary intoxication.

The significance of the evidentiary reforms, however, would be far more pronounced during the defense's presentation of its case and the trial court's evidentiary rulings. Essentially, evidence that demonstrated the voluntary nature of Jessica's intoxication, such as evidence that Jessica brought beer to the party,²⁰¹ consumed ten or more shots of vodka at the beginning of the night,²⁰² and photographs that implied (perhaps falsely) the voluntary nature of her intoxication,²⁰³ would have been excluded, or the admissibility would have been significantly restricted, based either on existing or reformed evidentiary rules. Such evidence could have been excluded under existing California Rule of Evidence 352. The trial court could have determined the significant risk that a jury would misuse this evidence to improperly hold Jessica partially responsible for her sexual assault substantially outweighed its minimal probative value.

Such evidence could also have been limited in scope or excluded under *reformed* evidentiary rules, as outlined above. Testimony that Jessica consumed more than ten shots or flirted with the defendants could have been introduced for the limited purpose of proving that Jessica was not so intoxicated or incapacitated, or the defendants did not have constructive knowledge of her impairment, subject to a jury instruction to this effect. Additionally, this evidence could have been excluded pursuant to a discretionary balancing test with a presumption of inadmissibility; the trial court could have determined that the evidence's minimal probative value did not outweigh the significant risk that a jury would misuse evidence to engage in prohibited victim blaming. Finally, such evidence could have been excluded pursuant to a rape-shield-like provision, in which evidence that demonstrated the voluntary or self-induced nature of Jessica's intoxication would be inadmissible.

Furthermore, if the defendants attempted to introduce evidence of their *own* voluntary intoxication, the trial court could have excluded such evidence as irrelevant under existing California Rule of Evidence 350.²⁰⁴ Evidence that the defendants were excessively intoxicated, and defense counsel's arguments that this was a "normal college party[.]"²⁰⁵ that they acted like normal "20

199. Tracey Kaplan, *De Anza Civil Trial Blog: Third Week of Testimony Begins*, SAN JOSE MERCURY NEWS (Mar. 14, 2011), http://www.mercurynews.com/crime-courts/ci_17610879.

200. *Witnesses to Alleged De Anza Rape Speak Out*, *supra* note 6.

201. Rusk, *supra* note 1.

202. Kaplan, *supra* note 2.

203. *Risqué Photos of Plaintiff*, *supra* note 32.

204. CAL. EVID. CODE § 350 (West 2011).

205. Kaplan, *supra* note 31.

year old[] [boys] at a party,” and that they were guilty of nothing more than exercising poor judgment, would be excluded.²⁰⁶ Essentially, the defense would be prevented from presenting a “boys will be boys” (or more accurately, “drunken boys will be drunken boys”) defense.

It is important to note that these proposed evidentiary reforms may not have made a significant difference in Jessica’s case, as some studies have demonstrated that juries may attribute partial responsibility to a victim for her sexual assault even when she is *involuntarily* intoxicated.²⁰⁷ Such a phenomenon demonstrates a pervasive culture of victim blaming and perhaps a more general skepticism for the criminalization of rape by intoxication in general.²⁰⁸ This unfortunate reality, however, is no reason to abandon all efforts to limit jurors’ legally impermissible attributions of responsibility. Evidentiary rules that limit victim blaming in even the most minimal way remain worthwhile.

Another hurdle to overcome is the fact that the prosecution may elect to proceed on a rape-by-intoxication theory in addition to a more traditional non-consent theory. Thus, while it would still be possible to exclude evidence of the voluntary nature of a victim’s intoxication and the defendant’s voluntary intoxication, basic constitutional principles of due process render it impossible to exclude evidence of the victim’s sexual conduct toward the defendants—as the defendant would likely introduce this type of evidence to prove that the victim consented to sexual intercourse. In Jessica’s case, this evidence was perhaps the most significant factor in the State’s decision not to criminally prosecute and the civil jury’s verdict. This evidence included testimony that Jessica performed a lap dance for the perpetrators,²⁰⁹ told the perpetrators to “(expletive deleted) [her]” several times throughout the night,²¹⁰ kissed one of the perpetrators,²¹¹ and had the “weirdest smile” on her face during group sexual intercourse.²¹² While such evidence should not have influenced a jury’s determination of Jessica’s *capacity* to legally consent or the defendant’s constructive knowledge of her intoxicated condition,²¹³ juries are not trained legal professionals, and it was likely extremely difficult for a jury to separate evidence of intoxication and *capacity* to consent from evidence of *actual* consent.

One possible solution to this source of jury confusion is a bifurcated trial. In the initial stage, a jury would determine (1) whether the victim was so

206. Sarah M., *Accused Rapists Just “20 Year-Olds Behaving Like 20 Year-Olds”*, SAFE (Aug. 18, 2011), <http://www.safercampus.org/blog/2011/08/accused-rape-just-20-year-olds-behaving-like-20-year-olds/>.

207. See Finch & Munro, *supra* note 101, at 599.

208. See *id.* at 593.

209. Kulwicki, *supra* note 24.

210. Kaplan, *supra* note 28.

211. *Id.*

212. Kaplan, *supra* note 31.

213. See *People v. Giardino*, 98 Cal. Rptr. 2d 315, 320 (2000) (holding that when a victim is not capable of consenting, her actual consent is irrelevant).

intoxicated that she did not have the capacity to consent to sexual activity; and (2) whether the defendants had constructive knowledge of her intoxication, or whether an objectively reasonable person should have known of her intoxication and incapacity to consent. If a jury determined that the victim was *not* so intoxicated to render her incapable of consent to sexual activity, or that defendants did *not* have constructive knowledge of her condition, the trial would proceed to the secondary stage. It is in this stage that a jury would determine if the victim *actually* consented to the sexual activity in question.

In the present case, then, Jessica's trial would be separated into two stages. In the initial stage, the jury would determine whether Jessica was so intoxicated that she could not legally consent to sexual intercourse. The jury would also determine whether the defendants had constructive knowledge of her intoxicated and incapacitated condition. Importantly, evidence that Jessica consented to sexual intercourse would *not* be introduced during this initial stage. If the jury determined that Jessica was not so intoxicated that she could not legally consent, or if the jury determined that the defendants did not have constructive knowledge of her intoxication and incapacitation, the trial would proceed to a secondary stage. In the secondary stage, the jury would determine if Jessica *actually* consented to sexual intercourse. Thus, the damning evidence mentioned above would be admissible, but *only* at this secondary stage of the trial and *only* after a determination that Jessica did in fact have the *capacity to consent to sexual intercourse*.²¹⁴

CONCLUSION

The outcome of the De Anza rape case can only be characterized as a tragedy. The young men who sexually assaulted Jessica Gonzalez were not criminally prosecuted for rape by intoxication and, to add insult to injury, were found not liable in a civil jury trial. Ultimately, Jessica's rapists were only temporarily suspended from the college baseball team.²¹⁵ This grave

214. While such evidence may seem highly prejudicial and subject to exclusion under California Rule of Evidence 1103(c)(1), California's rape shield provision, which provides that "opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness," exempts "evidence of the complaining witness' sexual conduct with the defendant" from this exclusion. CAL. EVID. CODE § 1103(c)(1), (c)(3) (West 2009). Thus, evidence that Jessica kissed one of the perpetrators, gave them a lap dance, and told them to "fuck [her]," *see supra* notes 209-211 and accompanying text, would be admissible as an exception to the rape-shield statute. One complication of this framework would be that the charges against the defendants would necessarily change. The initial charge would be a violation of California Penal Code Section 261(a)(3), rape of an intoxicated person. Once the jury determined that the victim was not so intoxicated as to prevent her from resisting, however, the charge would therefore change to a violation of California Penal Code § 261(a)(2), sexual intercourse "where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." CAL. PENAL CODE § 261(a)(2) (West 2008).

215. *See supra* note 43 and accompanying text.

miscarriage of justice, however, has the potential to initiate reform to ensure that a tragedy like this never happens again. At the root of the problem is the way that jurors allocate responsibility to voluntarily intoxicated victims and perpetrators. By holding a voluntarily intoxicated victim partially responsible for her sexual assault and a voluntarily intoxicated defendant less responsible for his criminal behavior, jurors blame the victims and pardon the perpetrators. Evidentiary reforms that exclude or significantly restrict evidence of a victim's and defendant's voluntary intoxication can limit these legally impermissible attributions of responsibility to more effectively accomplish legislative intentions and to ensure that prosecutors file criminal charges and juries reach the proper verdicts.

But these evidentiary reforms have an independent importance. They protect a woman's fundamental right to reject an unwanted sexual advance or encounter. Not long ago, the California legislature determined that a woman who wears a short skirt and a low-cut blouse and a woman with numerous sexual partners does not "assume the risk" of sexual assault, or relinquish her right to preserve her bodily integrity and autonomy, reforming evidentiary rules to reflect this principle.²¹⁶ A woman similarly does not "assume this risk" or relinquish this right when she voluntarily consumes alcohol, even to the point of excess. The time is ripe for California evidentiary rules to protect a voluntarily intoxicated woman's right to say no.

216. EVID. § 1103(c)(1), (c)(2).