

# British Society of Criminology

## The Boundaries of Drug Assisted Rape: the Findings of a Pilot Study

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### Introduction

This paper draws on the findings of a pilot study undertaken in 2002, which examined juror attitudes to drug assisted rape, and in particular looked at the way in which the means and parity of intoxication as between victim and defendant influenced perceptions of responsibility in rape cases. While the incidence of drug assisted rape has been a focus of much media and popular interest in recent years, legal frameworks have struggled to respond to the complex engagement between intoxication, consent and belief in consent entailed by such a practice.

At the time at which this study was undertaken, the guiding legal provisions in England and Wales relating to drug assisted rape were to be found under the Sexual Offences Act 1956 (as amended). Under this law, there is no separate category of drug assisted rape, and the use of intoxicants to facilitate intercourse only amounts to the offence of rape if the requirements of section 1 are satisfied. This requires that the defendant has intercourse with a victim who at the time does not consent and that the defendant is either aware that the intercourse is non-consensual or that there is a risk that this is the case. If the defendant has a genuine albeit mistaken belief in consent, he (the statute is itself drafted in gender-specific language) will not be liable for rape unless he has made this mistake because of his own intoxication.

The research project out of which this pilot study emerged was premised on a critical examination of the effects of so-called 'date rape drugs' and of the prevalence of their (mis)use. This indicated that the prototypical construction of drug assisted rape, within which the victim is given drugs that render her unconscious as part of a deliberate strategy to obtain intercourse, is not an accurate reflection of the reality of drug assisted rape. The emphasis placed on the unconsciousness of the victim in this model is not only misleading but it also obscures the issue that is at the heart of the problem of drug assisted rape, namely the validity of intoxicated consent to intercourse. As the question of consent is a determination of fact for the jury under the framework of the Sexual Offences Act 1956, this pilot study sought to analyse the ways in which the presence of a variety of intoxicants affect attributions of responsibility in rape trials and, more specifically, to examine how these attributions translate into a specific verdict.

### The Boundaries of Drug Assisted Rape

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Just as shoplifting and mugging are terms that are commonly used to describe particular manifestations of theft, drug assisted rape has passed into common parlance to describe the surreptitious administration of drugs that render the victim unconscious as a precursor to intercourse, *i.e.* it is a particular species of rape. This conceptualisation of drug assisted rape has become inextricably linked in the public consciousness with drugs such as Rohypnol and GHB, which have attained totemic status as *the* date rape drugs. These drugs are perceived not only as having distinct pharmacological effects which render the victim unconscious upon ingestion, but also as having no legitimate purpose beyond facilitation of sexual assault. The construction of these drugs and their effects thus has a deceptive simplicity. What's more, it presents a legally unproblematic model within which the victim's unconsciousness precludes the possibility of consent, and the defendant's knowledge of her inertia, established by his administration of the drugs in the first place, also precludes any claim to his honest belief that she was consenting. However, such a construction may in fact be fallacious and it merits closer consideration to determine whether it accurately encapsulates the characteristic nature of real drug assisted rape scenarios.

The exact boundaries of the phenomenon of drug assisted rape are by no means certain, and markedly different definitions of the conduct involved exist. In 2002, for example, the Joint Inspection Report into the Investigation and Prosecution of Cases involving Allegations of Rape (Joint Inspection Report, 2002) described drug assisted rape as a situation in which drugs, including alcohol, are purposely used to secure a sexual assault. Thus, unlike the prototypical perception, which focuses on particular types of drugs, predominantly Rohypnol and GHB, the Joint Inspection Report definition expands to include recreational and prescription drugs, as well as alcohol, within its ambit. Nonetheless, this approach is still relatively narrow as it is based upon the use of drugs as part of a deliberate strategy that is adopted by the defendant in order to facilitate intercourse. By contrast, the Sturman Report into Drug Assisted Sexual Assault, which was conducted for the Home Office in 2000, adopts a far broader approach in which drug assisted rape is defined as 'a situation where a person's ability to consent or refuse consent is impaired as a result of drugs' (Sturman, 2000, p. 10). Here the emphasis is not on the defendant's actions or purpose but on the victim's state of mind and her ability to give consent. As such, this approach has the potential to embrace a far wider range of situations, including those involving self-induced intoxication, than either the public perception of drug assisted rape or the definition adopted by the Joint Inspection Report.

It is apparent, therefore, that there is wide divergence between these different definitions, each of which reflects a competing perspective on the essential characteristics of drug assisted rape. But a clear understanding of the nature of the problem is necessary as the basis of an evaluation of the extent to which this conduct is accommodated within the existing framework of sexual offences. At the one extreme, the prototypical construction offers few problems for the current law whilst at the other, the wide definition adopted by the Sturman Report leads inexorably to the conclusion that the current law is wholly insufficient to address the problems of drug assisted rape. As such, the first aim of this research is to 'unpick' the conduct involved in order to gain an understanding of the wrong that is at the heart of drug assisted rape so that a more accurate assessment can be made of the efficacy of the existing law to tackle the problem.

There is a widely held misconception about the effects of the drugs commonly associated with drug assisted rape. Despite the prototypical construction, the reality is that people who have ingested drugs such as Rohypnol and GHB rarely lose consciousness. Rather, the amnesiac effects of the drugs prevent victims from recollecting events thus creating a 'memory void' that the brain rationalises as a period of unconsciousness. However, the victim will retain consciousness whilst appearing to the observer to be inebriated but able to act under her own volition (Dowd, Strong, Janicak and Negrusz, 2002). By eliminating the possibility of consent, the prototypical construction focuses attention on the use of drugs to obtain intercourse (from a victim who is presumed to be unconscious) rather than on the use of drugs to obtain consent (from a victim whose state of mind is affected by the drugs). It is this latter situation that is a more accurate representation of the majority of cases of drug assisted rape. Drugs such as Rohypnol and GHB lower anxiety, alertness and inhibition whilst inducing euphoria, passivity and a sense of relaxation thus increasing the likelihood that the victim will engage in intercourse, even if such behaviour would usually be uncharacteristic, leading them to be described as 'a particularly formidable weapon' in sexual assault cases (Weir, 2001, p. 80). In addition to this impact on the victim's thinking and behaviour, these drugs induce anterograde amnesia thus leaving the victim with only a hazy recollection of events. The amnesiac impact of these drugs has been described as 'their most insidious effects' and clearly has a negative impact on the ability to detect and prosecute perpetrators of drug assisted rape (Labianca, 1998). It would appear that Rohypnol and the like facilitate rape not because they render the victim unconscious but because they lead to a disassociation between mind and body that renders the victim receptive to sexual activity that she may well have found unwelcome in other circumstances whilst eroding her ability to recollect events once the drugs have worn off.

Therefore, although Rohypnol and GHB have come to be synonymous with drug assisted rape, the basis for this is an erroneous understanding of their effects. Upon closer examination, it is clear that a false distinction is being made between these drugs and other intoxicants. As toxicologist Laura Slaughter has noted, 'with moderate to heavy consumption, alcohol and marijuana have properties similar to both GHB and Rohypnol'; properties which she identifies as 'intoxication, disinhibition and amnesia' (Slaughter, 2000). Viewed in terms of the effects of the intoxicants upon the victim, it is clear that drug assisted rape should not be characterised by reference to particular drugs. It is not the nature of the intoxicant that encapsulates the 'wrongness' of drug assisted rape but the use of *any* intoxicant to erode or eradicate the victim's ability to make meaningful choices about participation in sexual activity (Weir, 2001).

This broader conceptualisation of drug assisted rape is of particular importance in light of the evidence of extensive misuse of alcohol in sexual offences. Research in the US indicates that whilst less than 4% of rape victims whose consciousness had been impaired had been given date rape drugs, alcohol was present in 67% of cases (Slaughter, 2000 and ElSohly and Salamone, 1999). This finding is supported by social research that discovered that 75% of men admitted to using alcohol to increase the likelihood that an initially reluctant woman would engage in intercourse (Masher and Anderson, 1986). This is not to say that every situation in which a woman who is intoxicated with alcohol engages in intercourse amounts to drug assisted rape, merely that it encompasses a broad continuum of conduct and that the boundaries between rape and consensual intercourse are more complex than the prototypical construction would suggest. Certainly, both the Drug Rape Trust and the Rape Crisis Federation view the misuse of alcohol as a widespread

part of modern socio-sexual behaviour and agree that 'the use of alcohol to obtain sex from a woman is pervasive – in other words it is a weapon against sexual reluctance ... [and a] major tool used to gain sexual mastery over women' (Martin and Hummer, 1989).

This examination of the effects of date rape drugs indicates that the prototypical construction is misleading and that either of the definitions favoured by the Joint Inspection Report or the Sturman Report might be a more appropriate characterisation of drug assisted rape. These broader approaches differ from the prototypical construction in two important ways. Firstly, they are not limited to any particular drugs but embrace a wider range of intoxicants. This not only broadens the scope of drug assisted rape but ensures that it does not exclude commonly occurring situations and easily available intoxicants. Secondly, these definitions avoid the presupposition that the intoxicants render the victim unconscious and thus incapable of consent. As such, they necessitate a consideration of the more complex question of whether the erosion of the victim's reasoning that is induced by intoxication renders the victim's apparent consent invalid. Although these broader approaches represent a more accurate reflection of the reality of cases in which intoxicants are misused in order to obtain intercourse, it is far less straightforward to fit them within the framework of sexual offences.

#### The Relevant Law on Sexual Offences

At the time of conducting this pilot study, the relevant law on sexual offences was contained in section 1 of the Sexual Offences Act 1956 (as amended). This defines rape as non-consensual intercourse whereby the defendant knows that the victim is not consenting or is reckless thereto. The essence of rape, the factor that differentiates it from lawful intercourse, is the absence of consent (*Olugboja*, 1982). Despite the centrality of the notion of consent to the law of rape, there was no legal definition of consent within this legislative framework, nor any legal formula to assist in the determination of its presence or absence. The breadth of meaning of the word 'consent' in the context of sexual relations was acknowledged by the Court of Appeal in *Olugboja* where it was said that 'it covers a wide range of states of mind ... ranging from actual desire on the one hand to reluctant acquiescence on the other' (*Olugboja*, 1982, per Dunn LJ). In this case, the Court of Appeal confirmed that the question of whether or not the victim consented to intercourse was a question of fact to be determined by the jury. This determination should be made by the jury 'applying their combined good sense, experience and knowledge of human nature and modern behaviour to the relevant facts of the case'. Although *Olugboja* was concerned about the delineation between consent and submission, the approach taken by the Court of Appeal has since been applied in a wider range of situations as a means of identifying the boundary between consent and non-consent. In particular, the Court of Appeal in *Malone*, a case involving a victim who was intoxicated to the point of unconsciousness, were confident that *Olugboja* was an accurate statement of the current legal position (*Malone*, 1998).

This position leaves a wide discretion in the hands of the jury who are left to make a determination between consent and non-consent on the basis of their own knowledge and experiences. There is little within this direction to provide guidance on the circumstances in which intoxication may negate an apparent consent to intercourse, and hence the jury must fall back on their 'good sense'. The difficulty with this position is that the flexibility inherent in this approach to the determination of the presence or absence of consent raises the possibility that

differently composed juries will reach disparate decisions in factually analogous cases. In some respects, this level of flexibility is desirable and entirely appropriate, particularly in cases involving intoxication where it would be impossible to set a benchmark level of consumption that automatically vitiated consent. Given the differing levels of tolerance to intoxicants and the variability of reaction as between individuals, any attempt to establish a threshold of intoxication which, once crossed, rendered an apparent consent invalid would be inherently flawed and would inevitably erode the autonomy of those who wish to become intoxicated and engage in intercourse. However, the absence of any guidance and the abdication of responsibility to the 'good sense' of the jury creates a risk that the exercise of this immense discretion will be tainted by a consideration of legally irrelevant factors. The attitude of the jurors towards intoxication and sexual behaviour would assume a central significance and this creates a forum within which misconceptions and value judgements may have a great impact on determinations of guilt and innocence.

### The Pilot Study

It is the level of discretion that is thus conferred upon the jury, together with the widely acknowledged prevalence of rape myths in jury decision-making, that necessitates an investigation into the factors that influence the outcome of rape trials involving intoxication. This is of particular importance given the tenacity of views regarding women, intoxication and sexual behaviour and the erroneous conceptualisation of drug assisted rape that has gained common currency.

Literature in this area is replete with examples of so-called 'rape myths' within which stereotypical views about 'appropriate' female socio-sexual behaviour interact with preconceived notions of 'ideal' rape as a forcible, violent and resolutely resisted sexual act, to produce exacting standards against which the narratives of real victims will be judged, and often found to be wanting. In a social context in which women are expected to be sexually passive, and in which the threshold of consent reflects women's ability to respond to characteristic male sexual initiative, female sexuality comes to be seen as somehow mysterious, as a prize, access to which is guarded by women themselves. Male sexual aggression presents its own justification, with the boundary between seduction, persuasion and coercion remaining illusive, and the means of determining acceptable sexual behaviour often dependent on the extent of the woman's own efforts to prevent access. Indeed, it is argued that any departure made by the woman from the female role of passivity and virtue will render her less easily accommodated within the victim position. Thus, as Duncan Kennedy surmises, "redress for sexual abuse is conditional on being, or appearing to be, a 'perfect' victim, and that means conforming to patriarchal norms" (Kennedy, 1993, p.153).

In a context in which such patriarchal norms tend to preclude the acceptability of women's self-inebriation, sexual scenarios involving intoxication become particularly problematic. More specifically, there is evidence which indicates that females who self-intoxicate will be regarded as more sexually available (both by potential sexual partners and by third-party observers), and thus less likely to attract the sympathy of the court. George et al, for example, found that a woman consuming alcohol in the presence of a male drinker was perceived to be more sexually disinhibited, and more likely to enjoy the process of being seduced (George et al, 1988). Similarly, Abbey et al have pointed out that when a man and a woman drink alcohol together, this is often interpreted as a sign of sexual intent (Abbey et al, 1996). Thus, as Koski argues, in cases involving non-legitimate victims

acquittals will be secured not so much because of a failure to meet the requisite legal standards, but more because of the existence of elements that defy stereotypical rape 'scripts', including the existence of a drunk victim (Koski, 2002). To the extent that these studies have identified certain important links between the attribution of responsibility and the involvement of alcohol in sexual relations, they provide a valuable framework upon which the content of this pilot study develops. However, the research conducted in this area to date has been limited in certain important regards, most specifically in its focus on alcohol as the sole intoxicant and on the voluntary nature of the victim's ingestion (Norris and Cubbins, 1992; Hammock and Richardson, 1997). In a context in which the surreptitious administration of alcohol (and other intoxicating substances) lies at the heart of popular conceptions of drug assisted rape, this pilot study seeks to embrace a broader remit of engagement. More specifically, it seeks to explore the differential ways in which jurors attribute responsibility for intercourse, depending on the means of administration and type of intoxicant involved.

As section 8 of the Contempt of Court Act 1981 precludes the possibility of gaining insight into the decision-making process of juries in real trials, some other means of exploration was needed. This pilot study used a combination of focus groups and trial simulation to elicit information about the decision-making process in rape trials involving intoxicants. The aim of this pilot was essentially two-fold: firstly, to increase knowledge of the impact of intoxication on the attribution of responsibility in rape trials, and to examine the translation of that attribution into specific verdicts; and secondly, to situate the impact of intoxication within the wider debate about the interaction between 'rape myths' and consent. In order to do so, this pilot set out to explore two key research questions: firstly, where, in a range of scenarios involving the misuse of intoxicants, do potential jurors establish the parameters of drug assisted rape?; and secondly, what factors influence the attribution of blame and responsibility in sexual encounters involving intoxicants?

### Methodology

This was a small scale pilot study comprising two focus groups and a single trial simulation. Volunteer participants were recruited (via posters and flyers) from amongst the University of Reading community of staff and students. The study was advertised as one involving jury perceptions in rape cases, but participants were not given any additional information regarding its specific focus. Eleven participants took part in the focus groups (8 female, 3 male), and the majority of these participants (perhaps unsurprisingly given the subject matter) were law students. While law student participants were asked to give their views from a lay rather than a legalistic perspective, it must be conceded that this may have influenced the findings of the focus groups. In addition, nine participants took part in the trial simulation (5 female, 4 male). These participants were drawn entirely from outside the law student community, although many of them were University employees or postgraduate students in other faculties.

The aim of the focus groups was two-fold: firstly, to explore perceptions of the use of various intoxicants in relation to sexual activity; and secondly, to formulate an appropriately ambiguous scenario for use in the trial simulation. Participants in the focus groups were given a scenario in which two people, who were known to each other but not intimate, met at a party and ultimately engaged in intercourse. These facts remained constant throughout the discussion but three factors were varied in subsequent scenarios - namely the nature of the intoxicant (alcohol, ecstasy, Rohypnol), the means of administration (self-administration or

surreptitious administration by another) and the level of intoxication (which varied as between both parties) (See Appendix 1). The discussions of both focus groups were audio-recorded, and contemporaneous notes were taken by one member of the research team. In addition, participants were given a dedicated feedback form on which they were asked to make a note of their own views on each scenario (selecting from an option of 'rape', 'not rape', or 'not sure').

The purpose of conducting a jury simulation alongside these focus groups was two-fold: firstly, to permit a more focused and sustained analysis of the factors that influence verdict decision-making in a rape trial involving an apparent consent by an intoxicated victim; and secondly, to compare the efficacy of this methodology with that of focus group discussion. While focus groups provide information on participant's attitudes, they permit greater scope for the incorporation of Finkel's "common sense justice", i.e. what ordinary people think the law ought to be, at the expense of consideration of what the law in fact is (Finkel, 1995). Thus, it was felt necessary to build on focus group findings in the context of this research, using a mock trial simulation to locate the emerging attitudinal information within a more legal context. It was anticipated that the requirement that the jury reach a majority verdict on a binary of guilt or innocence may promote a sense of greater accountability amongst participants and provide a greater insight into the way in which divergent social attitudes are negotiated towards a consensus.

The wealth of research on jury simulations conducted in other areas indicates that "it is imperative that realistic, engaging simulation are performed" (Lieberman and Sales, 1997, p. 592). Research in which jurors are provided with a description of a trial has been criticised because "it is so far removed from the dynamics of an actual trial that it is difficult to place high levels of confidence in their findings" (Lieberman and Scales, 1997, p. 592). The use of a real time re-enactment in this pilot study was intended to ameliorate some of these shortcomings.

The trial simulation was enacted in front of a jury composed of nine volunteers. The trial itself lasted 90 minutes. Trained barristers took the roles of prosecution and defence counsel, examining and cross-examining the victim, defendant and witnesses (all these roles were played by student volunteers). While the trial was not scripted, participants were given a summary of key facts and issues, which they were instructed to communicate during their testimony (See Appendix 2 for an outline of this scenario). The jurors watched as the trial unfolded, counsel gave closing speeches and the judge summed-up the key issues. The jury were directed upon the legal definition and requirements of the offence of rape, in line with judicial studies board direction guidelines. Members of the jury then retired to deliberate upon a verdict. They were placed in a separate seminar room, where they were advised to reach a unanimous verdict, and their discussions were video-recorded. Before commencing their discussion, each juror was asked to complete a form indicating their initial inclination regarding a verdict and give the reason for this viewpoint. After 50 minutes of deliberation, it became apparent that a unanimous verdict was not forthcoming, and researchers re-entered the room to advise that a majority verdict would be accepted. After a further 20 minutes, when it became apparent that no such majority verdict could be reached, the jury declared itself 'hung' (5 to 4 in favour of an acquittal). At the end of the deliberations, jurors were required to complete one final form which asked them whether they had changed their opinion in regard to the verdict as a result of the deliberations, and if so, to explain what had caused them to do so.

The feedback forms completed by participants in the focus group and mock jury forums were triangulated with the audio and video-recordings of group discussions, and together these data were analysed by the researchers with a view to identifying influential factors and dominant themes. A process of thematic content analysis was undertaken, with each researcher coding independently in the initial stages to ensure consistency. Given the size of the data set involved, researchers opted to code the data manually, without the assistance of electronic analysis software. The emergent themes were analysed in the context of pre-existing literature on attribution of blame in rape, such as just world theory (Lerner and Matthews, 1967; Kleinke and Mayer, 1990; Foley and Piggott, 2000) and the defensive attribution hypothesis (Shaver, 1970; Fulero and DeLara, 1976). In addition, sociological literature dedicated to examination of 'rape myths' (Ward, 1995; Hammock and Richardson, 1997; Shepherd, 2001) and of social attitudes towards gendered intoxication (George et al, 1988; Kramer, 1994; Lees, 1997) were employed to provide a broader framework within which to situate the emergent data. Finally, the data was analysed in the context of a body of legal and socio-legal research, frequently but not exclusively of feminist origin, that evaluates the efficacy of existing legal provisions and processes in the prosecution of rape cases and the treatment of victims of rape (Adler, 1987; Estrich, 1987; Lees, 1996; Archard, 1998; Schulhofer, 1998; Temkin, 2002).

### Findings of the Pilot Study

There are obvious dangers in seeking to extrapolate findings from such a small scale study and it was not the aim of this research to make draw purportedly generalisable conclusions from the focus group discussions and trial simulation. However, there was a high level of correspondence amongst participants in relation to the factors that influenced their decision-making that merits some discussion and further exploration in more wide-ranging research. Four key themes emerged as having a particular impact on the decision-making process and in the conclusions regarding liability that were reached by the participants:

- the victim's responsibility;
- the defendant's intentions;
- the parity of the parties' intoxication; and,
- the impact of intoxication upon the victim.

### Victim's Responsibility

Paramount amongst the issues that concerned participants in both the focus groups and the trial simulation was the victim's responsibility for the events leading up to intercourse. In the majority of cases in which the victim had voluntarily ingested either alcohol or so-called 'recreational' drugs (i.e. drugs used recreationally, such as ecstasy), participants were in broad agreement that she ought to bear some responsibility for the subsequent intercourse. There was a degree of divergence amongst participants as to the consequences of attributing responsibility to the victim. For some participants, this was sufficient to absolve the defendant of all liability whilst for others, although it did not wholly let the defendant off the legal or moral hook, it led to a reluctance to label the conduct as rape. This situation persisted even though the participants recognised that voluntary intoxication can have a dramatic impact on the victim's ability to reason

and to meaningfully consent to intercourse. The participants recognised that the effect of intoxication on the victim is the same regardless of the means by which she become intoxicated but they were nonetheless unwilling to accord moral equivalence to intercourse that followed voluntary and involuntary intoxication. There was an acknowledgement amongst some participants that this 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 but they were nonetheless adamant that the voluntary ingestion of intoxicants placed a higher burden of responsibility for events that followed on the victim and that this led to a corresponding lessening of the defendant's responsibility. Moreover, some participants took the attribution of responsibility further, suggesting that even when the victim's drink had been surreptitiously strengthened, she should nonetheless retain responsibility for subsequent events as she should have taken greater care about what she was drinking. Often this response was accompanied by a general disapprobation of the victim's conduct and a distaste for women who sought to abdicate responsibility for their behaviour due to intoxication.

To the extent that these findings correspond with previous studies which examined the attribution of responsibility in cases of self-intoxication through alcohol, they indicate that the means of intoxication or the type of intoxicant involved are not likely to impact upon jurors' disapproval of 'unfeminine' inebriation. Indeed, it was clear that the flexibility that exists with regard to the determination of the presence or absence of consent created scope for the incorporation into decision-making of stereotypical views about the relationship between women, intoxication and sexual activity. At a general level, there was strong evidence within the pilot study of an ongoing reliance on legally irrelevant factors and adherence to stereotypical views of sexual behaviour. Thus, for example, participants frequently identified a desire for information about the woman's past sexual history, illustrating support for the (vexatious) presumption that a woman who had engaged in casual intercourse in the past would do so again in an indiscriminating manner. Moreover, in the absence of such evidence, jurors made inferences about the sexual morality of the parties from the range of facts that were available. Often this interacted with stereotypes about the influence of intoxication, with jurors indicating, for example, that the fact that the victim did not usually drink to excess meant that her intoxication on this occasion had induced uncharacteristic promiscuity, which upon a sober re-evaluation she chose to deny by accusing the defendant of rape.

### Defendant's Intentions

In cases of voluntary intoxication, the focus was firmly upon the victim's behaviour and her responsibility for events which followed that was deemed to arise as a result of this. This remained so even in scenarios in which the defendant deliberately sought to take advantage of the victim's voluntary intoxication. However, in cases involving an element of surreptitious administration, the defendant's intentions in interfering with the victim's drink also came to assume a central importance for the participants. Surprisingly, the act of 'spiking' the victim's drinks with additional alcohol or with 'recreational' drugs was not viewed as sufficient in itself to displace the burden of responsibility that the participants tended to attribute to the victim. Their views on this issue only altered in circumstances where there was a clear sexual motivation behind the defendant's actions, in other words, where the defendant deliberately interfered with the victim's drink with the aim of facilitating intercourse. Participants were keen to differentiate between the morality of spiking the victim's drink in order to procure

intercourse and doing so in order to ensure that a woman 'loosened up' and enjoyed the party. This position did not alter even in cases where intercourse occurred, provided that the initial motivation for interfering with the victim's drink was not sexual. In making this distinction, participants appeared unshaken by the fact that the impact upon the victim's decision-making ability would be the same regardless of the motivation for spiking her drink. Moreover, it is noteworthy that some participants felt that the responsibility for the contents of the glass lay firmly with the victim notwithstanding the defendant's interference with the drink. As one focus group participant commented, 'drinks get spiked, girls know this and should take care'. It was surprising that the spiking of drinks, for whatever reason, did not attract greater criticism from the participants. Certainly, it was viewed as morally reprehensible behaviour but, in the absence of a deliberate strategy to obtain intercourse, this was not sufficient to remove the responsibility from the intoxicated victim and to inevitably render any intercourse that followed as rape.

These findings, of course, lend further support to the claim advanced in the previous section regarding the tenacity of legally irrelevant stereotypes in jury decision-making. In addition, they also highlight the extent to which men's predatory sexuality and the strategies invoked to pursue its satisfaction are normalised within the stereotypes thus deployed. 'Aggressive' tactics for securing sexual intimacy, including surreptitious administration or strengthening of intoxicants, were not deemed to absolve the victim of responsibility for the consumption of these substances and for the intoxicated intercourse that ensued. This can be seen to confirm psychological theories of blame attribution grounded in 'belief in a just world'. Particularly given the disproportionate representation of female participants in the focus groups and jury, this conviction that 'bad things don't happen to good people' can be seen to be reflected in their willingness to seize on the victim's "stupidity" in not looking after her drinks. This can be understood as a technique for creating distance between the victim and those female participants who might otherwise see themselves as similarly vulnerable to the threat of such 'spiking' activity.

#### Parity of Intoxication

The participants were agreed that if the defendant and the victim were equally intoxicated, it would be unfair to hold the defendant criminally liable for intercourse that followed, even when the victim's intoxication had rendered her incapable of giving meaningful consent to intercourse. This view was the clearest example of a strongly held belief that is in contrast with the legal position. It is established in case law that a defendant who makes a mistake as to whether a victim is consenting to intercourse cannot avoid liability for rape if this mistake was induced by intoxication (Woods, 1982; Fotheringham, 1989). Accordingly, a defendant who is intoxicated is in an extremely weak position and is unlikely to avoid conviction on a strict application of the law. However, as it is the jury who determine whether or not a defendant is guilty of the offence charged, it is possible that these strongly held views about the attribution of responsibility when both parties are equally intoxicated indicate that there is a possibility that verdicts are not being returned that are consistent with the law in this regard. However, such a conclusion is tentative in the light of the limited scope of the pilot but this is clearly an area where further research would be beneficial.

No such problems arose in the scenarios in which the defendant was less intoxicated than the victim. Here, participants were clear that a sober defendant,

or one who was intoxicated to a lesser degree than the victim, bore responsibility for ensuring that the victim was able to consent to intercourse and had sufficient awareness of what it was she was consenting to and with whom. This is a more onerous burden than that imposed by the law that requires only that the victim consents to intercourse and is not concerned with the identity of the defendant unless he has induced the victim to believe that he is her husband or boyfriend. Nonetheless, the participants were agreed that such a disparity in levels of intoxication would operate to shift responsibility from the victim to the defendant – one of the few situations in which the participants were prepared to absolve a voluntarily intoxicated victim of responsibility for intercourse that occurred.

Notwithstanding this, participants were not wholly convinced that ‘taking advantage’ of an intoxicated victim by a sober defendant would necessarily amount to rape. They were agreed that it was morally reprehensible behaviour but that in itself was not enough to convince them that any intercourse that followed would be rape. Participants thus suggested support for a ‘lesser’ offence which, in their view, would more accurately reflect the wrongdoing involved in these cases of ‘taking advantage’. To this extent, therefore, jurors remained reluctant to acknowledge the intoxicated victim as a fully-fledged rape victim, despite their acceptance of the dual facts that her consent was defective and that the defendant, in his sober mindset, surely knew that this was the case. What’s more, such findings indicate a reluctance on the part of jurors to apply the label of ‘rape’ save in the most extreme and unambiguous of cases – participants seemed to feel that labelling all conduct which fell short of consensual intercourse as rape was too harsh and carried consequences for the defendant that were too serious in the circumstances.

### Impact of Intoxication

It is this final category that is of fundamental importance to the issue of drug assisted rape: to what extent does intoxication impair the victim’s capacity to consent? Amongst the most noteworthy findings from the participant discussion was the extent to which their perceptions on this issue were influenced by media depictions of drug assisted rape. All the participants were immediately adamant that the use of Rohypnol rendered any intercourse that followed rape. This differed from their views on the surreptitious administration of ecstasy or alcohol, which they were not prepared to categorise as rape without further information as to the impact of the intoxicants upon the victim’s ability to reason and communicate. For most participants, this differentiation was based upon the fact that whilst there were several reasons to spike a person’s drink with alcohol or ecstasy, there was only one reason to administer Rohypnol and this was to commit rape.

Not only does this illustrate the significance attributed by the participants to the defendant’s motivations in surreptitiously administering an intoxicant, it also illustrates the extent of the popular belief that Rohypnol produces immediate unconsciousness thus rendering any questions about reasoning and communication redundant. The provision of further details about the real effects of the drug did not shake the participants from their belief that intercourse following the administration of Rohypnol was rape whilst they viewed the use of other intoxicants as far more open to debate. It was common for participants to express disapproval of the administration of other intoxicants whilst maintaining a paradoxical reluctance to label intercourse that followed as rape. Thus, as one focus group participant commented: ‘I wouldn’t want to call it [intercourse following the surreptitious administration of ecstasy] consensual sex but I wouldn’t want to

call it rape either'. The strongly held views of the participants on this issue illustrate not only the tenacity of the view that the use of Rohypnol is synonymous with rape but also that this view undermines the legal requirement that it is the victim's ability to consent to intercourse that is determinative rather than the nature of the intoxicant that has been ingested.

In the rare instances in which participants were willing to consider the possibility that a victim who had ingested other intoxicants might lack the capacity to consent, the crucial question for the participants was whether the victim was too intoxicated to give meaningful consent. The differing standpoints of the participants on this issue are illustrated by the following exchange:

- J6 If you are drunk but still you, you can say 'no'.  
J12 But the point is not did she say 'no', the point is did she say 'yes'.  
J5 Or the point is was she even in the same conversation.

For those participants who subscribed to the first of these views, the crucial test by which to establish whether the victim was able to consent was to focus on her level of consciousness. For these participants, a victim who was staggering, slurring her words and showing signs of confusion was intoxicated but not to a sufficient extent that her consent to intercourse should be invalidated. This view was encapsulated by the words of one juror who commented 'well, she wasn't unconscious though, was she?' This demonstrated a common belief amongst some participants that as long as a person is conscious, their level of intoxication will never be such as to render them incapable of reasoning at a basic level or of expressing dissent to intercourse if it were unwelcome. Implicit within this was a concern amongst participants to seek evidence of resistance or a struggle as this was perceived as the 'normal' way that a person would respond to unwanted sexual contact even if intoxicated. In the absence of such evidence, many participants deemed the intercourse that occurred to be consensual and their disapprobation of the possibility of retrospective revocation of consent (upon a sober re-evaluation) prompted a conclusion that no rape had occurred. Again, this differs to an extent from the legal position which imposes no requirement that dissent be made manifest and it illustrates a further possibility that jurors are influenced by extra-legal factors when making determinations in rape cases.

By contrast, some participants were of the view that a level of intoxication short of unconsciousness might render a victim incapable of giving consent to intercourse. Here, the emphasis was not so much on the presence of dissent but on whether a consent given in circumstances of extreme intoxication could be deemed valid. Focussing upon evidence as to the victim's ability to reason and communicate, these participants imposed a threshold that centred around whether or not the victim was so intoxicated that she did not know what she was doing. For participants who subscribed to this standard, a key concern was the need for concrete evidence as to the effect of specific levels of intoxication on an individual's behaviour. Whilst acknowledging the uncertain nature of such issues (with comments such as 'it all comes down to tolerance'), participants nonetheless displayed a paradoxical desire for greater certainty.

Thus whilst invocation of this latter threshold suggests a more receptive approach to the possibility that a conscious but intoxicated victim might be incapable of providing valid consent, the inherently individualised nature of the operation of this threshold renders it an illusive legal boundary. The complexity of translating it into an *a priori* legal standard means application is inevitably of the mercy of specific

juries in specific cases which, in turn, promotes inconsistency, unpredictability and scope for the incorporation of extra-legal factors into the decision-making process.

### Conclusions and Direction of Future Research

Although the findings of this pilot study are limited due to the small scale nature of the research, they disclose a variety of interesting and important issues associated with the influence of intoxication on the outcome of rape trials.

In terms of the perceived boundaries of drug assisted rape, participant discussion in this study indicates the tenacity of the prototypical conception, with its close association between the administration of specific drugs (Rohypnol and GHB), the unconsciousness of the victim and the commission of rape. But, as discussed earlier, this conception inappropriately shifts the emphasis away from the victim's ability to consent (which is the essence of rape) to the prior fault of the defendant in administering a particular type of intoxicant, and overlooks the fact that the victim who has ingested Rohypnol (just like the victim who has drunk alcohol or taking ecstasy) may be as much an active initiator of sexual contact as a passive recipient. In marked contrast to the strength of condemnation exhibited in cases involving Rohypnol, in cases involving other intoxicants, participants differed to a substantial degree about where the line was to be drawn. There was clearly greater consensus in situations in which the defendant had either administered an intoxicant without the victim's knowledge for the purposes of procuring intercourse or where he was far less intoxicated than the victim and thus deliberately took advantage of her vulnerability. However, the attribution of responsibility in both these situations was influenced by the defendant's morally reprehensible conduct rather than the victim's ability to consent. This emphasis on the significance of the use of intoxicants as part of a deliberate strategy to procure intercourse not only testifies to the influence of legally irrelevant factors in jury decision-making, but also suggests that public opinion is in greater accord with the definition suggested by the Joint Inspection Report than with the wider approach taken by the Sturman Report. Participants in the study expressed resistance to the idea emerging from the Sturman Report that self-intoxication could negate an apparent consent, and in particular they expressed concern that such a consent could be revoked retrospectively upon the victim's sober re-evaluation. In fact, the general view of the participants in this study was that such an approach was 'dangerous', giving too great an emphasis to the victim's viewpoint to the detriment of the defendant.

In addition, it is clear that other than in very narrow circumstances based upon the erroneous prototypical construction of drug assisted rape, participants were challenged by the breadth of the discretion conferred upon them in relation to consent to intercourse. A variety of extra-legal factors assumed great importance to participants in the decision-making process and many of these were based upon rape myths and stereotypical notions concerning appropriate female behaviour. More specifically, it would appear that the presence of intoxication, particularly by alcohol, has a great influence on attributions of responsibility in decision-making in rape trials. While defendants were viewed as less blameworthy if they were intoxicated, the intoxication of the victim was generally used as a basis for denigrating her behaviour and absolving the defendant of responsibility for the intercourse that followed. Not only is this inconsistent in that intoxication works in favour of the defendant but against the victim, these considerations are not deemed to be relevant in the determination of the presence of consent according to the law. Clearly, there are issues here, particularly those associated with perceptions of women who behave in a way that is deemed to be inconsistent with prevailing

norms of appropriate female behaviour, that merit further exploration. This is of particular importance given the prevalence of intoxication of one or both parties in rape trials (Frinter and Rubinson, 1993; Hammock and Richardson, 1997), the frequency with which rapes occur in social settings where intoxicants are readily available (particularly in light of the evidence of widespread abuse of alcohol) and the tendency of the police to view complaints of rape as unfounded if the victim was intoxicated at the time (Lopez, 1992). In an effort to examine the issues raised by this pilot study in further detail, a larger-scale project addressing reminiscent research questions and utilising a similar methodology commenced in January 2004. This research, which is funded by the ESRC, will build upon these findings and explore further the complexities associated with intoxicants, consent and rape.

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### Appendix 1: Focus Group Scenarios

Alice meets Bill (a friend of a mutual friend) at a party. Later that evening, they have sexual intercourse. The next morning Alice reports to the local police station that Bill raped her. Following a medical examination, there is evidence that intercourse took place, but no evidence of force being used. When questioned, Bill admits that he had intercourse with Alice, but argues that it was consensual.

Discuss whether any of the following situations amount to rape -

Scenario 1:

Alice was sober but, carried away with party atmosphere, she agreed to intercourse with Bill at the time. The next day, she awoke and regretted her actions.

Scenario 2:

Alice and Bill had shared a bottle of wine. They had intercourse. Although Alice agreed at the time, she awoke and regretted her actions, which she attributes to the alcohol.

Scenario 3:

(a) Alice has been drinking heavily all evening. Bill has had a couple of beers. Although Alice agreed to intercourse at the time, she awoke the next day and regretted her actions, which she attributes to the alcohol.

(b) Bill felt that she was a willing participant in intercourse. At all times, she seemed to know who he was and what they were doing. They had been talking and getting on well all evening. Although he knew Alice had been drinking heavily, she did not appear to be excessively drunk.

(c) Bill felt that she was a willing participant in intercourse. She showed some signs of confusion, and did not always seem to know who he was. Nonetheless, she agreed to intercourse at the time.

Scenario 4:

Alice and Bill have both been drinking heavily. They were both extremely drunk. Although Bill's recollection of events is hazy, he clearly remembers that Alice agreed to intercourse. Alice agrees that this was so, but claims that she would never have acted in this manner had she not been so intoxicated.

Scenario 5:

Bill is attracted to Alice but does not think that she is interested. During the evening, he buys her several drinks. Each time he does so, he orders a double measure of spirits when Alice believes that she is drinking single measures. Later in the evening, Bill makes advances towards Alice. Although Alice agreed to intercourse at the time, she awoke and regretted her actions.

Bill confesses to Alice that he increased the strength of her drinks the previous evening. Alice is very angry that he did so, particularly given that she would have slept with him anyway, as she had found him attractive for some time.

Scenario 6:

At the party, there are two punch bowls – one containing non-alcoholic fruit punch, and the other containing an alcoholic version. Alice does not drink alcohol but Bill thinks that if she is a little drunk she is more likely to have sex with him. He deliberately brings her alcoholic punch. Later in the

evening, Bill makes advances towards Alice. Although Alice agreed to intercourse at the time, she awoke and regretted her actions.

Scenario 7:

Alice is on medication, and does not want to drink alcohol at the party. Despite telling Bill this, when Bill goes to the bar and finds that the non-alcoholic punch has run out, he brings Alice back a glass of the alcoholic version. He thinks that one glass will not do her any harm. However, this reacts badly with the medication, making Alice uninhibited. Later in the evening, Bill makes advances towards Alice. Although Alice agreed to intercourse at the time, she awoke and regretted her actions.

Scenario 8:

Earlier in the evening, both Alice and Bill have taken ecstasy. They have intercourse. Alice wakes up the following morning and regrets her actions.

Scenario 9:

Earlier in the evening, Alice has taken ecstasy. Bill has not, but has had a couple of beers. They have intercourse. Alice wakes up the following morning and regrets her actions.

- (a) Alice has been drinking water all evening. Bill does not know that Alice has taken the drug.
- (b) This is the first time that Alice has taken ecstasy. Before doing so, she was not clear on its effects. She asked Bill what to expect but he has no knowledge of the drug's effects either.
- (c) Bill has given her the ecstasy tablet, knowing about its effects and about the fact that Alice has never taken the drug before.

Scenario 10:

Earlier in the evening, Bill places a crushed ecstasy tablet in Alice's drink without her knowledge. Later, they have intercourse. Although Alice agreed at the time, she awoke and regretted her actions.

Scenario 11:

Earlier in the evening, Bill places rohypnol in Alice's drink without her knowledge. Later they have intercourse. Although Alice agreed at the time, she awoke and regretted her actions.

Scenario 12:

Trevor goes to the party with several rohypnol tablets, hoping that administering these to women will make intercourse with him more likely. Trevor slips a tablet into Alice's drink, but is then distracted by the arrival at the party of his brother. Later in the evening, Bill makes advances towards Alice. Although Alice agreed to intercourse at the time, she awoke and regretted her actions.

[what if Bill doesn't know what Trevor has done?]

## Appendix 2: Mock Trial Scenario

The defendant and victim were both friends of the host of a party. During the course of the evening, they spent time in conversation and found that they had several interests in common. The victim had drunk two glasses of vodka and orange prior to engaging in conversation with the defendant and, at her request, he brought her two further drinks whilst they were talking. The host of the party joined their conversation and berated the victim for drinking as they had agreed to give up alcohol in pursuit of a healthier lifestyle. The victim agreed to switch to orange juice but the defendant claimed that he thought that this was spoiling her fun and so he brought her a vodka and orange. He claims that he assumed that she would realise that it contained alcohol and refuse to drink it if she was serious. The victim made no comment and the defendant brought her two further such drinks. At this stage, the defendant and the victim separated and the defendant did not see the victim for a further hour. There was some deliberate ambiguity about the victim's actions during this house and there was some suggestion that she may have continued drinking of her own accord. The defendant came across the victim lying on the sofa and realised that she was very drunk. He agreed to help her upstairs to bed. They encountered the host of the party who gave evidence that the victim was so drunk that she was incoherent and unaware of her surroundings. The defendant felt that this was an exaggeration and that the victim was largely coherent if a little confused at times. The victim had no recollection of events after 11pm that evening. The defendant claimed that the victim initiated intercourse. He stated that the victim seemed confused at times and that she once asked what his name was and what he was doing but that she did not want him to desist from intercourse. She fell asleep immediately afterwards and the defendant went home. The victim awoke at 3.30am and realised that intercourse had occurred. As she was confident that she would not have agreed to intercourse, she made an allegation of rape but was unable to remember the identity of the perpetrator. The defendant was identified as a potential suspect by the host of the party and he did not dispute that intercourse had taken place. The police were of the view that the victim was too intoxicated to give valid consent to intercourse and that the defendant's actions in spiking her drinks indicated that he intended to have intercourse regardless of the victim's consent. Thus he was charged with rape. At trial, the defence sought to eliminate the relevance of the means by which the victim became intoxicated and to focus on the fact that, notwithstanding her intoxication, the victim consented to intercourse. Evidence from the arresting officer, medical expert and other witnesses was ambiguous as to the amount of alcohol that the victim had consumed and the extent to which it affected her ability to exercise rational judgement.