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For what avail the plough or sail
Or land or life, if freedom fail?
EMERSON

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THE SCOPE OF THE JURY TRIAL RIGHT IN SEC ENFORCEMENT ACTIONS

*MATTHEW T. MARTENS & TROY A. PAREDES**

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INTRODUCTION

The Seventh Amendment to the United States Constitution provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[1] In *Tull v. United States*,[2] the Supreme Court held that this jury trial right extends to the finding of "liability" requisite to the imposition of a monetary penalty in a civil government en-

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1. U.S. CONST. amend. VII.
2. 481 U.S. 412, 414 (1987).

forcement action brought in federal district court.[3] This jury trial right has been recognized as applying in enforcement actions brought by the U.S. Securities and Exchange Commission (SEC or Commission) seeking civil money penalties.[4]

To date, few defendants have raised and few courts have considered the scope of the "liability" finding to which a defendant is entitled from a jury (as compared to a judge) before a monetary penalty may be imposed in an SEC enforcement action.[5] In particular, no court has decided whether it is sufficient for Seventh Amendment purposes for a jury to find the charged securities law violation alone, or whether the jury must also make the particular factual findings set forth in the penalty provisions of the federal securities laws that expose a defendant to a particular penalty tier. This question is of significant practical importance: just because a jury finds that the SEC has proved each element of the alleged securities law violation, it does not follow that the jury has made all factual findings that are required to impose a particular statutory penalty. What must be shown under the federal securities laws' penalty provisions to trigger a given penalty may be more than what must be shown to establish a violation in the first instance. This is especially so with regard to strict liability and negligence-based securities law violations.

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3. *Id.* at 427.

4. *See* SEC v. Lipson, 278 F.3d 656, 662 (7th Cir. 2002) (Posner, J.) (holding that defendant was entitled under *Tull* to a jury trial as to liability when the SEC sought a civil money penalty); SEC v. Spencer Pharm., Inc., 58 F. Supp. 3d 165, 166 (D. Mass. 2014) ("[T]here is a right to a jury trial to determine liability for civil penalties, but not to determine the amount of civil penalties." (internal quotation marks omitted) (citing *Tull*, 481 U.S. at 425–27)); SEC v. Mattera, No. 11 Civ. 8323, 2013 U.S. Dist. LEXIS 174163, at *44 (S.D.N.Y. Dec. 9, 2013); SEC v. Badian, 822 F. Supp. 2d 352, 365 (S.D.N.Y. 2011) (stating that "determination of whether the facts are such that the defendants can be subjected to a civil penalty" is a question for the jury under *Tull*); SEC v. Solow, 554 F. Supp. 2d 1356, 1367 (S.D. Fla. 2008) (holding that defendant had a "constitutional right to have a jury determine his liability"), *aff'd* 308 F. App'x 364 (11th Cir. Jan. 21, 2009); SEC v. Kopsky, 537 F. Supp. 2d 1023, 1026 (E.D.Mo. 2008). Indeed, the SEC has acknowledged the application of *Tull* to enforcement actions seeking penalties in federal district court. *See* SEC v. Gowrish, 510 F. App'x 588, 590 (9th Cir. 2013) ("*Tull* . . . remains law and controls in this case."); Hill v. SEC, No. 1:15-CV-1801, 2015 U.S. Dist. LEXIS 74822, at *36–37 (N.D. Ga. June 8, 2015) ("The SEC does not dispute Plaintiff's argument that an enforcement action for civil penalties is clearly analogous to the 18th-century action in debt, and this remedy is legal in nature." (internal citations and quotation marks omitted)).

5. *Solow*, 554 F. Supp. 2d at 1367 (noting the "uncertainty" regarding the findings that a jury must make before a judge may impose a particular penalty).

The issue considered here is the scope of a defendant's Seventh Amendment right to a jury finding of "liability" before a particular monetary penalty may be imposed in an SEC enforcement action. This analysis is done in light of the Supreme Court's more recent jurisprudence holding that a criminal defendant's Sixth Amendment right to a jury trial extends to all facts that increase the statutory maximum sentence that a judge may impose. This Article concludes that, following the Supreme Court's decision in *Tull*, the Seventh Amendment similarly entitles a defendant in an SEC enforcement action brought in federal district court[6] to a jury finding as to all facts that set the statutory maximum civil money penalty that a district judge may impose. It should make no difference whether the facts on which the maximum penalty turns are located in the statutory provision defining the violation itself or are instead located elsewhere in the statutory scheme and characterized as penalty enhancers.

In other words, the question of liability on which *Tull* holds a defendant is entitled to a jury trial extends beyond the elements of the violation proper to include all factual findings that can lead to a more severe maximum sanction. It is not enough for the jury simply to find that there was a securities law violation if an enhanced civil money penalty is to be imposed. One's liability for purposes of the Seventh Amendment jury trial right cannot be assessed apart from the maximum sanction to which one is ultimately exposed. Indeed, the very definition of liability is "the state of being legally responsible for something . . . (such as the payment of money)."[7] This Article ends with some practical ramifications of its understanding of

6. In *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. 442 (1977), the Supreme Court held that, notwithstanding the Seventh Amendment jury trial right, Congress can, at least in some circumstances, assign to an administrative tribunal the resolution of a claim created by Congress and on which a defendant would be entitled to a jury trial were the matter litigated in federal court. *Id.* at 450. One court has applied the teaching of *Atlas Roofing* to SEC enforcement proceedings brought in an administrative tribunal. *Hill*, 2015 U.S. Dist. LEXIS 74822, at *40–42 (holding that an SEC enforcement action for civil penalties does not guarantee a right to a jury trial under the Seventh Amendment because "Congress may assign the adjudication of cases involving so-called public rights to an administrative agency . . . ."); *see also* Wise, No. 3-11247, at *5 (ALJ Feb. 18, 2005) (holding that, as a result of the decision in *Atlas Roofing*, the respondent had no Seventh Amendment jury trial right in an enforcement proceeding brought in an administrative forum).

7. *Liability*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/liability (last visited Apr. 6, 2016); *see also liability*, BLACK'S LAW DICTIONARY 914 (6th ed. 1990) (defining "liability" as the "condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden").

the Seventh Amendment jury trial right as applied to the SEC's civil money penalty regime.[8]

I.
RIGHT TO A JURY TRIAL IN SEC ENFORCEMENT ACTIONS

Tull is the seminal Supreme Court case concerning the right to a jury trial in a civil government enforcement action. The defendant in *Tull* was a real estate developer sued by the federal government for illegal dumping under the Clean Water Act (CWA).[9] The government sought civil penalties of $22.8 million against the developer, as the CWA provided for a maximum penalty for an illegal dumping violation of $10,000 per day.[10] The district court judge denied the developer's request for a jury trial, and found after a fifteen-day bench trial that the developer had "illegally filled in wetland areas" in violation of the CWA.[11] The judge then imposed a civil penalty against the developer of $325,000.[12] The Fourth Circuit affirmed the trial court's judgment on appeal, rejecting the developer's argument that he was entitled to a jury trial under the Seventh Amendment.[13] The Supreme Court granted certiorari and reversed.[14]

The question presented in *Tull* was "whether the Seventh Amendment guaranteed . . . a right to a jury trial on both liability and the amount of penalty in an action instituted by the Federal Government seeking civil penalties and injunctive relief . . . ."[15] As noted above, the Seventh Amendment "preserved" the right to a jury trial "[i]n Suits at common law."[16] The Supreme Court has long interpreted the Seventh Amendment to afford a right to a jury trial "in those actions that are analogous to 'Suits at common law.'"[17] The *Tull* Court observed that "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of

8. Although we are focused in this Article on SEC enforcement actions, our reasoning may also apply to civil enforcement actions brought by other federal agencies.

9. Tull v. United States, 481 U.S. 412, 414 (1987).

10. *Id* at 414–15.

11. *Id.* at 415.

12. *Id.* at 420.

13. *Id.* at 416.

14. *Id.* at 417.

15. *Tull*, 481 U.S. at 414.

16. U.S. CONST. amend. VII.

17. *Tull*, 417.

law."[18] Accordingly, the Court held that the defendant had "a constitutional right to a jury trial to determine his *liability* on the legal claims."[19] Notably, the Supreme Court was unanimous on this point.[20]

The *Tull* Court then turned to the question of whether the defendant "additionally has a Seventh Amendment right to a jury assessment of the civil penalties."[21] The Court noted that, while the CWA "did not explicitly state whether juries or trial judges were to fix the civil penalties," the legislative history showed "that Congress intended that trial judges perform the highly discretionary calculations necessary to award civil penalties after liability is found."[22] The Court observed that "[t]he Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability."[23] Accordingly, the Court concluded that "Congress' assignment of the determination of the amount of civil penalties to trial judges . . . does not infringe on the constitutional right to a jury trial."[24] In other words, the Court held, "a determination of a civil penalty is not an essential function of a jury trial, and . . . the Seventh Amendment does not require a jury trial for that purpose in a civil action."[25]

A decade later, the Supreme Court explained that *Tull* recognized a "right to a jury trial on all issues relating to liability for civil penalties . . . ."[26] While the *Tull* opinion stated that this jury trial right does not extend to a determination of the amount of the penalty to be imposed, the Supreme Court has since observed that this statement in *Tull* may have been dicta.[27] In any event, the Court has

18. *Id.* at 422.

19. *Id.* at 425 (emphasis added).

20. *Id.* at 425; *id.* at 427 (Scalia, J., concurring in part and dissenting in part) (joining majority opinion on defendant's right to jury trial on the issue of liability).

21. *Id.* at 425.

22. *Id.* at 425.

23. *Tull*, 425–26.

24. *Id.* at 426–27.

25. *Id.* at 427. On this point, Justices Scalia and Stevens dissented. They would have gone further than the majority and recognized a right to a jury trial not only on the question of the defendant's "liability," but also on the amount of the civil money penalty to be imposed. *Id.* at 427–28 (Scalia, J., concurring in part and dissenting in part).

26. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 354 (1998).

27. *Id.* at 354 n.8. We assume for purposes of this Article that the distinction drawn in *Tull* between liability and penalty amount is the law. If that is not the case, it may be that the defendant is entitled to a jury finding not only as to the facts that set the statutory maximum penalty to which the defendant is exposed, but also the precise penalty amount to be imposed within that range. *See* Grant R.

explained that *Tull*'s disparate treatment of the liability determination and the penalty amount was founded, at least in part, on the ground that "the awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding."[28] Furthermore, there is a difference between determining the penalty to be imposed within the range fixed by a jury's factual findings, on the one hand, and the finding of facts that expose a defendant to a higher maximum penalty, on the other. Even as the former may be for the judge, the jury trial right attaches to the latter, as we discuss below.

Since the decision in *Tull*, lower courts have consistently recognized the application of its holding to SEC enforcement actions seeking civil money penalties.[29] The *Tull* Court did not, however, specify what findings are encompassed within a jury's "liability" finding that is requisite to a court's imposition of a civil money penalty, and the Supreme Court has not had a subsequent opportunity to consider that question. Nor have the lower courts offered much guidance concerning what is encompassed by the concept of "liability" that must be found by the jury before the trial judge may impose a penalty.

In SEC enforcement actions, courts and lawyers have mostly assumed, without discussion, that a jury need only return a general verdict finding a securities law violation, at which point the judge can (1) determine the appropriate penalty up to the statutory maximum authorized based on the facts found by the jury; and (2) make factual findings beyond those found by the jury regarding the presence of any additional facts set out in the statutory penalty regime that increase the maximum penalty that may be imposed on a defendant for a given violation.[30] To the extent this practice is based

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Mainland, Note, *A Civil Jury in Criminal Sentencing:* Blakely, *Financial Penalties, and the Public Right Exception to the Seventh Amendment*, 106 COLUM. L. REV. 1330, 1350 (2006) (arguing that "even though *Tull* is factually distinguishable from *Blakely*—the latter deals only with the Sixth Amendment, not the Seventh—it would make little sense to continue to apply an outdated, and possibly unconstitutional, liability/penalty dichotomy to the Seventh Amendment").

28. *Feltner*, 523 U.S. at 355.

29. *See supra* note 4.

30. *See* SEC v. Tourre, 4 F. Supp. 3d 579, 593–94 (S.D.N.Y. 2014) (imposing Second- and Third-Tier civil penalties after jury returned general verdict); SEC v. Solow, 554 F. Supp. 2d 1356, 1366–67 (S.D. Fla. 2008) (imposing Third-Tier civil penalties after jury returned general verdict); SEC v. Ingoldsby, No. 88-1001-MA, 1990 WL 120731, at *6 (D. Mass. May 15, 1990) (granting disgorgement and declining to impose additional civil penalty after jury returned general verdict). *But see* SEC v. Novus Techs., LLC, No. 2:07-CV-235-TC, 2010 U.S. Dist. LEXIS 111851, at *41 (D. Utah Oct. 20, 2010) (holding that the state of mind required for imposi-

on the belief that the Seventh Amendment entitles a defendant to no more than a general determination that a securities law violation has occurred, it cannot be reconciled with *Tull* and is inconsistent with how the Supreme Court has addressed what it has described as an "analogous"[31] issue in the criminal sentencing context.

II.
RIGHT TO A JURY TRIAL AS TO PENALTY ENHANCEMENTS IN CRIMINAL CASES

The Sixth Amendment provides that those accused of a crime have the right to a trial on those accusations by an impartial jury.[32] This jury trial right "requires that each element of a crime be proved to the jury beyond a reasonable doubt."[33] Beginning more than a decade ago with the Supreme Court's decision in *Apprendi v. New Jersey*,[34] the Supreme Court has held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[35] The Court held that this principle applies regardless of whether the fact is identified in the statutory regime as an "element" of the offense or a "sentencing factor."[36] The Court "dismissed the possibility that a State could circumvent the protections of [the Constitution] merely by 'redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'"[37]

The defendant in *Apprendi* was charged with and pled guilty to possession of a firearm for an unlawful purpose, but his maximum term of imprisonment for that crime was increased from ten years

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tion of Third-Tier penalties is a question for the jury). For a discussion of the penalty tiers in an SEC enforcement action, *see infra* Part III.

31. *Feltner*, 523 U.S. at 355.

32. U.S. CONST. amend. VI.

33. Alleyne v. United States, 133 S. Ct. 2151, 2156 (2013).

34. 530 U.S. 466 (2000).

35. *Id.* at 490.

36. *Id.* at 478, 492–94 (stating that the label of "element" or "sentencing factor" is irrelevant, and the "relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"); *see also* United States v. Leahy, 438 F.3d 328, 336 (3d Cir. 2006) ("[F]or purposes of sentencing under *Apprendi* and *Blakely*, whether a fact is labeled a sentencing fact or an element of the offense is of no consequence.").

37. *Apprendi*, 530 U.S. at 485 (quoting Mulvaney v. Wilbur, 421 U.S. 684, 698 (1975)).

to twenty years based on the trial judge's determination that the crime was committed with racial bias.[38] The State argued that the racial bias enhancement was a "sentencing factor" rather than an "element" of the offense, and thus was not subject to the Sixth Amendment's jury trial right.[39] The Supreme Court rejected this argument, concluding "that there was no 'principled basis for treating' a fact increasing the maximum term of imprisonment different than the facts constituting the base offense."[40] The relevant question, the Court explained, is whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict[.]"[41] If so, then the finding is one that must be made by the jury based on proof beyond a reasonable doubt.[42]

By contrast, a true "sentencing factor" that need not be found by a jury is a fact "that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense."[43] Indeed, the *Apprendi* Court was careful to note that it was in no way "suggest[ing] that it was impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute."[44] To the contrary, the Court observed that "judges in this country have long exercised discretion of this nature in imposing sentences *within statutory limits* in the individual case."[45]

The Court's analysis in *Apprendi* began with Oliver Wendell Holmes, Jr.'s observation that "'[t]he law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them.'"[46] As the Court observed, New Jersey threatened the defendant "with certain pains if he unlawfully possessed a weapon and with additional pains if he selected victims with a purpose to intimidate them because of their race."[47] Thus, the *Apprendi* Court concluded, "[a]s a matter of simple justice, it

38. *Id.* at 469–71.

39. *See id.* at 471–72.

40. Alleyne v. United States, 133 S. Ct. 2151, 2157 (2013) (quoting *Apprendi*, 530 U.S. at 476).

41. *Apprendi*, 530 U.S. at 494.

42. *Id.* at 492.

43. *Id.* at 494 n.19.

44. *Id.* at 481.

45. *Id.*

46. *Id.* at 476 (quoting OLIVER W. HOLMES, JR., THE COMMON LAW 40 (M. Howe ed. 1963)).

47. *Apprendi*, 530 U.S. at 476.

seems obvious that the procedural safeguards designed to protect [the defendant] from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment."[48] The State could not avoid this conclusion with careful labeling: "Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently."[49]

The Court based this conclusion in part on the Fourteenth Amendment's "proscription of any deprivation of liberty without 'due process of law.' "[50] The Court went on to observe that the "historical foundation" for this principle extended back to the common law respect for the role of the trial by jury " 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties.' "[51] Of particular relevance to our discussion here, the Court invoked the historic value placed on jury trials in *both* the civil and criminal context in support of its conclusion that a criminal defendant has a right to a trial by jury on any fact that increases the maximum sentence to which the defendant is exposed.[52]

One challenge facing courts in the wake of *Apprendi* has been how to define a "crime" as opposed to a "sentencing factor."[53] For example, the Federal Sentencing Guidelines purported to guide the district courts in their determination of the appropriate sentence up to the maximum set by statute. But in practice, the Guidelines mandated an increased sentence based on the presence of facts found by the judge under a preponderance of the evidence standard.[54] Accordingly, in *United States v. Booker*,[55] the Supreme Court held that this mandatory sentencing guidelines regime based on judge-found facts ran afoul of the jury trial right as articulated in *Apprendi*.[56] To remedy this constitutional flaw in the Sentencing Guidelines, the Supreme Court interpreted the Guidelines as advisory, serving only as a factor to guide a district judge in his or her exercise of sentencing discretion within the range permitted by the

48. *Id.*

49. *Id.*

50. *Id.* at 476 (quoting U.S. CONST. amend. XIV).

51. *Id.* at 477 (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).

52. *Id.* at 479–80 n.6 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES (dealing with civil jury trials) and 4 WILLIAM BLACKSTONE, COMMENTARIES (dealing with criminal jury trial)).

53. Alleyne v. United States, 133 S. Ct. 2151, 2156 (2013).

54. United States v. Booker, 543 U.S. 220, 233–35 (2005).

55. *Id.*

56. *Id.* at 243–45.

offense of conviction, but not mandating any particular sentence within that range.[57]

Similarly, numerous federal (and state) criminal statutes define a base offense subject to a given sentence, but then set out various factors that, if also present, increase the statutory maximum sentence to which the defendant is exposed for that base offense. For example, mail and wire fraud carry a statutory maximum sentence of twenty years in prison and a $250,000 fine, unless that offense "affects a financial institution," in which case the statutory maximum sentence increases to thirty years in prison and a $1 million fine.[58] Similarly, health care fraud generally carries a statutory maximum sentence of ten years in prison and a $250,000 fine.[59] But the statutory maximum term of imprisonment increases to twenty years if "the violation results in serious bodily injury" and up to life in prison "if the violation results in death."[60] And, for all federal offenses, the statutory maximum fine that may be imposed is the greater of either the fine set forth in the statute that the defendant was convicted of violating, or "twice the gross gain or twice the gross loss" resulting from the violation.[61] Since *Apprendi*,[62] courts have recognized that these additional facts must be proven to and found by a jury beyond a reasonable doubt to trigger the application of the enhanced statutory maximum sentence.[63]

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57. *Id.* at 245.

58. 18 U.S.C. §§ 1341, 1343, 3571(b)(3) (2012).

59. *Id.* §§ 1347, 3571(b)(3).

60. *Id.*

61. *Id.* § 3571(d).

62. Technically, these holdings are more a product of the Supreme Court's decision in *Jones v. United States*, 526 U.S. 227 (1999), than of *Apprendi*. *Jones* held that federal statutes should be interpreted to require a jury finding on these penalty-enhancing factors, so as to avoid the constitutional question addressed a year later in *Apprendi*. *Id.* at 242–44.

63. *See* United States v. Trudeau, 562 F. App'x 30, 34–35 (2d Cir. 2014) (holding that the statutory maximum sentence for wire fraud conviction was twenty years in the absence of a jury determination that the offense "affected a financial institution"); United States v. Webb, 655 F.3d 1238, 1255–58 (11th Cir. 2011) (holding that the jury must determine whether the health care fraud offense "resulted in death"); United States v. Pfaff, 619 F.3d 172, 174–75 (2d Cir. 2010) (holding that twice the gain or loss fine statute required that the jury determine the gain/loss resulting from the violation); United States v. Ubakanma, 215 F.3d 421, 426 (4th Cir. 2000) (holding that the mail or wire fraud that "affects a financial institution" is an additional element of the offense); United States v. Benzer, No. 2:13-CR-18 JCM (GWF), 2015 WL 2250043, *7 (D. Nev. May 13, 2015) ("In order for defendants to be convicted of the enhanced wire fraud category, the jury would have to find beyond a reasonable doubt that their conduct affected a financial institution."); United States v. Sanford Ltd., 878 F. Supp. 2d 137, 147 (D.D.C.

In *Southern Union Co. v. United States*,[64] the Supreme Court considered the application of the *Apprendi* principle to the imposition of criminal fines. In that case, the defendant was charged with violating the Resource Conservation and Recovery Act (RCRA) from September 19, 2002 through October 19, 2004.[65] RCRA provided for a statutory maximum fine of $50,000 for each day the defendant was in violation of the Act.[66] The jury found the defendant corporation guilty at trial, but did not specify in its verdict how many days RCRA had been violated.[67] Nevertheless, the district court imposed the statutory maximum fine of $50,000 for each of the 762 days from September 19, 2002 through October 19, 2004, resulting in a total fine of $38.1 million.[68] The appellate court affirmed the sentence, holding that *Apprendi* does not apply to criminal fines.[69]

The Supreme Court granted certiorari and reversed, holding that the principle of *Apprendi* does apply to criminal fines.[70] The government argued that *Apprendi* applies only to the elements of the offense, not to sentencing factors such as how long the violation lasted or how much money the defendant gained (or the victim lost) from the violation.[71] The Court rejected this argument, noting that those facts can, in a given statutory scheme, set the maximum penalty that the district court can impose.[72] For example, the Court noted that the maximum fine that may be imposed under many statutory schemes turns on such things as "the duration of a statutory violation" or "the defendant's gain or the victim's loss."[73] Such facts, the Court held, are precisely of the sort that the Sixth Amendment, as interpreted by *Apprendi* and its progeny, requires a jury to find to the extent they increase the statutory maximum fine to which a defendant is exposed.[74] In the *Southern Union* case, the district court's determination that the violation had continued for 762 days was "a determination that for each given day, the Government

2012) (holding that the jury must determine the "gross gain" derived from the offense under the statute increasing criminal fines to twice the gross gain or loss from the offense).

64. 132 S. Ct. 2344 (2012).

65. *Id.* at 2349.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *S. Union Co.*, 132 S. Ct. at 2357 ("We hold that the rule of *Apprendi* applies to the imposition of criminal fines.").

71. *Id.* at 2356.

72. *Id.*

73. *Id.* at 2350–51.

74. *Id.* at 2351.

ha[d] prove[n] that Southern Union committed all of the acts constituting the offense."[75] That determination, the Court concluded, was one that the Sixth Amendment commits to the jury.[76]

The *Southern Union* Court explained that "*Apprendi*'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.'"[77] The Court continued, "[t]hat concern applies whether the sentence is a criminal fine or imprisonment or death. Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses . . . . [T]he amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts."[78] The *Southern Union* Court emphasized its reasoning, stating, "[t]his is exactly what *Apprendi* guards against: judicial fact-finding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow."[79]

In response to the government's argument that the application of the *Apprendi* principle should be limited to the punishments of imprisonment and death, the Court responded that many criminal fines are substantial. For example, the Court noted that "[t]he federal twice-the-gain-or-loss statute, in particular, has been used to obtain substantial judgments against organizational defendants."[80] In the case of individual defendants, the Court observed that "a large fine may engender a significant infringement of personal liberty."[81]

In dissent, Justice Breyer, joined by Justices Kennedy and Alito, acknowledged that "[t]he number of days (beyond one) on which the defendant violated [the] criminal statute" was a fact within the

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75. *Id.* at 2356.

76. *See S. Union Co.*, 132 S. Ct. at 2357; *see also* Blakely v. Washington, 542 U.S. 296, 303–04 (2004) ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to punishment.'").

77. *S. Union Co.*, 132 S. Ct. at 2350 (quoting Oregon v. Ice, 555 U.S. 160, 170 (2009)).

78. *Id.*

79. *Id.* at 2352.

80. *Id.* (internal citations omitted).

81. *Id.* (internal quotation marks omitted). As the Court observed in *Southern Union*, the federal sentencing statute governing the imposition of fines requires a district court to consider the "burden" that a criminal fine would place on the defendant. *See id.* (citing 18 U.S.C. § 3572(a)(2)). Furthermore, the Eighth Amendment's Excessive Fines Clause recognizes the infringement of liberty that even purely monetary sanctions imposed by the government can cause.

scope of the rule laid down in *Apprendi*.[82] Nevertheless, the dissent did not believe that *Apprendi* and its progeny controlled the outcome in *Southern Union* because, in their view, criminal fines were historically an issue to be decided by the judge alone.[83] The majority disagreed with this reading of the historical precedents.[84]

One scholar has argued that the *Apprendi* principle should apply in the civil context because the beyond-a-reasonable-doubt standard of proof on which *Apprendi*'s reasoning is based originated in a civil case.[85] This scholar argues that *Apprendi* should apply to any statute, whether labeled civil or criminal, if the statute has an effect similar to a criminal proceeding in that it stigmatizes a defendant or deprives him or her of liberty.[86] Similarly, another commentator has argued that *Apprendi* could be extended to government enforcement actions because "Congress's 'civil' label is not determinative and certain 'civil' statutes that are punitive in nature should be considered criminal for the purpose of constitutional protections provided to the defendant."[87] In effect, this argument is that substance should trump form.

What these commentators have not considered is whether, as to civil money penalties in government enforcement actions, *Tull* provides a jury trial right under the Seventh Amendment that is analogous to the Sixth Amendment jury trial right articulated in *Apprendi* and *Southern Union* with respect to criminal cases.[88] In other words, the question addressed here is not whether *Apprendi*'s interpretation of the Sixth Amendment jury trial right applies to civil proceedings as such. By its terms, it does not. The question this Article addresses is whether *Apprendi* and *Southern Union* help us

82. *S. Union Co.*, 132 S. Ct. at 2360 (Breyer, J., dissenting).

83. *Id.*

84. *Id.* at 2353.

85. *See* W. David Ball, *The Civil Case at the Heart of Criminal Procedure:* In re *Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 121–22, 136–42 (2011).

86. *Id.*

87. Owen Moroney, Comment, *Complicating the Complicated:* Southern Union *and How Environmental Crime Cases Just Became More Complex*, 50 IDAHO L. REV. 115, 137 (2013). This argument is based on the Supreme Court's decisions in *United States v. Ward*, 448 U.S. 242, 248–49 (1980), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963), in which the Court noted that a statutory penalty designated by Congress as "civil" may be so punitive as to be criminal in nature.

88. *Cf.* Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After* Booker*: What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 895 (2005) (examining whether the Seventh Amendment's guarantee of a right to a jury determination of facts in the civil context should inform the interpretation of the Sixth Amendment right to a jury trial in the criminal context).

better understand the scope of the jury determination of "liability" that *Tull* holds a defendant in a civil penalty proceeding is entitled to under the Seventh Amendment. These authors think that they do, but it is useful first to discuss the civil money penalty regime under the federal securities laws enforced by the SEC.

III.
CIVIL MONEY PENALTY REGIME UNDER THE FEDERAL SECURITIES LAWS

As originally enacted, the federal securities laws authorized the SEC to bring enforcement actions only to seek injunctive relief.[89] This changed with the passage of the Insider Trading Sanctions Act of 1984, which authorized the imposition of civil money penalties in SEC enforcement actions brought for insider trading violations.[90] In particular, Congress authorized imposition of a penalty, the amount of which "shall be determined by the court in light of the fact[s] and circumstances, but shall not exceed three times the profit gained or loss avoided" as a result of the violation.[91]

The SEC's authority to seek the imposition of civil money penalties for insider trading was further expanded by the Insider Trading and Securities Fraud Enforcement Act of 1988.[92] That Act authorized the imposition of civil money penalties on those who "directly or indirectly controlled the person who committed" an insider trading violation.[93] The amount of those penalties was also to "be determined by the court in light of the facts and circumstances,

89. Securities Act of 1933 § 20(b), 48 Stat. 86; Securities Exchange Act of 1934 § 21(d)(1), 48 Stat. 900; Investment Company Act of 1940 § 42(d), 54 Stat. 843; Investment Advisers Act of 1940 § 209(d), 54 Stat. 847. Beginning in the early 1970s, courts grafted on to this statutory authority to grant injunctive relief further authority to grant monetary equitable relief in the form of disgorgement. *See* John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 DUKE L.J. 641–45 (1977) (discussing history of this supposed authority); SEC v. DiBella, 409 F. Supp. 2d 122, 130–32 (D. Conn. 2006) (same). The Supreme Court has yet to rule on the legitimacy of this claimed authority. *See id.* at 131. As part of the Sarbanes-Oxley Act of 2002, Congress expressly authorized the Commission to seek and courts to grant "any equitable relief that may be appropriate or necessary for the benefit of investors." Securities Exchange Act of 1934 § 21(d)(5), 15 U.S.C. § 78u(d)(5) (2012).

90. Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (codified as amended in scattered sections of 15 U.S.C.).

91. *Id.* § 2 (codified as amended at 15 U.S.C. § 78u-1(a)(2) (2012)).

92. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (codified as amended in scattered sections of 15 U.S.C.).

93. *Id.* § 3 (codified as amended at 15 U.S.C. § 78u-1(a)(1)(b) (2012)).

but shall not exceed the greater of $1,000,000, or three times the amount of profit gained or loss avoided as a result of" the insider trading violation.[94] The "profit gained" or "loss avoided," for purposes of these penalty provisions, was statutorily defined as "the difference between the purchase or sale price of the security and the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the nonpublic information."[95]

In the case of insider trading, then, the federal securities laws set a maximum statutory penalty to which a defendant is liable only upon proof of the profit gained or loss avoided as a result of the violation. That profit gained or loss avoided amount is trebled to determine the statutory maximum penalty to which a defendant is liable for an insider trading violation. The court (which is understood to mean a judge)[96] is then authorized to determine the appropriate penalty to be imposed up to that statutory maximum amount based on the facts and circumstances of the particular case.

The Securities Enforcement Remedies and Penny Stock Reform Act of 1990 authorized the SEC to seek, and courts to impose, civil money penalties for all violations of the federal securities laws.[97] Specifically, the Securities Act, Securities Exchange Act, Investment Company Act, and Investment Advisers Act were all amended to authorize a district court to impose civil money penalties in SEC enforcement actions for "each violation."[98] While these statutes provide that the "amount of the penalty shall be determined by the court in light of the facts and circumstances," the statutes set the maximum penalties that may be imposed depending on the presence or absence of additional facts.[99]

Specifically, the statutes set three penalty tiers that permit the imposition of progressively higher maximum money penalties for violations of the federal securities laws depending on the presence or absence of certain additional facts. The first penalty tier allows

94. *Id.* § 3 (codified as amended at 15 U.S.C. § 78u-1(a)(3) (2012)).

95. *Id.* § 3 (codified as amended at 15 U.S.C. § 78u-1(e) (2012)).

96. *See, e.g.*, SEC v. Svoboda, 409 F. Supp. 2d 331, 346–49 (S.D.N.Y. 2006) (assuming that statutory authorization for "court" to impose penalty means that judge, rather than jury, determines penalty amount).

97. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (codified as amended in scattered sections of 15 U.S.C.).

98. *Id.* at 932, 936, 945, 950.

99. SEC v. Kern, 425 F.3d 143, 153 (2d Cir. 2005) ("The tier determines the maximum penalty, with the actual amount of the penalty left up to the discretion of the district court.").

the judge to impose a maximum penalty of the greater of either $5,000 for a natural person ($50,000 for a corporation or other entity)[100] or the "gross amount of pecuniary gain to [the] defendant as a result of the violation."[101] The second penalty tier allows the judge to impose a maximum penalty of the greater of either $50,000 for a natural person ($250,000 for a corporation or other entity) or the "gross amount of pecuniary gain to [the] defendant as a result of the violation" *if* the violation committed by the defendant "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement."[102] The third penalty tier allows the judge to impose a maximum penalty of the greater of either $100,000 for a natural person ($500,000 for a corporation or other entity) or the "gross amount of pecuniary gain to [the] defendant as a result of the violation" *if* the violation committed by the defendant "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" *and* "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons."[103]

In other words, for violations other than insider trading, the penalty provisions of the federal securities laws set a base maximum penalty amount of $5,000 per violation for a natural person ($50,000 for a corporation or other entity). The maximum permissible penalty amount for any violation increases to the gross amount of pecuniary gain to that particular defendant from the offense if that gain is the "result of" the violation. In the absence of gross pecuniary gain to the defendant from the violation,[104] the

100. The amounts set forth in the above paragraph have been adjusted periodically for inflation. *See* 28 U.S.C. § 2461 note (2012) (Federal Civil Penalties Inflation Adjustment); SEC Adjustment of Civil Monetary Penalties Rule, 17 C.F.R. § 201.1005 (2013).

101. Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d)(2)(A) (2012); Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d)(3)(B)(i) (2012); Investment Company Act of 1940 § 42(e)(2)(A), 15 U.S.C. § 80a-41(e)(2)(A) (2012); Investment Advisers Act of 1940 § 209(e)(2)(A), 15 U.S.C. § 80b-9(e)(2)(A) (2012).

102. Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d)(2)(B); Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d)(3)(B)(ii); Investment Company Act of 1940 § 42(e)(2)(B), 15 U.S.C. § 80a-41(e)(2)(B); Investment Advisers Act of 1940 § 209(e)(2)(B), 15 U.S.C. § 80b-9(e)(2)(B).

103. Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d)(2)(C); Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d)(3)(B)(iii); Investment Company Act of 1940 § 42(e)(2)(C), 15 U.S.C. § 80a-41(e)(2)(C); Investment Advisers Act of 1940 § 209(e)(2)(C), 15 U.S.C. § 80b-9(e)(2)(C).

104. SEC v. Pentagon Capital Mgmt. PLC, 725 F.3d 279, 288 (2d Cir. 2013) ("The statutory language allowing a court to impose a civil penalty plainly requires

maximum penalty that can be imposed is a specified statutory amount that increases from the base amount of $5,000 for a natural person in the event that additional factual showings can be made (i.e., up to $50,000 if the violation involved fraud and up to $100,000 if it also involved substantial losses to others). For a corporation or other entity, the maximum penalty increases from $50,000 to $250,000 or $500,000 under similar circumstances.

Stated another way, a natural person defendant is liable for a maximum penalty of only $5,000 per violation in the absence of proof that the violation "result[ed]" in gross pecuniary gain to the defendant, "involved fraud," or "resulted in substantial losses" to others.[105] The situation is analogous for a corporation or other entity defendant: the maximum penalty of $50,000 can increase if the violation "result[ed] in" gross pecuniary gain to the defendant, "involved fraud," or "resulted in substantial losses" to others. In other words, certain "civil penalties do not automatically follow from findings of securities fraud."[106]

Or viewed from yet another perspective, the penalty regime under the federal securities laws gives rise to new violations with additional elements. For example, a defendant who engages in a scheme or artifice to defraud in connection with the purchase or sale of securities commits one violation of the securities laws.[107] We could call that violation "securities fraud simpliciter." But a defendant who engages in a scheme or artifice to defraud in connection with the purchase or sale of securities that results in substantial losses commits a different violation of the securities laws.[108] This violation could be referred to as "injurious securities fraud." The civil money penalty to which a defendant is exposed for each of

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that such awards be based on the 'gross amount of pecuniary gain *to such defendant*.'" (quoting 15 U.S.C. § 77t(d)(2)) (emphasis added)).

105. *See supra* notes 100–04 and accompanying text. It is worth noting that respondents in enforcement proceedings brought by the SEC in an administrative forum are not subject to civil monetary penalties determined by the amount of gross pecuniary gain. *See* Securities Act of 1933 § 8A(g)(2), 15 U.S.C. § 77h-1(g)(2); Securities Exchange Act of 1934 § 21B(b), 15 U.S.C. § 78u-2(b); Investment Company Act of 1940 § 9(d)(2)), 15 U.S.C. § 80a-9(d)(2); Investment Advisers Act of 1940 § 203(i)(2), 15 U.S.C. § 80b-3(i)(2).

106. SEC v. Capital Sols. Monthly Income Fund, LP, 28 F. Supp. 3d 887, 901 (D. Minn. 2014).

107. *See* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b); SEC Manipulative and Deceptive Devices & Contrivances Rule, 17 C.F.R. § 240.10b-5(a) (2012).

108. *Compare* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. §§ 78j(b), *with* Securities Exchange Act of 1934 § 21(d)(3)(B)(iii), 78u(d)(3)(B)(iii), *and* 17 C.F.R. § 240.10b-5(a).

these distinct violations differs. Similarly, the penalty for securities fraud simpliciter is different from the penalty for engaging in a scheme or artifice to defraud in connection with the purchase or sale of securities resulting in gain to the defendant.[109] We could call this "profitable securities fraud." While the elements of the securities fraud simpliciter, injurious securities fraud, and profitable securities fraud violations are scattered among multiple sections of the United States Code, the statutory organization of these elements cannot be determinative on the question of whether a defendant is entitled to a jury trial on those elements.[110]

IV.
REQUIRED JURY FINDINGS IN SEC ENFORCEMENT ACTIONS

What does *Tull*'s holding that a defendant is entitled to a jury trial on the question of "liability" in a government enforcement proceeding mean when it comes to applying the statutory penalty regime of the federal securities laws in an SEC enforcement action? It is clear, after *Tull*, that the defendant is entitled to a jury finding on the elements of the substantive violation with which the defendant is charged. But is a defendant in an SEC enforcement action also entitled to[111] a jury finding as to all of the facts that set the statutory maximum penalty that the court may impose for an underlying violation? Specifically, must the jury (rather than the judge) find (a) the number of violations; (b) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless violation of a regulatory requirement; (c) the causal connection between the violation and any gains or losses; (d) the gross amount of any pecuniary gain to the defendant; (e) whether any resulting losses to investors were substantial; and (f) in the insider trading context, the profits gained or losses avoided?

These authors think the answer is yes across the board. These additional factual findings are required to establish a defendant's potential "liability" for a new maximum penalty because, absent a

109. *Compare* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. §§ 78j(b), *with* Securities Exchange Act of 1934 § 21(d)(3)(B), 78u(d)(3)(B), *and* 17 C.F.R. § 240.10b-5(a).

110. *Cf. supra* notes 36, 43–45 and accompanying text.

111. Of course, as in criminal cases, a defendant may waive this right. *See* SEC v. Loving Spirit Found., Inc., 392 F.3d 486, 495 (D.C. Cir. 2004). However, at least one court has held that the SEC can insist on a jury trial in the face of a defendant's waiver of such right. *See* SEC v. Kopsky, 537 F. Supp. 2d 1023, 1028 (E.D. Mo. 2008).

finding of these facts, the defendant would be exposed to a lesser maximum penalty. In other words, a defendant's civil jury trial right extends to these additional facts because they expose the defendant to a greater punishment than does the jury's finding of the underlying substantive violation standing alone. Facts beyond the elements of the underlying offense need to be found before the judge can impose the heightened sanction. Thus, under *Tull*, a defendant is entitled to a jury finding that these facts are present and, accordingly, that the defendant is subject to a heightened maximum penalty before a judge can determine the appropriate penalty up to that statutory maximum. On the other hand, once the jury has determined the facts that expose the defendant to a particular penalty tier, the judge is then free under *Tull*[112] to hear evidence on the factors that inform his or her exercise of discretion to set the penalty up to the maximum penalty permitted by that tier.[113] Stated simply, the jury must decide the penalty range while the judge is entitled to decide the actual penalty within that range.

An example illustrates this point. Take the case of an individual charged with the unregistered sale of securities in violation of Section 5 of the Securities Act of 1933 (Securities Act).[114] Imagine that the defendant is alleged to have committed this Section 5 violation as part of a broader pump-and-dump securities fraud scheme, but is only alleged to have himself violated Section 5. The Commis-

112. As noted above, the Supreme Court has, since *Tull*, asserted that the statements in that decision to the effect that the defendant was not entitled to a jury finding as to the precise amount of the penalty to be imposed are "arguably dicta." *See supra* note 27 and accompanying text.

113. A court, in exercising its discretion to select the appropriate penalty to impose up to the statutory maximum, relies on a number of factors. Specifically, the court in SEC v. Coates, 137 F. Supp. 2d 413, 428–29 (S.D.N.Y. 2001), outlined five factors that judges should consider when determining whether to assess civil penalties and thereafter determining the amount of the penalty. These factors include: (1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition. *Id.* at 429. Courts routinely use the *Coates* factors to inform their exercise of discretion when assessing civil penalties for federal securities law violations. *See* SEC v. Gupta, 569 F. App'x 45, 47–48 (2d Cir. 2014) (applying *Coates* factors to determine civil penalty); SEC v. Sargent, 329 F.3d 34, 41–42 (1st Cir. 2003) (same); SEC v. Rockwell Energy of Tex., LLC, No. H-09-4080, 2012 WL 360191, at *4 (S.D. Tex. Feb. 1, 2012) (same); SEC v. Solow, 554 F. Supp. 2d 1356, 1365–66 (S.D. Fla. 2008) (same); SEC v. Opulentica, LLC, 479 F. Supp. 2d 319, 331–32 (S.D.N.Y. 2007) (same).

114. 15 U.S.C. § 77e(a) (2012).

sion has long argued—and, to date, the courts have accepted—that Section 5 is a strict liability provision.[115] In that instance, what penalty, if any, is the maximum to which the defendant is exposed? The answer to that question depends on the answer to a number of other questions. Absent proof of anything other than a Section 5 violation, the defendant is liable for no more than a single penalty of up to $5,000, since that is the base statutory maximum penalty authorized for a violation of the federal securities laws by an individual.[116]

Proof of additional facts beyond the elements of a Section 5 violation could expose the defendant to additional penalties. In the event it is proven that the defendant not only violated Section 5, but did so multiple times, the defendant could be liable for up to $5,000 for each such violation. If it is proven that the defendant reaped a gross pecuniary gain from one or more of the violations, then the statutory maximum penalty for each such violation would be the greater of $5,000 or the amount of the gross pecuniary gain to the defendant from each such violation. If the defendant did not receive a gross pecuniary gain greater than $5,000 from a violation, the defendant could be liable for a maximum penalty of up to $50,000 for that violation if it "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement"[117] and up to $100,000 for that violation if it also resulted in "substantial losses or created a significant risk of substantial losses to other persons."[118] Because proof of a violation of Section 5 does not necessarily involve the proof of a mental state, a jury's finding of a Section 5 violation does not entail a finding of fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. Nor does a jury verdict on a Section 5 claim standing alone involve a finding concerning losses.

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115. *E.g.*, SEC v. Sierra Brokerage Servs., Inc., 608 F. Supp. 2d 923, 939 (S.D. Ohio 2009) ("Scienter is not an element of a Section 5 violation because Section 5 imposes strict liability on sellers of securities." (citations omitted)).

116. *See supra* note 100 and accompanying text.

117. Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d)(2)(B) (2012); Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d)(3)(B)(ii) (2012); Investment Company Act of 1940 § 42(e)(2)(B), 15 U.S.C. § 80a-41(e)(2)(B) (2012); Investment Advisers Act of 1940 § 209(e)(2)(B), 15 U.S.C. § 80b-9(e)(2)(B) (2012).

118. Securities Act § 20(d), 15 U.S.C. § 77t(d)(2)(C); Securities Exchange Act § 21(d), 15 U.S.C. § 78u(d)(3)(B)(iii); Investment Company Act § 42(e)(2)(C), 15 U.S.C. § 80a-41(e)(2)(C); Investment Advisers Act § 209(e)(2)(C), 15 U.S.C. § 80b-9(e)(2)(C).

Thus, in each of these scenarios, the defendant's liability for a penalty above $5,000 requires proof of facts beyond establishing the elements of the Section 5 violation. The question is whether the defendant is entitled to a jury trial on each of these additional facts, which subject the defendant to a higher potential penalty. As was stated previously, these authors believe that the import of *Tull* is that a defendant is entitled to a jury finding on each of these additional facts. In *Tull*, the Supreme Court held that a defendant is entitled to a jury trial on the issue of "liability," though not on the particular penalty amount.[119] Whether a defendant is exposed to a maximum penalty requires proof of facts beyond the formal elements of the alleged violation, and these authors read *Tull* to hold that a defendant is entitled to a jury finding on those additional facts.

This reading of *Tull* is bolstered by the Supreme Court's more recent jurisprudence interpreting the Sixth Amendment's jury trial right in *Apprendi* and its progeny, including *Southern Union*. As noted above, the Supreme Court's analysis in *Apprendi* was based in part on due process principles that transcend criminal trials, and the Court explicitly invoked historic regard for the jury trial in both the civil and criminal arenas in support of its holding.[120] Indeed, the Supreme Court subsequently noted that *Tull*'s holding was based in part on the notion that "the awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding."[121] Furthermore, the due process principles of fairness that animated the Court's decision in *Apprendi* are likewise applicable in the civil context. Congress has threatened certain pains for violating the federal securities laws and other pains if that violation resulted in pecuniary gain to the defendant, or if the violation involved fraud or deceit, or if the violation resulted in substantial losses to victims.[122] The Supreme Court reasoned in *Apprendi* that, "[a]s a matter of simple justice, it seems obvious that the procedural safeguards designed to protect [a defendant] from unwarranted pains should apply equally to the [differing] acts that [Congress] has singled out for punishment."[123] This same reasoning applies when considering the punishment to which a defendant is exposed in an SEC enforcement action brought under the federal securities laws.

119. 481 U.S. 412, 426–27 (1987).

120. *See supra* notes 50–52 and accompanying text.

121. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998).

122. *See supra* notes 98–103 and accompanying text.

123. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

Our conclusion is further bolstered by the similar concerns and goals underlying the constitutional guarantees of a jury trial in both the civil and criminal context. Given these similarities, it has been argued that the scope of "the jury's constitutional authority" should be "integrate[d]" in the civil and criminal contexts.[124] The reasons for this integration are threefold. First, in both the civil and criminal contexts, the jury trial right is designed to further the goal of just adjudication[125] by, among other things, protecting "individual rights against an abusive government."[126] This vision of the role of the jury trial "enjoys a pedigree established both in modern legal theory and in the political thought of the Founders."[127] Second, an examination of the history, text, and structure of the Sixth and Seventh Amendment jury trial guarantees suggests that the intended role of civil and criminal juries is quite similar.[128] The Founders had a vision of the jury's role that, for the most part, was not dependent on whether that jury was civil or criminal and that, at its core, called for the jury to resolve disputed factual questions.[129] Finally, the respective "institutional attributes" of juries and judges do not differ as between civil and criminal trials.[130] In both contexts, juries "have similar societal functions, including checking the abuse of governmental power, determining disputed facts, injecting community values into legal decisions, and aiding the public acceptance of legal determinations."[131] As a result, "in most respects the criminal jury right guaranteed by the Sixth Amendment and the civil jury right guaranteed by the Seventh Amendment have been implemented in coordinate fashion."[132]

In the criminal context, the Sixth Amendment entitles the defendant to a jury finding on all facts that increase the statutory maximum sentence to which the defendant is subject; the court then exercises its discretion to impose a sentence up to that maximum.[133] Similarly, these authors believe that *Tull*'s holding that a defendant is entitled, under the Seventh Amendment, to a jury trial on the issue of "liability" in a civil government enforcement action

124. Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 729 (1993).
125. *Id.* at 727, 729.
126. *Id.* at 728.
127. *Id.*
128. *Id.* at 729.
129. *Id.* at 745.
130. Murphy, *supra* note 124 at 729.
131. Kirgis, *supra* note 88, at 903.
132. *Id.* at 902.
133. *Apprendi*, 530 U.S. at 490.

seeking monetary penalties means that a defendant is entitled to a jury finding on all disputed facts that increase the statutory maximum money penalty to which a defendant is exposed. The judge retains the discretion to select an appropriate money penalty up to that maximum based on the facts and circumstances of the given case. Put slightly differently, as to any factual finding that increases the potential punishment of a defendant beyond what the defendant is subject to as a result of the base offense itself, the defendant is entitled to a jury trial under the Seventh Amendment.

The authors' reading of *Tull* is confirmed by the historic fact-finding role played by the jury. In *Tull*, the Supreme Court concluded that the defendant was entitled to a jury determination of liability, but not as to the amount of the penalty, since the latter was not "'regarded as fundamental, as inherent in and of the essence of the system of trial by jury . . . .'"[134] By contrast, the Court held, the jury must determine liability because that determination was the "substance of the common-law right of trial by jury."[135] As noted above, the core of the jury's role, in both the civil and criminal contexts, is to resolve disputed factual issues.[136] Finding facts that increase the statutory maximum penalty to which a defendant is exposed is different in kind from the discretionary determination as to the specific amount of the penalty that is appropriate within the range authorized by the jury's factual findings. The jury trial right should extend not only to the disputed facts that determine whether there is a violation of the federal securities laws in the first place, but also to any additional facts that increase the maximum punishment to which a defendant is exposed. The judge, then, is free to set the appropriate penalty up to the maximum set by the jury's factual findings.

In light of the due process concerns animating the Supreme Court in *Apprendi* and *Southern Union*, there is no reason for the jury trial right to hinge on whether disputed facts are labeled an element of the violation itself or are labeled a penalty enhancement, when in either case the fact-finding is what exposes the defendant to a particular maximum penalty. Thus, *Tull*'s reasoning together with the historic role of the jury as fact-finder confirm the authors' reading of that decision as requiring a jury determination of disputed facts necessary for enhanced maximum penalties to apply for federal securities law violations. The resolution of these disputed

134. 481 U.S. 412, 426 (1987) (quoting Colgrove v. Battin, 413 U.S. 149, 156 n.11 (1973)).

135. *Id.* (quoting *Colgrove*, 413 U.S. at 157).

136. *See* Murphy, *supra* note 124 and accompanying text.

facts must reside with the jury in order to preserve the "substance of the common-law right of trial by jury" since such fact-finding is "inherent in and of the essence of the system of trial by jury."[137]

To restate this argument in more conceptual terms, "liability" should encompass more than the mere existence of a substantive violation. It should encompass all of the findings that can lead to a more severe sanction—that is, all the facts that determine the stakes for the defendant. After all, a primary reason for finding a violation—indeed, for making certain conduct illegal—is to deter the conduct by, among other things, allowing the government to seek a penalty (or injunctive relief). The maximum penalty permitted based on the jury's fact-finding is part and parcel with the defendant's liability because it sets the maximum consequence for the defendant arising from the defendant's conduct. The right to a jury trial is meant to protect the accused from the full brunt of the government. That animating purpose applies not only to finding an underlying substantive violation but also to any factor that results in a greater maximum punishment, as the defendant deserves the protection of a jury trial when it comes to both the violation which triggers any sanction and the facts that fix the maximum sanction that may be imposed.

To the extent that the SEC attempts to avoid this conclusion by arguing that facts that increase the maximum monetary sanction are penalty factors rather than offense elements, the *Apprendi* line of cases teaches that such a distinction is of no moment. The relevant question, the *Apprendi* line of cases explains, is whether a fact must be found, regardless of its label, in order to increase the statutory maximum penalty to which the defendant may be exposed. If so, that fact is one as to which the defendant is entitled to a jury finding. The same result should obtain in the civil context. If a fact increases the statutory maximum money penalty to which a defendant is subject, that fact constitutes part of the "liability" question on which the defendant is entitled to a jury trial. It makes no more difference to the jury trial right under *Tull* than under *Apprendi* where Congress has chosen to locate those factual requisites in the statutory scheme that determine the defendant's maximum potential jeopardy.

137. *Tull*, 481 U.S. at 426 (internal quotation marks omitted) (quoting *Colgrove*, 413 U.S. at 156–57).

V.
PRACTICAL APPLICATIONS

If this Article is correct that the Seventh Amendment entitles a defendant in an SEC enforcement action brought in federal court to a jury trial on those facts that increase the statutory maximum money penalty for which the defendant is liable, and not just on those facts that establish the underlying securities law violation, then the next challenge is identifying the requisite factual findings to be made by the jury under the statutory penalty scheme. While this Article does not purport to identify all such findings to be made by a jury, several of the more difficult issues presented are set out below.

A. Number of Violations

These authors believe that the Seventh Amendment jury trial right includes a right to a jury determination of the number of violations committed. Frankly, these authors see little room for disagreement on this point notwithstanding the contrary practice in many SEC enforcement actions. As explained above, the federal securities laws' penalty provisions authorize various penalties for "each violation."[138] In other words, penalty liability under the federal securities laws is on a per-violation basis; a defendant is liable for a second penalty only if he has committed a second violation.[139] It is inconceivable that, under *Tull*, a defendant could be entitled only to a jury verdict on the question of whether a single violation of the securities laws was committed, but that the judge could then determine that multiple violations were committed and impose additional penalties for these additional violations.[140] Such a practice would be directly contrary to the holding of *Tull*, which provides that a defendant is entitled to a jury trial on the issue of "liability," which must include a determination of the number of violations for

138. *See* Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d) (2012); Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d) (2012); Investment Company Act of 1940 § 42(e), 15 U.S.C. § 80a-41(e) (2012); Investment Advisers Act of 1940 § 209(e), 15 U.S.C. § 80b-9(e) (2012).

139. *See* SEC v. Schooler, No. 3:12-cv-2164-GPC, 2015 WL 3491903, at *11 n. 6 (S.D.Cal. June 3, 2015) ("[I]n determining the appropriate civil penalties in SEC enforcement actions, each separate violation is relevant."); SEC v. Tourre, 4 F. Supp. 3d 579, 583 (S.D.N.Y. 2014) ("Courts assess civil penalties on a per-violation basis.").

140. *See Schooler*, 2015 WL 3491903, at *11 n. 6 (putting to the jury the question of how many violations the defendant committed to the extent the SEC sought penalties with regard to those alleged violations).

which the defendant is liable.[141] Indeed, in the Sixth Amendment context, the Supreme Court has easily concluded that the number of violations is at the core of the defendant's jury trial right.[142]

At first blush, it may seem that putting to the jury the question of how many securities laws violations the defendant committed would be a simple endeavor. In practice, it may not be so easy.[143] The challenge is in identifying the appropriate unit of violation for a given statutory provision.[144] Take, for example, Section 10(b) of

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141. *Cf.* Rapoport v. SEC, 682 F.3d 98, 108 (D.C. Cir. 2012) (holding that, in order to impose a Second-Tier penalty, the Commission "must determine how many violations occurred and how many violations are attributable to each person, as the statute instructs").

142. S. Union Co. v. United States, 132 S. Ct. 2344, 2356 (2012).

143. The fact that defining the proper unit of violation for a given securities law violation may prove challenging is not an argument against submitting to the jury the question of how many violations were committed. The issue is already one that the jury must decide in criminal trials involving securities law violations and there is no reason to think the issue is more difficult for a civil jury to decide than for a criminal jury. *See supra* note 136 and accompanying text.

144. *See* SEC v. StratoComm Corp., 89 F. Supp. 3d 357, 372 (N.D.N.Y. 2015) ("While these statutes do not define a 'violation,' courts have determined the number of violations involved using different methods."); SEC v. GTF Enters., No. 10-CV-4258, 2015 WL 728159, at *4 (S.D.N.Y. Feb. 19, 2015) ("[C]ourts have determined the number of violations using several methods."); SEC v. Wheeler, 56 F. Supp. 3d 241, 246 (W.D.N.Y. 2014) ("Courts have used various methods for counting the number of violations pursuant to a third tier penalty, including counting each unlawful trade as a separate violation, each falsified or fraudulent document as a violation, and each investment a defendant received from defrauded investors as a violation." (citation omitted)); *Tourre*, 4 F. Supp. 3d at 592 ("The concept of a 'violation' is thus tied to some action (such as a misstatement) or an omission by the defendant. In the context of fraud, a violation is tied to the act or omission that constitutes the fraud, or the subsequent 'peddling' of that fraud."); *In re* Reserve Fund Secs. & Derivative Litig., Nos. 09 MD.2011(PGG), 09 Civ. 4346(PGG), 2013 WL 5432334, at *20 (S.D.N.Y. Sept. 30, 2013) (noting the statutory ambiguity regarding the scope of a particular "violation" for purposes of the penalty provisions); SEC v. Haligiannis, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007) ("Each of the quarterly statements sent to each of the investors is a materially false statement that technically constitutes an independent violation of the Securities Act."); SEC v. Invest Better 2001, No. 01 Civ. 11427(BSJ), 2005 WL 2385452, at *5 (S.D.N.Y. May 4, 2005) ("The exact number of violations committed by the Defendants is nearly impossible to determine."); Harding Advisory LLC, No. 3-15574, 2015 WL 137642, at *93 (ALJ Jan. 12, 2015) (noting the difficulty of identifying the "unit of violation" under the federal securities laws); Lorenzo, No. 3-15211, 2013 WL 6858820, at *9 (ALJ Dec. 31, 2013) (noting that the Exchange Act's penalty provision, "like most civil penalty statutes, leaves the precise unit of violation undefined"); *see also* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1441 (1979) (noting that "most [federal penalty] statutes leave the precise unit of violation undefined").

the Securities Exchange Act of 1934[145] (Exchange Act) and Rule 10b-5 thereunder,[146] prohibiting fraud and manipulation in connection with the purchase or sale of securities through the use of instrumentalities of interstate commerce. The question presented is whether the violation of these provisions consists of the entire scheme to defraud, each separate fraudulent misrepresentation, each purchase or sale of securities by an investor, or each use of an instrumentality of interstate commerce by the defendant. The federal appellate courts have reached different conclusions when considering what constitutes the analogous unit of prosecution in criminal securities cases.[147]

The practical significance is this: If the violation is defined by, say, each sale of securities, then the Commission will be required, in order to obtain Third-Tier penalties, to prove that each particular sale (*i.e.*, each separate violation) resulted in substantial losses. This could be difficult in some contexts, such as a pump-and-dump penny stock fraud scheme where the amount of loss in connection with each sale could be small even if the aggregate loss to investors across all sales is large. On the other hand, if the violation is the entire scheme to defraud, then the Commission could obtain only a single Second- or Third-Tier penalty for the violation. That is, the SEC could establish the additional factors to justify a higher tier penalty by defining the unit of violation broadly, but the result is that there would be only one violation. If a given individual defendant in the fraud scheme constituting the violation did not personally benefit from the scheme (or if the defendant's personal benefit was relatively modest), then the maximum penalty to which that

145. 15 U.S.C. § 78j(b) (2012).

146. 17 C.F.R. § 240.10b-5 (2012).

147. *Compare* United States v. Schlei, 122 F.3d 944, 978 (11th Cir. 1997) (holding that the unit of prosecution for securities fraud under Section 17(a) is each separate offer or sale of securities in connection with an instrumentality of interstate commerce), *and* United States v. Langford, 946 F.2d 798, 804 (11th Cir. 1991) (holding that the unit of prosecution for Section 10(b) securities fraud is each individual purchase or sale of securities), *with* United States v. Haddy, 134 F.3d 542, 549 (3d Cir. 1998) (rejecting the notion that the appropriate unit of prosecution for securities fraud is each individual purchase or sale, but recognizing that the appropriate unit of prosecution for securities fraud is fact-specific), United States v. Phillips, 726 F.2d 417, 419 n.6 (8th Cir. 1984) (holding that the appropriate unit of prosecution for securities fraud is each individual securities transaction accompanied by the use of the mails), *and* United States v. Waldman, 579 F.2d 649, 654 (1st Cir. 1978) (holding that the appropriate unit of prosecution for securities fraud is each individual securities transaction accompanied by the use of the mails).

defendant would be subject is $100,000.[148] Depending on how the math works out (*i.e.*, number of violations multiplied by the maximum penalty), the punishment a defendant faces could be more severe, at least as measured by the size of the ultimate penalty imposed, if there were more violations but only a First-Tier penalty.

Other federal securities law provisions pose similar challenges in defining the unit of violation. For example, Section 15(a) of the Exchange Act makes it unlawful for a broker or dealer not registered with the SEC to use an instrumentality of interstate commerce to effect a transaction in securities.[149] Again, is it the failure to register or each individual securities transaction that constitutes the violation of this provision? Section 17(a)(3) of the Securities Act makes it unlawful to engage in a "practice, or course of business" that operates as a fraud or deceit in the offer or sale of securities.[150] Is this provision's unit of violation the offer or sale of securities or is it engaging in a practice or course of business that operates as a fraud or deceit?[151] These and related questions under other provisions of the federal securities laws will need to be resolved so that the judge can instruct the jury on how to determine the number of violations committed by a given defendant. The rule of lenity counsels that these questions are likely to be resolved in favor of a single violation (and thus a single penalty), rather than multiple ones.[152]

148. *See supra* note 103–04 and accompanying text.

149. Securities Exchange Act of 1934 § 15(a)(1), 15 U.S.C. § 78o(a)(1).

150. Securities Act of 1933 § 17(a)(3), 15 U.S.C. § 77q(a)(3).

151. *See* Flannery, Securities Act Release No. 9689, Exchange Act Release No. 73840, Investment Advisers Act Release No. 3981, Investment Company Act Release No. 31374, 2014 WL 7145625, at *25–26 (Dec. 15, 2014) (contemplating the language of Section 17(a)(3)), *rev'd on other grounds sub nom.* Flannery v. SEC, 810 F.3d 1 (1st Cir. 2015).

152. *See* Bell v. United States, 349 U.S. 81, 83 (1955) (holding that when a statute is ambiguous as to the unit of prosecution, "the ambiguity should be resolved in favor of lenity"). Although the rule of lenity was originally developed as a rule of construction in the criminal context, it applies when interpreting statutes that have both civil and criminal applications. *See* Leocal v. Ashcroft, 543 U.S. 1, 11–12 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 727 (6th Cir. 2013) ("A single statute with civil and criminal applications receives a single interpretation."). Thus, the rule of lenity should apply when interpreting the federal securities laws, *Whitman v. United States*, 135 S. Ct. 352, 353–54 (2014) (Scalia, J., statement respecting the denial of certiorari) (arguing that the rule of lenity, rather than *Chevron* deference, should govern the interpretation of the federal securities laws), as every provision of those laws may be pursued both civilly by the SEC and criminally by the U.S. Department of Justice, 15 U.S.C. §§ 77x, 78ff, 80a-48, 80b-17 (2012). For a further discussion of the interaction between the rule of

B. Loss (or Gain) Amount, Reliance, and Causation

Another issue that must be considered is whether the SEC is required to prove, and the jury to find, loss (or gain) amount, reliance, and causation in order for a court to impose either a Third-Tier penalty or a penalty of any tier that is based on gross pecuniary gain. Third-Tier penalties are permitted when a violation involves "fraud [or] deceit" and "resulted in substantial losses or created a significant risk of substantial losses to other persons."[153] Under any penalty tier, a defendant is subject to a maximum penalty up to the "gross amount of pecuniary gain to [the] defendant as a result of the violation."[154]

The courts have long held that the "SEC does not need to prove investor reliance, loss causation, or damages in an action under Section 10(b) of the Exchange Act, Rule 10b-5, or Section 17(a) of the Securities Act."[155] An early Second Circuit decision noted that the SEC need not prove reliance or loss causation because the "Commission's duty is to enforce the remedial and preventative terms of the statute in the public interest, and not merely

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lenity and *Chevron* deference in the interpretation of the federal securities laws, *see* Matthew Martens et al., *Scalia's Deference Argument Could Have Dramatic Effects*, LAW360 (Nov. 18, 2014, 11:57 AM), http://www.law360.com/articles/597223/scalia-s-deference-argument-could-have-dramatic-effects.

153. Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d)(3)(B)(iii) (2012).

154. *See supra* notes 100–03 and accompanying text.

155. SEC v. Credit Bancorp, Ltd., 195 F. Supp. 2d 475, 490–91 (S.D.N.Y. 2002); *see also* SEC v. Teo, 746 F.3d 90, 102 (3d Cir. 2014) (holding that, in an SEC enforcement action under Section 10(b), "the Commission need not prove reliance, nor must it show that any investor lost money as a result of the violation"); SEC v. Goble, 682 F.3d 934, 943 (11th Cir. 2012) ("Because this is a civil enforcement action brought by the SEC, reliance, damages, and loss causation are not required elements."); SEC v. Tambone, 550 F.3d 106, 130 (1st Cir. 2009) ("Because this is an SEC enforcement action rather than a private claim, the Commission need not allege any of the elements required to establish a direct link between a defendant's misrepresentation and an investor's injury—including reliance by the investor on an explicit misstatement, economic loss, and loss causation."); Geman v. SEC, 334 F.3d 1183, 1191 (10th Cir. 2003) ("The SEC is not required to prove reliance or injury in enforcement actions."); SEC v. Rana Research, Inc., 8 F.3d 1358, 1363 n.4, 1364 (9th Cir. 1993) (holding that "reliance is not an element the SEC must prove to enjoin violations of the securities laws"); SEC v. Blavin, 760 F.2d 706, 711 (6th Cir. 1985) (per curiam) (holding that "the Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money"); SEC v. Constantin, 939 F. Supp. 2d 288, 303 (S.D.N.Y. 2013) (stating that the SEC need not prove reliance or loss causation to "prevail on any of its claims for primary liability under the securities laws").

to police those whose plain violations have already caused demonstrable loss or injury."[156]

These decisions may be correct[157] insofar as they go. The SEC may not be required to show reliance (sometimes thought of as transaction causation) or loss causation in an enforcement action brought to enjoin a violation.[158] But, if this Article's Seventh Amendment analysis is correct regarding the scope of a defendant's jury trial right, then it is likely that the jury must find a type of reliance and loss (or gain)[159] causation when the SEC goes further and seeks a monetary penalty.[160] Under any penalty tier, if the SEC seeks to set the maximum penalty amount by reference to gross pecuniary gain, the statute requires that such gain be the gain that was a "result of the violation."[161] Similarly, a Third-Tier penalty requires proof that the violation "resulted in" substantial losses, or at least created a significant risk of such.[162] The "resulted in" and "result of" language sound in both reliance and causation.[163] Even the

156. Berko v. SEC, 316 F.2d 137, 143 (2d Cir. 1963); *see also* SEC v. North Am. Research & Dev. Corp., 424 F.2d 63, 84 (2d Cir. 1970) (holding that "reliance is immaterial because it is not an element of fraudulent representation under Rule 10b-5 in the context of an SEC proceeding against a broker").

157. *But see Flannery*, *supra* note 151, at 48 (holding that, with regard to a claim under Section 17(a)(2), the SEC must prove a causal connection between the false statement and the defendant's obtaining money or property in the sale of securities).

158. The federal securities laws authorize the SEC to obtain an injunction whenever it appears that someone "is engaged or about to engage in" a violation of the federal securities laws. *See* 15 U.S.C. § 77t(b). But that is a separate question from whether the SEC has proven a "violation" as required to obtain monetary penalties.

159. By "gain causation," we mean the degree to which the defendant's gain is the result of the securities law violation, as compared to other factors.

160. Even in the administrative proceeding context, it would seem that loss causation and reliance are elements that the administrative law judge and ultimately the Commission would need to find in order to impose Third-Tier penalties. In *Rockies Fund, Inc. v. SEC*, 428 F.3d 1088 (D.C. Cir. 2005), the D.C. Circuit refused to uphold an SEC decision levying Third-Tier penalties against the defendant because the "SEC did not explain its reasoning" or show that the defendant's actions either (a) involved fraud or deceit or (b) resulted in significant losses. *Id.* at 1099. The court chided the SEC's analysis as "nonexistent," and held that the SEC "arbitrarily and capriciously imposed third-tier sanctions," indicating that in order to impose Third-Tier sanctions, the SEC might be required to prove causation. *Id.*

161. *See supra* notes 100–03 and accompanying text.

162. Securities Exchange Act of 1934 § 20(d), 15 U.S.C. § 78u(d)(3)(B)(iii) (2012).

163. *See* Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 131 S. Ct. 2179, 2187 (2011) (explaining that "resulted in the losses" language refers to loss

alternative statutory showing of a significant risk of losses requires showing a causal connection, because conduct cannot create a significant risk of losses if it would not be the cause of those losses.[164]

Our view that a defendant in an SEC enforcement action in federal court is entitled to a jury finding on the question of the amount of gross pecuniary gain caused by the violation when calculating the maximum statutory penalty is not inconsistent with the observation in *Tull* that the defendant was entitled to a jury trial because the statutory penalty provision in that case did "not direct that the 'civil penalty' imposed be calculated solely on the basis of equitable determinations, such as the profits gained from violations of the statute, but simply imposes a maximum penalty of $10,000 per day of violation."[165] First, the statement in *Tull* was dicta, as the Court was not presented with the question of whether a monetary penalty based on the amount of profits to the defendant would be an action on which the defendant would be entitled to a jury trial. Second, the Court made this statement in the context of distinguishing remedies "intended . . . simply to disgorge profits" from those designed "to impose punishment."[166] The Court observed that the penalty statute at issue in *Tull* gave rise to a legal remedy to which the jury right attached because it was a "punishment to further retribution and deterrence," rather than the authorization of

causation); Dura Pharm. Inc. v. Broudo, 544 U.S. 336, 344 (2005) (explaining that "as a result" language is causation language); *In re* Reserve Fund Secs. & Derivative Litig., Nos. 09 MD.2011(PGG), 09 Civ. 4346(PGG), 2013 WL 5432334, at *18 (S.D.N.Y. Sept. 30, 2013) (refusing to impose Third-Tier penalties given the absence of proof of transaction causation); SEC v. Razmilovic, 822 F. Supp. 2d 234, 260 n.22 (E.D.N.Y. 2011) ("The determination of the extent to which the value of a security was inflated due to fraud is the same regardless of whether the plaintiff must demonstrate loss causation, i.e., that its loss was causally connected to the fraud, or, in essence, gain causation, i.e., that the defendant's ill-gotten gain is causally connected to the fraud."); SEC v. Huff, No. 08-60315-CIV, 2010 WL 148232, at *4 (S.D. Fla. Jan. 12, 2010) (requiring proof of "gain causation" under penalty provision); RESTATEMENT (SECOND) OF TORTS § 548A (Am. Law. Inst. 1977) (explaining that "[a] fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance"); Pietro M. deVolpi, Jr., *Showing Loss in Securities Enforcement Actions*, 12 BARRY L. REV. 1, 12–16 (2009) (arguing that loss causation showing should be required for Third-Tier penalties).

164. Of course, whether losses did or did not result from the violation is relevant to the question of whether the violation created a significant risk of losses. *See In re Reserve Fund*, 2013 WL 5432334, at *18 ("Actual investor losses have a bearing on whether Defendants' conduct presented a risk of substantial investor losses, however.").

165. Tull v. United States, 481 U.S. 412, 422 (1987).

166. *Id.* at 423.

"equitable relief."[167] That the penalty at issue in *Tull* was not tied to profits merely confirmed its punitive, rather than equitable, purposes.[168] In other words, the *Tull* Court was not establishing an absolute rule that penalties based on profits to the defendant from a violation are not within the scope of the jury trial right. Rather, the Court was simply observing that the fact that the penalty in that case was not tied to profits was evidence of its punitive (and thus legal) rather than equitable nature.[169]

With regard to the monetary penalties authorized under the federal securities laws, there is no question that they are punitive in nature, meant to "further retribution and deterrence,"[170] and thus legal remedies that give rise to a Seventh Amendment jury trial right. This is so even as to the authorization of penalties up to the amount of the gross pecuniary gain to the defendant resulting from the violation. Those penalties are authorized in addition to disgorgement of any gains, with disgorgement being a remedy distinct from statutory penalties under the federal securities laws.[171] A court, with separate authority to award disgorgement cannot reasonably be seen to be granting equitable relief by imposing a distinct penalty measured by the amount of the gross pecuniary gain. Rather, such a penalty, regardless of the method by which its amount is determined, is a punitive remedy that is legal in nature and thus within the scope of the Seventh Amendment jury trial right.[172]

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167. *Id.*

168. *Id.* at 422–23.

169. There is also a question as to whether the calculation of the "gross pecuniary gain" for purposes of the penalty calculation is measured by profits, after expenses, from the misconduct. The SEC has argued that the reference to "gross" gain in the penalty statute does not allow for the deduction of at least certain expenses. *See* SEC v. Amerindo Inv. Advisors Inc., No. 05 Civ. 5231(RJS), 2014 WL 2112032, at *11 (S.D.N.Y. 2014); SEC v. Credit Bancorp, Ltd., 2002 WL 31422602, at *3 (S.D.N.Y. 2002). If this is correct—and it is by no means clear that it is—then this measure of "gain" is not the same as the equitable concept of profits. *See* SEC. v. Teo, 746 F.3d 90,106 n.29 (3d Cir. 2014) ("[R]evenue disgorgement (gross benefit) is generally understood as outside the traditional realm of equity.").

170. *Tull*, 481 U.S. at 423.

171. *See supra* note 87; *see also* SEC v. Tanner, No. 02 Civ. 0306(WHP), 2003 WL 21523978, at *2 (S.D.N.Y. July 3, 2003) ("Congress enacted civil penalties to punish and deter securities law violations, and such penalties may be imposed in addition to disgorgement and injunctive relief.").

172. Defendants have rarely, if ever, insisted that the jury determine their gross pecuniary gain, if any, for penalty purposes. *See, e.g.*, SEC v. Conway, 697 F. Supp. 2d 733, 772 (E.D. Mich. 2010) (concluding that the penalty amount should be the same amount as the amount of disgorgement determined by the court). Defendants' acquiescence in a determination by the judge (rather than a jury) of

Even when a judge makes the factual findings requisite to imposition of a penalty in SEC enforcement actions, courts have paid scant attention to these reliance/causation requirements in the context of the penalty determination.[173] In an effort to prove the amount of investor loss in a case involving fraud, the SEC often argues that, because a defendant made a false statement after which people invested, the entire investment loss is the amount of loss resulting from the violation.[174] However, the mere existence of a false statement in a broader investment presentation or set of disclosures does not establish that the statement caused losses, particularly given that materiality is determined on an objective, rather than subjective, basis.[175] In other words, causation of loss in the case of fraud necessarily requires a showing of (i) reliance (for with-

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the gain amount for penalty purposes is probably due to the fact that the judge typically determines the amount of the equitable remedy of disgorgement (which is also defined as the gain to the defendant from the violation), *see, e.g.*, SEC v. Cavanaugh, 445 F.3d 105, 116–20 (2d Cir. 2006) (discussing the court's authority to calculate disgorgement as an equitable remedy), and defendants have apparently assumed that because the judge can determine disgorgement amounts the judge can also determine the gain amount for penalty purposes. But this assumption is most likely incorrect. The issue presented is how the Seventh Amendment jury trial right applies to facts, like the amount of gross pecuniary gain resulting from a violation, that support both an equitable remedy (such as disgorgement) and a legal remedy (such as a monetary penalty). The *Tull* opinion answers that question, holding that "if a 'legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought.'" *Tull*, 481 U.S. at 425 (quoting Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974)).

173. *But see In re* Reserve Fund Secs. & Derivative Litig., Nos. 09 MD 2011(PGG), 09 Civ. 4346(PGG), 2013 WL 5432334, at *18 (S.D.N.Y. Sept. 30, 2013) (refusing to impose Third-Tier penalties given the absence of proof of transaction causation); SEC v. Razmilovic, 822 F. Supp. 2d 234, 260 n.22 ("The determination of the extent to which the value of a security was inflated due to fraud is the same regardless of whether the plaintiff must demonstrate loss causation, i.e., that its loss was causally connected to the fraud, or, in essence, gain causation, i.e., that the defendant's ill-gotten gain is causally connected to the fraud."); SEC v. Huff, No. 08-60315-CIV, 2010 WL 148232, at *4 (S.D. Fla. Jan. 12, 2010) (requiring proof of "gain causation" under penalty provision).

174. *See, e.g.*, SEC v. Tourre, 4 F. Supp. 3d 579, 595 (S.D.N.Y. 2014); SEC v. Capital Solutions Monthly Income Fund, LP, 28 F. Supp. 3d 887, 902 (D. Minn. 2014) (holding that jury had, simply by finding defendant liable for securities fraud, rejected the argument that some losses were due to market conditions).

175. Amgen Inc. v. Conn. Retirement Plans and Tr. Funds, 133 S. Ct. 1184, 1191 (2013) (holding that "materiality is judged according to an objective standard"); Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988) (applying a "reasonable investor" materiality test under Section 10(b)).

out reliance the loss cannot have been caused by the violation)[176] and (ii) that the false statement itself is the reason for investor losses as compared to other factors, such as a general downturn in the market, a tough business climate, or a product failure.[177]

To be sure, cases may arise where a defendant's securities law violation may carry with it a high degree of blameworthiness despite the fact that the SEC is unable to show reliance by victims or loss causation. The argument made here does not mean that, in such an instance, the district judge is precluded from considering the defendant's blameworthiness in crafting the appropriate penalty.[178] However, this argument does suggest that the judge be precluded from imposing a penalty that exceeds the statutory maximum penalty allowed based on the facts found by the jury. If the jury fails to find either reliance or loss causation, then the judge will be limited to imposing an appropriate Second-Tier, rather than Third-Tier, penalty to address the defendant's culpability.

It is also worth underscoring a point alluded to earlier: that the question of whether a violation resulted in substantial losses is bound up with the question of how the unit of violation is defined, because Third-Tier penalties are authorized for "each violation" that meets the statutory requisites.[179] Thus, for example, if the vio-

176. *Halliburton I*, 131 S. Ct. 2179, 2184 (2005) ("[P]roof of reliance ensures that there is a proper 'connection between a defendant's misrepresentation and a plaintiff's injury.'" (quoting *Levinson*, 485 U.S. at 243)); Nuveen Mun. High Income Opportunity Fund v. City of Alameda, 730 F.3d 1111, 1118 (9th Cir. 2013) (discussing and distinguishing transaction causation and loss causation).

177. *See generally* Dura Pharm. Inc. v. Broudo, 544 U.S. 336 (2005) (describing loss causation in terms of the losses that investors suffer as a result of a misleading statement when the truth becomes known (i.e., there is a corrective disclosure) and the price of a company's stock decreases as a result). Indeed, even in the criminal sentencing context, the government must prove that the losses suffered on an investment in securities were causally related to the fraud. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n. 3(F)(ix) (U.S. SENTENCING COMM'N 2014) (explaining that, for purposes of a securities fraud crime, the loss that "resulted from the offense" should not include "significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events)"); *see also* United States v. Rutkoske, 506 F.3d 170, 179 (2d Cir. 2007) (reaching same conclusion under prior version of Sentencing Guidelines); United States v. Olis, 429 F.3d 540, 546 (5th Cir. 2005) (same).

178. *See supra* note 100–03 and accompanying text.

179. *See* Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d) (2012); Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d) (2012); Investment Company Act of 1940 § 42(e), 15 U.S.C. § 80a-41(e) (2012); Investment Advisers Act of 1940 § 209(e), 15 U.S.C. § 80b-9(e) (2012).

lation is defined as each purchase or sale, it may be that no single violation resulted in substantial losses. In that case, multiple First- or Second-Tier penalties (but not a Third-Tier) can be imposed. Or it may be that some investors relied on the misstatements, while others did not, thus precluding the imposition of Third-Tier penalties as to some violations but not others.[180] On the other hand, if the violation is defined as the entire fraud scheme, then the SEC may be able to show substantial losses from that violation but could obtain only one Third-Tier penalty.[181]

C. Violation Involving Fraud or Deceit

The final question this Article raises is whether Second- or Third-Tier penalties may be imposed in the absence of a jury finding of scienter or reckless disregard of a regulatory requirement. Stated another way, can Second- or Third-Tier penalties be imposed based only on a jury finding of negligence? These authors believe that they may not.

This question is framed most starkly by negligence-based violations under Section 17(a)(2) or (3) of the Securities Act. Section 17(a)(2) prohibits a person from obtaining money or property by means of a false statement,[182] while Section 17(a)(3) prohibits a person from engaging in a transaction, practice, or course of business that "operates or would operate as a fraud or deceit."[183] In *Aaron v. SEC*,[184] the Supreme Court addressed the question of "whether the Commission[,] in seeking injunctive relief . . . for vio-

180. What remains to be seen is the degree to which the efficient market hypothesis will be adopted by courts for purposes of determining whether there was reliance on a material misrepresentation or omission involving publicly-traded securities such that it can be said, for penalty purposes, that the fraud "resulted in" substantial losses. *See* Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 134 S. Ct. 2398, 2417 (2014) (reaffirming use of fraud-on-the-market theory to establish reliance element in a securities fraud class action).

181. Finally, it is important to keep in mind that the statutory requisites for the penalty must be shown for each defendant. *See supra* notes 100–03 and accompanying text. In the case of Third-Tier penalties, this requires showing that a given defendant's violation resulted in substantial losses; it is not adequate to show that substantial losses were the aggregate result of all violations by all defendants. *Cf.* Rapoport v. SEC, 682 F.3d 98, 108 (D.C. Cir. 2012) (holding that, in order to impose a Second-Tier penalty, the Commission "must determine how many violations occurred and how many violations are attributable to each person, as the statute instructs").

182. 15 U.S.C. § 77q(a)(2) (2012).

183. *Id.* § 77q(a)(3).

184. 446 U.S. 680 (1980).

lations of § 17(a) . . . is required to establish scienter."[185] The Court held that the SEC may obtain an injunction against violations of Section 17(a)(2) or (3) without a showing of scienter and based only on proof that the defendant acted negligently.[186] As the Court explained, "it was not necessary in a suit for 'equitable or prophylactic relief' to establish intent."[187] At the time *Aaron* was decided, the SEC had no authority to seek civil monetary penalties for violations.[188]

In recent years, the SEC has brought negligence-based claims under Section 17(a)(2) and (3) with increasing frequency[189] and has sought civil monetary penalties for these violations.[190] The

185. *Id.* at 689.

186. *Id.* at 702; *see also* SEC v. Ginder, 752 F.3d 569, 574 (2d Cir. 2014); SEC v. Smart, 678 F.3d 850, 857 (10th Cir. 2012); SEC v. Shanahan, 646 F.3d 536, 545 (8th Cir. 2011) ("Like other circuits, we construe the Supreme Court's decision in *Aaron* as requiring proof that a defendant acted negligently to establish a violation of § 17(a)(2) or (a)(3)."); SEC v. Ficken, 546 F.3d 45, 47 (1st Cir. 2008); SEC v. Seghers, F. App'x 319, 327 (5th Cir. 2008) ("To show that a defendant has violated § 17(a)(2) or (a)(3), the Commission need only show that the defendant acted with negligence."); SEC v. Merch. Capital, L.L.C., 483 F.3d 747, 766 (11th Cir. 2007) ("[T]o show that the defendants violated section 17(a)(2) or 17(a)(3), the SEC need only show (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, (3) made with negligence."); SEC v. Dain Rauscher, Inc., 254 F.3d 852, 856 (9th Cir. 2001) ("Violations of Sections 17(a)(2) and (3) require a showing of negligence."); SEC v. Hughes Capital Corp., 124 F.3d 449, 453–54 (3d Cir. 1997); Meadows v. SEC, 119 F.3d 1219, 1226 n.15 (5th Cir. 1997) ("Under these subsections, culpability is established merely by a showing of negligence."); SEC v. Steadman, 967 F.2d 636, 643 (D.C. Cir. 1992) (holding that Section 17(a)(2) and (3) violations require showing of negligence); Newcome v. Esrey, 862 F.2d 1099, 1102 n.7 (4th Cir. 1988) (en banc); Pagel, Inc. v. SEC, 803 F.2d 942, 946 (8th Cir. 1986) (stating that the Commission "need only prove negligence in actions under sections 17(a)(2) or (3)"); SEC v. Holschuh, 694 F.2d 130, 143 (7th Cir. 1982) (stating that "only negligence need be shown in actions under sections 17(a)(2) or (3)").

187. *Aaron*, 446 U.S. at 693 (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 193 (1963)).

188. *See supra* notes 89–95 and accompanying text.

189. *See* Julie DiMauro, *Negligence Charges Gain Clout in SEC Enforcement Arsenal*, REUTERS (May 9, 2012), http://blogs.reuters.com/financial-regulatory-forum/2012/05/09/negligence-charges-gain-clout-in-sec-enforcement-arsenal/ (noting that the SEC has a "greater willingness . . . to base charges on negligence findings"); Jean Eaglesham, *At SEC, Strategy Changes Course*, WALL ST. J. (Sept. 30, 2011), http://www.wsj.com/articles/SB10001424052970203405504576601251693560910 (stating that in a major strategy shift, the SEC would file "more civil cases in which defendants are accused of negligence").

190. *See*, *e.g.*, Complaint at 25, SEC v. Stoker, 865 F.Supp.2d 457 (S.D.N.Y. 2012) (No. 1:11-cv-7388); Complaint at 27, SEC v. Steffelin (S.D.N.Y 2011) (No. 11-cv-04204).

question is whether these violations are ones "involv[ing] fraud [or] deceit" such that the Commission can seek Second-Tier or Third-Tier penalties for these violations where the defendant only acted negligently.[191]

Section 17(a)(2) makes no mention of fraud, deceit, manipulation, or recklessness, which are statutory requisites for Second- or Third-Tier penalties. As for Section 17(a)(3), it would be easy to assume simplistically that, because Section 17(a)(3) applies to certain conduct that "operates or would operate as a fraud or deceit," it is covered by the Second-Tier and Third-Tier penalty provisions as a violation "involv[ing] fraud [or] deceit."[192] However, the Supreme Court made clear in *Aaron* that the "fraud or deceit" language means different things in different statutory contexts, even within the federal securities laws.[193] Indeed, the point of the *Aaron* holding is that the language of Section 17(a)(3) has a meaning different from the nearly identical language of Rule 10b-5(c).[194] Specifically, the *Aaron* Court reasoned that the "operates or would operate" language of Section 17(a)(3) emphasizes the effect of the conduct, rather than the intent, such that the provision only requires negligence to be violated.[195]

The question is whether the terms "fraud" and "deceit," as used in the penalty provisions, are meant to convey the presence of scienter. These authors believe the best reading of these terms in that context is that they do require proof of scienter in order to impose a Second- or Third-Tier penalty on a defendant. As an initial matter, the terms "fraud" and "deceit" generally refer to intentionally misleading conduct.[196] The Supreme Court has

191. Similar questions arise under other provisions of the securities laws that require no proof of intent in order to establish a violation.

192. 15 U.S.C. § 77q(a)(2)–(3) (2012).

193. *Aaron*, 446 U.S. at 696–97; *see also* Yates v. United States, 135 S. Ct. 1074, 1082 (2015) (plurality) ("[I]dentical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute.").

194. *Aaron*, 446 U.S. at 696–97; *see also* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 192 n.40 (1963) (holding that while the "operates as a fraud or deceit" language in Section 206(2) of the Investment Advisers Act does not require proof of scienter in an SEC enforcement action seeking an injunction, "[o]ther considerations may be relevant" if different remedies are sought).

195. *Aaron*, 446 U.S. at 697; *see also* SEC v. Steadman, 967 F.2d 636, 647 (D.C. Cir. 1992) (reaching same conclusion with respect to Section 206(4) of the Investment Advisers Act).

196. United States v. Neustadt, 366 U.S. 696, 707 (1961) (noting that the term "deceit" refers to "deliberately false representations"); BLACK'S LAW DICTIONARY 521 (2d ed. 1979) ("[Fraud] consists of some deceitful practice or willful device,

acknowledged as much.[197] This interpretation is confirmed by the maxim of statutory construction that a word is interpreted according to the company it keeps.[198] Here, the other words in the list of acts that trigger application of a Second-Tier penalty—viz., "manipulation" and "deliberate or reckless disregard of a regulatory requirement"—are clear words of intentionality.[199]

Validating this view, district courts have held that, if a jury finds a defendant liable for negligence, that alone is insufficient to impose Second- or Third-Tier civil penalties absent an additional jury finding of intentional or reckless "fraud" or "deceit."[200] Similarly,

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resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional."); *id.* at 336 (defining "deceit" as "[a] fraudulent and cheating misrepresentation, artifice, or device, used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon"). At common law, "fraud at law" required a showing of intent. *See Capital Gains Research Bureau, Inc.*, 375 U.S. at 194–95.

197. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976) ("When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances—the commonly understood terminology of intentional wrongdoing—and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct.").

198. Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (interpreting the federal securities laws according to the principle of statutory construction "that a word is known by the company it keeps (the doctrine of *noscitur a sociis*)").

199. *See, e.g.*, *Aaron*, 446 U.S. at 690 (observing that the term "manipulative" refers to "knowing or intentional misconduct"); *Hochfelder*, 425 U.S. at 199 (holding that "manipulative . . . connotes intentional or willful conduct designed to deceive or defraud investors"); *id.* at 197 ("Section 10(b) makes unlawful the use or employment of any manipulative or deceptive device or contrivance in contravention of Commission rules. The words 'manipulative or deceptive' used in conjunction with 'device or contrivance' strongly suggest that Section 10(b) was intended to proscribe knowing or intentional misconduct."); *id.* at 193 n.12 ("In certain areas of the law, recklessness is considered to be a form of intentional conduct"); SEC v. Shanahan, 646 F.3d 536, 543–44 (8th Cir. 2011) (defining "recklessness" under the securities laws as "the functional equivalent for intent requiring proof of something more egregious than even white heart/empty head good faith" (citation omitted)); Dolphin and Bradbury, Inc. v. SEC, 512 F.3d 634, 639 (D.C. Cir. 2008) (holding that "extreme recklessness" is " 'a lesser form of intent' implying that the danger was so obvious that the actor was aware of it and consciously disregarded it" (quoting *Steadman*, 967 F.2d at 642)); MERRIAM-WEBSTER'S DICTIONARY (2015) (defining "deliberate" as something "done or said in a way that is planned or intended").

200. *See In re* Reserve Fund Secs. & Derivative Litig., Nos. 09 MD 2011 (PGG), 09 Civ. 4346(PGG), 2013 WL 5432334, at *19 (imposing only First-Tier penalties on a defendant found liable for Section 17(a)(2) and (3) violations); SEC v. Mattera, No. 11 Civ. 8323, 2013 U.S. Dist. LEXIS 174163, at *46 (S.D.N.Y. Dec. 9, 2013) ("Negligence alone is not sufficient to warrant the imposition of a third-tier penalty on a defendant."); SEC v. Novus Techs., LLC, No. 2:07-CV-235-TC, 2010

one court has suggested that, when a jury returns a general verdict, it may not be appropriate to impose Second- or Third-Tier penalties if actual fraud or deceit was not found expressly by the jury. In *SEC v. Solow*,[201] the jury found the defendant liable for numerous violations through a general verdict, and the SEC sought Third-Tier penalties for the defendant's violations.[202] The defendant argued that the general verdict form did not show whether the jury found him liable for intentional fraud or rather mere negligence, and thus that Third-Tier penalties were improper.[203] The court undertook its own analysis and determined that, based on the facts and circumstances, Third-Tier penalties were merited, yet refused to award them, suggesting that a jury should find all facts related to assessing penalty amounts.[204]

In addition to the question of whether fraud or deceit are terms requiring proof of scienter, another issue is what it means for a violation to "involve" fraud or deceit. For example, is the answer to that question determined by looking to the elements of the violation or to the specific facts of the case? This issue has arisen in the criminal context with regard to sentencing enhancements based on crimes that "involve" conduct that presents a serious potential risk of physical injury. Courts have wrestled with whether to look to the offense as defined or the offense as committed in determining whether it "involves" a risk of physical injury.[205] After more than two decades of struggling with this question, the Supreme Court ultimately struck this provision down as unconstitutionally vague.[206]

U.S. Dist. LEXIS 111851, at *41 (D. Utah Oct. 20, 2010) ("Imposition of a third-tier penalty requires a finding that [the defendant] acted with a high degree of scienter."); SEC v. Moran, 944 F. Supp. 286, 297 (S.D.N.Y. 1996) ("While the language of the statute describing the Second-Tier penalty includes fraudulent conduct, there is an unmistakable difference between conduct which negligently operates as a fraud when compared to conduct engaged in with the intent to defraud clients."); *see also* Harding Advisory LLC, No. 3-15574, 2015 WL 137642, at *93 (ALJ Jan. 12, 2015) (holding that Third-Tier penalties require proof of "scienter"); *Flannery*, *supra* note 151, at 57–58 (holding that a negligence-based violation of Section 17(a)(3) warranted only a First-Tier penalty).

201. 554 F. Supp. 2d 1356, 1365–68 (S.D. Fla. 2008).

202. *Id.* at 1366.

203. *Id.*

204. *Id.* at 1366–67. *But see In re Reserve Fund*, 2013 WL 5432334, at *19 (asserting that the district court can impose Second-Tier and Third-Tier penalties for non-scienter based violations).

205. *See, e.g.*, Taylor v. United States, 495 U.S. 575, 600 (1990).

206. Johnson v. United States, 135 S. Ct. 2551, 2557 (2015). Similarly, the Immigration and Nationality Act defines an "aggravated felony," the commission of which subjects an alien to deportation, as an offense that "involves fraud or deceit." 8 U.S.C. § 1101(a)(43)(M)(i). The Supreme Court has held that whether

At least some courts seem to look at the facts of the case when determining whether a securities violation "involved fraud" for purposes of assessing a Second- or Third-Tier penalty. In *SEC v. CMKM Diamonds, Inc.*,[207] the defendants admitted to violating Sections 5(a) and 5(c) of the Securities Act, and the district court assessed Third-Tier penalties, finding based on the facts of the case that the defendants' business practices were "fraudulent, deceitful, and manipulative."[208] Accordingly, if the underlying violation does not require scienter, as a Section 5 violation does not, it may still be determined that fraud or deceit was involved based on the particular facts of the case; just because Section 5 is a strict liability offense does not mean that the defendant did not in fact act intentionally when violating the provision.[209] On the other hand, in some cases in which courts have found Section 5 violations—but not Section 10(b) or 17(a) violations—courts have refused to assess Third-Tier penalties because they have found that the facts of the case did not show that the defendant's actions amounted to fraud.[210]

The practical import of all of this is that neither a strict liability violation of Section 5 nor a negligence-based Section 17(a) violation would be the type of violation for which a judge could impose Second- or Third-Tier penalties under the federal securities laws unless a jury found that the defendant acted with the requisite intent. Indeed, it may be that Second- and Third-Tier penalties cannot be imposed for such violations even if the defendant acted with the intent required by the penalty statutes, unless that intent was an element of the underlying violation. Ultimately, these are questions that the courts must sort out. To date, however, these questions have not even been presented to the courts, or at least have not been presented with any frequency.

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an offense satisfies this test must be determined "by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime." Kawashima v. Holder, 132 U.S. 1166, 1172 (2012). The Supreme Court held that this test does not require that fraud or deceit be "formal elements" of the offense, but rather only that the offense elements "necessarily entail fraudulent or deceitful conduct." *Id.* at 1172.

207. 635 F. Supp. 2d 1185, 1189 (D. Nev. 2009).

208. *Id.* at 1192; *see also* SEC v. Verdiramo, 907 F. Supp. 367, 369 (S.D.N.Y. 2013) (imposing Second-Tier penalty for Section 5 violation); SEC v. East Delta Res. Corp., No. 10 Civ. 310(SJF), 2012 WL 3903478, at *9 (E.D.N.Y. Aug. 31, 2012) (same).

209. SEC v. StratoComm Corp., No. 1:11-CV-1188, 2015 WL 1013792, at *11 (N.D.N.Y. 2015) ("Defendants correctly argue that a finding of recklessness is necessary to justify second- or third-tier penalties for violations of Section 5.").

210. *See, e.g.*, SEC v. Alpha Telecom, Inc., 187 F. Supp. 2d 1250, 1263 (D. Or. 2002).

CONCLUSION

In the nearly three decades since the Supreme Court decided *Tull*, litigants and lower courts have paid little attention to the application of the Seventh Amendment jury trial right to facts that increase the statutory maximum penalty to which a defendant is exposed in a civil enforcement proceeding brought by the SEC. In the meantime, the Supreme Court has explained that the Sixth Amendment ensures a criminal defendant the right to a jury trial as to all facts that increase the maximum sentence to which the defendant is exposed. These authors think an analogous principle exists under the Seventh Amendment as interpreted in *Tull*—namely, a defendant is entitled to a jury finding as to all facts that increase the maximum civil money penalty to which the defendant is exposed.

If this Article is correct in its understanding of the import of *Tull*, the SEC's litigation of enforcement actions in federal court would be far more similar to private securities litigation than is currently the case. For example, while the SEC has historically avoided difficult issues of loss amount, reliance, and causation when bringing actions in federal court, those issues would, under this reading of *Tull*, be grounds on which a defendant could move for summary judgment and, failing that, would be issues presented to the jury to determine the maximum penalty to which a defendant could be exposed for a securities law violation. Presentation of these issues to the jury would typically necessitate expert testimony, and numerous special interrogatories might need to be presented to the jury for a verdict. What is more, the jury's resolution for penalty purposes of the question of the gain to the defendant from a violation could even limit the disgorgement that the judge could impose after trial.[211] In sum, defendants in SEC enforcement actions brought in federal district court would often be well-advised to insist on their jury trial right on these and other facts that could increase the maximum statutory penalty.

211. *See supra* note 165.

THE INTERRELATIONSHIP BETWEEN PRICE IMPACT AND LOSS CAUSATION AFTER *HALLIBURTON I & II*

*MARK A. PERRY & KELLAM M. CONOVER**

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INTRODUCTION

In *Halliburton II*, the Supreme Court ruled that class certification in securities cases may be defeated by direct or indirect evidence that "an alleged misrepresentation did not actually affect the market price of the stock"—that is, that it did not cause any "price impact."[1] This Article addresses the connection between *Halliburton II*'s notion of price impact and the element of loss causation, an essential prerequisite to a private securities fraud claim.[2] The two concepts are obviously related: whereas loss causation requires proof that the revelation of a defendant's misrepresentation caused

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1. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2417 (2014) [hereinafter *Halliburton II*].

2. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 346 (2005).

the stock price to go down, price impact concerns how the issuance of the misrepresentation artificially caused the price to go up.

Intuitively, price impact and loss causation are the front- and back-end causal links between a misrepresentation and economic loss sustained by an investor. Some lower courts nevertheless have treated loss causation and price impact as distinct, non-overlapping categories.[3] This has allowed securities plaintiffs to proceed even when liability is predicated on a misrepresentation that did not—or, equivalently, has not been proven to—artificially inflate the stock price at all.[4] These cases raise an important doctrinal question: Can a defendant in a private securities action under federal law be held liable for a misrepresentation that purportedly causes artificial inflation to come *out* of a stock price without proof that the defendant's misconduct was responsible for the initial inflation of the stock price? In other words, can there be loss causation without price impact?

Although they did not directly resolve the question, the Supreme Court's recent decisions in *Halliburton II* and its predecessor, *Halliburton I*,[5] indicate that the doctrinal answer is the same as the intuitive one: because price impact is the obverse of loss causation, it is essential to proving that a defendant's fraud caused a plaintiff's economic loss.[6] *Halliburton I* confirmed that a plaintiff cannot prove loss causation without also showing that a fraudulent statement "affected the integrity of the market price."[7] *Halliburton II* established that any price impact inquiry must be conducted on a statement-by-statement basis, as is the case with other elements of a securities claim.[8] Taken together, these precedents teach that lower courts have been misguided in allowing securities claims predicated, at least in part, on misstatements that did not inflate the stock price.

Part I examines the relationship between loss causation and price impact, as explored in *Halliburton I*. That case established that loss causation requires proof that a defendant's misstatement artificially inflated its stock price. It nevertheless recognized that price impact and loss causation are not identical: rather, loss causation

3. *See infra* Part II.C.

4. *See infra* Part II.C.

5. Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011) [hereinafter *Halliburton I*].

6. *See infra* Part I.B-I.C.

7. *Halliburton I*, 131 S. Ct. at 2186.

8. *See Halliburton II*, 134 S. Ct. 2398, 2415 (2014).

requires proof of price impact *and* a causal link between that price impact and the plaintiff's economic loss.

Part II describes how price impact should be proven in the context of loss causation. Our starting point is *Halliburton II*, which required statement-by-statement proof of price impact to prove reliance. Statutory and economic principles militate in favor of applying that statement-by-statement requirement to the loss-causation context as well. But unlike with class certification, in the context of loss causation at trial the plaintiff must discharge the burden of proving price impact. Part II concludes by briefly surveying recent efforts by courts to relax this loss-causation requirement where some of the alleged misstatements did not affect the defendant's stock price at all. Those efforts are inconsistent with both *Halliburton I* and *Halliburton II* and have the potential to improperly transform securities fraud claims into "broad insurance against market losses."[9]

I.
PRICE IMPACT AS THE OBVERSE OF LOSS CAUSATION

Under the Private Securities Litigation Reform Act (PSLRA), a private plaintiff must show that "the act or omission of the defendant . . . caused the loss for which the plaintiff seeks to recover damages."[10] This provision codified the traditional elements of proximate causation and loss—i.e., loss causation.[11] To prove loss causation through the fraud-on-the-market theory, a plaintiff must "show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss."[12] That showing, however, is impossible if the statement did not first "affect[ ] the integrity of the market price"—that is, if the statement had no impact on the stock price.[13] As this part shows, price impact is thus an indispensable component of loss causation.

At first blush, this straightforward syllogism might appear to be at odds with *Halliburton I*, which held that putative class plaintiffs' failure to demonstrate loss causation at the class certification stage does not negate their ability to invoke *Basic*'s presumption of reli-

9. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 345 (2005).

10. 15 U.S.C. § 78u-4(b)(4) (2012).

11. *See Dura*, 544 U.S. at 343–44, 346.

12. *Halliburton I*, 131 S. Ct. 2179, 2186 (2011).

13. *Id.*

ance.[14] *Halliburton I* distinguished loss causation from price impact, observing that "loss causation is a familiar and distinct concept in securities law; it is not price impact."[15] Securities plaintiffs have seized on this statement to support their argument that price impact should not be considered as part of a loss-causation analysis. While superficially persuasive, however, that argument is wrong.

This article begins with a brief overview of price impact and loss causation. It then shows that *Dura* holds the key to understanding the relationship between the two concepts: namely that price impact is the obverse of loss causation. With that key in hand, we can see more clearly that price impact and loss causation are "distinct" simply because price impact *alone* cannot establish loss causation.

A. Brief Sketch of Price Impact and Loss Causation

Price impact and loss causation typically feature in the analysis of two discrete elements of a securities fraud claim. Price impact, which occurs when a fraudulent statement "actually affect[s]" the stock price, arises when class plaintiffs attempt to prove they relied on the integrity of the stock price in purchasing the stock.[16] Loss causation partakes of the traditional tort elements of proximate causation and economic loss.[17] Both concepts ultimately aim at the same central question: whether the plaintiff's economic loss can be attributed to the defendant's fraud. Price impact and reliance relate to whether a defendant's misrepresentation caused the plaintiff's *transaction*; loss causation pertains to whether the misrepresentation caused the plaintiff's economic *loss*.[18]

14. *Id.* at 2184–85 (discussing Basic Inc. v. Levinson, 485 U.S. 224, 246 (1988)).

15. *Id.* at 2187.

16. *E.g.*, *Halliburton II*, 134 S. Ct. 2398, 2406 (2014).

17. *See* Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 343–44, 346 (2005).

18. *See Halliburton I*, 131 S. Ct. 2179, 2186 (2011). Other courts have drawn a similar distinction between reliance and loss causation. *See, e.g.*, FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1311 (11th Cir. 2011) ("While reliance focuses on the front-end causation question of whether the defendant's fraud induced or influenced the plaintiff's stock purchase, loss causation provides the bridge between reliance and actual damages.") (quotation marks and citation omitted); Emergent Capital Inv. v. Stonepath Grp., 343 F.3d 189, 197 (2d Cir. 2003) ("Like reliance, transaction causation refers to the causal link between the defendant's misconduct and the plaintiff's decision to buy or sell securities. . . . Loss causation, by contrast, is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff."); *accord* Lentell v. Merrill Lynch & Co., 396 F.3d 161, 172 (2d Cir. 2005) (quoting *Emergent Capital*, 343 F.3d at 197).

The concept of price impact first arose in *Basic Inc. v. Levinson*, where the Supreme Court first permitted securities fraud plaintiffs to prove reliance indirectly by satisfying certain preconditions to establish a class-wide, rebuttable presumption.[19] *Basic*'s premise was that stock purchasers often purchase stock on the assumption that the stock price reflects all material information about the stock. "Because most publicly available information is reflected in [the] market price," the Court reasoned, "an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action."[20] *Basic* held that plaintiffs may invoke the presumption of reliance if they demonstrate the preconditions of publicity, materiality, and market efficiency and traded the shares while the fraud was still on the market.[21] Defendants can rebut that presumption, however, with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price."[22] One way to "sever the link" is to "show that the misrepresentation in fact did not lead to a distortion of price"—that is, to demonstrate a lack of price impact.[23]

Halliburton II subsequently confirmed that the concept of "price impact" was "*Basic*'s fundamental premise."[24] In that case, shareholders sued Halliburton for losses allegedly sustained from Halliburton's correction of misrepresentations regarding its revenue, its potential liability in asbestos litigation, and the potential benefits from a merger.[25] At class certification, the district court and court of appeals required the plaintiffs to prove "loss causation" in order to invoke *Basic*'s presumption of reliance, and Halliburton attempted to rebut that showing with evidence that there was no price impact.[26] The Supreme Court reversed in *Halliburton I*, concluding that plaintiffs need not show loss causation at the class certification stage.[27] The Court then remanded for consideration of

19. Basic Inc. v. Levinson, 485 U.S. 224, 246–47 (1988).

20. *Id.* at 247.

21. *Id.* at 248 n.27; *see also Halliburton I*, 131 S. Ct. at 2185–86.

22. *Basic*, 485 U.S. at 248.

23. *Id.* For additional examples of ways to rebut the *Basic* presumption of reliance, see GAMCO Invs., Inc. v. Vivendi, S.A., 927 F. Supp. 2d 88, 99–100 (S.D.N.Y. 2013), and *In re* Vivendi Universal, S.A. Sec. Litig., No. 02-cv-5571, 2015 WL 4758869 (S.D.N.Y. Aug. 11, 2015).

24. *Halliburton II*, 134 S. Ct. 2398, 2416 (2014) (quoting *Halliburton I*, 131 S. Ct. at 2186).

25. *Id.* at 2405–06.

26. *Halliburton I*, 131 S. Ct. at 2183-84.

27. *Id.* at 2186.

"any further arguments against class certification" that Halliburton had preserved.[28]

On remand, after Halliburton again tried to introduce evidence of lack of price impact, the Fifth Circuit affirmed class certification on the grounds that Halliburton could rebut the *Basic* presumption only indirectly by refuting one of its preconditions, not directly by showing there was no price impact.[29] The Supreme Court again reversed in *Halliburton II*, holding that price impact was "an essential precondition for any Rule 10b-5 class action," the absence of which could be shown through direct or indirect evidence.[30] Without price impact, there is "no grounding for any contention that [the] investor[ ] indirectly relied on [a] misrepresentation[ ] through [his] reliance on the integrity of the market price."[31] As a result, there is no reason to presume that the plaintiff's decision to purchase the stock could be attributed to the defendant's misrepresentation.[32]

The standard for proving loss causation in a securities fraud claim was established in *Dura Pharmaceuticals, Inc. v. Broudo*.[33] In *Dura*, the plaintiffs alleged that Dura's misrepresentations about a new asthmatic spray device had caused the plaintiffs to purchase Dura securities at "artificially inflated prices" and thereby caused damages.[34] After the district court dismissed the complaint for failure to adequately allege loss causation, the Ninth Circuit reversed, holding that an allegation that the price was artificially inflated at the time of purchase was sufficient to plead and prove loss causation.[35]

The Supreme Court reversed. Analogizing to common-law fraud claims, the Court held that a federal securities fraud plaintiff must "prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss."[36] An artificially inflated purchase price alone does not normally "constitute or proximately cause the relevant economic loss"

28. *Id.* at 2187.

29. *Halliburton II*, 134 S. Ct. at 2406–07, 2414–16.

30. *Id.* at 2415–16.

31. *Id.* at 2414 (alterations in original) (quoting Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1199 (2013)).

32. *See id.* at 2416.

33. 544 U.S. 336 (2005).

34. *Id.* at 339–40.

35. *Id.* at 340 (discussing Broudo v. Dura Pharms., Inc., 339 F.3d 933, 938 (9th Cir. 2003)).

36. *Id.* at 346. As the Court noted, this requirement was consistent with the statutory command that plaintiffs have "'the burden of proving' that the defen-

because an investor suffers no loss at the time of payment.[37] Rather, loss causation occurs only when the investor purchases the shares at an inflated price and *then* sees the stock price drop when the market learns of the fraud.[38]

Both price impact and loss causation thus have always concerned whether a plaintiff's loss can be attributed to a defendant's misrepresentation. As the next section shows, that common causal link is essential to the connection between price impact and loss causation.

B. Connecting Price Impact with Loss Causation

The Supreme Court first connected the concepts of price impact and loss causation in *Halliburton I*, noting that a plaintiff must show both that a "misrepresentation . . . affected the integrity of the market price" and also "caused a subsequent economic loss."[39] As the Court explained, a plaintiff can show loss causation only to the extent that fraud-induced inflation—as opposed to some other factor unrelated to the defendant's fraud—caused the plaintiff's losses.[40] *Halliburton I* revealed what *Dura* had left implicit: in the absence of initial price impact, a misrepresentation cannot cause a subsequent loss when that inflation is *removed* from the stock price.[41] In other words, if a supposedly true statement does not cause the price to go up, the revelation that the supposedly true statement was in fact untrue cannot be said to cause the price to go down.

This section examines *Dura* in light of *Halliburton I* in order to flesh out the relationship between price impact and loss causation. *Dura* made two key insights relevant to that relationship. The first was that the essence of economic loss in fraud-on-the-market claims is the removal of artificial inflation, specifically, from a stock price. The Court made clear that the securities laws do not "provide investors with broad insurance against market losses, but . . . protect them against those economic losses that misrepresentations actually

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dant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" *Id.* at 345–46 (quoting 15 U.S.C. § 78u-4(b)(4) (2000)).

37. *Id.* at 342.

38. *Id.* at 342–43.

39. *Halliburton I*, 131 S. Ct. 2179, 2186 (2011) (discussing *Dura*, 544 U.S. at 342–43).

40. *Id.* (discussing *Dura*, 544 U.S. at 342–43).

41. *See id.* ("As we made clear in *Dura Pharmaceuticals*, the fact that a stock's 'price on the date of purchase was inflated because of [a] misrepresentation' does not necessarily mean that the misstatement is the cause of a later decline in value.") (quoting *Dura*, 544 U.S. at 342) (alteration in original).

cause."[42] And a misrepresentation causes subsequent losses when an investor purchases shares at a price inflated by the fraud and subsequently sells them at a lower price reflecting the truth.[43] *Dura* gave no indication that a misrepresentation could cause subsequent losses *without* having first inflated the stock price. And *Halliburton I* confirmed that if something other than artificial inflation had been "responsible for the loss or part of it, a plaintiff would not be able to prove loss causation to that extent."[44]

Dura's second insight was that an artificially inflated purchase price only "*sometimes* play[s] a role in bringing about a future loss."[45] Often it is not the revelation of the fraud but a "tangle of other factors"—such as "changed economic circumstances" or "new industry-specific or firm-specific facts, conditions, or other events"—that causes the price to decline.[46] For example, if on the same day the fraud is revealed, the entire stock market takes a nosedive or the company announces a failed merger, then stock price declines on that day may well have been caused by those events, instead of (or perhaps in addition to) the revelation of the fraud. Even when the revelation of fraud does cause a subsequent loss, the Court added, "changed investor expectations" might diminish *how much* investors value the information that turned out to be fraudulent.[47] "Other things being equal," then, "the longer the time between the purchase and the sale . . . the more likely that other factors caused the loss."[48]

Dura thus treated price impact as a necessary but not sufficient component of loss causation.[49] Although a material misrepresentation initially causes artificial inflation in the stock price, it cannot cause economic loss until that inflation is removed from the stock

42. *Dura*, 544 U.S. at 345.

43. *Id.* at 342–43.

44. *Halliburton I*, 131 S. Ct. at 2186 (discussing *Dura*, 544 U.S. at 342–43).

45. *Dura*, 544 U.S. at 343.

46. *Id.* at 342–43.

47. *Id.* at 343. *Dura* is silent on what such changed investor expectations might be. But one can expect even fraudulent financial results to grow "stale" as *other* developments within a company—such as changes in executive personnel, increased profitability within other corporate divisions, or synergies achieved at scale—all make it less likely that a fraudulently concealed shortfall would result in default, bankruptcy, or other significant financial problems. Put differently, investors may value a one-time overstatement of profits by $0.2 billion far more significantly when overall annual revenue is only $1.0 billion than five years down the road when annual revenue is $10 billion.

48. *Id.*

49. *Id.* at 343 ("[An inflated purchase price] may prove to be a necessary condition of any such loss . . . . But, even if that is so, it is insufficient.").

price when the truth is revealed to the market. Consequently, loss causation requires proof that the removal of artificial inflation caused the stock to decline. If inflation—i.e., price impact—dissipates on its own over time, or if other factors cause the price decline, then no loss causation has been established. Both price impact and a causal link to the plaintiff's economic loss are therefore essential to proving loss causation: in order for the fraud to cause the price to drop, it first must have caused the price to rise.

One corollary to *Dura*'s conception of loss causation is that price impact should always be at least as great as loss causation. As *Dura* explained, initial price impact at best only "touches upon" a later economic loss because the natural trend is for artificial inflation to dissipate over time.[50] That means that the amount of inflation removed from the stock price when the truth comes out is at most only the same amount of inflation as entered the price when the fraudulent statement was made. Accordingly, totaling up residual increases in artificial inflation on days of misrepresentations can provide a helpful comparator for the amount of inflation that allegedly was removed on the back end: if the front-end inflation price impact totals are less than the back-end totals, then that means that the back-end measurements are—at least absent further explanation—inaccurate.

While *Dura* focused on the removal of artificial inflation, it did not necessarily foreclose other ways to prove loss causation that do not involve artificial inflation and hence price impact. But *Halliburton I* subsequently explained that if something other than an inflated purchase price caused a plaintiff's loss, then "a plaintiff would not be able to prove loss causation to that extent."[51] And because no artificial inflation can later be removed without first entering the stock price, price impact is essential to proving loss causation.

It is also unclear what those other ways of proving loss causation might look like in a fraud-on-the-market claim. Securities fraud claims are brought by shareholders who allege their stock lost value due to the defendant's fraud. Even in cases where a plaintiff directly relied on a fraudulent misrepresentation, the measure of the plaintiff's economic loss is the difference between the inflated and non-inflated value of the plaintiff's shares.[52] That measure of dam-

50. *Id.* at 343 ("Other things being equal, the longer the time between purchase and sale, . . . the more likely that other factors caused the loss.").

51. *Halliburton I*, 131 S. Ct. 2179, 2186 (2011).

52. *See, e.g.*, *Dura*, 544 U.S. at 344 (describing "judicial consensus" that defendant is "liable to a relying purchaser 'for the loss' the purchaser sustains 'when the

ages is especially appropriate in a fraud-on-the-market case, where the essential premise of the claim is that the plaintiffs implicitly relied on a material misrepresentation that affected the market price by inflating the stock value.[53] In fraud-on-the-market claims, the inflated stock price is therefore an essential component of causation for both the transaction and, ultimately, the loss.

This reading of *Dura* is confirmed by the circuit split that the Supreme Court agreed to resolve in that case. Circuit courts had adopted one of two standards for showing loss causation. The Ninth Circuit—whose decision was reviewed and reversed in *Dura*—had held that price impact alone was sufficient to prove loss causation.[54] Meanwhile, the Second,[55] Third,[56] and Eleventh[57] Circuits—whose standard *Dura* adopted—had all held that loss causation requires price impact *and* a causal connection to subsequent loss. No circuit court had suggested, however, that a fraudulent statement could cause economic loss without first affecting the stock price.

Since *Dura*, a number of lower courts have recognized that price impact is an essential component of the loss-causation inquiry. The Seventh Circuit, for instance, has held that in a fraud-on-

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facts . . . become generally known' and 'as a result' share value 'depreciate[s].'") (quoting RESTATEMENT (SECOND) OF TORTS § 548A, cmt. b at 107 (AM. LAW INST. 1976)).

53. *See, e.g.*, Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 297 (3d Cir. 1991) (stating that the difference between the purchase price and the "true value" of the security at the time of the purchase is the "proper measure of damages to reflect the loss proximately caused by the defendant's deceit") (quoting Huddleston v. Herman & MacLean, 640 F.2d 534, 555 (5th Cir. 1981), *modified on other grounds*, 459 U.S. 375 (1983)).

54. Broudo v. Dura Pharms., Inc., 339 F.3d 933, 938 (9th Cir. 2003) ("[I]n a fraud-on-the-market case, plaintiffs establish loss causation if they have shown that the price *on the date of purchase* was inflated because of the misrepresentation.") (internal quotation marks and citation omitted), *rev'd*, 544 U.S. 336 (2005).

55. Emergent Capital Inv. Mgmt. v. Stonepath Grp., 343 F.3d 189, 198 (2d Cir. 2003) (emphasizing that a previous case "did not mean to suggest . . . that a purchase-time loss allegation *alone* could satisfy the loss causation pleading requirement" because the plaintiffs there also "specifically asserted a causal connection between the concealed information . . . and the ultimate failure of the venture").

56. Semerenko v. Cendant Corp., 223 F.3d 165, 185 (3d Cir. 2000) (following Eleventh Circuit rule). *Semerenko* found loss causation sufficiently alleged where the class alleged that "it purchased shares of ABI common stock at a price that was inflated due to the alleged misrepresentations, and that it suffered a loss when the truth was made known and the price of ABI common stock returned to its true value." *Id.*

57. Robbins v. Koger Props., Inc., 116 F.3d 1441, 1448 (11th Cir. 1997) (requiring "evidence that [the artificial] inflation was removed from the market price of [the] stock, [thereby] causing . . . a loss.").

the-market claim, "plaintiffs must show both that the defendants' alleged misrepresentations artificially inflated the price of the stock and that the value of the stock declined once the market learned of the deception."[58] And the Second Circuit has held that defendants cannot be liable for statements that "at the time . . . did not affect share price, and thus did no damage."[59] These cases reflect *Dura*'s common-sense idea that for inflation to come out of a stock price, it first must have entered the stock price.[60]

C. Distinguishing Price Impact from Loss Causation

Whereas *Dura* established that price impact is a necessary component of loss causation, *Halliburton I* emphatically declared that loss causation "is not price impact."[61] As this section shows, there is no real tension between these two propositions: although the price-impact and loss-causation inquiries overlap, they are not identical precisely because price impact alone is insufficient to show loss causation.

The sole issue in *Halliburton I* was whether loss causation is a prerequisite to establishing *Basic*'s rebuttable presumption of reliance—a necessary condition for class certification.[62] The Fifth Circuit had required the plaintiff to prove loss causation; the Supreme Court explained, however, that although plaintiffs must prove a number of things in order to invoke the *Basic* presumption, loss

58. Ray v. Citigroup Global Markets, Inc., 482 F.3d 991, 995 (7th Cir. 2007).

59. *In re* Omnicom Grp., Inc. Sec. Litig., 597 F.3d 501, 514 (2d Cir. 2010); *accord* Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330, 336 (5th Cir. 2010) ("By relying on a decline in price following a corrective disclosure as proof of causation, a plaintiff need prove that its loss resulted directly *because* of the correction to a prior misleading statement; otherwise there would be no inference raised that the original, allegedly false statement caused an inflation in the price to begin with."), *vacated on other grounds by Halliburton I*, 131 S. Ct. 2179 (2011). *Cf.* DeMarco v. Robertson Stephens Inc., 318 F. Supp. 2d 110, 124 (S.D.N.Y. 2004) ("[T]he origins of loss causation reside precisely in that artificial price inflation.").

60. *E.g.*, FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1311 (11th Cir. 2011) ("[L]oss causation requires proof that the fraud-induced inflation that was baked into the plaintiff's purchase price was subsequently removed from the stock's price, thereby causing losses to the plaintiff."). *FindWhat*'s later holding that a statement can also cause harm by prolonging inflation is addressed *infra* Part II.C.

61. *Halliburton I*, 131 S. Ct. at 2187 (2011).

62. *Id.* at 2184 ("The courts below determined that EPJ Fund had to prove the separate element of loss causation in order to establish that reliance was capable of resolution on a common, classwide basis.").

causation is not one of them.[63] The Court therefore vacated the Fifth Circuit's decision and remanded for reconsideration of the class certification issue.[64]

In an attempt to avoid that result, the defendants argued that what the Fifth Circuit had called "loss causation" really was just "price impact" by another name.[65] It was in this context that the Court distinguished between loss causation and price impact. Rejecting the defendant's argument as a "wishful interpretation," the Court explained that the "Court of Appeals' repeated and explicit references to 'loss causation'" meant that it was requiring proof of loss causation, not price impact.[66] Whereas "[p]rice impact simply refers to the effect of a misrepresentation on a stock price," the Fifth Circuit had expressly discussed the "need for Plaintiff to [also] establish a *causal link* between the alleged falsehoods and its losses in order to invoke the fraud-on-the-market presumption."[67]

Halliburton I did not disturb the Fifth Circuit's holding that loss causation requires proof "that an alleged misstatement 'actually moved the market'"—i.e., price impact.[68] *Halliburton I* merely held that discussion of loss causation was premature at the class certification stage; there was not even a hint that the Fifth Circuit's loss-causation inquiry was erroneous. More fundamentally, the Court treated loss causation and price impact as distinct but overlapping categories. The real thrust of the Court's contrast was to distinguish

63. *Id.* at 2185 ("[I]n order to invoke *Basic*'s rebuttable presumption of reliance[,] . . . plaintiffs must demonstrate that the alleged misrepresentations were publicly known[,] . . . that the stock traded in an efficient market, and that the relevant transaction took place 'between the time the misrepresentations were made and the time the truth was revealed.'") (quoting Basic Inc. v. Levinson, 485 U.S. 224, 248 n.27 (1988)).

64. *Id.* at 2187.

65. *Id.* at 2186–87.

66. *Id.* at 2187.

67. Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330, 335 (5th Cir. 2010), *vacated on other grounds* 131 S. Ct. 2179 (2011). The Fifth Circuit stated: "[EPJ Fund] was required to prove loss causation, i.e., that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in the losses. . . . Thus, we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption." *See id.* at 334–35 (quoting Oscar Private Equity Invs. v. Allegiance Telecom. Inc., 487 F.3d 261, 265 (5th Cir. 2007)).

68. *Id.* at 335 (quoting Oscar Private Equity Invs., 487 F.3d at 265). *Archdiocese* required proof that plaintiff's "loss resulted directly because of the correction to a prior misleading statement" in order to show that "the original, allegedly false statement caused an inflation in the price to begin with." *Id.* at 336.

loss causation from price impact as a proxy for reliance.[69] Loss causation simply had nothing to do with whether or not a plaintiff had relied on the defendant's misrepresentation.[70] At the same time, the Court recognized that loss causation could be "consistent with a 'price impact' approach."[71] The main difference was that, in addition to requiring proof of artificial inflation, loss causation also requires proof that a misrepresentation "caused a subsequent economic loss."[72]

One might read *Halliburton I* as holding that price impact concerns only reliance and has nothing to do with loss causation at all. But the better reading, given that the elements of a Rule 10b-5 claim must be construed harmoniously,[73] is that price impact is relevant to both reliance and loss causation. *Halliburton I* recognized and *Halliburton II* expressly held that proof of price impact can presumptively establish reliance.[74] As both *Dura* and *Halliburton I* make clear, price impact is a necessary—though not sufficient—component of loss causation.[75] Nothing precludes the same evidence of price impact from applying to different elements of a plaintiff's claim.[76]

This should not surprise. Although reliance and loss causation are treated as separate elements of a securities fraud claim, they are closely related, and both are required to ensure a sufficient causal connection between wrongdoing and harm. Reliance is often re-

69. In *Halliburton II*, the Court thus summarized *Halliburton I* as distinguishing between loss causation and *reliance*. 134 S. Ct. 2398, 2406 (2014).

70. *Halliburton I*, 131 S. Ct. at 2186 ("Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock.").

71. *Id.* at 2187 (quotation omitted).

72. *Id.* at 2186; *see also Halliburton II*, 134 S. Ct. at 2406.

73. *See* Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 160–61 (2008).

74. *Halliburton I*, 131 S. Ct. at 2186 ("Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation if that 'information is reflected in [the] market price' of the stock at the time of the relevant transaction.") (quoting *Basic*, 485 U.S. at 247) (alterations in original); *see Halliburton II*, 134 S. Ct. at 2414 ("In the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse.").

75. *See supra* Part I.B–I.C.

76. *See, e.g.*, Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 432 & n.7 (5th Cir. 2013) ("[P]rice impact evidence does not fit neatly into any one fraud issue, but is probative of materiality, statement publicity, and market efficiency, all of which are relevant in establishing the presumption of fraud-on-the-market reliance. . . . [A] plaintiff cannot establish the element of loss causation without demonstrating a negative price impact resulting from the defendant's release of corrective information."), *vacated on other grounds*, 134 S. Ct. 2398 (2014).

ferred to in cases involving public securities markets (fraud-on-the-market cases) as "transaction causation."[77] It requires an investor to prove a causal connection between a misstatement and an investment decision, just as loss causation requires a causal connection between a misstatement and economic loss.

That *Halliburton I* distinguishes price impact from loss causation thus does not undermine the conclusion that price impact is the obverse of loss causation. As we have seen, loss causation requires proof that a misrepresentation caused price inflation and that the truth later removed that inflation from the stock price. An immediate question arises, however: can a plaintiff make this showing for all misrepresentations simultaneously, or does each statement need to affect the stock price? Part II addresses this question and concludes that to show loss causation, a plaintiff must prove that each statement had an impact on the stock price.

II.
LOSS CAUSATION AND STATEMENT-BY-STATEMENT PROOF OF PRICE IMPACT

The PSLRA's loss-causation provision requires plaintiffs to "prov[e] that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover."[78] That showing is straightforward when there is one alleged misstatement: a plaintiff must show that the misstatement inflated the stock price and then, when corrected, caused a subsequent decline.[79] But what about when there are multiple alleged misstatements? Does the statute's required showing apply to each individual statement? More specifically, does loss causation require statement-by-statement proof of price impact?

In short, the answer is yes: *Halliburton II* established that price impact should be analyzed on a statement-by-statement basis.[80] And although *Halliburton II* dealt with price impact in the context of proving reliance, a statement-by-statement approach to loss causation would be appropriate in light of the statute, proof of other elements in a 10b-5 private right of action, and economic principles.

77. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341 (2005).

78. 15 U.S.C. § 78u-4(b)(4) (2012).

79. Ray v. Citigroup Global Markets, Inc., 482 F.3d 991, 995 (7th Cir. 2007).

80. *Halliburton II*, 134 S. Ct. 2398, 2417 (2014); *see also* IBEW Local 98 Pension Fund v. Best Buy Co., No. 14-3178, 2016 WL1425807, at *7 (8th Cir. Apr. 12, 2016).

A. Halliburton II *and Proof of Price Impact in the Reliance Context*

After *Halliburton I*, Halliburton again tried to introduce evidence that some of its statements had no price impact, this time to rebut the *Basic* presumption of reliance. *Halliburton II* subsequently allowed Halliburton to make that showing, holding that defendants may rebut the presumption of reliance at the class certification stage with direct evidence that "an alleged misrepresentation did not actually affect the market price of the stock."[81] Importantly, that holding also established that an absence of price impact can be shown on a statement-by-statement basis.

The dispute in *Halliburton II* was relatively narrow. All parties agreed that at the class certification stage, Halliburton could introduce evidence of lack of price impact in order to dispute the plaintiff's showing of market efficiency—one of the four prerequisites for indirectly invoking the *Basic* presumption of reliance.[82] What the parties disagreed over was whether that same evidence could also be used to rebut the presumption directly.[83] "[S]ee[ing] no reason to artificially limit the inquiry at the certification stage to indirect evidence of price impact," the Court held that defendants could also rebut the *Basic* presumption with direct evidence that a particular statement "did not actually affect the market price."[84] Because the Fifth Circuit had not given Halliburton the opportunity to make that showing, the Court remanded for further proceedings.[85]

Halliburton II envisioned that defendants could introduce price-impact evidence on a statement-by-statement basis. Indeed, the plaintiffs had attempted to prove market efficiency by submitting an event study that included one of the alleged misstatements, while Halliburton had submitted an event study showing that none of the statements at issue had affected Halliburton's stock price.[86]

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81. *Halliburton II*, 134 S. Ct. at 2417.

82. *See id.* at 2415. The first three prerequisites for invoking the *Basic* presumption—publicity, materiality, and market efficiency—demonstrate price impact. *Id.* at 2414.

83. *Id.* at 2414.

84. *Id.* at 2417.

85. *Halliburton II*, 134 S. Ct. at 2417. Justice Thomas, joined by Justices Scalia and Alito, wrote a separate decision concurring in the judgment. *See id.* at 2417-27 (Thomas, J., concurring in the judgment). They would have overruled the *Basic* presumption of reliance entirely. *Id.* at 2418.

86. *Id.* at 2415 (majority opinion). An event study is a regression analysis that shows the likelihood that a specific variable—such as market conditions, fraud, or non-fraud causes—contributed to the rise or decline of a stock on a given day. Event studies are essential tools for securities fraud class actions, as day-by-day price

The Court also discussed an example where the defendant's event study measured six "discrete events"—including one of the specific misrepresentations alleged by the plaintiffs—and showed that none had any impact on the stock price.[87] It would be "bizarre," the Court reasoned, if despite conclusive proof that the plaintiffs could not have relied on the one misstatement, the court nevertheless certified the class on the theory that the market was efficient and hence the *Basic* presumption had indirectly been satisfied.[88]

Statement-by-statement proof of price impact is, moreover, consistent with the Court's rationale for permitting any direct evidence of price impact. As *Halliburton II* explained, *Basic*'s constituent requirements provide an "indirect proxy for price impact."[89] Although that indirect proxy is necessary in a class action to ensure that common issues predominate over individual issues, it does not preclude direct evidence of price impact when such evidence is available.[90] Accordingly, "[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance" for that statement.[91]

Statement-by-statement proof of price impact also accords with *Basic* itself. The *Basic* presumption is premised on the notion that "the fraud ha[s] been transmitted through market price" and thereby implicitly relied on by share purchasers.[92] When a statement "does not affect market price"—that is, when there is no price impact—the statement is "immaterial information, by definition"

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inflation figures are necessary to determine the damages of thousands of share purchasers all of whom acquired their shares on different days and hence at potentially different levels of price inflation. Brief of Law Professors as Amici Curiae in Support of Petitioners at 25–28, *Halliburton II*, 134 S. Ct. 2398 (2014) (No. 13-317), 2014 WL 60721, *24-32; Brief for Law Professors Robert Bartlett et al., as Amici Curiae in Support of Petitioners at 19–21, *Halliburton I*, 131 S. Ct. 2179 (2011) (No. 09-1403), 2011 WL 1229117, *26-33.

87. *Halliburton II*, 134 S. Ct. at 2415.

88. *Id.* This "bizarre" result likely would not occur if a defendant offered evidence of no price impact for only some, but not all, of a plaintiff's statements. In that case, class certification still might be appropriate based on the statements that did affect stock price; but a court should at least deny certification of a class based on the statements that did not.

89. *Id.*

90. *Id.* at 2415–16 (discussing Basic Inc. v. Levinson, 485 U.S. 224, 248 (1988)).

91. *Halliburton II,* 134 S. Ct. at 2415–16 (quoting *Basic*, 485 U.S. at 248).

92. *Basic*, 485 U.S. at 248.

and thus is not incorporated into the market price.[93] For each statement that does not actually affect market price, there is no basis for applying *Basic*'s presumption of reliance. Individual investors may have subjectively relied on those statements, but *Basic* affords no opportunity for presuming that the entire class did so.

Under *Halliburton II*, defendants can rebut the *Basic* presumption with respect to individual statements by proving that specific statements did not actually affect the stock price. As the next section shows, *Halliburton II*'s statement-by-statement framework should also apply to loss causation with only slight modification.

B. Statement-By-Statement Proof of Loss Causation

Halliburton II's requirement of statement-by-statement proof should apply equally to the loss causation inquiry. Statutory and economic principles militate in favor of applying statement-by-statement analysis to loss causation. Unlike with proof of reliance at class certification, however, plaintiffs should bear the burden of proving price impact in the context of loss causation at trial.

The PSLRA requires a plaintiff to prove that "the act or omission of the defendant . . . caused the [plaintiff's] loss."[94] That provision on its face requires statement-by-statement proof of loss causation. The use of the singular more naturally refers to *each* act or omission rather than to the defendant's conduct as a whole. When referring to the entirety of a defendant's actions, the statute uses a different word: "conduct."[95] Because different words are presumed to have different meanings, Congress's use of the singular words "act" and "omission" should refer to each statement made by the defendant.[96]

This interpretation is confirmed by the statutory context, in which all other elements of 10b-5 liability must be proven for each

93. Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1195 (2013).

94. 15 U.S.C. § 78u-4(b)(4) (2012).

95. *See, e.g.*, *id.* § 78u-4(f)(3)(C) ("In determining the percentage of responsibility under this paragraph, the trier of fact shall consider – (i) the nature of the conduct of each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs; and (ii) the nature and extent of the causal relationship between the conduct of each such person and the damages incurred by the plaintiff or plaintiffs."); *id.* § 78u-4(f)(10)(B) ("[R]eckless conduct by a covered person shall not be construed to constitute a knowing commission of a violation of the securities laws.").

96. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 62–63 (2006) ("We normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely . . . .'") (citation omitted).

statement. The PSLRA expressly provides that both falsity[97] and scienter[98] require statement-by-statement proof. Materiality[99] and even who "makes" a statement[100] likewise must be shown on a statement-by-statement basis. And as discussed above, *Halliburton II* permits statement-by-statement proof of price impact with respect to rebutting the presumption of reliance.[101] Given this statutory regime, it would be aberrational for loss causation to receive different treatment. Such a reading would conflict with both the statutory structure and the "narrow dimensions" the Supreme Court has given the Section 10(b) cause of action.[102]

Economic reasons also warrant statement-by-statement proof of loss causation and hence price impact. In the first place, it is unclear how a statement might cause subsequent losses without first causing artificial inflation. That notion would directly contravene *Dura*'s and *Halliburton I*'s premise that loss causation in a fraud-on-the-market claim requires the removal of artificial inflation from the stock price.[103] It also would conflict with *Basic* and *Halliburton II*. If a statement does not affect stock price, then the class cannot

97. 15 U.S.C. § 78u-4(b)(1) (requiring the complaint to "specify *each statement* alleged to have been misleading, [and] the reason or reasons why *the statement* is misleading.") (emphases added); *see* Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1330 (2015) ("[W]hether an omission makes an expression of opinion misleading always depends on context.").

98. *See id.* § 78u-4(f)(10)(A)(i)(I) (defining a knowing violation as when a "covered person makes an untrue statement of a material fact, with actual knowledge that *the representation* is false . . . .") (emphasis added).

99. *TSC Industries, Inc. v. Northway, Inc.*, long ago established that materiality in Section 14(a) claims must be proven on a statement-by-statement basis. 426 U.S. 438, 451–63 (1976). *Amgen* recently recognized the same principle for Section 10(b) claims. *See* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013). There, the defendants challenged class certification, arguing that "where misrepresentations and omissions are not material, there is no basis for presuming classwide reliance on those misrepresentations and omissions." *Id.* at 1194. Although the Court found the defendants' argument better suited to the merits rather than class certification, it observed that "[b]ecause immaterial information, by definition, does not affect market price, it cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity." *Id.* at 1195.

100. *See* Janus Capital Grp., Inc. v. First Derivatives Traders, 131 S. Ct. 2296, 2302 (2011) ("[T]he maker of *a statement* is the person or entity with ultimate authority over *the statement*, including its content and whether and how to communicate it.") (emphases added).

101. *Supra* Part II.A. *See Halliburton II*, 134 S. Ct. 2398, 2416–17 (2014).

102. Stoneridge Inv. Partners, v. Sci.-Atlanta, Inc., 552 U.S. 148, 160–62, 167 (2008).

103. *Supra* Part I.B. *See Halliburton I*, 131 S. Ct. 2179, 2186 (2011); Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 342–43 (2005).

presumptively have relied on it, and if a statement does not in any sense cause the transaction, then it cannot cause any downstream losses resulting from that transaction.[104]

Moreover, statement-by-statement proof is already an economic necessity in fraud-on-the-market actions. In order to calculate damages for class members who trade in and out of the stock throughout a class period, class plaintiffs need to calculate daily inflation values. As part of that analysis, plaintiffs' experts can calculate the price impact of each alleged misstatement. Because those economic figures are needed anyway for a class action, statement-by-statement proof of loss causation should not create an onerous burden for the parties.

The price-impact inquiry for loss causation should nevertheless differ from that considered in *Halliburton II*. Unlike in *Halliburton II*, which gave defendants an opportunity to demonstrate a lack of price impact at class certification, plaintiffs should bear the burden of proving price impact at trial. After all, the statute expressly requires plaintiffs to demonstrate loss causation,[105] and plaintiffs normally bear the burden of proving all elements of their claim. And unlike in *Halliburton II*, which allowed plaintiffs to prove reliance indirectly using the *Basic* presumption, there is no presumption of loss causation. Plaintiffs therefore must prove loss causation, including price impact, directly.

To prove loss causation, a plaintiff must show that each misrepresentation "affected the integrity of the market price" and "*also* caused a subsequent economic loss."[106] If a plaintiff fails to make that showing for any statement, that statement is inactionable as a matter of law. To avoid this obligation, securities plaintiffs have increasingly asked courts to recognize a so-called "maintenance" theory. The next section briefly examines this development.

C. Emerging "Maintenance" Theories

Under *Halliburton I* and *Halliburton II*, loss causation requires proof that, *inter alia*, each alleged misrepresentation "affected the integrity of the market price."[107] Some lower courts, however, have held that a misstatement can affect the integrity of the market price

104. *See In re* Vivendi Universal, S.A. Sec. Litig., 123 F. Supp. 3d 424, 430 (S.D.N.Y. 2015) ("The reliance and loss causation elements of a securities fraud claim are analogous to but-for and proximate causation, respectively.") (citing ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 106 (2d Cir. 2007)).

105. 15 U.S.C. § 78u-4(b)(4) (2012).

106. *Halliburton I*, 131 S. Ct. at 2186.

107. *Id.*

even if it does not increase artificial inflation.[108] Two strains of this "maintenance" theory have emerged—only one of which is consistent with *Halliburton I* and *II*.

In the first variant of "maintenance" theory, a misstatement is actionable if it prevents either the stock price or inflation from dropping more than it otherwise would have.[109] But there is nothing special or particularly problematic about this kind of "maintenance" theory: because the stock price (or inflation) would have otherwise dropped, the misstatement "affects" share price by preventing the price (or inflation) from dropping. The investor still has to prove the traditional elements of his or her claim.

A second strain of "maintenance" theory is more problematic, and cannot be reconciled with Supreme Court precedent. In this version, a misrepresentation can affect the stock price merely by "confirm[ing] existing information about a stock, rather than releas[ing] new and different information that might bring about a negative change in the stock's price."[110] Unlike in the first variant of "maintenance" theory, then, neither the stock price nor inflation rises after the misrepresentation. Courts have justified this version of maintenance theory on the grounds that pre-existing inflation would have dissipated if the company had simply spoken the truth,

108. *See, e.g.*, Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 418–19 (7th Cir. 2015); FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1314–16 (11th Cir. 2011); *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512, 561–63 (S.D.N.Y. 2011).

109. *See, e.g.*, *FindWhat*, 658 F.3d at 1315 (holding that defendants can be liable where a statement maintains inflation "by preventing preexisting inflation from dissipating from the stock price"); Schleicher v. Wendt, 618 F.3d 679, 683 (7th Cir. 2010) ("Likewise when an unduly optimistic statement stops a price from declining (by adding some good news to the mix): once the truth comes out, the price drops to where it would have been had the statement not been made."); Swack v. Credit Suisse First Boston, 383 F. Supp. 2d 223, 240 (D. Mass. 2004) ("Defendants' conduct could have tempered a drop in price that would otherwise have occurred, or resulted in a greater increase than the stock would otherwise have enjoyed, absent the deceptive [statement].").

110. Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 762 F.3d 1248, 1256 (11th Cir. 2014). *See Glickenhaus*, 787 F.3d at 419 ("[W]hat the plaintiffs had to prove is that the defendants' false statements caused the stock price to remain higher than it would have been had the statements been truthful."); In re *Vivendi Universal*, 765 F. Supp. 2d at 561 ("[A] misstatement may cause inflation simply by *maintaining* existing market expectations, even if it does not actually cause the inflation in the stock price to increase on the day the statement is made.").

rather than made a "confirmatory" misstatement.[111] But that ignores the fact that often the defendant also could have chosen not to speak at all.[112] If it had remained silent, then the share price would have remained inflated (with perhaps gradual dissipation) until the market learned that its assumptions had been inaccurate. In no sense, then, does a "confirmatory" statement "cause" inflation to remain in the stock price.

This latter version of maintenance theory will, in many scenarios, be irreconcilable with *Dura*'s requirement that a statement "play a role in bringing about a future loss."[113] When a fraudulent statement merely "maintains" inflation, the price would have been inflated—and subsequent losses still would occur—irrespective of the statement. The statement thus would have played *no* role "in bringing about a future loss."[114] After all, any inflation that later comes out of the stock price would have entered the stock price not because of the fraudulent statement, but through some earlier (and potentially non-fraudulent) means. Under *Dura* and *Halliburton I*, that precludes a finding of loss causation.[115]

At least one court has defended the second type of "maintenance" theory on the grounds that requiring price impact for each statement "would make it harder for plaintiffs to prove loss causation when a company makes numerous similar misstatements over a long time period."[116] That is incorrect. Requiring that each statement affect the stock price would not necessarily bar or limit plaintiffs' recovery at all: it simply would require them to identify the fraudulent statements that actually affected the stock price. That is something that, in effect, class plaintiffs already do when they calculate share price inflation (hence damages) throughout the class pe-

111. *E.g.*, *Local 703*, 762 F.3d at 1256; *In re* Sci.-Atlanta, Inc. Sec. Litig., 754 F. Supp. 2d 1339, 1380 n.12 (N.D. Ga. 2010); *In re* Cooper Sec. Litig., 691 F. Supp. 2d 1105, 1116 (C.D. Cal. 2010).

112. *See Glickenhaus*, 787 F.3d at 417 n.4 ("This assumes, however, that the only alternative to a false statement is a true statement. If *no statement* was an alternative, then the model is much less accurate because it measures the effect of the truth, not the effect of silence.").

113. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 343 (2005).

114. *Id.*

115. *Halliburton I*, 131 S. Ct. 2179, 2186 (2011) ("If one of those factors [other than artificial inflation caused by the statement] were responsible for the loss or part of it, a plaintiff would not be able to prove loss causation to that extent."); *Dura*, 544 U.S at 345 (holding that the securities laws "protect [investors] against those economic losses that misrepresentations *actually* cause") (emphasis added).

116. *In re* Vivendi Universal S.A. Sec. Litig., 765 F. Supp. 2d 512, 563 (S.D.N.Y. 2011).

riod.[117] Eliminating "maintenance" theory therefore would not "make it harder" for class plaintiffs to prevail; it merely would make it harder for them to prevail based on non-actionable statements.

There is another big problem with confirmatory statements that merely "maintain" price inflation without actually affecting stock price: they are irreconcilable with *Basic*'s presumption of reliance. Such statements add no new material information to the market, as the market has already incorporated the information into the stock price.[118] Because those confirmatory statements do not affect stock price, they cannot be material.[119] If they are not material, they cannot be incorporated into the integrity of the stock price.[120] Mere "confirmatory" statements thus cannot be presumptively relied upon by investors.

Halliburton I and *II* strongly undermine the kind of "maintenance" theory of loss causation that does not require statement-by-statement proof of price impact. That aspect of the theory is incompatible with the traditional understanding of the elements of loss causation and reliance. And by allowing plaintiffs to recover based on statements that did not actually cause their losses, courts adopting "maintenance" theory have run the risk of "provid[ing] investors with broad insurance against market losses" rather than protection "against those economic losses that misrepresentations actually cause."[121]

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117. *See supra* Part II.B.

118. *See, e.g.*, Greenberg v. Crossroads Sys., Inc., 364 F.3d 657, 665–66 (5th Cir. 2004) ("[C]onfirmatory information has already been digested by the market and will not cause a change in stock price. Because the presumption of reliance is based upon *actual movement* of the stock price, confirmatory information cannot be the basis for a fraud-on-the-market claim."). Note that this is not a categorical bar on confirmatory statements. Even a statement that confirms information already in the marketplace can have price impact if intervening events have cast doubt on, or caused the market to devalue, the original statement of that information. In those circumstances, however, a "confirmatory" statement reiterating that the original information was, in fact, correct, would likely introduce new artificial inflation into the stock—and would not be merely "maintaining" the stock price at all.

119. *See* Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1195 (2013) ("[I]mmaterial information, by definition, does not affect market price.").

120. *E.g.*, *Halliburton II*, 134 S. Ct. 2398, 2413–14 (2014); Basic Inc. v. Levinson, 485 U.S. 224, 248 (1988) (holding that if "the market price would not have been affected by [defendants'] misrepresentations, . . . the basis for finding that the fraud had been transmitted through market price would be gone").

121. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 345 (2005).

CONCLUSION

This Article has endeavored to begin unpacking the relationship between loss causation and price impact, an increasingly important area of securities fraud doctrine. *Halliburton I* established a fundamental, obverse relationship between the two concepts: before artificial inflation can come *out* of a stock price, it must first have *entered* the stock price because of the defendant's misrepresentation. And *Halliburton II* established that this relationship should play out on a statement-by-statement basis. Where a plaintiff cannot show that a specific statement actually affected the stock price, a court should dismiss that statement, even if a plaintiff claims that the statement merely "maintained" inflation.

Just as what goes up must come down, what goes down must at one point have gone up. And the civil plaintiff in a federal securities fraud action must tie it all to *each* challenged statement.

OUT OF THE HAZE: A CLEARER PATH FOR PROSECUTION OF ALCOHOL-FACILITATED SEXUAL ASSAULT

*ALLISON C. NICHOLS**

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INTRODUCTION

"The language of rape culture exists in everyday conversation," say bloggers on the *Huffington Post*.[1]
"The Rape 'Epidemic' Doesn't Actually Exist," counters a *U.S. News* columnist.[2]
"Rape culture exists because we don't believe it does," explains *The Nation*. "[W]e accept the degradation of women and posit uncontrollable hyper-sexuality of men as the norm."[3]
No, says Reason.com; the "rape culture crusade" is a radical feminist effort that "stigmatizes assertive male sexuality and promotes a sexual norm in which every act must be negotiated

1. Julia Kacmarek & Elizabeth Geffre, *Rape Culture Is: Know It When You See It*, HUFFINGTON POST, THE BLOG (June 1, 2013, 10:16 PM), http://www.huffingtonpost.com/julia-kacmarek/rape-culture-is_b_3368577.html.

2. Caroline Kitchens, *The Rape 'Epidemic' Doesn't Actually Exist*, U.S. NEWS (Oct. 24, 2013, 12:10 PM), http://www.usnews.com/opinion/blogs/economic-intelligence/2013/10/24/statistics-dont-back-up-claims-about-rape-culture.

3. Walter Moseley, *Ten Things to End Rape Culture*, THE NATION (Feb. 4, 2013), http://www.thenation.com/article/172643/ten-things-end-rape-culture.

in advance and undertaken with a completely rational, literally sober mind."[4]

Popular media is awash with the rape culture wars, in which feminists and traditionalists[5] accuse each other of misunderstanding the problem and even debate whether there is a problem at all. The discourse, unilluminating as it often is, reflects a new social interest in examining our collective morality concerning non-consensual sex—particularly alcohol-facilitated sexual assault—which raises important legal issues such as capacity to consent and where to allocate responsibility for the risk of misunderstandings. There is a growing recognition that although rape sometimes means a stranger with a weapon jumping out of the shadows, it more often does not.

So-called acquaintance rape[6] oftentimes transpires without outward manifestations of violence, yet is being prosecuted in a statutory framework created for one of the most violent crimes that exists. When non-consensual sex does not fit into a traditional rape framework, victims may not be believed and charges may be dropped or not brought at all. Prosecutors, the "invisible guardian[s] of our rights,"[7] are asked to vet and charge these cases and, in many jurisdictions, work with police in investigating them.

A particularly fraught area concerns alcohol-facilitated sexual assault.[8] Through several decades of activism, the "no means no" principle has very much taken root in our collective consciousness,

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4. Cathy Young, *Guilty Until Proven Innocent*, REASON, January 2014, at 26, 34, *available at* http://reason.com/archives/2013/12/17/guilty-until-proven-innocent.

5. This term is used for lack of a better one to refer to those opposed to the feminist rape law reform movement, notwithstanding that they may not be aligned on all issues.

6. Generally speaking, stranger rape refers to a crime between individuals with absolutely no prior contact. Acquaintance rape encompasses a much broader spectrum of relationships, from intimates and family to ex-lovers to individuals who meet at a party or bar the same night as the assault. From 2005 to 2010, seventy-eight percent of sexual violence involved an offender who was a family member, intimate partner, friend, or acquaintance of the victim. MICHAEL PLANTY ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010, 1 (2013).

7. David Luban, *The Conscience of a Prosecutor*, 45 VAL. U. L. REV. 1, 22 (2010).

8. Throughout, this Note uses the term "alcohol-facilitated sexual assault," mainly because the law is less developed in this area than in the area of drug-facilitated sexual assault. However, unless otherwise specified, "alcohol-facilitated sexual assault" is not intended to express the exclusion of drug-facilitated assault. Likewise, the term "intoxicated" means under the influence of alcohol, recreational drugs, medical drugs, and other substances.

and it is not uncommon for teens and college students to be taught that an intoxicated person cannot consent to sexual activity.[9] But these sentiments express moral or social constructs; legally speaking, in most states sexual contact with an intoxicated person is not a crime, provided the person willingly chose to drink or use drugs and did not lose consciousness. Hence the Internet outrage: the law has fallen behind morality for many people where alcohol-facilitated sexual assault is concerned.

This Note makes a legal and ethical case for prosecuting sexual assault of voluntarily intoxicated persons.[10] It advocates changes to black-letter law so that such assaults are addressed specifically by the criminal code rather than prosecuted under a legal framework intended for forcible, violent rape. And because the history of rape law reform demonstrates that statutory fixes alone can be insufficient to change case outcomes, this Note makes suggestions for police and prosecutor practices to improve victim experiences and conviction rates. Certain presumptions about criminal law underlie the main arguments: that a primary objective of criminal law should be to protect members of society from violence, hurt, and exploitation; that vulnerable victims are particularly deserving of such protection; that non-consensual sex is harmful; and that criminal law can and should shape social mores rather than being merely reactive to them.

Part I makes the case for criminalization of alcohol-facilitated sexual assault by examining the problems that arise in jurisdictions that criminalize non-consensual sex with a severely intoxicated person only when the perpetrator also administered an intoxicant for the purpose of vitiating the need for the victim's consent. Part II discusses the laws in those minority jurisdictions that specifically address alcohol-facilitated sexual assault. This section uses a few exem-

9. For example, Antioch College in the mid-1990s (to much ridicule) broke new ground by mandating step-by-step consent during any sexual encounter, and more recently California adopted a law requiring that all colleges receiving state funds for student financial aid adopt an affirmative consent standard for sexual activity. Campus disciplinary proceedings, however, have no bearing on criminal liability. *See generally Yes Means Yes, Says Mr Brown: Is California's New Standard for Consent the Future for America?*, ECONOMIST, Oct. 4, 2014, http://www.economist.com/news/united-states/21621819-californias-new-standard-consent-future-america-yes-means-yes-says-mr.

10. Criminal law typically treats "voluntary intoxication"—meaning that the victim freely and knowingly consumed a substance he or she knew to be alcohol or drugs—overwhelmingly differently than a situation in which the defendant deliberately slipped his victim an intoxicant without her knowledge or consent (i.e., used a date-rape drug) or otherwise injected or administered an intoxicant for the purpose of vitiating resistance or escape. Compare *infra* Part I with Part II.

plar states to illustrate statutory language in action, particularly in how states deal with the most difficult interpretive question: how drunk is too drunk to consent to sex? Part III acknowledges counter-arguments to legal protection of the voluntarily intoxicated and makes suggestions for how statutes can criminalize alcohol-facilitated sexual assault while still safeguarding defendants' rights. Part IV argues that prosecutors have an ethical obligation to bring charges and try cases involving alcohol-facilitated sexual assault because of the magnitude of the problem and because perpetrators of alcohol-facilitated sexual assault may well be serial offenders who will go on to harm additional victims. Part V addresses obstacles to successful prosecution of alcohol-facilitated sexual assault and compiles practice-oriented suggestions for prosecutors to overcome these obstacles and make convictions more likely.

I.
THE LEGAL SYSTEM FAILS THE VOLUNTARILY INTOXICATED

There is an overwhelming correlation between alcohol use and non-consensual sex. Alcohol is involved in approximately half of all sexual assaults[11] and a significant majority of acquaintance sexual assaults.[12] Alcohol's presence often facilitates the crime in several ways. Alcohol can make men more sexually aggressive and simultaneously less aware whether the woman has consented.[13] Multiple studies have confirmed that the degree of aggressor intoxication is among the most important factors in determining whether an acquaintance rape will occur.[14] As such, alcohol-facilitated sexual assault should not be considered a sub-topic or niche specialty within

11. Estimates from different studies have ranged from 34 to 74% for perpetrator alcohol consumption and 30 to 79% for victim alcohol consumption. Valerie M. Ryan, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 CAL. W. L. REV. 407, 411 n.33 (2004).

12. For acquaintance rape, about 75% of men and 55% of women consumed alcohol prior to the incident. *Id.* at 411 n. 34.

13. Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 BYU L. REV. 57, 84 (2009).

14. *E.g.*, VERNON R. WIEHE & ANN L. RICHARDS, INTIMATE BETRAYAL: UNDERSTANDING AND RESPONDING TO THE TRAUMA OF ACQUAINTANCE RAPE 20 (1995) (In a study of 236 perpetrators, 60 to 66% were using drugs or alcohol at the time of the assault.); Andrea Parrot & Laurie Bechhofer, *What Is Acquaintance Rape*, *in* ACQUAINTANCE RAPE 9, 23 (Andrea Parrot & Laurie Bechhofer eds., 1991) (calling male intoxication the "single most important factor" in acquaintance rape); Charlene L. Muehlenhard & Melaney A. Linton, *Date Rape and Sexual Aggression in Dating Situations: Incidence and Risk Factors*, 34 J. COUNSELING PSYCHOL. 186, 187 (1987) (Alcohol "reduces men's inhibitions against violence, including sexual vio-

rape law. Some states, discussed *infra* Part II, have begun treating alcohol- and drug-facilitated sexual assault distinctly, with separate statutory provisions and separate lines of case law interpreting those statutes. However, the majority of states continue to provide no separate criminal sanction for sexual contact with the voluntarily intoxicated, meaning that victims claiming non-consent will have no criminal recourse if they cannot show the statutory force or resistance requirements—elements that are often vitiated by severe intoxication.

This section will examine some of the problems with failing to treat alcohol-facilitated sexual assault as a separate and serious kind of sexual predation. Part I.A briefly outlines the evolution of rape law from its common law origins to the most common legal treatment of sexual assault: the requirement that the defendant deliberately administer an intoxicant for liability to ensue. Part I.B examines a few cases from these jurisdictions to illustrate the morally culpable conduct not captured by those states' criminal codes. Part I.C discusses how that legal framework can exacerbate evidentiary problems associated with date-rape drugs.

A. From Force and Resistance to Deliberate Administration

Today, there is a roughly widespread consensus that rape is not only a crime of violence but also a violation of sexual autonomy and bodily integrity—in other words, rape results in a harm aside from or in addition to that caused by any physical injuries.[15] Modern statutes often reflect this sentiment by using language such as "nonconsensual sexual penetration" to describe the act and by establishing enhanced culpability for crimes committed against vulnerable victims such as children or the physically or mentally impaired, irrespective of the degree of physical injury.[16] This moral and legal conception of sexual assault is a relatively recent innovation and the product of extensive and highly publicized reform efforts during

lence."); Ryan, *supra* note 11, at 411 n.34 (about 75% of men and 55% of women consumed alcohol prior to acquaintance sexual assault).

15. *See, e.g.*, Ryan, *supra* note 11, at 409.

16. *See, e.g.*, 3 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 280 (15th ed. 1995) (summarizing the use of "without consent" and similar phrases in state rape statutes); N.Y. PENAL LAW § 130.35 (McKinney 2015) (First-degree rape includes rape of a physically helpless victim and rape of a child under the age of eleven.) Rape that includes serious physical injury often results in enhanced punishment. *E.g.*, COLO. REV. STAT. ANN. § 18-3-402(5)(a)(II) (West 2015) (upgrading rape to a class 2 felony where the victim suffers serious bodily injury).

the 1970s and 1980s—a period sometimes referred to as the "first wave" of rape law reform.[17]

At common law rape was defined as carnal knowledge of a woman[18] not one's wife, forcibly and against her will.[19] To this narrow definition American courts and legislatures added additional interpretive and evidentiary glosses, including resistance,[20] corroboration,[21] and prompt complaint requirements;[22] allowed extensive

17. *E.g.*, Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1030 (2008).

18. This Note generally uses gender-neutral pronouns. Male rape is an epidemic problem in this country. The exact rates are hard to establish, as commentators routinely ignore rape committed inside prison in discussions of the prevalence of rape, which this author believes has the unfortunate effect of suggesting that rape is somehow less culpable in this context. Nonetheless, even outside of prisons one in thirty-three men has experienced a completed or attempted rape. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN, 13 (2000), https://www.ncjrs.gov/pdffiles1/nij/183781.pdf. However, where gendered pronouns appear in quotations, they are largely left as-is. And, when discussing historical trends in rape law, this Note uses female pronouns for victims, as common-law rape did not protect men.

19. 4 WILLIAM BLACKSTONE, COMMENTARIES *210 (1769).

20. The common law definition does not criminalize merely non-consensual sex, only *forcible* non-consensual sex. To determine whether a defendant used force sufficient for felony liability, courts and legislatures required proof of the victim's resistance. 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 17.4(a), Westlaw (2d ed. database updated 2015). This requirement established two conditions for female behavior: First, she must resist a rapist to the utmost of her physical capacity, and second, she must not cease resisting to the utmost until after penetration, even if further resistance appeared futile or dangerous. If a victim failed to meet both conditions, there was no rape. Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 963 (1998) [hereinafter Anderson, *Resistance*]. Resistance was thought to be probative of the elements of force and non-consent, although it also served a "gatekeeping function" to distinguish "good women" who would guard their chastity with their very life from "bad women" who were less deserving of the law's protection. I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 834 (2013).

21. The corroboration requirement reflected the widely held assumption that women frequently invent stories of rape. *E.g.*, Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967) ("A woman may accuse an innocent man of raping her because she is mentally sick and given to delusions; or because, having consented to intercourse, she is ashamed of herself and bitter at her partner; or because she is pregnant, and prefers a false explanation to the true one; or simply because she hates the man whom she accuses.").

22. The prompt complaint requirement was based on the view that delaying reporting of a crime increases the likelihood of fabrication. However, most rape victims do not report the crime at all, SHANNON M. CATALANO, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2004 10 (2005), and studies show that reporting rates are affected by victim demographics and assault characteristics, as well as vic-

examination of the victim's consensual sexual history;[23] and gave jurors cautionary instructions about a woman's penchant for lying.[24] These statutory and procedural elements often had the combined effect of making rape prosecutions traumatizing for the victims and ineffective at holding perpetrators accountable.

Even traditional rape law offered some protection to intoxicated victims who were unconscious. While the common law definition of rape did not explicitly account for a situation where force is unnecessary because the woman is unconscious, English courts generally considered intercourse with an unconscious woman to be rape.[25] Some American jurisdictions expanded protection to a woman who was asleep or physically powerless.[26] Technically, women who passed out from excessive alcohol or drug use could take advantage of these interpretations. Practically speaking, the likelihood of a successful prosecution on these facts was fairly low: as with all rape prosecutions at common law, the character of the victim effectively would be on trial, and a woman who drank to excess was less likely to be considered the sort of "good woman" the law was aimed at protecting.[27]

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tims' fear, shame, confusion, and self-blame. Amy M. Cohn et al., *Correlates of Reasons for Not Reporting Rape to Police: Results from a National Telephone Household Probability Sample of Women With Forcible or Drug-or-Alcohol Facilitated/Incapacitated Rape*, 28 J. INTERPERSONAL VIOLENCE 455, 456 (2013); Golden Millar et al., *Immediate and Delayed Treatment Seeking Among Adult Sexual Assault Victims*, 35 WOMEN & HEALTH 53 (2002).

23. A woman's previous sexual history was thought to be probative both of her consent in the case in question and of her character for honesty generally. *See, e.g.*, Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 416 (1998).

24. Courts frequently quoted to jurors verbatim a warning by the seventeenth-century English jurist Sir Matthew Hale that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 948 (2004), [hereinafter Anderson, *Legacy*] (quoting 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 635 (1971)). For examples of the Hale instruction incorporated by U.S. judges, see Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 10 (1977).

25. *See* Commonwealth v. Burke, 105 Mass. 376, 379 (1870) (citing half a dozen English cases holding that intercourse with an unconscious woman is rape, even if the defendant did not bring about her state of unconsciousness).

26. LAFAVE, *supra* note 20, at § 17.4(b).

27. Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 485 (2005) ("Courts view women who drink, especially those who drank with their assailants, as more likely to be sexually available and contributorily negligent in the subsequent assault.").

During the 1970s and 1980s, sexual assault laws were overhauled in every state.[28] Seeking to increase conviction rates while making rape prosecutions less painful and humiliating for victims, feminists partnered with tough-on-crime political conservatives to change statutory provisions and evidentiary practices and to educate judges, prosecutors, and police.[29] After the reform movement, more courts were willing to take an expansive view of "unconsciousness" to include situations where the victim is fading in and out of consciousness, as is common after heavy drinking.[30] State statutes now explicitly protect similar conditions such as being asleep, physically powerless, or physically incapacitated.[31] Reforms also included a recognition of the special danger imposed by intoxicants when used to render a woman unconscious or incapable of resisting her attacker: date-rape drugs.[32]

Today, almost all jurisdictions explicitly recognize a situation where the defendant administered a drug or an intoxicant to a victim without her knowledge or consent as meeting the elements of the state's rape or sexual assault statute.[33] The victim need not be fully unconscious to be protected in these cases where she was drugged against her will. Some jurisdictions also have enhanced

28. *See, e.g.*, Anderson, *Legacy*, *supra* note 24, at 964; Allison Menkes, *Rape and Sexual Assault*, 7 GEO. J. GENDER & L. 847, 848 n.5 (2006) (discussing the various state sexual assault statutes).

29. *See, e.g.*, Capers, *supra* note 20, at 840–41; Dressler, *supra* note 23, at 412 ("Strange bedfellows like this can produce unwanted offspring."); Virginia Blomer Nordby, *Reforming Rape Laws—The Michigan Experience*, *in* RAPE LAW REFORM 3, 5 (Jocelynne A. Scutt ed., 1980) (discussing, *inter alia*, the need to train police and educate the public).

30. *E.g.*, Commonwealth v. Erney, 698 A.2d 56, 59 (Pa. 1997) ("Because . . . the victim was intermittently unconscious throughout the assault and was at all relevant times in such impaired physical and mental condition so as to be unable to knowingly consent, her submission to intercourse was involuntary.").

31. LAFAVE, *supra* note 20 at § 17.4(b).

32. *E.g.*, TEX. PENAL CODE ANN. § 22.021(a)(2)(vi) (West 2015) (codifying as aggravated sexual assault providing or administering "flunitrazepam, otherwise known as rohypnol, gamma hydroxybutyrate, or ketamine to the victim of the offense with the intent of facilitating the commission of the offense"). *See also* The Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, H.R. 2130, 106th Cong, 2d Sess. (codified as Pub. L. No. 106-172 (2000)) (making gamma hydroxybutyric acid, a date-rape drug, a Schedule I narcotic).

33. *See* Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 173 (2002) (Falk includes American territories, federal law, and military law in her jurisdictional count. By her reckoning forty-seven of fifty-six jurisdictions include provisions for intoxicated or drugged victims in sexual assault statutes.). Accounting for updates in the law and excluding territories, this author determined that forty-two states and the District of Columbia explicitly mention intoxicants or substances.

penalties for assaults effectuated by the administration of drugs—even naming specific date-rape drugs in their statutes—or separately criminalize drugging another person for non-medical or non-therapeutic purposes.[34]

More than half the states continue to follow a rule similar to the Model Penal Code, which holds that the defendant is culpable if he "substantially impaired [the victim's] power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance."[35] These states plus the District of Columbia provide that the victim's intoxication supplies the force, non-consent, or resistance elements of sexual assault *only if* the intoxicant was administered without the victim's knowledge or consent.[36] These jurisdictions are referred to throughout this Note as "deliberate administration jurisdictions."

Deliberate administration statutes are insufficient for several reasons. First, while deliberate administration of intoxicants is a particularly heinous crime deserving of heightened penalty, drawing the line between rape and sex at deliberate administration fails to account for a significant number of non-consensual sexual encounters. When the victim is severely inebriated (but not yet unconscious), taking advantage of his or her inability to protest meaningfully is a vicious and depraved act that should be punished by criminal law. Second, the same properties that make drugs effective at debilitating victims also raise serious evidentiary problems for prosecutors. Screening for date-rape drugs must take place soon after administration, but many drugs have amnesiac effects that make timely reporting of the assault less likely. States that require proof of deliberate administration as an element of the offense may fail to protect the very victims at whom the statute was aimed, because the best evidence—the presence of drugs—is quickly lost. The amne-

34. *Id.* at 178, 183, 186.

35. MODEL PENAL CODE § 213.1(1)(b) (1962). The author has reviewed the statutory language in all fifty states. *See also* Falk, *supra* note 33, at 173.

36. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 53a-65, 53a-70 (West 2015) (defining mental incapacitation as referring to "a person who temporarily cannot appraise or control his conduct because of the influence of some narcotic or intoxicating substance, or some act (such as hypnosis), administered to him without his consent" and separately criminalizing sex with an incapacitated person); 18 PA. STAT. AND CONS. STAT. ANN. § 3121(a)(4) (West 2015) (defining rape as an offense "[w]here the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance").

siac effect of the drugs prevents some victims from seeking medical attention until after the drugs have dissipated from their bodies. The following two subsections will explain why the deliberate administration regimes offer insufficient protections by analyzing cases from those jurisdictions.

B. Deficient Justice in Deliberate Administration Jurisdictions

There is no doubt that the defendant who drugs an unwitting victim for the purpose of exploiting the ensuing incapacitation or inebriation should be subject to higher sanctions than the one who merely comes across a drunk individual and takes advantage. Administering an intoxicant can be considered a battery in its own right, often involves fraud or deception, definitively verifies victim non-consent, and requires planning or premeditation that might not otherwise be present.[37]

Still, the fact that deliberate administration is deserving of heightened punishment does not mean that it should be the only conduct punishable. Laws that only protect victims to whom substances were administered without their knowledge effectively "assign the risk of rape to the woman when she is voluntarily intoxicated."[38] "In retributive terms, treating [intoxicated] consent as valid may not fit the crime of being intoxicated."[39] The following cases illustrate both the type of morally culpable conduct not captured by criminal law in these jurisdictions, and also the "problems associated with trying to fit drug-induced sexual conduct into categories such as physical helplessness, rather than dealing more straightforwardly with the problem of reduced capacity to consent based on intoxication."[40]

A North Carolina court in *State v. Haddock* overturned a defendant's conviction on the grounds that the jury had not been properly instructed on mental incapacity.[41] After a night of heavy drinking, the victim went home with the defendant, who had served as designated driver for the evening.[42] "S.B. testified at trial that she did not know where she was when she arrived at defendant's apartment and that she soon passed out from excessive drinking, falling asleep on defendant's bed. Defendant put on a condom and had

37. Falk, *supra* note 33, at 136.
38. Ryan, *supra* note 11, at 418.
39. Alan Wertheimer, Consent to Sexual Relations 245 (2003).
40. Falk, *supra* note 33, at 148.
41. State v. Haddock, 664 S.E.2d 339 (N.C. Ct. App. 2008).
42. *Id.* at 341.

intercourse with S.B. at around 6:00 a.m."[43] Afterwards, the victim went down to the lobby of the apartment building, "where she sprawled out on the floor in a 'very intoxicated' state."[44] Police officers were summoned, and they smelled alcohol as soon as they entered the lobby.[45] The victim was taken by ambulance to a hospital, where she was evaluated for possible injuries arising from excessive alcohol consumption.[46] The defendant asserted the intercourse was consensual.[47]

After a unanimous jury found the defendant guilty of second-degree rape, an appellate court overturned the conviction. The appellate court found the jury instruction regarding mental incapacitation fatally deficient,[48] despite the fact that the jury could have returned a guilty verdict upon finding *either* that the victim was mentally incapacitated or that she was physically helpless.[49] The victim was so drunk she was sprawling on the floor of an apartment building lobby and emanating a smell of alcohol palpable to those entering the lobby doors. Yet, without considering whether the victim physically could resist sex in this condition, the court found that "the evidence essentially boils down to a 'he said/she said' version of the event."[50]

Haddock raises questions about how physical helplessness could ever be established.[51] For how long must she resist? How capably?

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43. *Id.*

44. *Id.* at 342.

45. *Id.*

46. *Id.*

47. *Haddock*, 664 S.E.2d at 342.

48. The appellate court held that the instruction was deficient because it should have included the words "due to any act committed upon the victim" to make clear that voluntary intoxication is not protected under the statute. *Id.* at 347.

49. *Id.* at 343. The court also could have deemed the error in the mental incapacitation harmless if it had found there was not a reasonable probability of a different result had a clearer instruction been given. *Id.* at 344. Additionally, the defendant failed to object to the jury instruction at trial. *Id.* at 343. The court allowed the appeal on the theory that it fit into an exception to the general rule that unpreserved errors may not be raised on appeal because the defective instruction violated the defendant's constitutional right to a unanimous jury verdict. This unusual procedural maneuver raises the inference that perhaps the court wanted to have an opportunity to hear this appeal.

50. *Haddock*, 664 S.E.2d at 347.

51. Physical helplessness is defined under North Carolina law as "(i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act." N.C. GEN. STAT. ANN. § 14-27.1(3) (West 2015).

How cogent must her communication of unwillingness be? Is anything more required to trigger a "he said, she said" case than the defendant's assertion that the act was consensual? These questions illustrate the difficulties of fitting alcohol-facilitated sexual assault into a statutory framework intended for a crime of violence.

In a case from Florida, which requires that the intoxicant be administered without the victim's knowledge, an appellate court overturned a conviction because the prosecutor failed to prove the victim was physically helpless.[52] Florida law defines "physically helpless" as when "a person is unconscious, asleep, or for any reason *physically unable to communicate unwillingness to an act*."[53] The situation involved a young girl who had initially consented to using drugs, to engaging in sex acts, and to being tied to a bed for the purpose of sex.[54] While there seems to be some dispute in the case as to which facts the court was permitted to consider, the dissent cited evidence that the victim did not consent to certain acts, that she passed in and out of consciousness, and that she remained tied to a bed dirtied with blood and feces while her assailants held a plate of cocaine under her nose.[55] In an ironic step, the majority found damning the fact that the victim was able to describe the sexual acts committed against her: "Obviously she would not be able to describe the sexual acts charged in the information if she had been unconscious or asleep during them."[56]

These two cases illustrate that in deliberate administration jurisdictions, predatory conduct inflicted on severely intoxicated individuals is extremely difficult to prosecute. The statutory provisions most states have criminalizing sexual contact with mentally incapacitated or physically helpless individuals are simply inadequate to protect victims who are incapacitated and helpless because of the voluntary consumption of drugs or alcohol. Further, these two cases offer only a snapshot of the problem of appellate courts overturning jury convictions.[57] An even greater problem is that prosecutors,

52. Coley v. State, 616 So.2d 1017, 1021 (Fla. Dist. Ct. App. 1993).

53. *Id.* at 1020 (quoting Fla. Stat. § 794.01(1)(e) (1989)).

54. *Id.*

55. *Id.* at 1025–27 (Gersten, J., dissenting).

56. *Id.* at 1020.

57. *See also, e.g.*, State v. Galati, 365 N.W.2d 575 (S.D. 1985) (overturning jury conviction because statute does not protect persons incapable of consenting to an act of sexual penetration because of an intoxicant unless the intoxicant was administered by or with the privity of the accused); State v. Hatten, 927 N.E.2d 632 (Ohio Ct. App.) (overturning jury conviction, finding insufficient evidence that the defendant knew or had reasonable cause to believe that the victim was substantially impaired where the 120-pound victim had consumed seven shots and multiple

aware of judicial hostility to voluntarily intoxicated victims, may be shying away from bringing charges at all.[58]

However, when protection for the voluntarily intoxicated is part of a gradated rape statute that criminalizes several different means of effectuating non-consensual sex, conviction is more likely even if there actually was deliberate administration. Prosecutors can ask jurors to consider alternative arguments even where evidence supports a theory that the defendant drugged the victim without the victim's knowledge or consent. The facts of *State v. Quasim*,[59] a case from a state that does criminalize intercourse with the voluntarily intoxicated, illustrate this point. The victim in *Quasim* testified that she voluntarily smoked marijuana and drank two to three small juice glasses of tequila—an amount she testified would normally have given her only a little buzz.[60] She woke up feeling as though she had been "really drugged" with no memory of the previous evening other than watching TV with the defendant.[61] The defendant "was prosecuted for rape in the second degree by forcible compulsion, and on the alternative theory that A.M. was incapable of consent due to being physically helpless or mentally incapable of resisting."[62] The jury's verdict convicted the defendant on both grounds.[63]

If the case arose in a jurisdiction holding that only the deliberate administration of an intoxicant without the victim's knowledge or consent is criminal, the same facts would begin to look less persuasive. With the victim's memory lost and in the absence of a toxicology screen identifying a substance other than marijuana and alcohol in the victim's bloodstream, the prosecutor might not be able to prove beyond a reasonable doubt the element of deliberate administration. The case begins to look more like "he said, she said." Particularly if marijuana plus three glasses of tequila seems excessive to members of the jury not themselves accustomed to con-

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beers and the defendant had previous police officer training on identifying intoxicated persons and had taken a course for a state liquor agents designed to aid in detecting drunk drivers).

58. *See infra* Part IV arguing that prosecutors have an ethical obligation to pursue these cases and Part V recommending practical strategies to prosecutors.

59. No. 65859–0–I, 2012 WL 2086961 (Wash. Ct. App. June 11, 2012) (unpublished).

60. Quasim v. Glebe, 2014 WL 3696021, No. C14–296–MJP, at *2 (W.D. Wash. July 23, 2014) (denial of habeas relief) (reciting factual history from Washington appellate court).

61. *Id.*

62. *Id.*

63. *Id.*

suming such quantities of intoxicants, they might not credit the victim's testimony that she would ordinarily only feel a small buzz and find reasonable doubt that she had been drugged. In sum, even if the victim almost certainly *was* drugged, the case gets harder to prove in a deliberate administration state.[64]

C. The Drug-Induced Haze and Problems of Proof

It is crucial to emphasize the importance of timely reporting in jurisdictions that only criminalize intercourse after deliberate administration of intoxicants. For victims who delay reporting, these statutes are hardly more than a dead letter, because the evidence of the drug will have already left their system. GHB,[65] for instance, remains detectable in the system for only twelve hours.[66] Additionally, many drugs commonly used for date rape have an amnesiac effect, such that victims may never fully piece together what happened to them and delay reporting until other clues or their friends put them on notice of what may have happened.

There is a reason certain drugs are used for date rape. Rohypnol and GHB, for example, rarely cause loss of consciousness.[67] Instead, the victim's brain rationalizes the memory void created by the drugs' amnesiac effects as a period of unconsciousness.[68] To an observer, the victim will appear to "be inebriated but able to act under her own volition. . . . 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."[69]

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64. *Quasim* is perhaps an easier case for other reasons: the victim was a lesbian who did not have sex with men, and she suffered significant physical injuries during the attack. Notwithstanding that a case lacking similar facts may present more difficulties to successful prosecution under any regime, *Quasim* still illustrates the basic point that a gradated statute offers prosecutors more opportunities to persuade a jury that criminal wrongdoing occurred.

65. Gamma hydroxybutyrate, a common date-rape drug. *Drug Fact Sheet: GHB*, DRUG ENFORCEMENT AGENCY, http://www.dea.gov/druginfo/drug_data_sheets/GHB.pdf (last visited Oct. 14, 2015).

66. Regina A. Schuller et al., *Mock Juror Sensitivity to Forensic Evidence in Drug Facilitated Sexual Assaults*, 36 INT'L J. L. & PSYCHIATRY 121, 122 (2013).

67. Emily Finch & Vanessa E. Munro, *Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study*, 45 BRIT. J. CRIMINOLOGY 25, 27 (2005).

68. *Id.*

69. *Id.* (citation omitted).

Lack of direct proof of deliberate administration is not insurmountable if substantial other evidence is available. In one case of alleged rape using drugs, the appellate court found sufficient evidence that the victim was incapable of giving consent because of drugs or an intoxicating substance administered to her without her consent and that the defendant was aware of this incapacity, despite an apparent lack of evidence in the record of the presence of, or even testing for, intoxicants in the victim's bloodstream.[70] That case contained several other pieces of evidence favorable to the prosecution.[71] Most significantly, the defendant had previously told a friend that he "wanted to take [the victim] out and gang bang her" and that "he had an idea about drugging the girl."[72] Evidence supported the victim's testimony that she had consumed only 7-Up that evening, yet experienced extreme "[d]izziness, failure of memory and weakness."[73] Such damning statements by the defendant will not always be available, and in cases where the victim has been voluntarily drinking alcohol, the fact-finder may be skeptical of her testimony that the effects of the alcohol must have surely been augmented by another intoxicant if a toxicology report is unavailable or inconclusive.[74] In another case, a serial rapist was caught when his ex-wife found a bottle labeled "Rohypnol" and a videotape documenting his assaults of three different women who had all suffered memory loss.[75] Most cases will lack this type of corroboration.

The examples in Part I illustrate injustices that arise in jurisdictions that only criminalize deliberate administration. The cases analyzed generally are not "borderline" cases or particularly close calls—they do not describe miscommunications between lovers or regret borne of hindsight, but deliberate, calculated assaults on vulnerable victims. Yet the legal structures in these jurisdictions make it extremely difficult for prosecutors to hold perpetrators accountable for their crimes, even in instances where the defendant did indeed deliberately drug his victim. The following section will examine case law in states that protect the voluntarily intoxicated.

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70. Rapetti v. James, 784 F.2d 85, 86 (2d Cir. 1986).

71. *Id.* at 86–89.

72. *Id.* at 90.

73. *Id.* at 90–91.

74. See *infra* Part V.C.2 for a discussion of the effect of expert toxicology testimony on juror decision-making.

75. Sera v. State, 17 S.W.3d 61, 69 (Ark. 2000).

II.
CRIMINAL SANCTIONS FOR SEXUAL ASSAULT OF THE VOLUNTARILY INTOXICATED

Though the majority of states still decline to criminalize conduct in which the victim was intoxicated due to drugs and alcohol she voluntarily consumed,[76] nearly half have taken steps to protect the voluntarily intoxicated against unwanted sex. These jurisdictions fall into three basic categories.

In the "definitional" model, discussed *infra* Part II.A, voluntary intoxication is addressed in the statute's definition section, typically by defining intoxication as a form of mental incapacitation. Each definitional jurisdiction then separately criminalizes sexual contact with persons who are mentally incapacitated. In the "enumeration" model, discussed *infra* Part II.B, states created a separate provision in their main rape statutes for sexual assault of intoxicated persons. Intoxication or incapacity is just one of several enumerated ways that a person can be found guilty of rape in those jurisdictions. A few states, discussed *infra* Part II.C, lack any statutory provision mentioning intoxicants. Protection for the voluntarily intoxicated is entirely judge-made in these jurisdictions.

The objective of this Part is to present the universe of states that criminalize sexual intercourse with a voluntarily intoxicated victim. To illustrate the operation of the statutory language, each of the models, including the non-statutory model, is represented by an exemplar state. The development of case law in the three exemplar states demonstrates approaches for addressing the thorniest interpretive issue for these jurisdictions: how to quantify the degree of victim intoxication necessary to separate criminally liable activity from mere drunk sex. Part II also highlights two of the most significant normative considerations any jurisdiction moving to a voluntary intoxication regime will have to address: what the prosecution should have to prove with respect to the defendant's mental state, and how severely sexual assault of the voluntarily intoxicated (absent other aggravating factors) should be graded relative to other kinds of sexual assault. Variations within each model are also noted.

Despite the different statutory approaches, the following subsections will show that the definitional and enumeration models work very similarly in practice. A rigorous study examining case outcomes in different jurisdictions could suggest that one is more helpful from a prosecutorial standpoint. But previous studies examining the effect of specific statutory reforms in other aspects of rape law

76. *See supra* notes 35-36 and accompanying text.

have concluded that black-letter law only has a partial effect on case outcomes; equally significant are the judgments and informal norms of actors in the criminal justice system.[77] It seems likely that a study of the models, controlling for other factors, would reach a similar conclusion.

Still, this Note takes the position that codification of protections for the voluntarily intoxicated is preferable to reliance on judicially created law. While all statutes require interpretation and are thus susceptible to misapplication by prosecutors or jurors, judicially created law is more vulnerable to confusion and multiple interpretations and makes a prosecutor's job more difficult. Further recommendations for codification of alcohol-facilitated sexual assault follow in Part III.

A. Definitional Model

Five states use a two-part statutory structure defining voluntary intoxication as a form of mental incapacitation and then criminalizing sexual contact with mentally incapacitated persons.[78] The focus of these statutes is on the ability of the intoxicated person to monitor his or her own behavior at the time in question—typical language is "incapable of appraising or controlling the person's own conduct."[79] The strength of this definitional statutory framework is that it puts the legal focus on the victim's mental state at the time of the assault. One difficulty is that "mental incapacitation" requires interpretation, specifically line drawing. Another weakness is that mental incapacitation due to intoxication is often sited in the same or similar sub-sections as those dealing with mental and developmental disabilities.[80] Because incapacitation due to the effects of

77. *See, e.g.*, Cassia Spohn & Julie Horney, *"The Law's the Law, but Fair Is Fair:" Rape Shield Laws and Officials' Assessments of Sexual History Evidence*, 29 CRIMINOLOGY 137, 139 (1991).

78. IOWA CODE ANN. § 709.1A.1 (West 2015); MD. CODE ANN., CRIM. LAW § 3-301(c) (West 2015); OR. REV. STAT. ANN. §§ 163.305(4), 163.375(1)(d) (West 2015); S.C. CODE ANN. §§ 16-3-651(f), 651(1)(b) (2014); WASH. REV. CODE. ANN. § 9A.44.010(4) (West 2015). Iowa actually also has a separate provision criminalizing a sexual act performed while the victim is under the influence of a controlled substance, making it a state utilizing both the definitional and enumeration models. *See* IOWA CODE ANN. § 709.4(1)(c) (West 2015).

79. *See* OR. REV. STAT. ANN. § 163.305(4) (West 2015); S.C. CODE ANN. § 16-3-651(f) (2014). Iowa's statute reads, "temporarily incapable of *apprising* or controlling the person's own conduct," but this is almost certainly a scrivener's error. IOWA CODE ANN. § 709.1A.1 (West 2015) (emphasis added).

80. *E.g.*, WASH. REV. CODE. ANN. § 9A.44.010(4) (West 2015) ("'Mental incapacity' is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse

alcohol is not particularly similar to the mental state of a person with more permanent cognitive impairments, this grouping introduces unnecessary confusion.[81]

The five states exhibit slight variations in the way they define mental capacity to engage in sexual activity. Maryland holds that a mentally incapacitated individual may be one substantially incapable of appraising the nature of that individual's conduct or substantially incapable of resisting intercourse, a sexual act, or sexual conduct.[82] Washington provides that mental incapacity "prevents a person from understanding the nature or consequences of the act of sexual intercourse."[83] Iowa and Maryland provide that the incapacitation may be caused by an "intoxicating substance," while South Carolina and Washington mention only a "substance."[84] Oregon makes no mention of possible causes of mental incapacitation, but in 2009 amended its law by deleting "because of the influence of a controlled or other intoxicating substance administered to the person without the consent of the person or because of any other act committed upon the person without the consent of the person."[85] The reason for the change was to allow for harsher punishment for sexual assault of the voluntarily intoxicated.[86]

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whether that condition is produced by illness, defect, the influence of a substance or from some other cause.") (emphasis added).

81. For example, it is not immediately clear whether case law interpreting the definition of mental incapacity in a case involving a person with a low IQ should have precedential effect for a case involving a voluntarily intoxicated person, notwithstanding that the two cases would require interpretation of the same definition in the same statute.

82. MD. CODE ANN., CRIM. LAW § 3-301(c) (West 2015).

83. WASH. REV. CODE. ANN. § 9A.44.010(4) (West 2015).

84. *See* statutes cited *supra* note 78.

85. H.B. 2343-A, 75th Legis. Assemb., Reg. Sess. (Or. 2009) (amending OR. REV. STAT.§ 163.305).

86. STAFF OF JOINT COMM. ON WAYS & MEANS, 75TH LEGIS. ASSEMB., H.B. 2324-A MEASURE SUMMARY (Or. 2009) (prepared by Tim Walker). The committee stated:

> This change would allow for possible prosecution for Rape in the first degree, Sex Abuse in the first degree, etc. in the following scenarios: A victim becomes incapable of granting consent as a result of his or her own actions, such as drinking to the point of incoherence, or due to some unforeseen factor such as illness, and then a person subjects the victim to sexual contact or intercourse. Under the current law, the person would only be charged with sex abuse in the second degree, not Rape in the first degree or Sex Abuse in the first degree. Sex Abuse 2 is a 7 on the Sentencing Guidelines Grid and a person prosecuted under this statute may receive a presumptive probation sentence, depending on their criminal history.

Id.

Arizona and Montana represent a subcategory within the definitional approach: their provisions related to intoxication or mental incapacitation are contained within their definitions of "without consent" rather than in a separate incapacitation definition.[87] Practically speaking, this minor adjustment does not seem to express different legislative intent, and the statutory regime as a whole might be slightly clearer.[88] All told, seven states utilize the definitional model.

1. Degree of Intoxication

The biggest interpretive issue with the definitional model statutes is determining how impaired the victim's appraisal or understanding needs to be before liability is triggered. The exemplar definitional model state will be Washington, which has slightly more specific statutory language than the other states. An analysis of Washington case law will show how the statute operates in specific cases.

Washington defines mental incapacity as "that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse."[89] When a defendant engages in sexual intercourse with a victim incapable of consent by reason of mental incapacity, the defendant is guilty of second-degree rape.[90] While "nature or consequences of the act of sexual intercourse" is more specific than the other states' "appraising one's conduct," there is still a range of possible interpretations that such language might suggest. Does it mean physical consequences, such as pregnancy or disease? If metaphysical consequences are included, what separates the operation

87. ARIZ. REV. STAT. ANN. § 13-1401(5)(b) (2015) ("The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For purposes of this subdivision, 'mental defect' means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another."); MONT. CODE ANN. § 45-5-501(1)(a)(ii)(A) (West 2015) (defining without consent to include a victim incapable of consent because she is mentally incapacitated). Montana then defines "mentally incapacitated" elsewhere in its criminal code, in a section setting forth general principles of liability. MONT. CODE ANN. § 45-2-101(41) (West 2015).

88. Compare to Washington's nearly identical provisions, discussed *infra* notes 89-90.

89. WASH. REV. CODE. ANN. § 9A.44.010(4) (West 2015).

90. WASH. REV. CODE. ANN. § 9A.44.050(1)(b) (West 2015).

of this criminal law from ordinary regret that might often accompany one's actions with the benefit of hindsight?[91]

Washington begins to address these gray areas through pattern jury instructions that explain the provision's operability.[92] They specify that a superficial understanding of intercourse is not sufficient.[93] Rather, liability "is appropriate where the jury finds the victim had a condition which prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse."[94]

Court decisions give further guidance on how to interpret "meaningful understanding." In *State v. Ortega-Martinez*, the Washington Supreme Court held that meaningful understanding encompasses more than the "physical mechanics" of sexual intercourse; it also includes factors such as the development of emotional intimacy between sexual partners, the fact that intercourse can result in a disruption in established relationships, and its association with pregnancy, disease, and in rare occasions even death.[95] While none of these indicia of understanding are explicitly required, they are important for the "trier of fact to bear in mind."[96] *Ortega-Martinez* concerned a victim with an IQ in the forties who lived in a facility with twenty-four-hour staff support, which illustrates one of the biggest flaws with the definitional model. Though it is better to have a statutory provision addressing victim incapacity than to try to treat the condition within the force or resistance requirements of traditional rape law, it makes little sense to situate these provisions in the same or similar sub-sections as those dealing with mental and developmental disabilities. It is not at all self-evident that the mental incapacity resulting from extreme intoxication is similar to that resulting from a more permanent state of impaired intellectual

91. A widely held rape myth, see *infra* note 235, is that women "cry rape" when they experience "buyer's remorse" about their own bad decisions. Feminist readers should not interpret my question as endorsing the view that "some girls rape easy." *See* Amanda Terkel, *Roger Rivard Loses Reelection to Wisconsin Assembly After Saying 'Some Girls Rape Easy'*, HUFFINGTON POST (Nov. 7, 2012, 4:26 PM), http://www.huffingtonpost.com/2012/11/07/roger-rivard-reelection-wisconsin-assembly_n_2089654.html. Rather, a person can fail to understand the nature and consequences of any number of decisions, such as attending a particular college or accepting a particular job offer. For criminal law to have legitimacy, it must clearly separate such ordinary consequences from consequences that trigger criminal liability.

92. 11 Wash. Prac. Pattern Jury Instructions: Criminal 45.05 (3d ed. 2005) (citing State v. Ortega-Martinez, 881 P.2d 231, 237 (Wash. 1994)).

93. *Id.*

94. *Id.*

95. State v. Ortega-Martinez, 881 P.2d 231, 237 (Wash. 1994).

96. *Id.*

and adaptive functioning. Maryland has separate definitions for "mentally defective" individuals who suffer from mental retardation or a mental disorder and "mentally incapacitated" individuals who are under the influence of an intoxicating substance.[97] But the language for the two definitions is virtually identical, so the separation may have little practical effect.

Significantly, Washington has applied the holding of *Ortega-Martinez* to cases of intoxicated victims. In *State v. Al-Hamdani*, an appellate court quoted extensively from *Ortega-Martinez* in upholding the conviction of a defendant who argued that the severely intoxicated victim was aware of the nature and consequences of sexual intercourse because she was an adult and a mother.[98] He also asserted that his own expert's testimony about short-term memory loss caused by alcohol consumption showed that the victim could have been conscious and consented to intercourse but have no memory of her consent later.[99] The court held that the jury could have reasonably concluded based on the testimony "that she was debilitatingly intoxicated at the time of sexual intercourse" and accordingly incapable of meaningful understanding.[100] The victim estimated she had consumed at least ten alcoholic drinks; expert testimony placed her estimated blood alcohol level between 0.1375 and 0.21 at the time of the assault.[101] A witness corroborated the victim's testimony that prior to the assault she was "stumbling, vomiting, and passing in and out of consciousness."[102]

The evidence that the victim in the *Al-Hamdani* case was unconscious for part of the assault makes the case easier than it would otherwise have been. A significantly more difficult case for a jury to evaluate would require a determination of whether a victim was "debilitatingly intoxicated" without having ever lost consciousness. In an unpublished opinion with no precedential effect under Washington practice rules,[103] an appellate court upheld a conviction in a case that lacked evidence of the victim's blood alcohol level and in which the victim could not estimate the number of drinks she con-

97. *Compare* MD. CODE ANN., CRIM. LAW § 3-301(b), *with* MD. CODE ANN., CRIM. LAW § 3-301(c).

98. State v. Al-Hamdani, 36 P.3d 1103, 1107 (Wash. Ct. App. 2001).

99. *Id.*

100. *Id.* at 1108.

101. *Id.* For context, this BAC range is nearly two to three times the legal limit for adult drivers in Washington. *See* WASH. STATE DEPT. OF LICENSING, DUI (DRIVING UNDER THE INFLUENCE), http://www.dol.wa.gov/driverslicense/dui.html (last visited Mar. 18, 2015).

102. *Al-Hamdani*, 36 P.3d at 1108.

103. Wash. R. Gen. Application 14.1(a) (citation of unpublished opinions).

sumed. But again in that case, the victim's description of her level of intoxication included passing in and out of consciousness.[104]

The dearth of cases interpreting Washington's mental incapacity statute where the victim was intoxicated but not to the point of passing in and out of consciousness could be explained by several factors. It may be that prosecutors are bringing such cases and jurors are acquitting defendants, suggesting a loose consensus that that level of intoxication sufficient for mental incapacity is that hovering at or near the loss of consciousness. It may also be that prosecutors are not bringing such cases, either out of their own belief that such a level of intoxication is not high enough to trigger the statute or out of a concern that jurors would not convict. Another possibility is that individuals are not reporting such experiences as crimes. A study examining details from crime reports in Washington, along with an analysis of attrition of such crimes through the criminal justice system, could begin to answer questions about what is happening.

What should be happening is another matter. Where the statute does not specify that unconsciousness is required, prosecutors and jurors should not read it in as an additional element of the crime, particularly as Washington has a separate definitional provision covering people who are unconscious.[105]

2. Mens Rea

Under Washington law the defendant's knowledge that the victim was mentally incapacitated such that the person was prevented from understanding the nature or consequences of the act of sexual intercourse is not an element of the offense. Rather, the defendant may prove by a "preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless" as an affirmative defense.[106] At least one state court has rejected a defendant's argument that the state should have to prove the defendant's knowledge of the victim's incapacity as recently as 2013.[107]

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104. State v. Digerlamo, No. 69308-5-I, 2014 WL 953498, at *3 (Wash. Ct. App. Mar. 10, 2014) (unpublished opinion).

105. WASH. REV. CODE ANN. § 9A.44.010(5) (West 2015).

106. WASH. REV. CODE ANN. § 9A.44.030(1) (West 2015).

107. *See* State v. Mohamed, 301 P.3d 504, 508 (Wash. Ct. App. 2013), *review denied*, 178 Wash. 2d 1019 (Wash. 2013) (interpreting § 9A.44.030(1) in the context of affirming a conviction for indecent liberties, which punishes sexual contact that falls short of rape).

3. Seriousness of Offense

Sexual intercourse with a person who is incapable of consent by way of mental incapacitation due to intoxication is second-degree rape in Washington, a Class A felony.[108] This is the same level of culpability as that of crimes of forcible rape, which means "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped."[109] First-degree rape is reserved for offenses committed with a deadly weapon or by feloniously entering the building or vehicle where the victim is located or that include kidnapping or serious physical injury.[110] Compared to the other states in the definitional category, Washington is about average in how seriously it treats alcohol-facilitated sexual assault.[111]

B. Enumeration Model

Seven states—California, Iowa, Idaho, Kansas, Louisiana, South Dakota, and Wisconsin—created a separately enumerated provision for sexual assault of intoxicated persons.[112] Almost all the enumeration model statutes contain gradations in levels of seriousness of the offense, and it is more common for those gradations to be contained within a general subsection, such as "Rape Defined" or "Sexual Assault," than in smaller and more specific subsections. The enumeration model solves one of the weaknesses of the definitional model in that it does not lump alcohol-facilitated sexual assault in with the dissimilar offense of rape of the mentally and developmentally disabled.[113] Just as it makes little sense to prose-

108. WASH. REV. CODE ANN. § 9A.44.050(1)(b) (West 2015).

109. WASH. REV. CODE ANN. § 9A.44.010(6) (West 2015).

110. WASH. REV. CODE ANN. § 9A.44.040 (West 2015).

111. The comparable offense in Iowa is third-degree sexual abuse, a Class C felony. IOWA CODE ANN. § 709.4(2) (West 2015). In Maryland it is rape in the second-degree, with a penalty range of fifteen to twenty years. MD. CODE ANN., CRIM. LAW § 3-304 (West 2015). In Oregon first-degree rape is a Class A felony, OR. REV. STAT. ANN. § 163.375 (West 2015), and in South Carolina the comparable offense is criminal sexual conduct in the third degree, a third degree felony, S.C. CODE ANN. § 16-3-654 (2014).

112. CAL. PENAL CODE § 261(a)(3) (West 2015); IDAHO CODE ANN. § 18-6101(5) (West 2015); IOWA CODE ANN. § 709.4(1)(c) (West 2015); KAN. STAT. ANN. § 21-5503(a)(2) (West 2015); LA. REV. STAT. ANN. § 14:43(A)(1) (2015); S.D. CODIFIED LAWS § 22-22-1(4) (2015); WIS. STAT. § 940.225(2)(cm) (2015).

113. See discussion of interpretations of "mental incapacity," in Part II.A.1, *supra*, noting that the mental incapacity resulting from extreme intoxication is not cognitively similar to that resulting from developmental disabilities.

cute alcohol-facilitated sexual assault within statutory language directed at violent and forcible rape,[114] equating the mental incapacity that results from drunkenness with the mental functioning of the developmentally disabled is likely to generate confusion in how to apply legal standards and poorly serve both sets of victims.[115] Further, it is simpler and more straightforward to organize a statute with one provision articulating different forms of rape, rather than to cross-reference to a definitional section to determine liability.

However, the enumeration states face the same interpretive difficulties as the definitional states. For both groups, the question remains how prosecutors and courts should judge the effect of the intoxicant on the victim's capacity to consent meaningfully to sexual activity. In the enumeration model, there are two different ways of articulating that standard. In three states, sexual intercourse with an intoxicated person is a crime if the person was *prevented from resisting* by the intoxicant.[116] In the remaining four, it is a crime if the intoxicant rendered the victim *incapable of giving consent*.[117] As the following analysis using California as the exemplar state shows, the two standards are not actually different in practical effect—both are simply attempts to quantify the effect the intoxicant must have on the victim to meet the elements of the crime.

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114. *See supra* notes 6–10 and accompanying text.

115. The British Psychological Society, among others, cautions against oversimplified attempts to equate impaired intellectual functioning, as from disability, with developmental scales designed for other purposes. THE BRITISH PSYCHOLOGICAL SOCIETY, LEARNING DISABILITY: DEFINITIONS AND CONTEXTS 9 (2000), http://www.bps.org.uk/system/files/documents/ppb_learning.pdf ("[A]ttempts to derive extrapolated IQ scores from the use of developmental scales or child intelligence tests constitutes extremely dubious practice and is not recommended. Likewise, the practice of referring to 'mental age' when reporting on the level of intellectual or social functioning of adults should be avoided."). Additionally, there is at least one case of an appellate court overturning a conviction in a case involving a drugged victim because the statutory category "mentally incapable" was limited to mentally retarded or defective persons, not those who are drugged. *See* Falk, *supra* note 33, at 190.

116. Those states are California, Idaho, and Louisiana. *See* § 261(a)(3), § 18-6101(5), § 14:43(A)(1), *supra* note 112. The Louisiana statute says "incapable of resisting or of understanding the nature of the act." § 14:43(A)(1).

117. Iowa, Kansas, South Dakota, and Wisconsin use consent language. *See* § 709.4(1)(c), § 21-5503(a)(2), § 22-22-1(4), § 940.225(2)(cm), *supra* note 112.

1. Degree of Intoxication

California uses the language "prevented from resisting by any intoxicating or anesthetic substance."[118] The use of resistance language evokes an earlier era in rape law when culpability required the victim to resist to the utmost, even at risk of her life.[119] However, California courts have explained that this provision does not require active resistance; rather, the element is met if the victim is "robbed of judgment by intoxicants."[120] At issue is not the victim's actual consent, but her ability to give legal consent.[121] This liberal interpretation is supported in part by the fact that even before California's rape statute was revised, the state's resistance requirement did not require the victim to exert physical force; verbal resistance was sufficient.[122] Accordingly, in California the "prevented from resisting" requirement is simply a way of characterizing the victim's capacity to give consent, which is determined by the effect of alcohol on her judgment.[123]

The standard of being "robbed of judgment due to the effect of intoxicants" is akin to the definitional model standard of prevention of "meaningful understanding." And, it suffers from a similar line drawing problem: how is the fact-finder to determine the degree to which a victim must be robbed of judgment before finding the defendant guilty of rape? California courts have offered several interpretations. The *Giardino* court explained that "[l]egal capacity is the ability to exercise reasonable judgment, i.e., to understand and weigh not only the physical nature of the act, but also its moral character and probable consequences."[124] The fact-finder should consider the victim's age and maturity.[125] "It is not enough that the victim was intoxicated to some degree, or that the intoxication re-

118. CAL. PENAL CODE § 261(a)(3) (West 2015).

119. *See supra* note 20 and accompanying text.

120. People v. Giardino, 82 Cal. App. 4th 454, 461 (2000).

121. *Id.*

122. *Id.* at 462 (citing People v. Peckham, 232 Cal. App. 2d 163, 165-68 (1965); People v. Austin, 198 Cal. App. 2d 669, 673-75 (1961); People v. Cook, 10 Cal. App. 2d 511, 512-16 (1935)).

123. Compare Louisiana's interpretation of its resistance language: "A defendant may be convicted of simple rape when the victim's capacity to resist was negated by an abnormal condition or state of mind produced by alcohol consumption. In the present case, there was evidence of alcohol consumption by the victim and of an *alcohol-influenced state of mind*." State v. Porter, 93-1106, p. 7–9 (La. 7/5/94); 639 So.2d 1137, 1143 (emphasis added).

124. *Giardino*, 82 Cal. App. 4th at 466. Compare this language to the Washington courts' interpretation, discussed *supra*, text accompanying notes 89–96.

125. *Giardino*, 82 Cal. App. 4th at 466.

duced the victim's sexual inhibitions[,]" as not all levels of intoxication prevent the exercise of reasonable judgment.[126] This instruction does still require application and interpretation by the jury, but it is likely no more difficult for a juror to interpret than the many other areas in the law referring to "reasonableness," such as reference to the reasonable man in the duty of care context or proof beyond a reasonable doubt in criminal prosecutions.

The *Giardino* court also noted with skepticism that the day after the alleged assault, the alleged victim "amicably associated with [the defendant] without indicating in any fashion that she would have made different decisions the night before had she not been under the influence of alcohol."[127] While evidence that the victim subjectively believes that her own judgment was severely impaired by the effect of intoxicants would seem to be a necessary condition to prosecution under this statute, courts should be wary of putting too much weight on evidence that but-for the intoxicant she would have made different choices, simply because this evidence is virtually never available to a factual certainty. Sometimes a victim may be able to give convincing testimony that she would not have engaged in intercourse absent the influence of intoxicants, such as if she is a lesbian[128] or if a subsequent medical exam recovers a tampon painfully lodged inside her and she testifies that she would not have had intercourse while menstruating or would not have had intercourse without removing a tampon.[129] But most of the time, such clear and simple explanations will be lacking.

In another California appellate court case, the defendant objected to the following jury instruction as insufficient for failing to distinguish between affirmative exercise of poor judgment and inability to exercise reasonable judgment:[130]

> A person is prevented from resisting if she is so intoxicated that she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable

126. *Id.*

127. *Id.* at 470.

128. *E.g.*, State v. Quasim, No. 65859–0–I, 2012 WL 2086961, at *3 (Wash. Ct. App. June 11, 2012) (unpublished).

129. Because direct evidence of non-consent will so often be lacking, prosecutors should be comprehensive in interviewing victims about their sexual habits to elicit ways in which the night of the assault might have differed from their usual behavior. For additional recommendations on prosecuting sexual assault, see *infra* Part V.

130. People v. Smith, 191 Cal. App. 4th 199, 204 (2010).

> consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved.[131]

The appellate court held that the instruction adequately distinguished between poor judgment and the legal standard of reasonable judgment, observing: "[E]ven a poor judgment is a reasonable judgment so long as the woman is 'able to understand and weigh the physical nature of the act, its moral character, and probable consequences.'"[132] California practice guidelines further explain that the statute expresses terms and ideas jurors are capable of interpreting based on their common understanding: "There are commonly recognizable indications of a person's intoxication, including an odor of alcohol and slurring of speech and unsteadiness, that enable one to reasonably determine if another no longer has the ability to resist."[133]

2. Mens Rea

As is common in the enumeration category, California stipulates the mens rea requirement in the text of the statute. The victim's condition must have been "known, or reasonably should have been known by the accused."[134] California courts have held that jurors are capable of applying this standard to determine whether the victim was too intoxicated to resist.[135] The "knew or should have known" standard is common in the enumeration category; Iowa and Louisiana also have this requirement, and Kansas has the very similar "known or reasonably apparent" standard.[136] Wisconsin has a much more stringent mens rea requirement. Culpability follows

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131. *Id.*

132. *Id.* at 205.

133. GEORGE BLUM ET AL., 18 CAL. JUR. 3D, CRIMINAL LAW: CRIMES AGAINST THE PERSON § 534 (updated Aug. 2015). Compare State v. Chaney, 5 P.3d 492 (Kan. 2000), where the Kansas Supreme Court explicitly declined to define the degree of intoxication required for a rape conviction under the law of Kansas, another state using the enumeration model. "Like force or fear, incapacity to consent is a highly subjective concept. It is not one which lends itself to definition as a matter of law. In *Borthwick,* we declined to define in absolute terms the degree of force required to sustain a rape conviction. Our holding here is no different." *Id.* at 498. Because "[l]ay persons are familiar with the effects of alcohol," great deference is due to a jury's finding. *Id.*

134. CAL. PENAL CODE § 261(a)(3) (West 2015).

135. *See, e.g.*, People v. Linwood, 105 Cal. Rptr. 2d 73, 79 (2003) (quoting People v. Rodriguez, 726 P.2d 113, 147 (Cal. 1986)) ("[T]he average juror has the ability to cull from everyday experience a standard by which to assess the ability of a defendant to know the status of his or her victim.").

136. IOWA CODE ANN. § 709.4(1)(c) (West 2015); LA. REV. STAT. ANN. § 14:43(A)(1) (2015); KAN. STAT. ANN. § 21-5503(a)(2) (West 2015).

only where "the defendant has actual knowledge that the person is incapable of giving consent and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent."[137]

3. Seriousness of Offense

In California, rape of an adult is punishable by imprisonment of three, six, or eight years. The California rape statute makes no facial distinction among forcible rape, rape of the physically disabled, rape of the voluntarily intoxicated, and so forth. Rather, whether a defendant gets sentenced to the lower, middle, or upper range depends on the aggravating or mitigating factors of the offender or of the offense, such as criminal history or whether a weapon was involved.[138] California's system may be unique, but the other states in the enumeration category similarly offer a range of gradations and punishments.[139]

C. Judicially Constructed Protections

Only a few states in the country entirely omit any mention of intoxicants from their rape law provisions. Courts in those states are faced with the decision of whether to protect the voluntarily intoxicated through broad interpretations of other elements of the state's rape law.[140] North Carolina courts have expressly declined to do so, adopting a strict construction of the North Carolina provision on mental incapacity.[141] Massachusetts and Nebraska courts have both

137. WIS. STAT. § 940.225(2)(cm) (2015).

138. *See, e.g.*, People v. Wilson, 187 P.3d 1041, 1075 (Cal. 2008).

139. Iowa's enumerated provision is in the same category of offense as its definitional provision, sexual abuse in the third degree or Class C felony. *Compare* IOWA CODE ANN. § 709.4(2) (West 2015), *with* IOWA CODE ANN. § 709.2, § 709.3 (West 2015). *See also supra* note 78. In Idaho, rape may be punishable by anywhere from one year to life in prison at the discretion of the trial judge. IDAHO CODE ANN. § 18-6104 (West 2015). Kansas law calls rape of the voluntarily intoxicated a "severity level 1, person felony"—the same categorization as forcible rape and rape of an unconscious or physically helpless victim. KAN. STAT. ANN. § 21-5503(b)(1)(A) (West 2015). Rape of an intoxicated person is "simple rape" in Louisiana, punishable by a maximum sentence of twenty-five years. LA. REV. STAT. ANN. § 14:43(A)(1) (2015). In South Dakota, rape when the victim is intoxicated is third-degree rape, a Class 2 felony. S.D. CODIFIED LAWS § 22-22-1 (2015). In Wisconsin, rape of the voluntarily intoxicated is second-degree rape, a Class C felony. WIS. STAT. § 940.225(2)(cm) (2015).

140. *See* Falk, *supra* note 33.

141. State v. Haddock, 664 S.E.2d 339, 346 (N.C. Ct. App. 2008); *see also supra* notes 41–50 and accompanying text.

construed their statutes broadly to include criminal liability for intercourse with intoxicated persons.[142]

Georgia represents the confusion that can arise when legislatures defer to courts the responsibility of addressing intoxicants and rape. In dicta, Georgia's highest court interpreted the rape statute's force requirement as fulfilled by "constructive force," when the victim is intoxicated, meaning "the use of force as is necessary to effect the penetration made by the defendant."[143] The constructive force doctrine has not been uniformly applied in subsequent cases,[144] and a separate line of Georgia cases criminalizes intercourse with a woman "whose will is temporarily lost from intoxication."[145] Lack of legislative direction leading to disjointed judicial interpretation can make a prosecutor's job more difficult.[146] Massachusetts will serve as the exemplar state for the judicial construction category, as its case law is the most developed.

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142. *See* Commonwealth v. Burke, 105 Mass. 376 (1870); State v. Rossbach, 650 N.W.2d 242, 248-50 (Neb. 2002).

143. Drake v. State, 236 S.E.2d 748, 751 (Ga. 1977), *superseded by statute on other grounds*, GA. CODE ANN. § 16-6-1(a)(2), *as recognized in* State v. Lyons, 568 S.E.2d 533, 535 (Ga. 2002). Drake concerned the appeal of a man convicted of forcibly raping his nine-year-old daughter. The court raised the intoxication issue to distinguish cases where lack of consent imputes force, as when the victim is intoxicated, drugged, or mentally incompetent, from statutory rape cases, in which non-consent is not an element of the crime. *Id.* at 750.

144. *Compare* Demetrios v. State, 541 S.E.2d 83, 86 (Ga. Ct. App. 2000) (evidence sufficient to supply the element of constructive force in a case where the defendant injected the victim with an unknown drug and argued on appeal that she was not so drugged as to be incapable of attempting to prevent him from having intercourse with her), *and* Baise v. State, 502 S.E.2d 492, 496 (Ga. Ct. App. 1998) (constructive force doctrine applied to a case involving a mentally incompetent victim), *with* Melton v. State, 639 S.E.2d 411, 419 (Ga. Ct. App. 2006) (declining to apply constructive force doctrine to aggravated sodomy because nonconsensual but unforced sodomy is covered by a sodomy statute).

145. Paul v. State, 240 S.E.2d 600, 602 (Ga. Ct. App. 1977) (finding evidence sufficient to sustain the jury's verdict of rape when expert testimony indicated the victim's blood alcohol content was 0.23%).

146. Professor Falk cites Georgia and Massachusetts cases in which the judge or prosecutor misstated established case law. In Georgia, the prosecutor ignored the established "constructive force" doctrine and argued that the drugged and assaulted victim was mentally incapable. The convictions were overturned on appeal because Georgia's provision for mental incapability was limited to mentally retarded or defective people. In the Massachusetts case, *Commonwealth v. Tatro*, 676 N.E.2d 843 (1997), the court, according to Professor Falk, gave "an erroneous and non-responsive answer" to a jury query whether Massachusetts law included intoxication or inability to consent as an element of force. *See* Falk, *supra* note 33, at 189-90.

In 1870, the Massachusetts Supreme Court in *Commonwealth v. Burke* defined rape as carnal intercourse with a woman the defendant knew to be "wholly insensible so as to be incapable of consenting."[147] The court specifically mentioned drugs and alcohol:

> If it were otherwise, any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take even by the defendant himself, would be unprotected from personal dishonor. The law is not open to such a reproach.[148]

Burke is good law and continues to be cited by Massachusetts courts.[149] Even more so than "meaningful understanding"[150] or "prevented from resisting,"[151] the meaning of "wholly insensible" under Massachusetts law requires explication. Because the phrase is "archaic and confusing," jury instructions must be given concerning capacity to consent.[152] The instruction should "communicate to the jury that intoxication must be extreme before it can render a complainant incapable of consenting to intercourse."[153] But "[t]he law does not require that the complainant have been rendered 'unconscious or nearly so' before she may be deemed past the point of consent."[154] Evidence such as that the victim was visibly physically impaired, that her legs were giving out, that she felt confused, that she suffered memory loss, or that she was unable physically to resist or move can support a finding that she was "wholly insensible so as to be incapable of consenting."[155]

The mens rea requirement in Massachusetts is knowledge: the defendant must have known that the victim was incapable of consenting.[156] The judicial construction categorizes intercourse with an intoxicated victim under MASS. GEN. LAWS ANN. ch. 265, § 22(b),[157] which is the less serious of two statutory provisions ad-

147. Commonwealth v. Burke, 105 Mass. 376, 380 (1870).

148. *Id.* at 381.

149. *E.g.*, Commonwealth v. Urban, 853 N.E.2d 594, 598 (Mass. App. Ct. 2006) (holding the trial judge's instructions were deficient "[f]inally, and perhaps most important[ly]" because they "lacked any reference to the 'wholly insensible' language derived from *Burke*").

150. WASH. REV. CODE. ANN. § 9A.44.050(1)(b) (West 2015).

151. WASH. REV. CODE ANN. § 9A.44.010(6) (West 2015).

152. Commonwealth v. Blache, 880 N.E.2d 736, 743 (Mass. 2008).

153. *Id.* at 743 n.14.

154. *Id.* at 742–43.

155. Commonwealth v. Jansen, 942 N.E. 2d 959, 967 (Mass. 2011).

156. Commonwealth v. Burke, 105 Mass. 376, 380 (1870); *Blache*, 880 N.E.2d at 744.

157. *See, e.g.*, *Blache*, 880 N.E.2d at 738.

dressing rape of adult victims.[158] The offense carries no minimum or maximum sentence, unless committed with a weapon, in which case there is a mandatory minimum of ten years for a first-time offense.[159]

Georgia's two disjointed lines of cases and Massachusetts's vague "wholly insensible" language[160] illustrate problems associated with criminalizing alcohol-facilitated sexual assault in the absence of a specific statute. Though all statutes require interpretation and any criminalization of alcohol-facilitated sexual assault will present line-drawing problems for jurors to solve, both the definitional and enumeration models are preferable to statutory silence, given the magnitude of the problem.[161] The following section presents additional recommendations for jurisdictions considering drafting an alcohol-facilitated sexual assault statute.

III.
THE CASE FOR SPECIFIC STATUTORY TREATMENT OF ALCOHOL-FACILITATED SEXUAL ASSAULT

The American legal system has moved far beyond its common law roots. The criminal law is codified, and because alcohol-facilitated sexual assault is a significant portion of the number of sexual assaults, it should be addressed in specific, individualized statutory provisions aimed at protecting the voluntarily intoxicated. Trying to fit alcohol-facilitated sexual assault into statutory provisions meant for other types of rape causes confusion and raises unnecessary barriers to successful prosecution.[162]

There are two central objections to legal protections for the voluntarily intoxicated, elaborated upon in Part III.A, *infra*. One argument is that criminalization of alcohol-facilitated sexual assault is unfair to men who were also extremely drunk during the encounter. Why, the argument goes, should men bear all the responsibility for staying sober? The second argument is even broader, touching on the role of criminal law in a free society: criminalization of alcohol-facilitated sexual assault will make illegal a great deal of mutu-

158. Compare MASS. GEN. LAWS ANN. ch. 265, § 22 (West 2015) ("[T]he offense described in subsection (b) shall be a lesser included offense to that described in subsection (a).").

159. MASS. GEN. LAWS ANN. ch. 265, § 22(b) (West 2015).

160. *See supra* notes 143–155.

161. *See* Ryan, *supra* note 11, at 411 ("The prevalence of acquaintance rape must be understood in context of the close relationship between alcohol and sexual assault.").

162. *See supra* Section I.B.

ally desired sexual activity between adults. On a philosophical level, criminalization of private sexual activity between consenting adults is repugnant to many. Practical concerns include that criminalization of activities widely engaged in leads to net-widening and the threat of abuse that comes with the discretion to prosecute such cases. These counterarguments to this Note's position raise important considerations, and will be treated carefully. However, in the end, these considerations do not weigh significantly against the need to address alcohol-facilitated sexual assault with specific, individualized statutory language.

Part III.B, *infra*, will lay out this Note's main recommendations for successful and fair alcohol-facilitated sexual assault statutes. References will be made to the examples provided by those states that do protect the voluntarily intoxicated, discussed *supra* Part II, and to some lessons provided by previous rape law reform efforts.

A. Analysis of Counter-Arguments to Protection for the Voluntarily Intoxicated

There are two significant arguments against criminalization of sexual conduct with an individual who is severely but voluntarily intoxicated. The first, which generally assumes that the initiators of intoxicated sexual encounters are men, contends that it is unfair to place the responsibility for staying sober solely on the man. A man who misjudged the degree of incapacitation of his date while himself inebriated should not be labeled a rapist, the argument goes. The second main critique is that the proposals in this Note would criminalize consensual and voluntary sexual conduct. The contention is that criminal law should not declare private sexual activity to be immoral and harmful when the parties engaged in the activity have freely chosen it. These arguments will be analyzed more thoroughly in the following subsections, but in brief, both concerns pale in comparison to the rampant problem of unpunished sexual assault committed against vulnerable victims.

1. The Problem of Mutual Intoxication

The first main criticism is that it is not fair for intoxicated defendants—usually men—to be labeled rapists because of sexual miscommunications that occurred when their judgment was impaired.[163] Culpability in this context, the argument goes, punishes

163. *See, e.g.*, MODEL PENAL CODE § 213.1. Comment at 315 (1980) (Because liquor and drugs are "common ingredients in the ritual of courtship" it is "unrealistic and unfair to assign to the male total responsibility for the end result.").

men for having drunk sex and lets women whose impairment contributed to sexual miscommunications disclaim agency for their actions.[164] Recall that in most cases of acquaintance rape, both parties had been drinking.[165] It is important to examine this critique in the context of basic criminal law principles.

Broadly speaking, "voluntary intoxication is not a defense to the commission of a crime."[166] Some states enshrine that common law rule with statutes specifically forbidding any intoxication defense to criminal liability, while others take the opposite approach and permit a voluntary intoxication defense any time intoxication would negate one of the required elements.[167] Other jurisdictions have taken various middle-ground positions, including retaining the common law distinction between general- and specific-intent crimes.[168] Rape is typically considered a general-intent crime,[169] meaning that "general malice or its equivalent" is presumed "by showing that the defendant engaged in the prohibited conduct."[170] By contrast, intoxication may be a defense to a specific-intent crime if the state of intoxication prevents the defendant from forming the mental state necessary to sustain a conviction.[171]

There are strong policy arguments on both sides of the debate. One of the most important principles in criminal law is that there can be no culpability without a guilty mind.[172] If intoxication prevents such a mental state from forming, then holding the accused

164. Karen M. Kramer has compiled a number of studies demonstrating "the tendency to excuse men for alcohol-related sexual violence [despite] the fact that some men deliberately use alcohol as a weapon for sexual aggression." Karen M. Kramer, Note, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 119–24 (1994). Also see Ryan, *supra* note 11, at 420–23, for a discussion of juror reticence to hold men accountable when evidence indicates they were intoxicated during the assault.

165. *See supra* notes 11–12.

166. 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 111, at 81 (15th ed. 2015) [hereinafter 2 WHARTON'S].

167. 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSE § 65 (1984).

168. *Id.*

169. *See* Douglas N. Husak and George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 L. & PHIL. 95, 99 (1992) ("American courts usually construe rape as a 'general' intent offense.").

170. 2 WHARTON'S, *supra* note 166, § 111, at 103.

171. ROBINSON § 65, *supra* note 167. Some commentators argue that any distinction regarding the effect of voluntary intoxication between general- and specific-intent crimes is unprincipled: "[I]f intoxication does in fact negative an intention which is a required element of the crime (whether it be called specific intent or general intent), the crime has not been committed." LaFave, *supra* note 20, at § 9.5.

172. LaFave, *supra* note 20, at § 5.1.

criminally liable is unjust, as LaFave argues.[173] But such a position could lead to social chaos if individuals realize that drunken criminal activity will go unpunished, which is a large part of why common law provided that an accused who voluntarily became drunk chose the consequences that flowed from his drunkenness.[174] Imagine, for instance, if drunkenness were a defense to drunk driving: every person arrested could argue that she was too drunk to know that she was too drunk to drive. The very facts that established her culpability—field sobriety tests, breathalyzers, eyewitness reports of erratic driving—would also exonerate her.

This Note takes a skeptical view towards intoxication as a defense to alcohol-facilitated sexual assault. People even passingly familiar with the effects of alcohol should know that it impairs judgment and increases the risk of social miscommunications.[175] Under those circumstances, the *initiator* of sexual activity—whether male or female—should take additional precautions to ensure that his or her sexual advances are welcomed and desired by a potential partner. Professor Christine Chambers Goodman advocates a sliding scale where increasingly explicit consent is required as alcohol consumption increases.[176] This would not seem to be too much to ask. People engaged in social drinking, even binge drinking, routinely take a variety of precautions against their own drunk selves, such as giving their car keys to a friend or enabling an app on their phone that will block them from texting or calling an ex-partner later in the evening against their better judgment.[177]

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173. *Id.* at § 9.5.

174. R. W. Gascoyne, *Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge*, 8 A.L.R.3d 1236, § 3[b] (1966).

175. *See, e.g.*, Claude A. Steele & Robert A. Josephs, *Alcohol Myopia: Its Prized and Dangerous Effects*, 45 Am. Psychol. 921, 923 (1990). Synthesizing previous research, Steele and Josephs note that alcohol intoxication both restricts the range of cues we perceive in a situation and reduces our ability to process and extract meaning from the cues we do receive. "Alcohol . . . causes what we have called an *alcohol myopia*, a state of shortsightedness in which superficially understood, immediate aspects of experience have a disproportionate influence on behavior and emotion, a state in which we can see the tree, albeit more dimly, but miss the forest altogether." *Id.*

176. Goodman, *supra* note 13, at 58. Goodman later responds to critics who say it is not reasonable to require men to make the determination of what level of explicitness is required for valid consent. "When there is doubt, however, it would seem equally reasonable to err on the side of requiring explicit consent. A firm 'yes, I do' will be substantial evidence to establish consent." *Id.* at 92.

177. *See* Andrew Trotman, *'A Condom For Your Phone': New App Stops You Drunk-Calling Your Ex*, The Telegraph (Nov. 24, 2015), http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/digital-media/11254559/A-condom-for-your-phone-New-app-stops-you-drunk-calling-your-ex.html.

Allowing an intoxication defense to rape raises the concern that would-be perpetrators will use alcohol as an excuse for aggressive behaviors in which they intend to engage all along. Studies suggest that men use alcohol "as an alibi"; that is, they behave as though alcohol excuses deviant sexual indulgence.[178] A 1993 study found that 35% of college men indicated some likelihood that they would rape if they could get away with it.[179] An earlier study found that 30% of men generally said they would commit rape and 50% would "force a woman into having sex" if they knew they would not get caught.[180] As Professor Katharine K. Baker observes, most adolescents do not get drunk and go rob banks or commit murder. They break "little rules" like those against shoplifting, joyriding, and committing minor acts of vandalism.[181] "The rule against raping, particularly date raping, is like the rule against shoplifting—it is a little rule."[182] Allowing an intoxication defense in the acquaintance-rape context opens the door to disingenuous arguments based on antiquated gender-role notions: that men cannot control their sex drive, especially after consuming alcohol.[183]

For the forgoing reasons, this Note takes the position that an intoxication defense is disingenuous and not in keeping with the best criminal law practices. Nonetheless, even in those jurisdictions whose criminal statutes already contemplate such a defense, an intoxication defense will not be fatal to successful prosecution, and prosecutors in such jurisdictions should not shy away from pursuing these cases. In Massachusetts, for instance, case law indicates that where the prosecution must prove that the defendant *knew or should*

178. William H. George & Jeanette Norris, *Alcohol, Disinhibition, Sexual Arousal, and Deviant Sexual Behavior*, 15 ALCOHOL HEALTH & RES. WORLD 133, 135 (1991) (summarizing such studies). For more detail about alcohol as an excuse for rape, see Scully and Marolla's account of interviews with 144 convicted and incarcerated rapists. Diana Scully & Joseph Marolla, *Convicted Rapists' Vocabulary of Motive: Excuses and Justifications*, 31 SOC. PROBS. 530, 538-39 (1984).

179. Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 212 (2011) (citing CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 21 (1993)).

180. *Id.* at 212 (citing ROBIN WARSHAW, I NEVER CALLED IT RAPE 97 (1988)).

181. Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 604–05 (1997).

182. *Id.* at 605.

183. *See, e.g.*, Antonia Abbey, et al., *Alcohol and Sexual Assault*, 25 ALCOHOL RES. HEALTH. 43, 46 (2001) (collecting studies, including evidence that "heavy drinkers may routinely use intoxication as an excuse for engaging in socially unacceptable behavior, including sexual assault").

have known[184] that the victim was too intoxicated to consent, the first prong is wholly subjective, and the second prong contains both objective and subjective elements.[185] Accordingly, it is grounds for error in Massachusetts to instruct the jury that the "should have known" inquiry must be made with reference to what a reasonable non-intoxicated person should have known in the defendant's position.[186] Rather, the jury can consider any "credible evidence that the defendant was affected by the voluntary consumption of alcohol."[187] The appellate court went on to find the case against the defendant "overwhelming," the evidence of intoxication "very weak," and held that no jury, properly instructed as to the subjective element of "should have known" would have acquitted him,[188] demonstrating that the mere fact of defendant intoxication is not fatal to a prosecution even in a jurisdiction that takes his intoxication into account.

An intoxication defense to alcohol-facilitated sexual assault raises the same issues as an intoxication defense to any other crime. There is a concern that individuals will use the fact of their intoxication as an excuse to engage in harmful, criminal activity free from repercussions. Nonetheless, in those jurisdictions that already allow intoxication defenses to specific-intent crimes or otherwise, allowing one here will not preclude successful prosecution of alcohol-facilitated sexual assault.

2. The Problem of Criminalizing Private, Consensual Sexual Activity

The second critique is that many individuals engage in sexual activity while intoxicated, are freely consenting adults, and do not consider their behavior criminal or feel harmed by it.[189] However, the fact that there are, or may be, individuals who do not subjectively feel victimized by sexual acts committed upon them while they are too drunk to consent does not have any bearing on the moral question, nor does it negate the experiences of the vast num-

184. On a mens rea standard of "knew or should have known," which is the standard in many of the jurisdictions discussed *supra* notes 134–36, the prosecutor prevails by proving either prong.

185. Commonwealth v. Mountry, 972 N.E.2d 438, 447 (Mass. 2012).

186. *Id.*

187. *Id.* at 448.

188. *Id.* at 449.

189. When the "progression" of a courtship ritual that begins with facilitating "relaxation" through the use of drugs or alcohol "occurs in a course of mutual and voluntary behavior, it would be unrealistic and unfair to assign to the male total responsibility for the end result." LaFave, *supra* note 20, at § 17.3(e) (quoting Model Penal Code § 213.1, cmt. at 315 (1980)).

bers of people who have been deeply harmed by non-violent, non-consensual sex.[190] This Note advocates a normative vision of the law: that society should protect the voluntarily intoxicated from sexual predators.

The most forceful counterargument to this position is that the government should not be in people's bedrooms.[191] The difficult hypothetical here is not the drunk college student, but a couple who jointly (and soberly) agreed to consume drugs, say ecstasy, for the very purpose of enjoying intoxicated sex in the privacy of their own home. While the ecstasy use is already per se illegal, the statutory revisions advocated in this Note would also make the ensuing factually consensual sexual activity illegal. This country has in the past few decades made rapid strides past its puritanical roots towards recognition of a right to intimacy.[192] But recognition of liberty "in its more transcendent dimensions" does not mean that the government is foreclosed from criminalizing sexual activity where there is a legitimate state interest.[193] There absolutely is such an interest in alcohol-facilitated sexual assault. Given the outsized role that alcohol plays in sexual assault,[194] the state must step in with criminal sanctions.

The fact that any criminal statute will sweep in some factually consensual sexual activity is a relatively small price given the magnitude of the problem, and one that society is willing to pay in other areas. For instance, there are very likely a few physically and emotionally mature fourteen-year-olds in happy, healthy, consensual sexual relationships with twenty-five-year olds. But the fact that we might be able to find an exception to the rule does not mean that

190. For more on the financial and psychological effects of sexual assault, see, for example, CHRISTINE CARTER, THE OTHER SIDE OF SILENCE: WOMEN TELL ABOUT THEIR EXPERIENCES WITH DATE RAPE (1995); Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 641 (2005); Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 870–72 (2002); Lori A. Post et al., *The Rape Tax: Tangible and Intangible Costs of Sexual Violence*, 17 J. INTERPERSONAL VIOLENCE 773, 775 (2002).

191. Analogues can be drawn to Supreme Court protection of the right to privacy in contraception, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); abortion, *Roe v. Wade*, 410 U.S. 113, 152–54 (1973); consensual gay sex, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–99 (2015).

192. *E.g.*, *Lawrence*, 539 U.S. 558.

193. *Id.* at 562, 578.

194. *See supra* notes 11–14.

the per se rules against adults having sexual relationships with children are invalid.[195]

Some additional critiques of the approach advocated in this Note tend to misunderstand either this Note's position or other facts about sexual assault. This Note does not advocate criminalization of all drunk sex. First, the level of victim intoxication required to trigger criminal liability is extremely high. Criminalization of alcohol-facilitated sexual assault does not demand that all sexual decisions be made with a "completely rational, literally sober mind."[196] It does not forbid sex after indulgence in a bottle of wine over dinner. It criminalizes predation and exploitation of severely intoxicated individuals who are so impaired that they cannot form the mental state necessary to consent to sexual intercourse.[197] Second, in cases of true alcohol-facilitated sexual assault there is almost always an imbalance in the level of intoxication. Even though both parties are statistically likely to have consumed alcohol,[198] typically the man must be less intoxicated than the level of intoxication required of the victim for liability to ensue because alcohol at such high levels causes male impotence.[199]

B. A Statutory Fix: Recommendations for Drafters

Rape law has moved beyond a stranger with a knife, beyond requiring women to fight with their lives until the moment of penetration.[200] It now recognizes that the right to bodily integrity, safeguarded by consent standards and greater protections for vulnerable victims, should be legally protected.[201] More complete statutory protection for the voluntarily intoxicated is a necessary

195. About 30% of statutory rape offenders were boyfriends or girlfriends of their victims. See J. Robert Flores, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, Juvenile Justice Bulletin: Statutory Rape Known to Law Enforcement 1 (2005), https://www.ncjrs.gov/pdffiles1/ojjdp/208803.pdf.

196. Young, *supra* note 4, at 34.

197. *See generally supra* Part II; *infra* Part III.B.1.

198. Ryan, *supra* note 11, at 411.

199. *E.g.*, Ethel Sloane, Biology of Women 189–90 (William Brottmiller et al. eds., 4th ed. 2004) (Alcohol relaxes inhibitions, but "released inhibition is replaced quickly by a depression of the central nervous system," which then "proceeds very rapidly to the central nervous system depressant or totally-zonked-out stage, resulting in impotence in the male and complete passivity in the female."). Of course male impotence prevents only penile penetration, and other forms of unwanted sexual contact could still occur.

200. *See* Anderson, *Resistance*, *supra* note 20, at 963 (defining the common-law "utmost resistance requirement").

201. *See, e.g.*, Ryan, *supra* note 11, at 409.

next step in that evolution. Consent to drink is not tantamount to consent to sex. As that point is increasingly being made on a moral and social level, the law should also supply criminal sanctions. Increased protection can be accomplished without trampling on defendant's rights by focusing on the victim, imposing standards through jury instructions, maintaining a mens rea of at least recklessness, grading non-violent, non-consensual intercourse as less culpable than more violent rape, and using clear, simple statutory language.

Suggested statutory language is "Rape/sexual assault [in the nth degree][202] is sexual intercourse accomplished with a person who is mentally incapacitated because of the influence of an intoxicant, such that the person is unable to meaningfully understand the nature and consequences of the act, and the perpetrator knew or consciously disregarded a substantial and unjustifiable risk that the person was so incapacitated."

The following subsections will further explain the considerations that led to the development of this sample language.

1. Focus on the Victim

This Note declines to take a strong position on whether incapacitation language should be written as "unable to appraise one's conduct," "unable to meaningfully understand," "prevented from resisting," "robbed of the ability to exercise reasonable judgment," "incapable of consenting," or some other synonym. Analysis of these provisions in operation[203] shows that judicial explanations of how they should be interpreted all express the same general idea: when a victim is severely intoxicated—not yet unconscious but significantly, noticeably intoxicated, more than merely buzzed, impaired, or uninhibited—that victim is legally incapable of consenting to intercourse. The provisions express the judgment that a defendant who beguiles, lures, coerces, or forces sex out of such a person has criminally taken advantage of a vulnerable person whom the law should protect.

Professor Patricia J. Falk argues that "the description of the victim's incapacity should not be written in terms of the victim's ability to 'resist,' 'appraise or control her conduct,' or 'understand the nature or consequences of the act,' but rather whether the victim is

202. Whether the statute uses "rape" or "sexual assault" and the particular degree should be consistent with the rest of the state's statute. See also *infra* Part III.B.4 for a discussion of gradation.

203. *See generally supra* Parts II.A.1, II.B.1, and II.C.

capable of giving informed or knowing consent."[204] She argues that the former language inappropriately retains a focus on force, rather than on protecting individuals' sexual agency and autonomy.[205] While this Note is entirely aligned with Professor Falk's vision for statutory reform that protects "individuals who are too drunk or otherwise too intoxicated to give informed or knowing consent to sexual activity," her objection to the above statutory language misses entirely that these descriptors of incapacity are aimed precisely at articulating what informed or knowing consent looks like. Capacity to give knowing and informed consent has to be measured in some way, and there is a limit on how specific statutory language can be. Ability to appraise one's conduct, to meaningfully understand, and to exercise reasonable judgment are all articulations of the basic principle that the victim must have the mental capacity to consent. They give shape to a legal definition of consent for the voluntarily intoxicated. That definition can be further refined as case law and jury instructions evolve in a given jurisdiction.

2. Careful Jury Instructions

Where statutory language requires interpretation, there is a risk that different juries will adopt different interpretations, leading to unfairness and uncertainty in the law. The usual way to guard against this result is through jury instructions.[206] Appellate decisions interpreting the previously discussed statutes shed some light on what those instructions might include.[207] In a jury system, we must have faith in jurors' ability to evaluate conflicting sets of facts that may or may not support legal standards. Too much explication of a standard can actually change the plain meaning of the words.[208]

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204. Falk, *supra* note 33, at 188.

205. *Id.* at 187-88.

206. Critiques of jury instructions are myriad. *E.g.*, David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 483 (1976). The point is merely that if jury instructions are considered valid in other criminal law contexts, they should not be less valid in rape law. The generalized critiques of uncertainty and lack of clarity that suggest plain-language revisions to jury instructions would be helpful should likewise apply to instructions issued in this context.

207. *See generally supra* Parts II.A.1, II.B.1 and II.C.

208. *See e.g.*, 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2497, 408–09 (James Chadbourn rev. 1981) (regarding the efforts to use more detailed jury instructions to explain the standard of proof beyond a reasonable doubt in criminal trials: "In practice, these detailed amplifications of the doctrine have usually denigrated into a mere tool for counsel . . . to save a cause for a new

3. Mens Rea of Reckless Disregard

The mens rea requirement for an alcohol-facilitated sexual assault statute should be carefully crafted to safeguard the rights of the accused. While there is variation, many of the statutes discussed above use a standard of actual or constructive knowledge—meaning that the defendant knew or should have known that the victim was too intoxicated to consent to intercourse.[209] Such a standard is relatively anomalous in criminal law,[210] as it allows liability based on negligence: because of the facts and circumstances, a reasonable person should have known that the victim was severely intoxicated, but this defendant did not.

This Note proposes a more stringent recklessness standard,[211] meaning that liability would ensue only if the defendant knew or "consciously disregard[ed] a substantial and unjustifiable risk"[212] that the victim was mentally incapacitated. Recklessness is the default level of culpability in criminal law,[213] and in addition to safeguarding fairness for the defendant, a recklessness mens rea signals that alcohol-facilitated sexual assault is a serious crime that should be treated like other crimes. Likewise, the defendant's mens rea should be an element of the crime that the prosecution must prove. On a two-pronged mens rea requirement like "knew or recklessly disregarded a substantial and unjustifiable risk that the victim was mentally incapacitated due to the effects of alcohol," the prosecution can prevail by proving either prong. Requiring the prosecution to prove the defendant's mens rea is fairer to defendants than the Washington model of allowing defendants to raise their lack of

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trial. . . . The effort [to develop these elaborate definitions] should be abandoned.").

209. *See supra* notes 106–07, 134–36.

210. *See, e.g.*, LaFave, *supra* note 20, at § 5.4 (noting that something greater than tort negligence has always been required for common law crimes and that there is an ongoing dispute whether criminal liability should ever be based on objective negligence).

211. Actual knowledge alone is too high a standard because it is simply too difficult to prove—in any area of criminal law, the best and often only evidence of a defendant's knowledge lies with the defendant himself. Purpose, an even higher standard, almost conflates a voluntarily intoxication provision with a deliberate administration one. *See supra* note 137.

212. Model Penal Code § 2.02(2)(c) (AM. LAW. INST. 1962).

213. *See, e.g.*, *id. But see* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 258 (1998) (discussing the prevailing negligence liability approach to mens rea in rape cases); Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 384 (2005) (same).

mens rea as an affirmative defense.[214] Such a standard does not pose too high a hurdle to prosecutions in part because laypersons are familiar with the effects of alcohol. A defendant's assertion that he did not know will seem disingenuous and self-serving in the face of evidence that the victim was stumbling, slurring her words, unable to stand independently, mumbling, incoherent, and confused—in short, expressing the many physical and outward manifestations of severe inebriation that signal mental cloudiness.

Some feminists and victim advocates have written in support of a negligence standard.[215] Professor Goodman argues that, as applied, a mens rea standard like most of those discussed above (the defendant knew or should have known that the victim was so intoxicated that her consent was invalid) is very high.[216] Her argument is that because the level of intoxication necessary to trigger the operation of the statute is so severe, the statute is not always available and thus rarely operates to place a "substantial" portion of the risk of intoxicated consent on the defendant.[217] However, each legal concept should be kept wholly separate for a statutory regime to be most effective, clear, and fair. And regardless of the other elements of the crime, a mens rea of negligence is not a very high one. Just as a high standard as to degree of intoxication is needed to separate out alcohol-facilitated sexual assault from general drunk sex, risk-taking behavior, and poor judgment, a mens rea of reckless disregard is preferable to one of negligence both because it is fairer to defendants and because it reinforces the notion that this crime is a serious one.

4. Graded Less Seriously Than More Violent Assaults

Some of the statutes discussed in Part II are relatively flat—they lump intercourse with a voluntarily intoxicated victim into the same category, with corresponding level of punishment, as forcible rape or rape by deliberate drugging.[218] It does not minimize the importance of protecting the voluntarily intoxicated to recognize that more violent attacks merit higher punishment. Indeed, gradated statutes both protect the defendant in the sense that they attempt to mete out punishment proportionately to culpability, and

214. *See* State v. Al-Hamdani, 36 P.2d 1103, 1107-08 (Wash. App. Div. 2001).

215. *E.g.*, Taslitz, *supra* note 213, at 387 ("Rape is different from other crimes in a way that justifies severe potential penalties even when liability is based solely upon negligent conduct.").

216. Goodman, *supra* note 13, at 72.

217. *Id.*

218. *See supra* Parts II.A.3 & II.B.3.

they protect victims because they reduce the chance of jury nullification if jurors feel that the crime at hand was not commensurate with a more traditional conception of rape.[219] Enhancements can be added if the assault of the voluntarily intoxicated person also included a weapon or if the victim suffered additional injuries.

5. Simple Statutory Language

One important lesson from the first wave of rape law reform[220] is that complex and contradictory statutes can undermine ostensible reforms. For example, a major push for many reformers was to refocus attention from force and resistance requirements onto the issue of consent.[221] The non-consent movement has achieved statutory success in twenty-eight states.[222] However, of these states, at least nine undermine the principle through other statutory language.[223]

For example, Delaware's second-degree rape provision applies when a person "[i]ntentionally engages in sexual intercourse with another person, and the intercourse occurs without the victim's consent."[224] However, in a separate section containing general definitions, Delaware defines "without consent" as "compel[ling] the victim to submit by any act of coercion . . . or by force, by gesture, or by threat of death, physical injury, pain or kidnapping to be inflicted upon the victim or a third party, or by any other means which would compel a reasonable person under the circumstances to submit."[225] Therefore, even though Delaware appears to have enshrined a "no means no" standard, it actually defines non-consent with reference to force, threats of great bodily harm, and coercion. To make matters even more confusing, Delaware has four additional definitions of "non-consent," codified at § 761(j)(2)-(5), applying to unconscious victims, disabled victims, defendants who are health professionals, and defendants who deliberately administer an intoxicant without the victim's knowledge or against her will.[226]

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219. *See generally* Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 90–94 (2009).

220. *See supra* notes 17, 28–34.

221. *E.g.*, SCHULHOFER, *supra* note 213.

222. John F. Decker & Peter G. Baroni. *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1084 n.11 (2012).

223. *Id.* at 1090–91.

224. DEL. CODE ANN. tit. 11, § 772(a)(1) (West 2015).

225. DEL. CODE ANN. tit. 11, § 761(j)(1) (West 2015).

226. DEL. CODE ANN. tit. 11, § 772(j)(2)-(5) (West 2015).

This sort of "faux reform," wherein states appear to write victim-friendly statutes and then interpret the language in a manner more closely resembling traditional common law standards, is not merely disingenuous, it also makes prosecution less likely. Decker and Baroni note a "striking dearth" of case law in many non-consent states—suggesting that either non-consent cases are not being prosecuted or they are not being won.[227] This evidence indicates that the non-consent movement's twenty-eight state victory is being chipped away at by both statutory and practice-oriented limitations.

Drafters considering protection for the voluntarily intoxicated need to be alert to the possibility of faux reform and attempts to undermine statutory reform efforts. For these reasons, the enumeration model, discussed *supra* Part II.B, is preferable to the definitional model outlined in Part II.A. Addressing alcohol-facilitated sexual assault in its own, separate codification is cleaner, clearer, and less susceptible to being undermined elsewhere than a statutory structure that requires cross-referencing various definitions to determine whether the law was violated.

IV.
PROSECUTORS' ETHICAL OBLIGATION TO PURSUE ALCOHOL-FACILITATED SEXUAL ASSAULT

Prosecutors may be reluctant to bring charges if they think they will lose at trial. This section argues that prosecutors have an ethical obligation to bring charges of alcohol-facilitated sexual assault, even if they believe—rightly or wrongly—that the case will be a tough sell for jurors. Some prosecutors may be under the mistaken impression that ethical guidelines for prosecutors advise against bringing cases to trial if they subjectively believe they might lose. This is not a correct understanding of the rules.

The American Bar Association standard related to prosecutorial discretion in charging decisions says that prosecutors should not pursue criminal charges if the prosecutor knows the charges are not supported by probable cause.[228] Further, there

227. Decker & Baroni, *supra* note 222, at 1101. Case law would arise following convictions, as only the defendant has the right to appeal. Case law could be helpful in interpreting, for example, the catch-all provision in Delaware's statute "or by any other means which would compel a reasonable person under the circumstances to submit." DEL. CODE ANN. tit. 11, § 761(j)(1) (West 2015). In the absence of precedent to the contrary, it would be reasonable for courts to apply the cannon of statutory construction *ejusdem generis*, by which catch-all provisions are defined by reference to the earlier terms in the list—here, force, threat of death, etc.

228. PROSECUTION FUNCTION STANDARD § 3-3.9(a) (AM. BAR ASS'N 1993).

should be "sufficient admissible evidence to support a conviction."[229] The standard does not ask prosecutors to contemplate the "downstream"[230] effects of rape myths and possible juror nullification of the law. In fact, it does exactly the opposite: "In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question."[231]

There absolutely is a serious threat to the community here. Not only is alcohol-facilitated sexual assault prevalent, the data show that the majority of rapists are serial offenders with an average of six victims each.[232] Police and prosecutors need to work with the victims who do come forward instead of shutting them out of the criminal justice system because of a perception that jurors will not be sympathetic to victims who were drinking or using drugs. Even though overburdened prosecutors may be inclined to focus on the most violent cases, treating alcohol-facilitated sexual assault as a priority has the potential to greatly improve community safety by taking serial offenders off the street. And prosecutors may find that changing their own attitudes also changes the way they view the evidence and the "win-ability" of the case. Much of the existing research on the importance of victim credibility on prosecutorial charging decisions "has assumed, to varying degrees, that victim credibility is a phenomenon that exists independently of prosecutors' interpretations and assessments of such credibility. Such approaches neglect the processes whereby prosecutors actively assess and negotiate victim credibility in actual, ongoing case processing."[233]

Studies indicate that police and prosecutors have a "downstream" orientation: when police interview a victim, they consider how her story will be received by the prosecutor, who in turn is considering whether she can prove the case beyond a reasonable doubt to a jury.[234] In the past, police and prosecutors may have directly relied on factors beyond whether the conduct in question met the statutory definition of rape—such as the victim's personal

229. *Id.*

230. *See* Lisa Frohmann, *Discrediting Victim's Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213 (1991).

231. PROSECUTION FUNCTION STANDARD, *supra* note 228, § 3-3.9(e).

232. *See* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002).

233. Frohmann, *supra* note 230, at 213.

234. *See generally id.* at 213–14, 224.

characteristics, the relationship between the victim and the accused, or the victim's risk-seeking behavior such as walking alone at night—in deciding whether to credit the victim's story. Now, after several decades of training and public awareness focused on "rape myths,"[235] police and prosecutors are much less likely to say that these factors affect whether a crime was "real rape,"[236] but they continue to consider the "downstream" effects of these same factors.[237] This phenomenon is somewhat troubling at the police level. Early assumptions about the strength of a case can seriously impair a fledgling investigation, and police should be wary of confirmation bias—the subconscious tendency to value information that supports a hypothesis and discount evidence that does not. And, we generally do not want police detectives making legal judgments reserved to prosecutors.[238]

Downstream orientation is different for prosecutors. Prosecutors are ethically and often legally required to believe they have sufficient evidence to convict before proceeding to trial.[239] This requirement bases the standard not on what the prosecutor believes

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235. Rape myths are socially perpetuated misconceptions about rape, including:

> [W]omen mean 'yes' when they say 'no'; women are 'asking for it' when they wear provocative clothes, go to bars alone, or simply walk down the street at night; . . . if a woman says 'yes' once, there is no reason to believe her 'no' the next time; women who 'tease' men deserve to be raped; the majority of women who are raped are promiscuous or have bad reputations; a woman who goes to the home of a man on the first date implies she is willing to have sex; women cry rape to cover up an illegitimate pregnancy; a man is justified in forcing sex on a woman who makes him sexually excited; a man is entitled to sex if he buys a woman dinner.

Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1015 (1991).

236. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1088 (1986).

237. *See* Frohman, *supra* note 230, at 213 (listing studies finding that victim credibility is important in police decisions to even investigate cases); Rose Corrigan, *The New Trial by Ordeal: Rape Kits, Police Practices, and the Unintended Effects of Policy Innovation*, 38 LAW & SOC. INQUIRY 920, 932 (2013) (summarizing studies finding "that law enforcement officers have learned what answers they are 'expected' to give about rape" while continuing to treat rape reports with undue skepticism).

238. A determination that there is probable cause to arrest a person, for instance, is a significantly lower bar than the standard of proof beyond a reasonable doubt. See *infra* Part V.B.1. for a discussion on how a tepid response from a police officer can damage or even thwart a potential prosecution.

239. *See* PROSECUTION FUNCTION STANDARD, *supra* note 228, § 3-3.9. ("A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."). *See also* Recommendation for Dismissal, People v. Strauss-

is the truth, but what she believes she can prove. Therefore, consideration of how jurors' possible belief in rape myths may affect their reception of the evidence is a crucial part of the prosecutor's job. But even more crucially, awareness of the obstacles presented by rape myths and juror perceptions should not dissuade prosecutors from pursuing alcohol-facilitated sexual assault cases and even taking them to trial. Studies show that it does: "prosecutors select cases with a high probability of conviction and reject charges in cases in which conviction is unlikely."[240] Knowledge of the obstacles should change the nature of the investigation and trial,[241] but prosecutors have an ethical obligation to pursue these difficult cases for public safety reasons.

While these ethical obligations are clearest for prosecutors in states whose statutory or common law protects voluntarily intoxicated victims from sexual assault, even prosecutors in jurisdictions requiring deliberate administration of intoxicants by defendants should reconsider their charging decisions. First, for reasons explained *supra* Part I.C, a victim of surreptitious administration of an intoxicant may not initially realize he or she was drugged, particularly if the victim also consumed alcohol. Further investigation, such as interviewing eyewitnesses or seeking medical and pharmacological evidence, could uncover other evidence of criminality. Second, severely intoxicated individuals may have been slipping in and out of consciousness at times or may have been so inebriated as to meet the jurisdiction's definition of physically helpless. Prosecutors should try to get as complete a picture of the event as they can, and then turn to their jurisdiction's law to see if the facts meet the statutory definitions. This two-step process for evaluating victim reports is appropriate irrespective of the particular jurisdiction's exact statutory language.

When there is such confusion about the legal standards, particularly related to alcohol-facilitated sexual assault, observers should hardly be surprised that a majority of college women who reported facts describing a completed rape did not characterize their experience as rape.[242] Prosecutors cannot expect victims to come forward

Kahn, No. 02526/2011 at 2 (N.Y. Sup. Ct. Aug. 22, 2011) ("If we do not believe [the complainant] beyond a reasonable doubt, we cannot ask a jury to do so.").

240. Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461, 487 (2005).

241. *See infra* Part V.B–C.

242. *See* BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 15 (2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf.

if their reports are not taken seriously. When criminal justice system actors take a strong stand against sexual assault, they can slowly change social perceptions, attitudes, and behaviors. The final section proposes recommendations to help prosecutors win alcohol-facilitated sexual assault cases.

V.
STRUCTURAL AND PRACTICE-ORIENTED STRATEGIES: RECOMMENDATIONS FOR PROSECUTORS

Observers familiar with the criminal justice system know not to assume an orderly progression from crime to complaint to investigation to prosecution and conviction. Rather, there are opportunities for derailment at each stage, a phenomenon known as attrition.[243] Many victims choose not to report the crime to police. Police, in turn, do not investigate every allegation, nor do they always alert prosecutors to a victim's report. For those cases that are referred for prosecution, line prosecutors then make an independent decision of whether to bring charges in court. Finally, juries (and sometimes judges) weigh the evidence and make a determination of guilt. Attrition at any level leads to perpetrators going or remaining free, and in some circumstances can also result in victims feeling betrayed and disbelieved by public servants.

Victim advocates are critical of police and prosecutorial responses to rape allegations.[244] They portray a criminal justice system insensitive to rape victims and reluctant to prosecute rapists, which creates a disincentive for victims to report rape at all.[245] In-

243. Attrition refers to the gap between levels of known crime and the response of the criminal justice system. *See generally* RICHARD GARSIDE, CRIME AND SOCIETY FOUNDATION, CRIME, PERSISTENT OFFENDERS AND THE JUSTICE GAP 7 (2004), http://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/crime%2C%20persistent%20offenders.publication.pdf. Accordingly, attrition must be distinguished from an affirmative determination after an investigation that no crime occurred, known as "unfounding" or "no-criming." *See infra* notes 278–79 and accompanying text.

244. One researcher recently concluded a series of interviews with 167 rape counselors and victim advocates at 112 rape crisis centers in six states that focused on rape crisis workers' perceptions of victims' experiences in the criminal justice system. Some of the key takeaways included that reports by individuals from marginalized groups were disregarded, ignored, or not taken seriously by police; that police skepticism about victim veracity included threats to file charges against them; and that detectives and prosecutors in some jurisdictions made illegal demands that victims submit to a polygraph as a precondition of conducting an investigation. Corrigan, *supra* note 237, at 924, 931, 933.

245. Department of Justice data indicate that only 36% of rape victims report to the police; for college students, the figure was less than 5% in 2000. CATALANO,

deed, one of the big debates in rape law concerns the extent of the attrition problem[246] and the degree to which statutory reforms have actually changed the type and number of rape cases that are prosecuted.

More work needs to be done to validate and expand on social science research aimed at isolating the causal effects of particular statutory reforms. But existing research confirms what scholars and prosecutors already know: statutory revision in isolation is simply not enough. Just as reformist statutes can be undermined within a statutory framework,[247] statutory reforms are vulnerable to being undermined by actors within the criminal justice system. An empirical study attempting to quantify the impact of the strength of various rape shield laws, for example, revealed that judges', prosecutors', and defense attorneys' perceptions of the admissibility of evidence was not entirely determined by the strength of that jurisdiction's law.[248] If the laws were being implemented as written, assumptions about evidence should depend primarily on variations in the laws across the six tested jurisdictions. The researchers con-

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supra note 22, at 10; FISHER, *supra* note 242, at 23–24. Reporting rates in the United States are currently in a state of decline. Kathleen Daly & Brigitte Bouhours, *Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*, 39 CRIME & JUST. 565, 581 (2010). The percentage of rape or sexual assault victimizations reported to police increased to a high of 56% in 2003 before declining to 35% in 2010, a level last seen in 1995. PLANTY ET AL., *supra* note 6, at 1.

246. Several studies have found that the attrition pattern for rape at the police and prosecutor level mirrors that of other felonies. David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY, 1194, 1212–13 (1997). The authors cited several studies including Jim Galvin & Kenneth Polk, *Attrition in Case Processing: Is Rape Unique?*, 20 J. RES. CRIME DELINQ. 126, 136 (1983) (finding that rape cases in California experienced somewhat more attrition than homicide, but less than robbery and considerably less than assault or burglary); Martha A. Myers & Gary D. LaFree, *Sexual Assault and Its Prosecution: A Comparison With Other Crimes*, 73 J. CRIM. L. & CRIMINOLOGY 1282, 1288 (1982) (finding few differences between rape and other crimes after controlling for evidentiary strength and crime seriousness); and U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, THE PROSECUTION OF FELONY ARRESTS, 1988 15–23 (1992) (finding comparable attrition patterns in rape and aggravated assault in a study of thirty urban jurisdictions). However, this parity does not hold true for acquaintance rape. Bryden & Lengnick, *supra*, at 1214. Significant differences in outcomes for stranger rape versus acquaintance rape mask high attrition rates for acquaintance rape cases. *Id.*

247. *See supra* Part III.B.5.

248. Cassia Spohn & Julie Horney, *"The Law's the Law, but Fair Is Fair:" Rape Shield Laws and Officials' Assessments of Sexual History Evidence*, 29 CRIMINOLOGY 137, 139 (1991). Interestingly, neither the gender of the respondent nor the respondent's role (as judge, prosecutor, or defense attorney) affected respondents' answers to whether the hypothetical evidence would be admissible. *Id.* at 145.

cluded that criminal justice officials' perceptions of the admissibility of evidence depend on both the statutory mandate and informal norms.[249] This result echoes a similar study finding that harsh drunk driving laws are unlikely to be implemented as written if officials perceive the laws as too punitive.[250]

In short, statutes are not self-executing. They must be interpreted and applied by players within the criminal justice system who have enormous power to circumvent the letter and spirit of a progressive law. Accordingly, the following subsections outline best practices suggested by existing research relating to structural considerations for prosecutorial offices, responses to and investigations of the initial victim report, and trial strategies for line prosecutors. Most of the suggested practices work best when combined with other reforms, and research attempting to isolate the effects of a particular change has concluded as much. These subsections are meant to serve as a sketch of the broad considerations, and crucially, the best practices are meant to be valuable regardless of whether the jurisdiction has a deliberate administration statute like those discussed in Part I or has separate provisions to protect the voluntarily intoxicated like those addressed in Parts II and III.

A. Structural Considerations for Prosecutors' Offices

The recommendations following in this Part V.A are most applicable in larger district attorney's offices. Fifteen percent of prosecutor's offices in the country are part-time offices with no full-time staff.[251] Most others are small offices serving populations of fewer than 100,000 people.[252] In such small offices, structural recommendations like appointing specialized units for the prosecution of alcohol-facilitated sexual assault make little sense. But the remainder of the recommendations in this Part V are widely applicable across offices of different sizes and locations.

1. Specialized Units

AEquitas, a group funded by the Department of Justice's Office of Violence Against Women that provides legal research, case consultation, trainings, and conferences to support prosecutions related to violence against women, recommends specialized units—

249. *Id.* at 153.

250. *Id.* at 139.

251. Steven W. Perry & Duren Banks, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prosecutors in State Courts, 2007 - Statistical Tables*, http://www.bjs.gov/content/pub/ascii/psc07st.txt.

252. *Id.*

including specialized investigators and prosecutors—for sexual assault cases.[253] Victims of sexual assaults involving drugs or alcohol are historically less likely to report the crime.[254] However, as some evidence indicates that reports of alcohol-facilitated sexual assault may be rising nationally,[255] having experienced attorneys on hand to address these cases specifically may also be beneficial. Specialization helps victims because the victim need not retell the story to a new attorney at each stage of the process.[256] Specialized units can offer prosecutors better opportunities to become involved early in the investigation, which has been shown to improve case outcomes.[257] And specialization promotes the accumulation of experience and skills in the attorneys who continue to work on the same kinds of cases.

While specialized units have the potential to positively affect both the process for victims and case outcomes, they are unlikely to change the number or type of cases filed without other good practices in place. Specifically, "prosecutors' concerns with convictability could be precluding the predicted benefits from emerging in the specialized unit."[258] If supervisors are evaluating prosecutors' job performance based on win-loss record, rather than through more holistic criteria, line ADAs[259] will be reluctant to take on challenging cases, regardless of whether they belong to a specialized unit. A study comparing two district attorney's offices, one with a specialized sexual assault unit and one without, found that prosecutors at both offices continued to make charging decisions based on the victim's perceived "risk-taking" behavior or their assessment of his or her moral character.[260]

253. Jennifer G. Long & Elaine Nugent-Borakove, *Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions*, AEQUITAS STRATEGIES, April 2014.

254. *See, e.g.*, Dean G. Kilpatrick, et al., *Drug-facilitated, Incapacitated, and Forcible Rape: A National Study* 2 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf.

255. U.S. DEP'T OF JUSTICE, NAT'L DRUG INTELLIGENCE CTR., *Drug-Facilitated Sexual Assault Fast Facts* (2004), http://www.justice.gov/archive/ndic/pubs8/8872.

256. Beichner & Spohn, *supra* note 240, at 490. Vertical prosecutions, without a specialized unit, can have the same effect.

257. *Id.*

258. *Id.* at 491.

259. "ADA" is an abbreviation for Assistant District Attorney and is used as short-hand throughout this section, notwithstanding that some jurisdictions use other titles for local prosecutors.

260. Beichner & Spohn, *supra* note 240, at 491.

2. Office Culture, Priorities, and Promotions

District attorneys need to make alcohol-facilitated sexual assault a priority and incentivize line ADAs to take risks in allocating time and resources to these cases. This may require some conscious effort to change the office culture. "The promotion policy of the county district attorney's . . . office encourages prosecutors to accept only 'strong' or 'winnable' cases for prosecution by using conviction rates as a measure of prosecutorial performance."[261] Not guilty verdicts are sometimes considered an indicator of prosecutorial incompetence, rather than of the difficulty of the case.[262] ADAs are also rewarded for early rejections of weak cases as a mechanism for shepherding resources and reducing excessive caseloads.[263] And there is a concern that too many losses will cause judges to question the prosecutor's competence as an officer of the court.[264] While these considerations have an important place in local prosecutor's offices, there must be a recognition from office supervisors that pursuing alcohol-facilitated sexual assault is worthwhile, that these cases require resources to pursue adequately, and that sometimes jurors return not guilty verdicts through no obvious error by the prosecutor, even when the case was, *ex ante*, provable beyond a reasonable doubt.

One experienced prosecutor who has worked in multiple large, urban district attorney's offices, including in supervisory roles, suggests that supervisors who do not normally carry a case load can send a signal about office priorities to subordinates by taking on difficult cases.[265] He recommends that supervisors must also make clear to the prosecutors they supervise that they are being judged not only by victories, but also by the quality of work they do and how well they manage their caseload.[266]

B. Victim Reporting and Subsequent Investigation

1. The Importance of the Initial Report

While prosecutors must evaluate the truth of allegations and jurors are the ultimate fact-finders, police are at the front lines of deciding whether an investigation has generated sufficient proba-

261. Frohmann, *supra* note 230, at 215.
262. *Id.*
263. *Id.*
264. *Id.*
265. Telephone interview (Sept. 23, 2015) (*hereinafter* 9/15 Interview). The prosecutor requested anonymity because his office's policies do not permit such interviews.
266. *Id.*

ble cause for an arrest. "Low-visibility decisions made early in the rape reporting process can influence whether and how sexual assaults are formally acknowledged or are dismissed as 'not credible' or 'unfounded.'"[267] As such, the importance of police to successful rape prosecutions can hardly be overstated. Police often serve as a victim's "first point of contact" with the criminal justice system.[268] A negative or judgmental response "may influence the nature and quality of evidence obtained" and even dissuade the victim from continuing to cooperate with law enforcement.[269]

Criminal justice system personnel, especially police, need to be aware that alcohol-facilitated sexual assault reports may have merit even when they seem less than ideal:

> The initial report from the victim may well sound like this: "I think I may have been raped. I'm not sure. I was pretty out of it. I don't remember everything. But I think I was raped. Maybe." . . . Within a few moments, it may well emerge that the victim was very intoxicated at the time of the sexual assault, she has significant gaps in her memory of what transpired, she delayed reporting for hours or even days, and she does not think anyone observed significant interactions between herself and the suspect either before or after the reported assault. Perhaps not surprisingly, this type of report often has a very short lifespan within the criminal justice system.[270]

Police and prosecutors must resist the urge to dismiss such a report without consideration or investigation. Instead, they should view this halting report as an opportunity to catch a serial rapist. One study of 1882 men found that 63% of the 120 identified rapists were serial rapists, with an average of six victims each.[271] In another study of 1146 male Navy recruits, 71% of those who engaged in behavior meeting legal definitions of attempted and completed rape admitted to serial rapes, again with an average of six each.[272] If a victim is shut out of the criminal justice system before an investigation even has the opportunity to reveal corroborative evidence to

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267. Corrigan, *supra* note 237, at 923.

268. Joanna Jamel, *Researching the Provision of Service to Rape Victims by Specially Trained Police Officers: The Influence of Gender – An Exploratory Study*, 13 NEW CRIM. L. REV. 688, 689 (2010).

269. *Id.*

270. M. Claire Harwell & David Lisak, *Why Rapists Run Free*, 5 FAM. & INTIMATE PARTNER VIOLENCE Q. 175, 175 (2012).

271. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 78 (2002).

272. Stephanie K. McWhorter et al., *Reports of Rape Reperpetration by Newly Enlisted Male Navy Personnel*, 24 VIOLENCE & VICTIMS 204, 208–09 (2009).

fill in the gaps in the victim's memory, an opportunity to catch a predator is lost, and the predator is potentially emboldened to commit future crimes.

Additional investigation is possible and should be pursued before cases are dismissed. One prosecutor recalled a victim who very honestly told him that she could not say whether the drug-facilitated assault was real or a dream.[273] The prosecutor was able to make the case by having the victim do a controlled phone call and then a controlled meet.[274] The defendant made statements confirming the assault.[275]

Police officers must keep in mind how difficult it is for victims of alcohol-facilitated sexual assault to report at all.[276] Police must also realize that many victims know that something terrible happened to them but do not know that they can or should call it rape.[277] Guidelines issued by both the FBI and the International Association of Chiefs of Police ("IACP") dictate that police should only "unfound"—declare an allegation false—if it is determined through investigation that the report was false or baseless.[278] A recent study of the Los Angeles Police Department found that the LAPD had inappropriately categorized ten of the eighty-one false reports in the sample as false or baseless, or 12.3%.[279] More troub-

273. 9/15 Interview, *supra* note 265.

274. *Id.*

275. *Id.*

276. Christopher Mallios, *Prosecuting Alcohol-Facilitated Sexual Assault*, AEQUITAS (Apr. 11, 2013), https://bwjp.ilinc.com/perl/ilinc/lms/async_launch.pl?pvr_id=rtrsrzz&session_id=33445939&activity_id=hyfmxjv&user_id=pwjbxkth&type=recording [hereinafter Mallios Webinar].

277. *See generally* FISHER, *supra* note 242. Less than half of the college women surveyed who reported an experience categorized as a completed rape considered the experience to be rape: "Women may not define a victimization as a rape for many reasons (such as embarrassment, not clearly understanding the legal definition of the term, or not wanting to define someone they know who victimized them as a rapist) or because others blame them for their sexual assault." *Id* at 15. The researchers could not definitively substantiate which of these possible factors were applicable. *Id.*

278. Cassia Spohn, Clair White & Katharine Tellis, *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports*, 48 L. & SOC'Y REV. 161, 163 (2014). *See also* U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTING HANDBOOK (2004) at 77, https://www2.fbi.gov/ucr/handbook/ucrhandbook04.pdf. The guidelines distinguish between "false" and "baseless" claims deliberately: these terms, though often used interchangeably, have different meanings. A false report is one that was deliberately fabricated; a baseless report indicates a claim that was related truthfully but does not meet the legal definition of sexual assault.

279. Spohn, White & Tellis, *supra* note 278, at 173. In most of the ten cases determined to be not false or baseless, the victim recanted. *Id.* at 177. In each of

ling, a recent anecdote-based survey of rape victim advocates' experiences with law enforcement found it was "quite common" for police to threaten to file charges against victims as an investigation or interrogation tactic.[280] Police in several jurisdictions illegally demanded victims submit to a polygraph before they would proceed with an investigation.[281]

Prosecutors can work with their police counterparts to develop community guidelines that stress the difficulty of victim reporting and the importance of thorough investigation. But prosecutors will have trouble maintaining these alliances if they then decline to prosecute after police have done investigatory work. Bringing charges and taking cases to trial are clear signals of prosecutorial priorities.[282]

2. Rape Kits and SANE-Trained Nurses

Sexual Assault Nurse Examiner (SANE) programs train registered nurses in working with sexual assault victims and, in particular, to conduct forensic exams to collect admissible evidence of the assault.[283] A report funded by the Department of Justice suggests that SANE nurses are both considerably more effective at collecting usable evidence than general emergency room staff and more sensitive to victims in the process.[284]

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these cases, the researchers determined from the file that it was "clear that [the victim's] recantation was motivated by fear of reprisal from the suspect, pressure from the suspect or his family or friends, or her lack of interest in pursuing prosecution of the suspect." *Id.* Corroborating evidence in these cases, along with other indicia of reliability, led researchers to conclude that the recantations were not genuine. *Id.* at 178. For example, in one case researchers noted that "complainant gave a very clear account of the incident, used the same words to describe the incident to the patrol officer and the investigating officer, and appeared to be concerned that the suspect would get in trouble." *Id.*

280. Corrigan, *supra* note 237, at 933.

281. *Id.*

282. Of course there is also a role for plea negotiations, and prosecutors must consider factors including likelihood of success at trial and the level of egregiousness of the behavior. 9/15 Interview, *supra* note 265. Additionally, in sexual assault cases prosecutors may be inclined to emphasize with victims that the mere fact of bringing the defendant to trial, regardless of outcome, can be part of the healing process. *Id.*

283. *See generally What is a SANE/SART*, Rape, Abuse & Incest National Network, https://rainn.org/get-information/sexual-assault-recovery/medical-information/SANE-SART (last visited Oct. 24, 2013).

284. Rebecca Campbell, et al., Systems Change Analysis of SANE Programs: Identifying the Mediating Mechanisms of the Criminal Justice System Impact 118, 120-21 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/226498.pdf.

SANE programs are not a panacea and will not be effective in isolation. If "SANE programs play out against a background of fundamental skepticism about sexual assault," then police may deny access to SANE exams for victims who do not fit the blameless victim profile that police expect.[285] Accordingly, police skepticism not only can be traumatic for a truthful victim and weaken her resolve to pursue justice in the criminal courts, but can actually weaken the case from an evidentiary standpoint. SANE training needs to be accompanied by police training that emphasizes that police should not act as a barrier to access this evidence and that promotes prosecutorial involvement early in the investigative process.

In alcohol-facilitated sexual assault, identification of the perpetrator is less frequently an issue than victim capacity and consent. SANE exams can help build a case even where the identity of the defendant is already known, because they can identify abrasions, bruises, and tears "often so minute they cannot be seen with the naked eye."[286] Any evidence supporting the theory of non-consensual intercourse can be helpful to successful prosecutions.

C. Trial Techniques

> The tough thing about alcohol is it affects every stage of the proceeding—victims' realistic ability to remember and the credibility with the jury. You ask them in voir dire if they would treat them differently, and everybody of course says no, but talking them afterwards, they always let it affect their decision. They'll say, "We understand that it doesn't mean she should have been raped, but we have to take it into consideration for consent." It's just a complicating factor.[287]

1. Voir Dire

Even though much of the existing social science research about sexual assault will not be admissible in a criminal case, the prosecutor with a "thorough understanding of the dynamics of sexual assault" can "better identify jurors who might harbor mistaken beliefs and accept false mythology about sexual assault and poison

285. Corrigan, *supra* note 237, at 934, 936.

286. Linda E. Ledray, *Evidence Collection and Care of the Sexual Assault Survivor: The SANE-SART Response*, VIOLENCE AGAINST WOMEN ONLINE RESOURCES (Aug. 2001), http://www.mincava.umn.edu/documents/commissioned/2forensicevidence/2forensicevidence.html#idp37498064.

287. Telephone Interview with Wendy Patrick, Deputy Dist. Attorney, Sex Crimes & Human Trafficking Div., San Diego Cnty. Dist. Attorney's Office (Mar. 17, 2014).

the rest of the jury with misinformation."[288] Voir dire in sexual assault cases should aim to uncover juror rape myth acceptance, to begin to redefine these myths, and to prepare jurors for difficult evidence.[289]

Voir dire should be about more than discovering and striking jurors that prosecutors think are too biased to serve. It is also the prosecutor's first opportunity to educate the jury pool (and through them, the community)[290] about sexual assault. "Successful juror education begins with voir dire, continues throughout the entire trial, and culminates with a strong closing argument."[291] One California prosecutor cautions that jurors do not readily admit to subscribing to rape myths.[292] She tries to be creative in asking open-ended questions to solicit their reactions to different hypothetical situations to elucidate their true feelings.[293]

2. Expert Testimony

Expert testimony can be crucial to counter incorrect and unfavorable preconceptions jurors may have about evidence in sexual assault cases and rape victim behaviors. In sexual assault cases generally, experts can help explain any dynamics of sexual assault or victim behaviors that jurors are likely to find troubling or counter-intuitive.[294] Testifying about "syndromes" is not generally advised, as it suggests the victim has a pathological condition and detracts from the victim's believability.[295] Rather, an expert such as a com-

288. Christopher Mallios & Toolsi Meisner, *Educating Juries in Sexual Assault Cases Part I: Using Voir Dire to Eliminate Jury Bias*, STRATEGIES (AEquitas, Washington, D.C.) July 2010, at 1, 1–2.

289. *Id.* at 2. The specific issues AEquitas suggests prosecutors should raise during voir dire are the following: a victim is more likely to be assaulted by a person the victim knows than by a stranger; sexual violence is never the victim's fault; rape is an act of violence, not sex; there is no "typical" victim; most victims do not incur physical injuries from sexual assaults; and most rape victims either delay reporting or never report to law enforcement at all. *Id.* at 2–5.

290. The National District Attorneys Association does not share this view: "[I]t is unlikely that prosecutors will be able to change long-standing prejudices of jurors who are inclined to believe rape stereotypes and myths. Prosecutors will generally be more successful by eliminating jurors who hold such deep-rooted beliefs that they cannot be fair." TERESA P. SCALZO, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, PROSECUTING ALCOHOL-FACILITATED SEXUAL ASSAULT, 16 (2007).

291. Mallios & Meisner, *supra* note 288, at 5.

292. Interview with Wendy Patrick, *supra* note 287.

293. *Id.*

294. SCALZO, *supra* note 290, at 30.

295. Jennifer Gentile Long, Viktoria Kristiansson & Christopher Mallios, *When and How: Admitting Expert Testimony on Victim Behavior on Sexual Assault Cases in Pennsylvania*, STRATEGIES (AEquitas, Washington D.C.), July 2010, at 3.

munity-based victim advocate can discuss behaviors common to sexual assault victims.[296] The following two subsections discuss expert testimony specifically related to drug- and alcohol-facilitated sexual assault.

a. Forensic Tracing and Negative Reports

In cases of drug-facilitated sexual assault, jurors may wonder why they are not hearing evidence about the type and strength of drugs administered to the victim. Such evidence may often be lacking. GHB, for example, is completely undetectable only twelve hours after ingestion.[297] Victims of drug-facilitated sexual assault, who often sustain memory loss as a result of the intoxicant, are less likely to report the crime to police, less likely to sustain other physical injuries, and more likely to delay seeking treatment at a hospital.[298] Additionally, GHB is extremely unstable, and so even if the victim does timely report and has a blood or urine sample taken, that sample needs to be frozen immediately or the drug will continue to dissipate.[299] Most jurisdictions do not adequately freeze samples prior to testing, and some blame a lack of resources.[300]

In short, there are many reasons prosecutors may lack direct evidence that a victim was drugged. Researchers found that when jurors are presented with a negative forensic report—one that detects no presence of drugs in the victim's bloodstream—they were less likely to find the defendant guilty, as compared to the group that received expert testimony explaining the result.[301] However, the group that received the same facts but no forensic report at all and no expert testimony was more likely to convict than the group that received the negative report plus expert testimony.[302] This result may suggest that prosecutors are best served by seeking to have evidence of a negative forensic report excluded altogether as too prejudicial. Or, expert testimony, while helping jurors understand evidence, may also produce greater juror skepticism in general.[303] The study may also point to the inadequacy of the manner in which the expert presented her testimony: she may not have drawn "sufficient attention to the relationship between reporting time and the

296. SCALZO, *supra* note 290, at 30.
297. Schuller et al., *supra* note 66, at 122.
298. *Id.* at 121.
299. Mallios Webinar, *supra* note 276.
300. *Id.*
301. Schuller et al., *supra* note 66, at 123.
302. *Id.*
303. *Id.* at 122.

scientific veracity of the report," such that more careful explanation of the times at which the drugs dissipate would have been more helpful.[304]

b. BAC and Retrograde Extrapolation

Victims of alcohol-facilitated sexual assault often delay reporting. Retrograde extrapolation is designed to estimate an earlier blood-alcohol content ("BAC") using the principles of alcohol absorption into the blood stream, which occurs along a BAC curve.[305] Though experts remain divided about the reliability of the science,[306] courts have permitted expert testimony estimating the victim's BAC at the time of the earlier incident. For example, in *Commonwealth v. Blache*, a Massachusetts court allowed an expert to give an estimate of the victim's BAC at the time of the assault and to testify that such a level was "likely to produce disorientation, loss of judgment, impaired perception, lethargy, imbalance, slurred speech, impaired comprehension, and confusion."[307] While the weight of such evidence was for the jury to determine, the evidence was sufficient for the trial court to give an intoxication instruction.[308] In *State v. Al-Hamdani*, expert witnesses provided an estimate of the victim's BAC at the time of the assault, and one expert testified that "a person with a blood alcohol level of .15 could not appreciate the consequences of his or her actions."[309] It is important to note that this testimony was only part of a larger factual picture presented indicating that the victim was extremely drunk and also unconscious for part of the assault.

3. Non-Expert Testimony

Rape trials at common law were almost entirely focused on the conduct of the victim.[310] Because of rape myths, socialized gender roles, and defense attorney tactics, a prosecutor must continually work to put the emphasis back on the defendant and his conduct and not the victim's drinking, clothing, or sexual history. In an alcohol-facilitated sexual assault case the victim and people close to him

304. *Id.* at 126.

305. Kimberly S. Keller, *Sobering Up Daubert: Recent Issues Arising in Alcohol-Related Expert Testimony*, 46 S. TEX. L. REV. 111, 121-22 (2004–2005).

306. *See generally*, *id.* at 122-24 (noting that the most contested issue for experts is the variability of individuals' alcohol absorption rates).

307. Commonwealth v. Blache, 880 N.E.2d 736, 747 (Mass. 2008).

308. *Id.* at 748.

309. State v. Al-Hamdani, 36 P.3d 1103, 1108 (Wash. Ct. App. 2001).

310. *See supra* note 27 and accompanying text*; see also supra* notes 20–24 and accompanying text.

or her can contextualize his or her attitudes and behaviors to highlight the defendant's predatory conduct.

Focusing on the accused treats the defendant "in the same way as a purported drug dealer, by evaluating his (or her) contacts, social circle, former romantic partners, etc., all with an eye toward developing information that pertains not just to a single crime, but potentially to a larger pattern of offenses."[311] Prosecutors must anticipate and be prepared to refute the "rape is not regret" defense—a common defense strategy is to argue that the victim simply regretted his or her choices and is now accusing the defendant of rape to cover his or her own embarrassment.[312] Instead, the prosecutor must "keep[ ] the focus every step of the way on the offender."[313] Prosecutors should elicit testimony from the victim and from eyewitnesses, if any, about any of the defendant's behaviors that were predatory, such as buying drinks, trying to convince the victim to drink, or orchestrating situations wherein the defendant could be alone with victim, such as volunteering to walk the victim home after someone else at the bar or party observed that the victim was excessively drunk.[314]

Though the victim's prior sexual history need not be an issue in the case, it can be helpful for illustrating incapacity to consent. For example, "N.J. testified that normally, if having sex with a man for the first time, she would do so in her bedroom, where she kept condoms, rather than in the living room without condoms."[315]

CONCLUSION

Alcohol is involved in the overwhelming majority of acquaintance sexual assaults. Yet most states do not provide criminal sanctions for sexual intercourse with severely intoxicated individuals unless the perpetrator administered the intoxicant without the victim's knowledge or consent. A growing minority of states do recognize that intercourse with a person so drunk as to be stumbling, incoherent, and falling over should be criminal, even if the individual voluntarily decided to consume alcohol or drugs. A thorough understanding of the statutory landscape and the ways different jurisdictions explain and interpret their statutory language related to voluntary intoxication can help prosecutors—in all jurisdictions—

311. Harwell & Lisak, *supra* note 270, at 179.
312. Mallios Webinar, *supra* note 276.
313. *Id.*
314. *See, e.g.*, SCALZO, *supra* note 290, at 11–12.
315. State v. Al-Hamdani, 36 P.3d 1103, 1108 (Wash. Ct. App. 2001).

with everything from voir dire strategy to closing arguments to proposing jury instructions.

Statutory revisions are only one part of the reform process. Statutory language is subject to being undermined by actors in the criminal justice system who do not agree with it, and even by other provisions elsewhere in the statutory regime. Because of the danger to individuals and communities, prosecutors have an ethical obligation to pursue charges in cases of alcohol-facilitated sexual assault. And, legal reform must be accompanied by careful attention to best practices for prosecutions of alcohol-facilitated sexual assault, particularly office-wide recognition that conviction rates are not always the best measure of prosecutorial ability.