Putting Beer Goggles on the Jury: 
Rape, Intoxication, and the 
Reasonable Man in

*Commonwealth v. Mountry*

ANNALISE H. SCOBEY

**ABSTRACT**

Alcohol is often present in situations of sexual assault, and makes charging and prosecuting these crimes more difficult. The court must decide what role the evidence of intoxication will play. In Massachusetts, the Supreme Judicial Court’s (“SJC”) recent decision in *Commonwealth v. Mountry* held that where the victim is unable to consent, the defendant’s own intoxication is permissible evidence for the jury to consider in both the subjective and objective prongs of knowledge. In effect, the jury is to consider, “what a reasonable person, as intoxicated as the defendant, would have known about the victim’s inability to consent.” This decision is error on multiple grounds because voluntary intoxication has no place as a characteristic of what is “reasonable” by legal standards, and this rule allows the defendant back-door access to the voluntary-intoxication defense and the mistake-of-fact defense.

This holding makes it much more likely that a jury will find that, based on the defendant’s intoxication, it was reasonable for him to mistakenly believe that the victim had the ability to consent. Now the defendant may be exculpated by the very intoxication that facilitated the crime in the first place, thus, creating a dangerous precedent and undermining what current protections for the victim already exist.

---

Candidate for J.D., New England Law | Boston 2014; B.A., University of Washington 2009. The author would like to thank Professors Louis Schulze and Wendy Murphy for always encouraging a critical eye.
INTRODUCTION

How should the criminal justice system approach the issue of intoxicated consent to sexual activity—or the lack thereof—when the line between the two is often blurry, even for the parties involved? The answer to this question has evolved over the past half century, largely due to shifting understandings in the dynamics of power, gender, and violence. Rape reformists have attempted to answer this question focusing on the victim and not on the accused rapist—a most unusual lens among other assaultive crimes. Rape has traditionally required the prosecution to show that the intercourse occurred with force and without the consent of the victim. This requires an inquiry into the victim’s state of mind as a prerequisite for a finding of the accused’s guilt regardless of his conduct and is often rebutted by his claims of ignorance.

1. WILLIAM SHAKESPEARE, OTHELLO act 2, sc. 3.
3. See SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 17–18 (1975) (arguing that rape is more of an exercise of power than a sexual act); Klein, supra note 2, at 984 (noting that rape reform began along with the women’s rights movement and was based on rejection of patriarchal laws and entrenched gender roles).
4. See Craig T. Byrnes, Putting the Focus Where it Belongs: Mens Rea, Consent, Force, and the Crime of Rape, 10 YALE J. L. & FEMINISM 277, 278–79 (1998); see also Susan Estrich, Rape, 95 YALE L. J. 1087, 1090–91 (1986) (“For example, rape is most assuredly not the only crime in which consent is a defense; but it is the only crime that has required the victim to resist physically in order to establish non-consent. Nor is rape the only crime where prior relationship is taken into account by prosecutors in screening cases; yet we have not asked whether considering prior relationship in rape cases is different, and less justifiable, than considering it in cases of assault.”).
6. Throughout this Comment, the masculine pronoun will be used when referencing
With the realities of limited evidence in sexual assault cases, trials can quickly turn into “swearing matches” where the jury has little to weigh but the credibility of the victim’s story versus that of the accused. This situation is further convoluted when the sexual assault occurred after consumption of alcohol. Intoxicants lead to a lack of inhibition, decreased judgment, and a rise in reckless behavior. Statistics show that intoxication is present in at least half of all sexual assaults. This can create difficulties in charging and prosecuting rape, as the recollection of one or both of those involved is often foggy.

When weighing credibility in rape prosecutions, should the jury consider the defendant’s intoxication, and if so, how much? Should a defendant’s voluntary intoxication be allowed to bear on his claimed
ignorance of the victim’s consent? And how should jury instructions be crafted to adequately instruct the jury on the law, while allowing room for an effective prosecution and also protecting the constitutional rights of the accused?

These issues all intersected in the Massachusetts Supreme Judicial Court’s (“SJC”) decision in Commonwealth v. Mountry. There, the court was confronted with an intoxicated victim without capacity to consent and no memory of the intercourse, a DNA match to the defendant, and the defendant’s claims that he was too intoxicated to know that the victim was incapable of consent. The SJC held that the district court should have allowed the jury to consider the defendant’s intoxication in determining whether a reasonable person in the defendant’s circumstances would have known of the victim’s inability to consent. Though the SJC found this to be harmless error and rightfully affirmed the defendant’s conviction, the rule has far-reaching consequences that undermine protections previously in place for victims of sexual assault.

This Comment will argue that the SJC’s extension of the rule allowing juries to consider a defendant’s voluntary intoxication in cases of rape, where the court has already determined they are not entitled to a voluntary-intoxication instruction, is error. Allowing this, while maintaining that it does not overrule Massachusetts’s rejection of the mistake-of-fact defense, risks jury confusion and acquittal contrary to policy intentions.

Part I of this Comment will explore the background law relevant to the court’s decision in Mountry—namely, rape involving an intoxicated victim, mistake of fact, and voluntary intoxication. Part II will discuss the court’s opinion, including the relevant facts, procedural history, and implications for future cases. Part III will argue that while the objective prong of

16 Cf. Derrick Augustus Carter, Bifurcations of Consciousness: The Elimination of the Self-Induced Intoxication Excuse, 64 MO. L. REV. 383, 415–16 (1999) (“States that apply the specific intent approach effectively subsidize intoxication to the extent they allow it to exculpate conduct in a large number of crimes. It is a perverse twist of justice to allow one to impair one’s own mental state in order to excuse future acts.”); Klein, supra note 2, at 1011.
18 Id. at 440–43.
19 Id. at 447.
20 See id. at 448–49.
knowledge requires some individuation in order for a jury’s inquiry to be meaningful, voluntary intoxication is not a proper characteristic for consideration in the objective prong. Part IV will also analyze how the new rule allows the defendant back-door access to voluntary intoxication and mistake of fact—both defenses not officially allowed in these circumstances. Finally, Part V of this Comment will briefly explore the relevant and far-reaching consequences of this decision.

I. Background

A. The Law of Rape

1. Incapability as a Presumption of Non-Consent in Massachusetts

In Massachusetts, rape is defined traditionally: the state must prove that sexual intercourse occurred by force and without the victim’s consent.\(^\text{23}\) However, if a victim is incapable of consenting—for instance, by reason of intoxication, sleep, unconsciousness, or helplessness—the element of non-consent is satisfied, and the only force required for proof of the crime is the force necessary to effect penetration.\(^\text{24}\) This rule was first expressed in 1870 in \textit{Commonwealth v. Burke}, where the court reasoned that the language, “against her will,” as stated in the early form of the statute, was synonymous with “without her consent.”\(^\text{25}\) Based on this finding, the court further concluded that if consent had not been secured, then a man who “took advantage of” a woman’s “insensibility” is just as guilty of rape as he would be if a sober woman had not consented.\(^\text{26}\) Legally, this establishes a presumption of non-consent when a victim is otherwise incapable of expressing her wishes.\(^\text{27}\) The court noted that this rule was recognized as such to protect victims of rape and allow them legal recourse.\(^\text{28}\)

\(^{23}\) Mass. Gen. Laws ch. 265, § 22(b) (2012) (“Whoever has sexual intercourse or unnatural sexual intercourse with a person and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury, shall be punished by imprisonment in the state prison for not more than twenty years, and whoever commits a second or subsequent such offense shall be punished by imprisonment in the state prison for life or for any term or years.”).


\(^{25}\) Id. at 377.

\(^{26}\) See id. at 378–79.

\(^{27}\) Kramer, supra note 15, at 126.

\(^{28}\) Burke, 105 Mass. at 381 (“If [this holding] 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
Burke has been interpreted as standing for two principles in situations where the victim was incapable of consent. First, the Commonwealth must show only the force necessary for penetration. Second, the Commonwealth must also prove that the accused knew or should have known of the victim’s incapacity to consent. Thus, in rape cases where the victim’s intoxication is at issue, the Commonwealth must prove penetration and that the defendant knew or should have known the victim’s condition rendered her incapable of consent.

As interpreted by more recent decisions, Burke sets out a dual-prong test to prove the defendant’s knowledge. The first prong includes a wholly subjective inquiry, encompassing what the defendant actually knew at the time of the alleged crime. The objective second prong—what the defendant should have known—analyzes what level of knowledge a reasonable person in the defendant’s circumstances would have possessed. In situations where the defendant claims he had no actual knowledge of the victim’s incapacity to consent, he can still be found guilty of rape if he reasonably should have known of this incapacity.

2. What He Should Have Known: The Objective Prong of Knowledge

Courts utilize this dual-prong approach for the required element of knowledge in many other crimes, including murder, to which the court in Mountry analogized. In murder cases, the Commonwealth is required to prove that, “in the circumstances known by the defendant, a reasonably prudent person would know that his conduct carried with it the risk of death or serious bodily injury.” This rule has generally been extended beyond malice in murder, so that it applies to most cases where knowledge
is a requisite element.\textsuperscript{39}

While it is the jury’s role to determine if this prong has been met, they are often instructed as to what factors can be considered.\textsuperscript{40} The goal is to provide a framework for the jury’s inquiry, so it can analyze the availability of socially permissible (reasonable) alternative conduct in the unique situation the defendant found himself in.\textsuperscript{41}

The \textit{objective} prong contains both subjective and objective elements.\textsuperscript{42} These elements help the jury to individualize the defendant and allow for a meaningful evaluation of the circumstances in which the defendant found himself.\textsuperscript{43} Personal characteristics that are sometimes taken into account include gender, age, and physicality of those involved.\textsuperscript{44} Contention amongst critics arises when juries are allowed to consider more deeply subjective elements such as the defendant’s prior experiences, biases, and possible racism.\textsuperscript{45}

Subsequently, the threshold inquiry for the objective prong becomes individualized to the defendant’s knowledge of the circumstances.\textsuperscript{46} The second inquiry for this prong involves what a reasonable person with that specific knowledge would have understood about the victim’s ability to consent.\textsuperscript{47} Together, they are understood as what the defendant “reasonably should have known of the victim’s incapacity to consent.”\textsuperscript{48} In other words, “[t]he objective component focuses on what the average prudent person possessing the defendant’s knowledge would have understood regarding the victim’s incapacity.”\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{39} See Mass. Continuing Legal Educ., \textit{Criminal Model Jury Instructions for Use in the District Court: Intoxication with Alcohol or Drugs}, MJII MA-CLE 9.180 (2013) (citing \textit{Sama}, 582 N.E.2d at 491) (recognizing that “the model instruction may be appropriately adapted if there is evidence of intoxication that may have negated a knowledge requirement”).
\item \textsuperscript{40} See Lundy, supra note 36, at 47.
\item \textsuperscript{41} See id.; see also Cynthia Kwei Yung Lee, \textit{Race and Self-Defense: Toward a Normative Concept of Reasonableness}, 81 MINN. L. REV. 367, 381–82 (1996) (discussing the theory behind adoption of an objective standard of reasonableness).
\item \textsuperscript{42} See Commonwealth v. Mello, 649 N.E.2d 1106, 1116 (Mass. 1995).
\item \textsuperscript{43} Cf. State v. Wanrow, 559 P.2d 548, 556 (Wash. 1977) (discussing how the reasonableness standard, in the context of a self-defense claim against a charge of murder, is intended to enable the jury to step into the shoes of the defendant as much as possible in order to determine what, from his—or in this case, her—perspective, was reasonable).
\item \textsuperscript{44} See People v. Goetz, 497 N.E.2d 41, 52 (N.Y. 1986) (taking into account physical characteristics for the objective prong of reasonableness in self-defense).
\item \textsuperscript{45} See Lee, supra note 41, at 372–73.
\item \textsuperscript{46} See Lundy, supra note 36, at 47.
\item \textsuperscript{47} See id.
\item \textsuperscript{48} Commonwealth v. Mountry, 972 N.E.2d 438, 440 (Mass. 2012).
\item \textsuperscript{49} Id. at 447 (emphasis added).
\end{itemize}
B. Intersection of Knowledge Requirement and Mistake of Fact

1. Mistake of Fact and Rape Law in Massachusetts

As is often the case when knowledge is a required element, the defendant will argue that he did not know of the victim’s inability to consent and was thus merely mistaken as to the surrounding circumstances. However, Massachusetts courts have rejected mistake of fact as a defense to rape.

In Commonwealth v. Lopez, the court refused to offer a mistake-of-fact instruction for a defendant who claimed he was under a reasonable and honest belief that the victim consented. Because the victim in that case was capable of consent, and therefore no specific mens rea was required, the court held “[a]ny perception (reasonable, honest, or otherwise) of the defendant as to the victim’s consent is consequently not relevant to a rape prosecution.” Consequently, Massachusetts is in the minority of states that reject this defense for rape cases. The court rejected this defense, noting that, generally, the requirement that the prosecution prove that the defendant used force or threat to compel the victim minimizes the chance of any mistake as to the element of consent. In other words, it would be difficult for a defendant to have a reasonable mistake of consent if he used force or coercion to obtain it.

50 Remick, supra note 7, at 1109 (recognizing that the most commonly used defense in sexual assault cases is that the act was merely consensual sex).
51 Commonwealth v. Lopez, 745 N.E.2d 961, 966 (Mass. 2001). To commit a crime because the facts were not as the defendant believed, and what the defendant intended would have been legal, is only a defense in certain instances. DRESSLER, supra note 5, at 157. Mistake of fact is a defense to general intent crimes (such as rape) if the mistake was honest and reasonable, but will not exculpate the defendant where the mistake was unreasonable. Id.
52 See Lopez, 745 N.E.2d at 962.
53 Id. at 966 (noting that the mistake-of-fact instruction is only available when the definition of the offense makes the defendant’s mental state material to a particular element). See also DRESSLER, supra note 5, at 119 (defining mens rea as the particular mental state set out expressly in the definition of an offense).
54 Lopez, 745 N.E.2d at 967.
55 Commonwealth v. Blache, 880 N.E.2d 736, 744 (Mass. 2008); see also Estrich, supra note 4, at 1097-98 (noting that a man who uses a weapon to compel a woman to submit to intercourse is not likely to doubt her lack of consent, and a jury would likely find any claim of doubt implausible).
56 See Blache, 880 N.E.2d at 744 (citing Lopez, 745 N.E.2d at 966–67) (“[A] primary rationale for our rule in cases where the complainant has the capacity to consent is that the prosecution must prove that the defendant compelled the complainant to submit by the use of force or threat of bodily injury, and proof of that element of force should negate any possible mistake as to consent.” (internal quotation marks omitted)).
However, knowledge is a required element to be proven by the prosecution in rape situations where the defendant is incapable of consent, such as in Burke.\textsuperscript{57} Despite the addition of a required mental state, the SJC held fast to its continued rejection of mistake of fact even for situations where the defendant was incapacitated.\textsuperscript{58} The risk in that decision, as pointed out by the Lopez court, is that the possibility of the defendant’s reasonable mistake could increase when the victim is incapable of consent.\textsuperscript{59} Despite this risk, the court declined to recognize a general mistake-of-fact defense for rape in any form.\textsuperscript{60} Instead, the court emphasized the necessity of proving the defendant’s knowledge as a way to combat the “potential injustices” that could occur without a mistake-of-fact defense.\textsuperscript{61}

This implies that a jury would be able to distinguish those defendants who made an “honest and reasonable mistake” as to the victim’s capacity to consent from those whose mistakes were “unreasonable.”\textsuperscript{62} Presumably, this would be clear where the defendant subjectively claims not to have had knowledge of the victim’s inability to consent, and where it would not have been reasonable for someone in his circumstances to know of this inability.\textsuperscript{63}

C. The Voluntary-Intoxication Defense in Rape Cases

Generally, voluntary intoxication is not a defense to general intent crimes—such as rape—where the only mental state required is a general


\textsuperscript{58} Blache, 880 N.E.2d at 748 (“We decline to accept the defendant’s invitation to overrule Commonwealth v. Lopez . . . . Having addressed in this case the special circumstances presented by a complainant who may have been incapable of consent, we are not prepared to adopt a rule that would recognize more generally a mistake of fact defense.”).

\textsuperscript{59} See Lopez, 745 N.E.2d at 966.

\textsuperscript{60} Blache, 880 N.E.2d at 748.

\textsuperscript{61} Id. at 744–45.

\textsuperscript{62} Id. at 745 & n.18 (“Justice Spina [in dissent] expressed concern about a risk of unjust convictions for defendants who ‘could not possibly know the complainant was in an incapacitated state that prevented . . . consent.’ However, the requirement that the Commonwealth prove the defendant knew or reasonably should have known of the complainant’s incapacity in order for a jury to convict on that basis provides protection from precisely that potential injustice.”).

\textsuperscript{63} Where a jury finds this mistake to be one easily committed, they are likely to find it reasonable and therefore, acquit the defendant. See Keith A. Rowley, \textit{To Err is Human}, 104 Mich. L. Rev. 1407, 1407–08 (2006) (discussing the definition of a mistake as a “flawed perception of reality” reflecting the gap—that we all share to some degree—between the process of perceiving and deciding).
“moral culpability.” Historically, it was understood that voluntarily impairing one’s faculties constituted reckless conduct and therefore satisfied the level of mental culpability necessary for criminal punishment. However, where “specific intent” is required by a crime’s definition—such as rape when the victim is incapable of consent—voluntary intoxication is a defense. In those instances, the defendant may introduce evidence of his intoxication to prove that he was unable to form the specific mental state required by the crime, and therefore was incapable of meeting all the elements required for guilt. While this distinction has been criticized as artificial, it reflects the understanding that a person’s choice to impair his own faculties, and likely increase the recklessness of his behavior, should not excuse criminal conduct that occurs during his intoxication.

1. Intoxication Defense in the Commonwealth

In Massachusetts, if a defendant is charged with a crime requiring a specific intent, he can request a voluntary-intoxication jury instruction. A voluntary-intoxication instruction acts as an affirmative defense, totally exculpating the defendant from liability if the jury finds that because of the alcohol’s effect, the defendant could not possess the mens rea required by the crime. In order to be entitled to this instruction, however, the defendant must present evidence of “debilitating intoxication” that could support a reasonable doubt as to whether he was capable of forming the requisite criminal intent. This high burden of proof was adopted to allow the defense only where it was clear that the defendant was unable to reach the necessary mental state.

64 DRESSLER, supra note 5, at 322.
65 People v. Register, 457 N.E.2d 704, 709 (N.Y. 1983).
67 See DRESSLER, supra note 5, at 323.
70 DRESSLER, supra note 5, at 323.
72 See Mountry, 972 N.E.2d at 448; see also Commonwealth v. Sama, 582 N.E.2d 498, 501 n.2 (Mass. 1991) (explaining how the current defense of voluntary intoxication in Massachusetts requires the defendant to show that he was under a “debilitating” level of intoxication). Despite this rule, it appears that the use of intoxication evidence in Massachusetts is not clearly defined. Judges have wide discretion to admit such evidence, and it appears that not all courts maintain the “debilitating” standard. See INTOXICATION, supra note 69.
II. Court’s Opinion

A. Facts and Procedural History

In 2004, the sixteen-year-old victim was staying overnight at the home of Somdeth Mountry, a family friend. During dinner, the defendant gave the victim alcohol, and after finishing one 750ml bottle of vodka, the two went to the store to obtain more alcohol. Upon returning home, the victim, who did not feel well after drinking so much, went to the bedroom to sleep. She awoke at 5 a.m. to the defendant putting her pants back on her as she lay on the bedroom floor. She also noticed that her shirt was up, her underwear was on incorrectly, and a button from her pants was missing. When she asked the defendant what had happened, he responded, “Nothing.” The victim then called her mother and reported what she remembered. When police completed a vaginal swab, they discovered traces of semen and DNA test results indicated a match to the defendant. At trial, the defendant claimed that he was too intoxicated himself to know that the victim’s ability or capacity to consent was impaired.

The jury convicted the defendant of rape and furnishing alcohol to a person less than twenty-one years of age. On appeal, the defendant asserted error in the judge’s refusal to instruct the jury that they could consider the defendant’s state of intoxication when deciding whether he reasonably should have known of the victim’s incapacity to consent.

The challenged jury instruction noted that to be convicted of rape when the victim was unable to consent, the defendant either (1) must have had actual knowledge, or (2) reasonably should have known of her inability to consent. When the instruction as to the objective prong was read as what a “reasonable person, not intoxicated . . . would have

73 Moultry, 972 N.E.2d at 441.
74 Id.
75 Id.
76 Id.
77 Id. at 441–42.
78 Id. at 441.
79 Moultry, 972 N.E.2d at 441–42.
80 Id. at 442.
81 Id. at 443.
82 Id. at 440 (noting that there was additional evidence from which the jury could infer that he did indeed have knowledge that the victim was highly intoxicated, including inconsistent statements and an attempt to offer the victim money after the fact).
83 Id.
84 Id. at 446.
known,” the defendant objected. The SJC transferred the case from the Appeals Court on its own initiative.

B. Holding

The SJC held that while the trial court’s jury instruction was error, it was harmless and, thus, the conviction was affirmed. In doing so, the SJC extended the rule from Commonwealth v. Sama that, in determining whether a defendant had “knowledge” of the victim’s inability to consent, the defendant’s own voluntary intoxication could be taken into account in both the subjective and objective prongs of knowledge so long as “credible evidence” existed. “The Commonwealth had to prove what the defendant reasonably should have known, . . . not what the reasonable unintoxicated person would have known.”

The court stated that “the judge should have instructed the jury that the Commonwealth must prove that in the circumstances known to the defendant, a reasonable person would have known that the victim was incapable of consent.” The trial court’s error was giving an instruction that officially precluded the jury from considering the intoxication in the objective prong. “[I]ntoxication has no mitigating effect on general intent crimes such as rape. . . . However when proof of knowledge is an element of the crime charged a defendant’s mental impairment by intoxication or otherwise ‘bears on his ability to possess the requisite knowledge of the circumstances in which he acted.”

The SJC so held despite finding that the defendant was not entitled to a voluntary-intoxication instruction, as he had not made a showing of debilitating intoxication. The court also hastened “to emphasize that our decision today should in no way be construed as reconsideration of our rejection of mistake of fact as a defense to rape cases generally.”

This was the first time this rule had been applied to a rape-by-intoxication

---

85 Mountry, 972 N.E.2d at 446.
86 Id. at 440–41.
87 Id. at 441.
89 Mountry, 972 N.E.2d at 448 (emphasis removed) (internal quotation mark omitted).
90 Id.
91 Id. at 447–48.
92 Id. at 446–47 (quoting Sama, 582 N.E.2d at 501–02).
93 See Mountry, 972 N.E.2d at 448.
94 Id. (citing Commonwealth v. Blache, 880 N.E.2d 736, 748 (Mass. 2008)) (“Our holding is confined to cases in which the Commonwealth relies on proof that a victim was incapable of consent.”).
2013 Putting Beer Goggles on the Jury 215

situation.95

ANALYSIS

The implications of the holding in Mountry are threefold.96 First, whenever a victim is unable to consent due to incapacity, her attacker will be entitled to introduce evidence of his own intoxication for jury consideration, even when that intoxication does not reach the “debilitating” level generally required for the affirmative defense.97 Second, this evidence of intoxication is to be considered by the jury in determining both the defendant’s subjective and objective knowledge.98 In effect, the jury is to consider what a reasonable person, as intoxicated as the defendant, would have known about the victim’s inability to consent.99 Third, though not overruling the rejection of mistake of fact, this holding makes it much more likely that a jury will find that, based on the defendant’s intoxication, it was reasonable for him to mistakenly believe that the victim had the ability to consent.100

I. Intoxication Is Not a Proper Factor for Jury Consideration in the Objective Prong.

The concept of reasonableness is the central inquiry when a jury is instructed to determine whether, “in the circumstances known to the defendant, a reasonable person would have known that the victim was incapable of consent.”101 However, in this context, the term reasonable is

95 See Mountry, 972 N.E.2d at 445–46.
96 See infra notes 97–100 and accompanying text.
97 Mountry, 972 N.E.2d at 446.
98 Id. at 446, 448.
99 Cf. Montana v. Egelhoff, 518 U.S. 37, 42, 44 (1996) (holding that the Constitution does not protect a defendant’s unfettered right to present evidence of intoxication, and a state may preclude all intoxication evidence if it so chooses).
100 See Kramer, supra note 15, at 130 (noting that if a defendant can convince a jury that his mistake as to consent is reasonable, he can often successfully defend a rape charge). Contra Ryan, supra note 21, at 419 (describing California’s approach to mistaken consent).
101 Mountry, 972 N.E.2d at 448 (emphasis added); see also Kevin J. Heller, Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases, 26 AM. J. CRIM. L. 1, 8 (1998) (“[T]he rationale for using an objective standard remains the same: ‘to ensure that . . . there is no fluctuating standard of self-control against which accused are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard, notwithstanding their distinctive personality traits and varying capacities to achieve the standard.’” (alteration in the original) (quoting R. v. Hill, [1986] 1 S.C.R. 313, 343 (Can. Ont. C.A.)).
already modified by the defendant’s subjective level of knowledge. The more a defendant’s personal characteristics are allowed to influence the jury’s objective inquiry, the more subjective the test becomes, resulting in a fluctuating and inconsistent standard of measure. When “reasonableness,” in the legal sense, is intended to represent what is deemed societally reasonable, the importance of avoiding excess subjectivity becomes clear.

A. People v. Goetz and Limitations on the Individuation of the “Reasonable Man”

In one of the most highly critiqued self-defense cases of recent history, the New York Court of Appeals discussed what characteristics of the defendant are proper for jury consideration in determining what is “reasonable.” Individuation of the objective prong is considered necessary in order for the jury to examine the “circumstances” facing the defendant, and factors for consideration often include physical attributes, relevant prior knowledge about the victim, and the physical actions of the criminal act. However, not every factor that influenced the defendant’s “circumstances” is to be considered, as the Legislature intended to avoid what would otherwise be a purely subjective standard by including the word “reasonable” before “belief.”

The court noted that interpreting the test to consider only what was reasonable to the defendant would essentially allow his own perceptions to exonerate him from liability, which runs contrary to the very purpose of including an objective inquiry. Further, this would allow defendants to

---

103 See Heller, supra note 101, at 9.
104 Id. at 3–5 (noting that courts originally rejected subjective standards in “reasonableness” inquiries based on the assumption that law should reflect generally accepted standards that are applicable to everyone); see also Lee, supra note 41, at 383 (noting that a “reasonableness requirement is included to encourage adherence to societal norms” and to encourage socially desirable behavior).
105 People v. Goetz, 497 N.E.2d 41, 52 (N.Y. 2001). The two-pronged test for self-defense is analogous to the test for knowledge, as it requires the defendant to have a subjective belief that the deadly force is necessary and also requires that the belief was reasonable. Id. at 47.
106 Id. at 52.
107 See Lee, supra note 41, at 423 (noting that Goetz’s racism, though impacting his actions in shooting four black youth on a subway, was not proper for the jury consideration).
108 Goetz, 497 N.E.2d at 49–50 (emphasis added).
109 Id. at 50 (“We cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable. . . . To completely exonerate such an
set their own standard of permissible (reasonable) conduct despite the fact that this conduct might include criminal acts and severe harm to other people. This is improper because the objective inquiry was intended as a baseline of socially acceptable behavior so that everyone shall be held to the same standard of conduct.

Similarly, allowing a defendant’s intoxication to modify what is reasonable in a situation where sexual assault occurred introduces too subjective an element into what should remain a more objective determination. Unlike physical characteristics or relevant knowledge of the victim, intoxication is achieved voluntarily and has effects that last only temporarily. Despite the fact that alcohol’s effects may be “universal,” its temporary nature makes it especially improper for use as a “particularizing” factor. The defendant’s intoxication at the time of the crime inherently means that his perspective at that time is not the same perspective that would exist in a normative state when he is not intoxicated. Only those characteristics that uniquely influence the defendant’s perceptions and that are consistently present, or at least long-term, should be considered by the jury in the objective prong.

The other danger with using non-universal characteristics to particularize the objective standard is that no legal standard exists to determine which characteristics are proper. Successful advocacy in either direction, bias, politics, or a judge’s own perspective could be the factor

individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to . . . perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.”)

| 110 | Id. |
| 111 | Heller, supra note 101. |
| 112 | Id. at 88 (discussing critiques of a particularized standard of reasonableness). |
| 113 | Cf. Goetz, 497 N.E.2d at 52 (noting that “the defendant’s circumstances” also include the defendant’s prior experiences). |
| 114 | See Heller, supra note 101, at 88–90. |
| 115 | See Ryan, supra note 21, at 412 (discussing the physiological effects of alcohol and its connection with increased probability of aggression and rape of acquaintances). |
| 116 | But see Lee, supra note 41, at 389–90 (discussing a criticism of objectivity in refusing to accept natural human responses that are not socially desirable). This Comment does not argue that no individuation of the objective prong is useful or necessary. There are circumstances where a defendant’s unique perspective is fundamental to a jury’s understanding of the situation, such as with battered woman’s syndrome. See, e.g., Naomi R. Cahn, The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice, 77 CORNELL L. REV. 1398, 1402–03 (1992). |
| 117 | Heller, supra note 101, at 89. |
that allows a characteristic in for jury consideration. The extreme controversy and opposing viewpoints on sexual assault and intoxication make the lack of standard particularly dangerous, for reasons that Mountry makes clear. Rape myths and gender stereotypes are firmly entrenched in the minds of Americans and the criminal justice system, making it all the more likely that particularizing characteristics detrimental to rape victims could impact the jury’s decision.

The court’s decision in Mountry allows a characteristic to be considered by the jury that has no place in the concept of the reasonable person. By doing so, it has created a dangerous precedent, beneficial to the intoxicated defendant, and muddied the lines of legally acceptable behavior.

B. Allowing Evidence of Intoxication to Become “Reasonable” Allows a Social Norm to Control the Rule of Law.

Every personal characteristic that is allowed for jury consideration carries with it implied judicial approval. Asking a jury to consider what a reasonable person would do, or what a reasonable five-foot tall female next to a six-and-a-half-foot tall male would do, assumes that there is nothing legally impermissible about being in that situation. In much the same way, asking a jury to consider what a reasonable intoxicated defendant would do implies that this perspective is valid and appropriate.

The influence of social perceptions and cultural norms involving alcohol can make the use of this particularizing characteristic dangerous. As a legal intoxicant, alcohol often enjoys a position at the center of social gatherings. The majority of Americans would likely agree on the beneficial social lubricant that moderate drinking provides; and therefore, many understand that it is quite possible to innocently drink to a

---

119 See supra notes 96–100 and accompanying text.
120 See Taslitz, supra note 118 (discussing the problem with discretion and predetermined notions of rape).
121 See, e.g., People v. Goetz, 497 N.E.2d 41, 52 (N.Y. 1986).
122 See Kramer, supra note 15, at 120–21 (discussing the dominant social beliefs surrounding alcohol consumption and sexual expectations).
123 Studies have found that alcohol has played a central role in nearly all cultures and is closely associated with symbolic and festive rituals. THE SOC. ISSUES RESEARCH CENT., SOCIAL AND CULTURAL ASPECTS OF DRINKING 9 (1998), available at http://www.sirc.org/publik/drinking 3.html (click on the image on the right-hand side of the screen to access the full report).
124 Contra Ryan, supra note 21, at 413 (noting that the social context of alcohol often means it is a shared activity).
point where perceptions are skewed. However, this general understanding creates a paradox: what might be so commonplace as to be understood as “reasonable” to an average group of jurors might not be something that should be considered legally reasonable.

Though it is legal to drink, and even to drink heavily, the law has an extremely low tolerance for wrongs committed while intoxicated. This distinction is clearly illustrated through the increasing rejection of voluntary-intoxication defenses by other jurisdictions. This represents the growing consensus that those who choose to create the risk should bear the burden of that risk in court, in addition to the statistical recognition of intoxication as the source of a substantial amount of crime. In other words, the very intoxication that facilitated the crime should not also be the factor that relieves the offender of liability—as it could now be, post-Mountry.

Allowing intoxication evidence also undermines the punishment theory of deterrence, which is one of the main theories upon which our criminal justice system is premised. Where punishment results from an unlawful act, it becomes less likely that the offender, and others, will commit the crime thereafter. Where intoxication is permissible evidence

---

125 Meredith J. Duncan, Sex Crimes and Sexual Mistakes: The Need for a Clearer Line Between Rape and Nonconsensual Sex, 42 Wake Forest L. Rev. 1087, 1120–21 & n.166 (2007) (arguing that the lesser crime of “nonconsensual sex” should be allowed where the victim did not consent, but the perpetrator’s actions were reasonable, and further questioning whether a woman who chose to drink and was then forced into intercourse was actually “raped”).

126 Kramer, supra note 15, at 124 (analyzing how some “social norms [can] diametrically oppose key legal doctrines” in the rape and intoxication context).

127 For example, driving while intoxicated is a strict liability crime if performed above the legal blood alcohol content. Mass. Gen. Laws ch. 90, § 24 (2012).

128 See Ryan, supra note 21, at 415 (recognizing the recent trend to increase criminal liability for intoxicated perpetrators); see also Mitchell Keiter, Just Say No Excuse: The Rise and Fall of the Intoxication Defense, 87 J. Crim. L. & Criminology 482, 518–20 (1997) (listing all states’ use or rejection of the defense).

129 Carter, supra note 16, at 383 (noting that the rejection of the defense is based on courts’ acknowledgement that voluntary intoxication is preventable and the source of a significant amount of crime).

130 Montana v. Egelhoff, 518 U.S. 37, 49–50 (1996) (noting that Montana’s disallowance of the voluntary-intoxication defense “comports with and implements society’s moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences”).

131 See Dressler, supra note 5, at 14–15 (discussing the principles of deterrence at the heart of the utilitarian theory of criminal liability; in this model, the defendant’s punishment serves as a lesson for the rest of society).

132 Id. at 120 (noting that where an offender is equally dangerous, the principles of general deterrence demand equal treatment, which is undermined by artificial distinctions in criminal
of a perpetrator’s reduced knowledge of the situation, that allowance does nothing to deter the accused from avoiding that situation in the future.\textsuperscript{133} In fact, it acts as an incentive for the perpetrator to highlight his intoxication to the jury because it may increase his chances of avoiding a guilty verdict.\textsuperscript{134} Evaluating the intoxicated offender “on his terms” by equating his diminished capacity with reasonable capacity provides no incentive for him to act in any other way.\textsuperscript{135} At the heart of the objective prong is the intention to judge the accused by society’s terms in an attempt to encourage socially acceptable behavior.\textsuperscript{136} By allowing the jury to consider the defendant’s intoxication, \textit{Mountry }judges the defendant on his own intoxicated terms, as social norms would allow; not by the objective terms that society, and the rule of law, would otherwise demand.\textsuperscript{137}

IV. In \textit{Mountry }, the SJC Improperly Introduced Defenses Not Otherwise Permissible.

\textbf{A. The Reintroduction of the Voluntary-Intoxication Defense}

While the decision in \textit{Mountry }assumes that a defendant will not be afforded a defense for his intoxication, it increases the possibility that this will occur despite judicial intentions otherwise.\textsuperscript{138} Because the evidence of a defendant’s intoxication is now permissible for jury consideration in subjective and objective inquiries, even where the official defense is not allowed, the defendant’s intoxication will inherently garner more consideration.\textsuperscript{139}

A voluntary-intoxication instruction, if allowed, would permit the jury to consider the defendant’s debilitating intoxication on his ability to form the requisite knowledge.\textsuperscript{140} It is only if this high burden—showing that his intoxication was debilitating—is met that this instruction would be proper.\textsuperscript{141} However, the court’s opinion demonstrates that even where the

\begin{itemize}
\item \textsuperscript{133} Keiter, \textit{supra }note 128, at 514.
\item \textsuperscript{134} See \textit{id. }at 510 (“Far from deterring excessive intoxication, states limiting intoxicated offenders’ responsibility effectively subsidize intoxication to the extent they allow it to exculpate.”).
\item \textsuperscript{135} See \textit{id.}
\item \textsuperscript{136} See \textit{id. }at 514.
\item \textsuperscript{137} See \textit{id.}
\item \textsuperscript{139} See \textit{id}. In contrast, some state legislatures have chosen to limit or exclude this evidence.
\item \textsuperscript{141} See \textit{supra }note 39 and accompanying text.
\item \textsuperscript{142} See \textit{Mountry}, 972 N.E.2d at 448; \textit{INTOXICATION, supra note 69}.  
\end{itemize}
defendant has not met this burden, a jury may consider the defendant’s intoxication in determining whether a reasonable person, with the defendant’s *same alcohol-induced diminished capacity*, would have the requisite knowledge.\(^\text{142}\) In essence, it drops the reasonableness inquiry from a “person” with all faculties intact, to one whose judgment and perception are stunted.\(^\text{143}\) The question before the jury is essentially the same as that for the affirmative defense: did his drinking make him unable to know of the victim’s incapacity/lack of consent?\(^\text{144}\) The theoretical and legal distinction between considering the intoxication as a barrier to *mens rea* and considering the intoxication for purposes of what is reasonable is a fine and difficult line to ask a jury to walk.\(^\text{145}\)

The formalities taken by the court to properly reject the official defense are rendered meaningless when the difference quite obviously has little effect on the jury.\(^\text{146}\) One commentator has noted that “once evidence of intoxication is proffered and then accepted as true, an uncertain but presumably significant number of defendants are acquitted because [the jury will assume] they did not know and could not have been expected to know that they were engaging in nonconsensual sexual intercourse.”\(^\text{147}\) If a jury believes that a defendant did not reasonably know of the victim’s incapacity because of his own intoxication, that same defendant has surely highlighted his subjective lack of knowledge already.\(^\text{148}\) The result of this is acquittal, as it undermines the second prong of the Commonwealth’s case-in-chief.\(^\text{149}\) Functionally, it is the same result as if a defendant received a voluntary-intoxication instruction: he walks free.\(^\text{150}\) The difference now is that the defense is allowed with any credible evidence of intoxication; it does not need to reach the level of debilitating intoxication.\(^\text{151}\)

The creation of this *de facto* defense is inconsistent with criminal law’s punishment of culpable behavior regardless of the excuse of intoxication.\(^\text{152}\) This very inconsistency was criticized by the Tennessee Appeals Court where the defendant argued that his intoxication, though not a formal defense, should still be considered by the jury:

\(^\text{142}\) *See Mountry, 972 N.E.2d at 447–48.*  
\(^\text{143}\) *See id.*  
\(^\text{144}\) *See id.*  
\(^\text{145}\) *See Ryan, supra note 21, at 422.*  
\(^\text{146}\) *See id.*  
\(^\text{147}\) *Id.*  
\(^\text{148}\) *See id.*  
\(^\text{149}\) *See id.*  
\(^\text{150}\) *See id. at 423.*  
\(^\text{151}\) *See Mountry, 972 N.E.2d at 447–48.*  
\(^\text{152}\) *See DRESSLER, supra note 5, at 320.*
THE COURT: You mean that a man can get so drunk, if he’s walking down the street and then he blacks out, and then he gets in a car and drives it and kills somebody, he’s not guilty of vehicular homicide because he didn’t—he was so drunk he couldn’t appreciate what happened? Is that what you’re saying?\(^{153}\)

This inconsistency is analogous to the inconsistency created, and subsequently ignored, by the court in Mountry.\(^{154}\) It suggests that the defendant’s drunken failure to appreciate that he raped a woman could excuse his behavior by reintroducing the defense of voluntary intoxication even where he is not entitled to it.\(^{155}\) In doing so, it undermines Massachusetts’ policy of limiting that defense to cases that involve extreme inebriation.\(^{156}\)

B. Reintroduction of the Mistake-of-Fact Defense: The Defendant’s Intoxication

The mistake-of-fact defense was previously rejected for rape cases in Massachusetts.\(^{157}\) In fact, the SJC, in Mountry, recognized how similar their holding was to undermining that general rule, and in an effort to claim distinction noted: “We hasten to emphasize that our decision today should in no way be construed as reconsideration of our rejection of mistake of fact as a defense to rape cases generally.”\(^{158}\) Despite this, the court’s opinion in Mountry makes it more likely that a jury will find that a defendant was reasonably mistaken in his assumption that the victim had capacity to consent, and that she was, in fact, consenting.\(^{159}\) This “lack of knowledge” is functionally equivalent to a mistake of fact: he thought she was capable of consenting, she was not, and as such, he was mistaken.\(^{160}\) If mistake of

\(^{154}\) See Mountry, 972 N.E.2d at 447–48.
\(^{155}\) See Ryan, supra note 21, at 422.
\(^{158}\) Mountry, 972 N.E.2d at 448.
\(^{159}\) See id. at 446 (noting that a defendant’s intoxication bears on his ability to possess knowledge of the victim’s capacity). Many commentators note that highly prevalent social myths make juries more likely to believe that mistake of consent could be reasonable. See Berliner, supra note 22, at 2687–88 (recognizing that juries are more hesitant to convict where they find it reasonable that the victim might have consented, such as where the victim and defendant were “voluntary social companions”).
\(^{160}\) Cf. Rowley, supra note 63, at 1411–12 (discussing the differences between mistake and misunderstanding).
fact was rejected to avoid exculpation from criminal liability for defendants who cannot reasonably distinguish between consent and non-consent, the defendant who cannot distinguish between capacity to consent and lack of capacity to consent should not be treated differently.161

This obvious contradiction is further aggravated by the fact that the very reason that the defendant was mistaken was because he voluntarily chose to consume alcohol, knowing it would inhibit his perceptions and memory.162 The effects of alcohol are well known and widely documented; a defendant would have difficulty successfully arguing that he didn’t know that drinking might impair his ability to accurately assess the situation.163 This is fundamentally different than a defendant who was mistaken despite having all of his perceptive faculties intact.164 Commentators recognize that it is a common-sense conclusion that if one is at fault for his own mistake, he should not be afforded the same protection as a party who is innocently mistaken.165 Importantly, rather than accepting this evidence at face value when presented with the same issue, California recognized the inherent bad faith in this argument.166 And it is because of this bad faith, not because of any evidentiary objections, that California refuses to allow intoxication to modify reasonableness.167 In contrast, Massachusetts’ decision to allow the evidence came with no discussion of propriety or policy.168 The SJC, in Mountry, had an opportunity to opine whether the fault of the defendant for the intoxication should carry weight. In choosing not to comment, the court made its double standard clear: a sober mistake about consent is not exculpatory, but an intoxicated mistake about capacity to consent is in fact reasonable.169

162 See Ryan, supra note 21, at 412.
163 See SCALZO, supra note 11, at 3.
164 Generally, the mistake-of-fact defense requires the defendant’s belief to be reasonable, and in good faith. See DRESSLER, supra note 5, at 154–55. Intoxication would generally not be considered good faith. See id.
165 Rowley, supra note 63, at 1434.
166 See Ryan, supra note 21, at 418–19.
167 Id.; see also People v. Potter, 143 Cal. Rptr. 379, 382 (Cal. App. 1978) (“If, as a result of self-induced intoxication, appellant believed that the victim was consenting, that belief would thereby not become either ‘reasonable’ or in ‘good faith.’”).
168 See Ryan, supra note 21, at 419.
V. Consequences of the Mountry Decision

A. Mountry Undermines Justice and Sexual Autonomy for Rape Victims.

The autonomy of a person over her own personal space, in particular the use of her body, is engrained in law.\textsuperscript{170} It is protected from battery, assault, and even confinement.\textsuperscript{171} But clearly, female sexual autonomy is not given this same protection.\textsuperscript{172} A women’s choice to have sex when she wants to, and not have sex when she doesn’t want to, is fundamental.\textsuperscript{173} But this is undermined when defendants are held to a lesser standard of conduct—one that does not protect a woman to be free from unwanted intercourse.\textsuperscript{174}

By allowing intoxication to be considered reasonable, it becomes reasonable that a man could rape a woman without realizing she was unable to consent.\textsuperscript{175} This does not even require an affirmative consent—it is judicially excused negligence concerning the bodily autonomy of another human being.\textsuperscript{176} The inability to consent is a lack of consent, and, as in any other situation, where consent does not exist, it should be honored as a “no.”\textsuperscript{177} Our legal system fails to recognize the sexual autonomy of women when it makes decisions that undermine the importance of securing a clear “yes.”\textsuperscript{178}

[B]eing negligently sexually penetrated without one’s consent remains a grave harm, and being treated like an object whose words or actions are not even worthy of consideration adds insult to injury. This dehumanization exacerbates the denial of dignity and autonomy which is so much a part of the injury of rape, and it is equally present in both the purposeful and negligent rape.\textsuperscript{179}

The harm to the victim is the same regardless of whether the defendant


\textsuperscript{171} See id.


\textsuperscript{173} Id. at 41.

\textsuperscript{174} See Estrich, supra note 4, at 1105.

\textsuperscript{175} See Mountry, 972 N.E.2d at 448.

\textsuperscript{176} See Remick, supra note 7, at 1105, 1135.

\textsuperscript{177} Id. See also Schulhofer, supra note 172, at 41.

\textsuperscript{178} See Remick, supra note 7, at 1105.

\textsuperscript{179} Estrich, supra note 4, at 1105.
was sober or intoxicated. The fact that a man was drunk makes this no less a rape, no less an injury, and no less an invasion of the victim. Simply because a woman was physically unable to consent does not mean that the man who violated her trust and her body should have a better chance of escaping punishment. The fact that the judicial system allows this evidence as reasonable becomes yet another injury, and yet another institutionalized betrayal, to the victim who seeks justice from the courts.

B. Social and Demographic Realities of Intoxication Indicate That This Problematic Factual Situation is Likely to Reoccur.

Though the SJC took pains to keep Mountry’s holding narrow, the statistical likelihood of this exact situation occurring again is high. Studies show that over half of sexual assaults involve alcohol. In acquaintance rapes, this number jumps to 75%. When 70% of crimes against women involve acquaintances, the significance of alcohol-facilitated assault takes on greater importance. The presence of alcohol amongst college students presents an even larger problem. Nearly one in five college women are victims of completed or attempted sexual assault, and the Boston metropolitan area attracts over 360,000 college students.

---

180 See id.
181 See id.
183 See, e.g., Tyler Kingkade, College Sexual Assault Survivors Form Underground Network to Reform Campus Policies, HUFFINGTON POST (Mar. 21, 2013, 1:35 PM), http://www.huffingtonpost.com/2013/03/21/college-sexual-assault-survivors_n_2918855.html.
184 SCALZO, supra note 11, at 1 (discussing the high prevalence of alcohol facilitated sexual assaults).
185 Abbey et al., supra note 12.
from all over the world. One national estimate finds that 97,000 college students between eighteen and twenty-four years old are victims of alcohol-related sexual assault annually. The statistics are clear: intoxication plays a large part in sexual assault, and the situation in Massachusetts is particularly dangerous.

This danger has been recognized by the current Administration, evidenced by Vice President Biden addressing the issue to an audience of college students. “Rape is rape is rape,” he said, and “[n]o means no, if you’re drunk or you’re sober . . . . No matter how much she’s had to drink, it’s never, never, never, never, never ok to touch her without her consent.” The very fact that he had to state this implies that this might be more common—and its wrongfulness less obvious—than one may like to think.

CONCLUSION

Though seemingly innocuous, the rule announced in Mounroy presents a dangerous situation. Allowing the defendant’s intoxication to be considered by the jury in the objective prong of knowledge is error. By announcing a rule that suggests it might be legally reasonable for a defendant’s voluntary intoxication to excuse his lack of knowledge and mistake regarding the victim’s consent, the court paid mere lip service to its previous rejection of mistake-of-fact and limitations on the voluntary-intoxication defense. The court’s respect for that previous rejection ended there. The SJC treated the case as if there was no other alternative but to extend the rule in Commonwealth v. Sama. There was, however, another alternative: require a jury to consider what a reasonable person, not intoxicated, would have done in the defendant’s situation. This would have recognized that the intersection of rape and intoxication presents a truly unique situation requiring the objective prong to be exactly what it was.

192 See supra notes 189–91 and accompanying text.
194 Id.
195 See supra notes 179–88 and accompanying text.
intended to be—a safeguard. If protecting victims of sexual assault and deterring dangerous crime truly are top priorities, then law’s “reasonable man” and Shakespeare’s “beast,” whose brain was stolen away, must not be permitted to be one and the same.