

DRUG AND ALCOHOL- FACILITATED SEXUAL ASSAULT

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AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

ALCOHOL-FACILITATED SEXUAL ASSAULT OR...

Who needs force when you have
alcohol?



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SUPPORT

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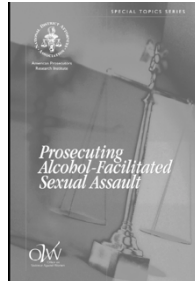
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OVERVIEW

- Why are these cases hard?
- 2-step charging process
- Basic toxicology
- Trying the case

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THE RESOURCE



http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf

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DISCUSSION

Why is alcohol the perfect weapon for a sex offender?

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THREE KEY ELEMENTS TO EVERY SEXUAL ASSAULT

1. PERPETRATOR
2. VICTIM
3. AUDIENCE

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QUESTION

- How does a victim's intoxication affect the criminal justice response to sexual violence?
- How does a perpetrator's intoxication affect the criminal justice response to sexual violence?

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WHAT IS ALCOHOL-FACILITATED SEXUAL ASSAULT (AFSA)?

- Victim is too drunk to consent for 1 of 3 reasons:
 - Surreptitious administration by assailant
 - Mixing of prescription or over the counter drugs with alcohol or recreational drugs
 - Recreational use by victim

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VICTIM MAY BE INCAPACITATED DUE TO THE EFFECTS OF

- Alcohol alone
- Alcohol mixed with drugs surreptitiously administered by assailant
- Alcohol mixed with prescription, over the counter drugs
- Alcohol mixed with recreational drugs

UNDERSTAND THE SYNERGISTIC EFFECT
OF COMBINING DRUGS

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SYNERGISTIC EFFECT

The interaction of two or more substances or other agents to produce a combined effect that is greater than the sum of their separate effects

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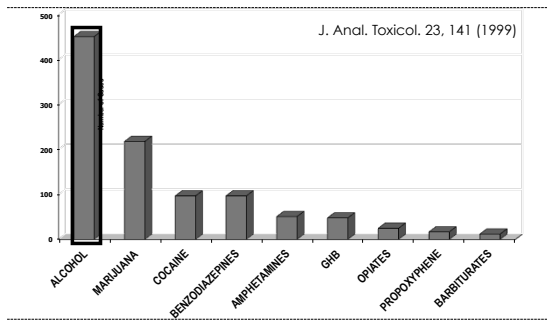
PREVALENCE OF AFSA

More than 97,000 students between the ages of 18 and 24 are victims of alcohol-related sexual assault or date rape.

National Institute on Alcohol Abuse and Alcoholism: A Snapshot of Annual High-Risk College Drinking Consequences. <http://www.collegedrinkingprevention.gov/StatsSummaries/snapshot.aspx> (last visited May 6, 2010).

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PREVALENCE OF DRUGS USED IN ALLEGED CASES OF SEXUAL ASSAULT



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AFSA IS UNDERREPORTED

Victims of drug-facilitated or incapacitated rape were less likely than victims of forcible rape to report to authorities.

Kilpatrick, Dean, PhD, et al, Drug-facilitated, Incapacitated and Forcible Rape: A National Study (2007)

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WHY SHOULD WE CARE?

Of the study participants, victims of incapacitated rape were comparable to victims of forcible rape with regard to risk for post-traumatic stress disorder (PTSD) and depression but were nearly twice as likely as victims of forcible rape to have past-year substance abuse problems.

Kilpatrick, Dean, PhD, et al, Drug-facilitated, Incapacitated and Forcible Rape: A National Study (2007)

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2-STEP CHARGING PROCESS

- Assuming the victim's version is 100% true, do the allegations constitute rape ?
- Can you prove the victim's allegations?

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STEP 1

IS IT RAPE?

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THE CHALLENGES YOU FACE

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DRUNK SEX?

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ALCOHOL USE IS A PART OF OUR CULTURE

- 82% of people 12 and older have used alcohol at least once in their lifetimes
- Nearly 1/2 of all Americans (12 and older) have used alcohol in the past month (approximately 109 million people)

Substance Abuse in Brief, April 2003, Volume 2, Issue 1, National Clearinghouse for Alcohol & Drug Information, Substance Abuse and Mental Health Services Administration, US Dept. of Health and Human Services

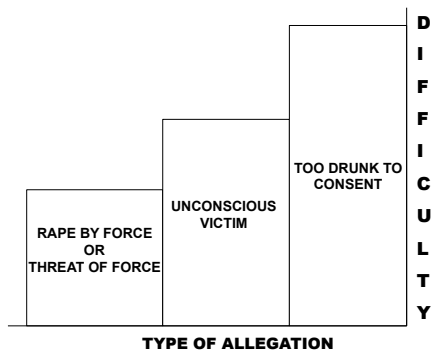
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WHAT IS RAPE?

- Traditional categories
 - Force or threat of force but with a drunk victim
 - Unconscious victim
- Victim too drunk to consent

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PROVING RAPE ALLEGATIONS



THE LAW: 3 WAYS TO PROVE

- Too intoxicated to consent
- Physically helpless
- Mentally incapacitated

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UTAH RAPE LAW

- 1) A person commits rape when the actor has sexual intercourse with another person without the victim's consent.
- 2) This section applies whether or not the actor is married to the victim.

U.C.A. § 76-5-402

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ANALYZING YOUR CASE

ELEMENT(S)	WITNESS(ES)	EVIDENCE
By force (penetration)		
Intoxication to point where incapable of consent		
DEGREE OF INTOXICATION		
CONSCIOUS V. UNCONSCIOUS		
MENTAL ALERTNESS		
ABILITY TO WALK		
ABILITY TO COMMUNICATE COHERENTLY		
CONSENT PRIOR TO UNCONSCIOUSNESS		

LOOK AT THE TOTALITY OF THE CIRCUMSTANCES

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INVESTIGATING DUI

- ◉What do police look for with DUI?
 - Odor of alcoholic beverage
 - Bloodshot/watery eyes
 - Slurred speech
 - Unsure balance
 - In field tests:
 - ◉Cannot follow instructions
 - ◉Problems with balance and coordination

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QUESTIONS FROM ALCOHOL INCIDENT REPORT

- ◉When did you last eat?
- ◉What did you eat?
- ◉What were you doing during the last 3 hours?
- ◉Have you been drinking?
- ◉Are you under the influence of an alcoholic beverage now?
- ◉Are you taking tranquilizers, pills or medications of any kind?
- ◉When did you last sleep and for how long?

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FACTORS

- Did victim:
 - Vomit?
 - Urinate?
 - Defecate?
- Could victim:
 - Walk?
 - Talk?
- Did victim have to be helped with physical tasks?
- Did defendant carry victim?
- Did the defendant follow victim?

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FACTORS

- | | |
|--|---|
| <ul style="list-style-type: none"> • Victim's coordination • Who undressed whom? • Victim's appearance clothing <ul style="list-style-type: none"> • Dirty? • Disheveled? • Bloodshot eyes? | <ul style="list-style-type: none"> • Location of assault • Was victim conscious? • Sexual acts and position <ul style="list-style-type: none"> • Degree of coordination involved |
|--|---|

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**YOU MUST ANTICIPATE
AND BE PREPARED TO
ADDRESS THE "RAPE IS
NOT REGRET" DEFENSE**

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DEFINING RAPE

Almost 1/2 of the women who were characterized as victims of a completed rape by the National College Women Sexual Victimization Survey did not consider themselves to be victims of rape.

Rand, Michael and Callie Rennison, "How Much Violence Against Women is There?", p.8, DOJ, National Institute of Justice 199702

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"RAPE IS NOT REGRET" ANALYSIS

- Type of rape alleged
- Time and circumstances of report
 - Eye and ear witnesses
- Motive to lie
- Predatory behavior on part of accused

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BUT THE BIGGEST CHALLENGE . . .

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...BUT HE WAS DRUNK TOO

“So, why wasn’t it just drunk sex?”

Isn’t his intoxication a defense?

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PECK v. DUNN

574 P.2D 367 (UTAH 1978)

Some crimes, such as murder, rape, and kidnapping, require only general intent to do an act, which is evil in itself, and are said to be “malum in se”; in such circumstances, person is presumed to intend natural consequences of his act and general criminal intent with which act was done may be inferred from words and conduct of actor.

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THE REALITY

Approximately 50% of all sexual assaults are committed by a man who has been drinking.

Abbey et al. (2004)

In a nationwide survey of college students, 68% of sexual assaults involved alcohol consumption by the offender.

Fisher et al. (2003)

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SEXUAL PREDATOR v. JUST SOME DRUNK GUY

• Look at:

- His degree of intoxication, capacity to do other things
- Any planning, manipulation or attempts to deceive victim
- Accused's attempts to control the situation and overcome victim's will (e.g. providing alcohol or drugs, isolation, lies)

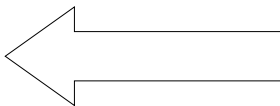
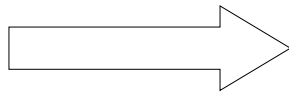
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SEXUAL PREDATOR v. JUST SOME DRUNK GUY

- Is there any evidence the accused selected victim because he knew she would be an easy target?
- Did he use force?
- Did she say no?

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**GOOD TARGET
FOR
PREDATOR**



**GOOD WITNESS
FOR
PROSECUTION**

BOTTOM LINE

We will never make the right charging decisions if we only consider the wrong evidence

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STEP 2

Can you prove the victim's allegations?

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VICTIM'S CREDIBILITY

- Perception at the time of the incident
- Memory after the incident
- Corroboration
- Victim likeability

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PERCEPTION AT THE TIME OF THE INCIDENT

- ◉ Degree of intoxication
 - Were her motor skills impaired?
 - Was she able to perceive what was happening around her?
- ◉ Who gave her the drinks or drugs?
 - Was it the accused?
 - Did accused encourage her to drink or use more drugs?

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MEMORY AFTER THE INCIDENT

- ◉ What does she remember about the incident?
- ◉ Where did she go that night?
- ◉ Did she black out or pass out?

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MEMORY AFTER THE INCIDENT

- ◉ Can anything refresh victim's memory?
 - Physical or medical evidence
 - Statements from other witnesses
 - Photographs, videotapes, 911 tape

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CORROBORATION

Must corroborate everything possible

THERE IS ALWAYS SOMETHING MORE

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CORROBORATION

- ◉Victim may not report or may delay in reporting
 - Evidence collection issues
 - Credibility issues

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CORROBORATION

- ◉Witnesses
 - Does she remember if anyone else was present?
 - Who did she first tell?
 - Who saw her first after the incident?

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CORROBORATION

•Witnesses

- To ingestion, incident, aftermath
- Prompt complaint witnesses
- Interview bartenders and waiters
 - How much did the victim have to drink?
 - Did she appear drunk or high?
- Friends of victim and suspect
- Look for ex-wives, girlfriends, other victims

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EVIDENCE COLLECTION

- Is there corroborating physical or medical evidence?
 - Are there surveillance tapes?
 - Videotapes? Tape recordings?
 - Photographs?
 - Injuries?
- Evidence of victim's presence
 - Blood, hair, urine, vomit, clothing

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THE ACCUSED

- Always attempt an interview
- Did accused know victim was drunk?
 - How much did she drink?
 - What signs of intoxication did she exhibit?
 - Who purchased alcohol?
 - Who provided the alcohol?
- Why does accused think the encounter was consensual (if he does)?

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EVERYTHING WE EVER LEARNED IN DRUG INVESTIGATIONS...

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PRETEXT PHONE CALLS

- Check the law
- Plan carefully
- Make sure the victim can handle it
- What can you say?
 - Victim has a sexually transmitted disease (STD)
 - I really enjoyed that drug you have me, what was it?
 - I really enjoyed last night...

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VICTIM "LIKEABILITY"

- Victim becomes the focus of the trial instead of the accused
- The jury may believe the behavior goes all the way to "yes"
- Victim may blame self for placing self in a risky situation
 - May not want to cooperate with prosecution
 - Self blame may cause victim to be less sympathetic or less credible

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PRETRIAL MOTIONS

- Rape shield motions
- Motions in limine
 - Motion to preclude arguing that intoxication is a defense
 - Exclude references to irrelevant bad behavior
 - Prior drug or alcohol use
 - Caveat: Rohypnol users build a tolerance for some effects so defense may be able to introduce in some cases

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INJURIES: RESEARCH FINDINGS

ROSAY & HENRY

- 38% of incapacitated patients had genital injury; 44% had nongenital injury; statistically significantly less likely to have genital and nongenital trauma than patients were not incapacitated at the time of the assault.
- Bruising to the arms and legs most common types and sites of nongenital injury
- Incapacitated patients less likely to have genital bruising and lacerations and less likely to have injury to their fossa, fourchette, vaginal walls, anus, and rectum than those not incapacitated.

<http://www.ncjrs.gov/pdffiles1/nij/grants/224520.pdf>

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TOXICOLOGY

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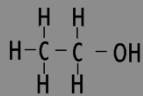
OVERVIEW OF TOXICOLOGY

- Absorption distribution & excretion of alcohol
 - Where alcohol goes in the body
- Physiology of intoxication
 - Why people get drunk / What alcohol does in the body
- “Date rape” drugs

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ABSORPTION OF ALCOHOL

- Passage of alcohol into the bloodstream
 - Ethanol – Ethyl Alcohol
 - The intoxicating component of alcoholic beverages



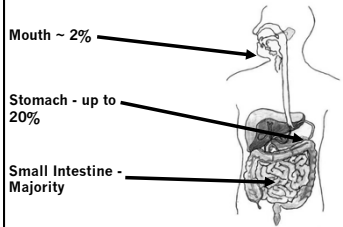
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ETHANOL CONTENT

- A 12-ounce bottle or can of regular beer =
- A 5-ounce glass of wine =
- A drink of one and 1/2 ounce of 80 proof distilled spirits (either straight or in a mixed drink)
- Alcohol is Alcohol is Alcohol!

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ABSORPTION



Human Digestive System Diagram
Source: National Science Foundation

THE SMALL INTESTINE

- Primary absorption point
- Large surface area
- Rapid absorption – alcohol needs no digestion
- Enters the blood and circulates throughout the body (including the brain)

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ABSORPTION RATE

- Time it takes for 100% of the alcohol contained in one beer, glass of wine, or spirit to be completely absorbed into the blood
 - Average ~ 30 minutes
 - Range = 15 min. to 1.5 hours
 - Depends on a variety of factors

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FACTORS AFFECTING ABSORPTION

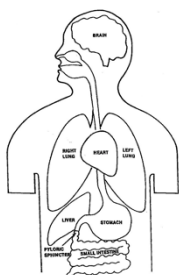
•Stomach content:

- Empty Stomach – Alcohol will reach the SI faster
- Full Stomach – Delays the time it takes for alcohol to reach the SI

J. C. Garriott. (1996) *Medicolegal Aspects of Alcohol*. Tucson, AZ: Lawyers and Judges Publishing Company, Inc.

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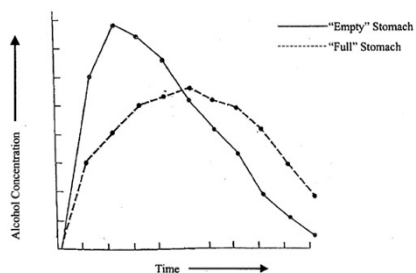
PYLORIC VALVE



- Regulates entry into the small intestine
- Open v. Closed
- Type of food matters (High protein/fat v. Carbohydrate)

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AFFECT OF STOMACH CONTENT



OTHER FACTORS AFFECTING ABSORPTION

- Type of beverage consumed
 - Effect of carbonation
 - Effect of concentration
- These are not significant when compared to the effect of stomach content

J.C. Garriott (1996) Medicolegal Aspects of Alcohol, Tucson, AZ: Lawyers and Judge Publishing Company, Inc.

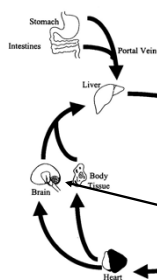
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DISTRIBUTION

The temporary placement of alcohol in various tissues of the body

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DISTRIBUTION PATHWAY



- Alcohol to the liver
- The liver gets first pass at all *ingested* substances (vs. inhaled, injected)
- From the liver, alcohol travels to the heart, to the lungs, back to the heart, to all parts of the body (including the brain)

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FACTORS AFFECTING DISTRIBUTION

- Water content
 - Alcohol is hydrophilic (water loving)
 - Alcohol will accumulate in tissues which have high water content
 - Oil (fat) and alcohol don't mix (as well) – Alcohol will not accumulate (as much) in fatty tissue

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WHERE THE ALCOHOL GOES

ALCOHOL ACCUMULATES IN

- Liver
- Muscle
- Brain

ALCOHOL DOES NOT ACCUMULATE IN

- Fatty Tissue
- Bone

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THE BRAIN

- Alcohol will temporarily accumulate in the brain because the brain is highly vascular (bloody) and has a high water content
- Alcohol, unlike some other substances, freely crosses the blood brain barrier

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MUSCLE v. FAT (DISTRIBUTION)

- Alcohol will leave the blood and enter muscle – concentration decreases in the blood
- Alcohol will not leave the blood and enter fat and its concentration increases in the blood
- Practical effect – Higher Muscle: Lower BAC
Higher Fat : Higher BAC

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Wall Street Journal Columnist: Rape Victims Are Just As Guilty As Rapists If They're Both Drunk

"If two drunk drivers are in a collision, one doesn't determine fault on the basis of demographic details such as each driver's sex. But when two drunken college students 'collide,' the male one is almost always presumed to be at fault," Taranto writes. He goes on to conclude that efforts to address sexual violence on college campuses are creating a culture in which "women, but not men, are absolved of responsibility by virtue of having consumed alcohol."

MALE v. FEMALE (DISTRIBUTION)

- Average Male = 68% Water
 - Higher proportion of muscle compared with women
- Average Female = 55% Water
 - Higher proportion of fat compared with men
- Effect on BAC – Increased BAC in women for a given quantity of alcohol

National Institute on Alcohol Abuse and Alcoholism. Alcohol Alert: Alcohol and Women. No. 10, PH 290. Bethesda, MD: the Institute, 1990.

Frezza, M.; Di Padova, C.; Pozzato, G.; Terpin, M.; Baroana, E.; & Lieber, C.S. High blood alcohol levels in women: The role of decreased gastric alcohol dehydrogenase activity and first-pass metabolism. The New England Journal of Medicine 322(2):95-99, 1990.

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MALE / FEMALE

- Average 140 pound male and average 140 pound female each consume 6 x 12 oz beers over 2 hours

- Male ~ .14-.15
- Female ~ .18-.19

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MALE / FEMALE

- Average 190 pound male and average 125 pound woman each consume 6 x 12 oz beers over 2 hours

- Male ~ .09-.11
- Female ~ .19-.21

The playing field is not equal!

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ELIMINATION

- The body ridding itself of alcohol
- If we didn't eliminate alcohol we would remain drunk permanently

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DIRECT EXCRETION
SMALL BUT IMPORTANT

- Direct Excretion accounts for ~5-10 % of alcohol elimination
- Urine
- Sweat
- Breath
 - Excretion of alcohol via breath is what permits breath testing
 - Average – 2,100 : 1 (ml of alveolar air to ml of blood)

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METABOLISM

- 90 – 95% of alcohol is metabolized by Alcohol Dehydrogenase (ADH), primarily in the liver
- There is some ADH in the stomach
- Food in the stomach also ensures that more alcohol is metabolized before getting into the blood

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PATHWAY

Alcohol Dehydrogenase

Ethanol Acetaldehyde

Alcohol Dehydrogenase

Acetaldehyde Acetic Acid

Acetic Acid H₂O + CO₂

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RATE OF METABOLISM

- Fixed and unchanged regardless of amount of alcohol consumed at one sitting
- Average rate of metabolism – BAC is decreased by ~ .015-.025/ hour (Approximately one drink per hour)
- Startling events do not “sober people up”
 - Neither do coffee or cold showers!

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FACTORS AFFECTING METABOLISM

- Gender
 - Gastric (stomach) Alcohol Dehydrogenase activity in females is far less than that of males
 - In men, less alcohol reaches the small intestine to be absorbed

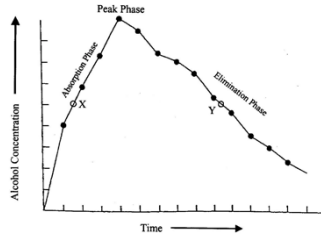
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FACTORS AFFECTING METABOLISM

- Novice v. Experience Drinker
 - Chronic alcohol users express more Alcohol Dehydrogenase
 - Generally, it takes more alcohol consumption to attain the same BAC
 - This is distinct from the fact that it also requires higher BAC to achieve the same level of “intoxication”
 - Cirrhosis reverses this somewhat

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ALCOHOL CONCENTRATION CURVES (VISUALIZING ABSORPTION v. ELIMINATION)



X, Y = The Same Alcohol Concentration At Different Times

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MECHANISM OF INTOXICATION

Why Alcohol Makes Us Drunk

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ALCOHOL IS A CNS DEPRESSANT

DEPRESSANTS – SLOW DOWN THE CNS

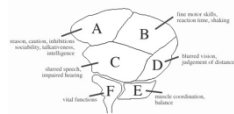
- Barbiturates
- Nitrous oxide
- Tranquilizers
- "Date rape" drugs

STIMULANTS – SPEED UP THE CNS

- Cocaine
- Crack cocaine
- Amphetamines
- Methamphetamine

AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

BAC AS AN INDICATOR OF EFFECTS ON THE BRAIN



- The most developed portion of the human brain is affected at lower BACs
- The least developed portion of the human brain is affected at higher BACs

<http://www.mtholyoke.edu/offices/health/ADAP/brain.htm>

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EUPHORIA (BAC = .06-.12)

- Judgment becomes impaired. People may say the first thought that comes to mind, rather than the appropriate comment in a given situation
- People become more self-confident or daring as judgment is affected
- Attention span shortens
- People may begin to appear flushed
- Fine motor coordination begins to deteriorate

<http://www.howstuffworks.com/alcohol3.htm>

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“Of all the embarrassing, mortifying, horrible memories of my life, the vast majority can be directly traced to excess alcohol consumption.”

Jennifer M. Sommers

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EXCITEMENT (BAC = .09 - .25)

- Body movements become uncoordinated
- Loss of balance
- Reaction times increase
- People may have trouble understanding or remembering things (even recent events)
- Speech may begin to slur
- Vision may begin to blur
- Sleepiness sets in

<http://www.howstuffworks.com/alcohol3.htm>

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CONFUSION (BAC = .18-.30)

- Confusion sets in – people may not know where they are or what they are doing
- People become dizzy and may stagger
- People may be highly emotional aggressive, withdrawn or overly affectionate
- People are sleepy
- They have slurred speech
- They may not feel pain as readily as a sober person

<http://www.howstuffworks.com/alcohol3.htm>

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STUPOR (BAC = .25-.40)

- People can barely move at all
- Cannot respond to stimuli
- Cannot stand or walk
- People may vomit
- People may lapse in and out of consciousness

<http://www.howstuffworks.com/alcohol3.htm>

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COMA (BAC = .35-.50)

- Reflexes are depressed (i.e. pupils do not respond appropriately to changes in light)
- People feel cool as body temperature drops
- Unconsciousness
- Breathing is slower and more shallow
- Heart rate may slow
- People may die

<http://www.howstuffworks.com/alcohol3.htm>

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DEATH (BAC = .50 OR GREATER)

- People will generally stop breathing, thereby causing death
- Remedy – Respirator

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ETHANOL AND BLACKOUTS

- Blackout: Periods of memory loss for events that transpired while a person was drinking (no loss of consciousness- not passed out)
- The brain's ability to form long term memories from short term memories is destroyed

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BLACKOUTS

- Not predicted by BAC only
- More likely to suffer the effects of blackout if BAC rises rapidly as opposed to slowly (i.e. - binge drinking increases likelihood)
- Person who consumes alcohol slowly and reaches a high BAC slowly is less likely to blackout than a person who drinks rapidly and reaches the same BAC

What Happened? Alcohol, Memory, Blackouts, and the Brain. Aaron M. White, Ph.D.; <http://pubs.niaaa.nih.gov/publications/arn27-2/186-196.htm>

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ETHANOL AND PASSOUTS

- Alcohol-induced unconsciousness
- Sedation due to CNS depressant effect
- Resembles sedated state associated with surgery
- Can last for hours
- Groggy-sedated feeling can linger for 24 hours

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BLACKOUT DEFENSE

- "She wanted me, she just doesn't remember that she wanted me."
- "She remembers saying no, she just doesn't remember saying yes."
- "Even though she remembers a lot, she is blacking out the 5 seconds when she said 'Yes! I want you!'"

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IF THE DEFENSE CALLS AN EXPERT

- May be better to NOT call your own expert;
- Use the defense expert to establish general alcohol facts good for your case (be friendly – get concessions):
 - Alcohol is a CNS Depressant,
 - Women are affected disproportionately,
 - Alcohol is not a hallucinogen (important if the V remembers saying NO, struggling, etc.)

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DEFENSE EXPERT

- Expert will need to acknowledge that:
 - Generally speaking (almost always) a person who blacks out will be showing visible signs of gross intoxication (support this w/ witness testimony)
 - A person intoxicated to the point of blackout will be drowsy / sleepy (i.e. when horizontal, sleep will be the preferred state)

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