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'A drunken consent is still consent'—or Is It? A Critical Analysis of the Law on a Drunken Consent to Sex Following Bree

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Abstract Does a person who is voluntarily drunk remain capable of giving valid consent to sex? The Court of Appeal in *Bree* held that 'a drunken consent is still (valid) consent', though it further recognises that the capacity to consent may evaporate well before a complainant becomes unconscious. This decision is a move in the right direction, yet this article argues that it has not gone far enough, and that s. 74 of the Sexual Offences Act 2003 which governs these scenarios allows—and even requires—a more drastic interpretation: a drunken consent is *not* consent when the person is very drunk. Based on a distinction between factual and legal consent, the article starts by setting up the legal framework as set out in s. 74, and developed in *Bree* and *H*. It then goes on to criticise the current case law and its interpretation of s. 74 for not being restrictive enough, by examining two possible theoretical rationales, mentioned in the judgments. The first, which is based on an analogy with the law relating to intoxicated offenders, is criticised on the grounds of differences between consent and intent. The second, which is based on the general argument that this position recognises the positive aspect of sexual autonomy, is criticised for its failure to distinguish between claims of normative facts and claims of public policy and for giving too much weight to the latter considerations. From the discussion an alternative, more restrictive position, emerges in line with s. 74 of the 2003 Act, according to which a drunken consent is *not* consent. This position can be adopted by judges, through the provision of better guidance to juries, but failing that a reform of the law might be needed.

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Keywords Sexual offences; Consent; Capacity; Intoxication/ drunkenness; Rape

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Is a drunken consent to sexual intercourse still consent in English law? This is the question at the centre of this article. Intoxication-related rapes where some sort of consent to sexual intercourse is given include three types of cases: involuntary intoxication cases, in which the victim's drink was spiked with alcohol without her knowledge; voluntary intoxication cases in which the offender has actively encouraged the

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Throughout this article I refer to women as the complainant or the victim for the sake of convenience, but the argument is similarly applicable to complainants and victims of both genders.

1 victim to reach an advanced state of drunkenness in the hope that this
2 will facilitate sexual intercourse; and voluntary intoxication cases in
3 which the offender makes no contribution to the victim's state of
4 drunkenness, but takes advantage of her condition to engage in sexual
5 intercourse in the knowledge that there is a likelihood that she would
6 not behave in such a manner if she were sober.¹ The discussion below
7 concentrates on the third category whereby consent to sex is given in
8 circumstances of voluntary intoxication. Consent given in these circum-
9 stances is governed by the general definition of 'consent' set out in s. 74
10 of the Sexual Offences Act 2003, and in order to answer the question
11 posed at the outset, this article will engage in the interpretation of this
12 section.

13 Section 1 below sets the legal framework for the discussion pointing
14 to an important distinction between factual and legal consent and to the
15 language of the relevant sections arguing that they set the conditions for
16 legal rather than factual consent. The current position of the law as
17 developed in the cases of *Dougal*,² *Bree*³ and *H*⁴ is then presented. Section
18 2 criticises the current law and its interpretation of s. 74 for being too
19 restrictive, by examining two possible theoretical rationales, mentioned
20 in the judgments, for the court's proposition that 'a drunken consent is
21 still consent': the first is an analogy with the law relating to intoxicated
22 offenders, and the second is the general argument that this position
23 recognises the positive aspect of sexual autonomy. It is argued that the
24 first rationale is unsound because of the existence of some important
25 differences between the *consent* given by the victim and the *intention* of
26 the offender. Discussing the second rationale, the arguments that relate
27 to the existence of valid consent as a matter of normative fact and
28 arguments that involve public policy considerations are distinguished. It
29 is submitted that questions of the first type should be discussed first, as
30 they are questions of facts. Once the drunken person's incapacity to
31 consent is established as normative fact, Section 2 below goes on to
32 examine whether considerations of public policy can override these
33 facts. It is concluded that they cannot. From the criticisms discussed, an
34 alternative position emerges: a much lower level of intoxication (than
35 that required by the courts) negates capacity to consent, and that this
36 should be reflected by a default position that 'a drunken consent is *not*
37 consent'. Subsequently, a two-step process is set out for the jury: (1) was
38 the victim drunk so as to make her incapable of giving a valid consent;
39 and, if so, (2) was there pre-intoxication consent? If the answer for both
40 questions is in the negative, then it must be concluded that no (valid)
41 consent to sex has been given. This, it is argued, is in line with, and
42 required by, the current law. Section 3 below argues that the need for
43 consistent interpretation of the idea of 'consent' across criminal law
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45 1 See E. Finch and V. Monro, 'Intoxicated Consent and the Boundaries of Drug
46 Assisted Rape' [2003] Crim LR 773, 782–3; cf. N. Dixon, 'Alcohol and Rape' (2001)
47 15 *Public Affairs Quarterly* 341.

48 2 *R v Dougal*, unreported, November 2005, Swansea Crown Court.

49 3 *R v Bree* [2007] EWCA Crim 804, [2007] 2 Cr App R 13.

49 4 *R v H* [2007] EWCA Crim 2056.

1 lends further support to the suggested interpretation of the law. The
2 final part of the discussion (Section 4) responds to some concerns
3 regarding the effect that the suggested interpretation of ‘consent’ may
4 have on the reasonable belief of the perpetrator (of the existence of
5 consent). The article ends with some thoughts as to practical ways of
6 making the necessary changes to the law.

8 **1. The present law**

10 The law that governs situations of (voluntary) drunken consent is set in
11 ss 74 and 75 of the Sexual Offences Act 2003 (hereafter ‘the 2003 Act’).
12 Section 75(2)(d) creates an evidential presumption of lack of consent
13 where the victim is unconscious. It is also widely recognised that a
14 person who has had one or two glasses of wine, or a pint of beer, is
15 capable of giving a valid consent to sex. The central question for con-
16 sideration here is whether a person who is found in between these two
17 extremes, i.e. when the person is very drunk but is not unconscious (or
18 to use Sir Igor Judge P’s terminology in *Bree* ‘someone who has had a lot
19 to drink’⁵), is capable of giving a valid consent. Peter Westen distin-
20 guishes between factual consent and legal consent. Factual consent
21 consists of factual state of mind and/or an expression of acquiescence. It
22 is also factual in nature, i.e. ‘a factual concept is one that organizes our
23 experiences with natural events without constituting a normative judg-
24 ment about people’s ensuing moral or legal relationship to others’.⁶
25 Legal consent is the set of rules which defines situations in which a
26 person is legally deemed to have consented whether or not this is
27 factually the case.⁷ So, put another way, the question, is whether a
28 factual drunken consent should be recognised as a legal consent. Section
29 74 of the 2003 Act sets out the conditions for legal consent, stating
30 that:

31 For the purpose of this [Act] a person consents if he agrees by choice, and
32 has the freedom and capacity to make that choice.

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34 Thus, the answer to the question just presented should be focused on
35 the capacity of the drunken person to choose freely and consent. The
36 language of s. 74 necessitates the interpretation of the term ‘capacity to
37 consent’ as referring to legal conditions rather than to factual-technical
38 inability to consent. If the word ‘capacity’ only referred to the technical
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40 5 *R v Bree* [2007] EWCA Crim 804, [2007] 2 Cr App R 13 at [33].

41 6 P. Westen, *The Logic of Consent* (Ashgate: Farnham, 2004) 4–5. For current purposes
42 it is not necessary to discuss whether in the context of sexual offences (and more
43 generally, in criminal law) the relevant conception of consent should be a person’s
44 ‘state of mind’—i.e. subjective attitude or feeling that one experiences internally on
45 a first person basis—or a person’s objective expression: words or conduct, by which
46 she expresses her choices to others. For further discussion on this, see e.g. H. Hurd,
47 ‘The Moral Magic of Consent’ (1996) 2 *Legal Theory* 121; L. Alexander, ‘The Moral
48 Magic of Consent II’ (1996) 2 *Legal Theory* 165; J. Simmons, *Moral Principles and
49 Political Obligations* (Princeton University Press: Princeton, NJ, 1979) 83; A.
Wertheimer, *Consent to Sexual Relations* (Cambridge University Press: Cambridge,
2003) 144–59.

7 Westen, above n. 6 at 6.

1 ability to form and/or express that state of mind then this requirement
2 would be redundant. When no such ability exists, the person does not
3 (factually) 'agree'. The requirement of 'capacity to make that choice'
4 would then be included in the first requirement of 'if he agrees . . .', and
5 in the evidential presumption of lack of consent—due to lack of factual
6 consent—when the person is unconscious set out in s. 75(2)(d). The
7 existence of the two requirements side by side means that they must be
8 given distinct meanings, so that the requirement of 'capacity' adds to the
9 requirement of 'agreement'; that even when a person agrees as a matter
10 of fact, there is a need to examine further whether he was capable of
11 making such an agreement.

12 Section 74 clearly intends to set out the conditions for *legal* consent. A
13 necessary condition is that the person 'agrees', i.e. that there is *factual*
14 consent, but though necessary this is insufficient. The section goes on to
15 set two further distinct conditions: capacity and freedom to consent.
16 Only when all three conditions are fulfilled can there be talk of legally
17 valid consent. The question of whether a person is *capable* of agreeing
18 must therefore be understood as a *legal* question (rather than a *factual*
19 question) about the conditions of mental capacity under which the law
20 would recognise factual consent as a basis of legal consent.

21 The leading case on this issue is the Court of Appeal decision in *Bree*.
22 The case involves a complainant who was continually vomiting in her
23 bathroom after a long night of heavy drinking. The defendant was
24 helping her out, washing her face and hair. He then went on to have sex
25 with her—according to his account, with her consent, although the
26 complainant claimed that due to her drunken condition she had gaps in
27 her memory of the event and could not remember whether consent was
28 given. The defendant was charged with the offence of rape contrary to s.
29 1 of the 2003 Act. The court was then required to consider the validity
30 of her (factual) drunken consent.⁸ Delivering the decision of the court,
31 Sir Igor Judge P held that the phrase 'a drunken consent is still consent'
32 'provides a useful shorthand accurately encapsulating the legal position'
33 according to which a person who is very drunk is capable of consenting
34 and 'when someone who has had a lot to drink is in fact consenting to
35 intercourse, then that is what she is doing, consenting'.⁹ Though the
36 court went on to acknowledge that 'as a matter of practical reality,
37 capacity to consent may evaporate well before a complainant becomes
38 unconscious'.¹⁰

39 The problem in *Bree* is that although the court acknowledged, in
40 principle, the vanishing capacity to consent, it did not apply it to the facts
41 of the case. During the trial, the prosecution changed their position:
42 initially they alleged that the defendant had sex with the complainant
43 while her level of intoxication was so great that she was unconscious.
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45 8 If her factual drunken consent is not regarded a legal consent, i.e. it is not a 'valid'
46 consent, then it does not matter whether or not she has consented, and
47 subsequently her failure to remember her acts that evening does not matter or
48 undermine the prosecution's case.

49 9 *R v Bree* [2007] EWCA Crim 804, [2007] 2 Cr App R 13 at [33].

10 *Ibid.*

1 However, on cross-examination, the complainant admitted that her
2 recollections of the event were patchy and that she had gaps in her
3 memory. The prosecution then claimed that the complainant was con-
4 scious, but did not consent. The court described this change in the
5 prosecution's position as a move from claims of lack of *capacity* to consent
6 to lack of *actual* consent.¹¹ This description suggests that the acknow-
7 ledgement of the vanishing capacity to consent was lip service paid in
8 response to public uproar that followed the case of *Dougal*.¹² This was
9 rectified in the later case of *H*¹³ in which the court truly accepted that the
10 capacity to consent is a legal question, independent of the question of
11 unconsciousness, and capacity to consent can evaporate well before the
12 victim becomes unconscious.

13 This position also reflects the practical attitude taken by jurors. Recent
14 research found that in a set of mock trials in which the victim was
15 described as follows: '. . . while conscious and communicative, she was
16 confused, having trouble walking, slurring her words, and the defend-
17 ant admitted that [the victim] was largely unresponsive as he undressed
18 her', most jurors concluded that she did not consent to intercourse since
19 she lacked the capacity to do so under s. 74.¹⁴ However, the varying
20 reasons given by the jurors in support of their conclusion suggest that in
21 less extreme situations their answers might change.

22 Nevertheless, even if (following *H*) the law is taken as set out in *Bree*
23 at face value, it is still too restrictive. It requires proof of a very high level
24 of intoxication before capacity to consent is negated, and it reflects a set
25 of assumptions and values which, once aired, are of real concern. Jesse
26 Elvin argues that the problem with *Bree* is that the court's position did
27 not distinguish between voluntary and involuntary intoxication, but
28 that, insofar as the judgment applies to voluntary intoxication, it is
29 uncontroversial.¹⁵ Contrary to this position, it is submitted that the
30 general rule (and the default position) even with regards to voluntarily
31 intoxicated complainants should be that a drunken consent *should not* be

32 11 *R v Bree* [2007] EWCA Crim 804, [2007] 2 Cr App R 13 at [20].

33 12 *R v Dougal*, unreported, November 2005, was a case heard in front of the Swansea
34 Crown Court. In that case the defendant, a security guard, was asked to escort the
35 complainant to her dormitory because she was very drunk and her friends feared
36 she would get lost on the way. They had sex in the corridor of her dormitory. At
37 first the complainant said she did not consent to the sex, and the defendant was
38 charged with her rape. However, on cross-examination, the complainant admitted
39 that she could not remember anything of the events of that night (due to heavy
40 drinking) and could not definitely say if she consented to sex or not. At this stage
41 the prosecution declared that as there was no further evidence on the issue of
42 consent and because 'a drunken consent is still consent', the case should be
43 discontinued and the court accepted the prosecution's request. Following the court's
44 decision, there was public uproar against the position taken by the prosecution and
45 the court. See the report by the BBC at <http://news.bbc.co.uk/1/hi/wales/mid/4464402.stm>,
46 accessed 8 June 2009, and the description in *R v Bree* [2007] EWCA Crim 804,
47 [2007] 2 Cr App R 13 at [30].

48 13 *R v H* [2007] EWCA Crim 2056. NB the decision of the court was delivered by Lady
49 Justice Hallett who also sat in the case of *Bree*.

50 14 E. Finch and V. Munro, 'Breaking Boundaries? Sexual Consent in the Jury Room'
51 (2006) 26 *Legal Studies* 303 at 314–15.

52 15 J. Elvin, 'The Concept of Consent under the Sexual Offences Act 2003' (2008) 72
53 JCL 519 at 524; J. Elvin, 'Intoxication, Capacity to Consent, and the Sexual
54 Offences Act 2003' (2008) 19 *King's Law Journal* 151 at 152–3.

1 recognised as valid consent. It has already been shown above why this
2 approach is in line with the language of s. 74 of the 2003 Act. This
3 position will be defended in the remainder of this article. First, the two
4 distinct (though connected) rationales suggested by the proposition that
5 ‘a drunken consent is still consent’ will be examined. It will be argued
6 that both rationales are wrong. The discussion of the problems with the
7 two rationales will also clarify the alternative position put forward.
8 Further support will be found in the principle of consistent inter-
9 pretation of ‘consent’ across criminal law. Finally, possible concerns
10 regarding the implication of the suggested law on the *mens rea* of the
11 defendant will be addressed.

12 13 **2. The two rationales for the court’s position in *Bree* and** 14 **their flaws**

15 16 *(a) The first rationale—analogy to the law of intoxication relating to* 17 *offenders*

18 Sir Igor Judge P suggests an understanding of the capacity requirement
19 in s. 74 of the 2003 Act, which is captured by the phrase ‘a drunken
20 consent is still consent’, as echoing the law regarding the defence of
21 intoxication which states that ‘a drunken intent is still intent’.¹⁶ This
22 interpretation is based on the close similarities between the two phrases.
23 The law on intoxication when applied to offenders holds that if the
24 offender carried out an offence intentionally, it is not a defence for
25 the intoxicated offender to claim that he would not have committed the
26 offence had he been sober. This is true even if the intoxication was
27 involuntary.¹⁷ In other words, if it has been proven that the offender had
28 the intention required by the offence, he cannot argue that because he
29 was intoxicated, his actions were not completely voluntary or that
30 he was lacking the regular powers of resistance and self-control that he
31 has when sober which would have prevented him from acting on his
32 desires. Indeed, the court in *Bree* states that: ‘We note in passing that [the
33 phrase] also acts as a reminder that a drunken man who intends to
34 commit rape, and does so, is not excused by the fact that his intention is
35 a drunken intention’.¹⁸

36 37 *(i) The difference between intention and consent*

38 The comparison between the victim’s consent and the law regarding
39 intoxication is wrong. Such a comparison assumes that consent equates
40 to intention, an assumption which is very controversial,¹⁹ and needs
41 further explanation. Going into the details of the relationship between
42 consent and intention is a complex matter which deserves a separate
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45 16 *R v Sheehan, R v Moore* [1975] 2 All ER 960 at 964; *R v Bree* [2007] EWCA Crim
804, [2007] 2 Cr App R 13 at [32]–[36].

46 17 *R v Kingston* [1993] 3 All ER 353.

47 18 *R v Bree* [2007] EWCA Crim 804, [2007] 2 Cr App R 13 at [32]–[36].

48 19 For example, see Hurd, above n. 6, for the view that intention and consent are
49 similar, and Wertheimer, above n. 6 at 243–4, for the view that intention and
consent are not similar concepts.

1 article. For current purposes it is sufficient to point to some of these
2 differences: both intention and consent involve a deliberate, conscious,
3 choice,²⁰ but there are some significant differences between the two
4 concepts. Discussing the notion of intention, Anthony Duff identifies
5 three conditions that need to be satisfied to be able to say that I have
6 intention:²¹ (1) I want the result; (2) I believe that my action may bring
7 about that result; and (3) I act as I do because of this want and this belief.
8 However, according to Duff, to consent (to a result) requires only the
9 satisfaction of the second condition: that I believe that the result will
10 ensue but conditions (1) and/or (3) are not necessary (I do not want the
11 result; and/or I do not act *in order to* bring it about).²² The situations that
12 Duff has in mind are situations in which I do X knowing that it would
13 bring about a further result Y. In such situations, Duff points to the
14 existence of two distinct states of mind: one is intention—which re-
15 quires compliance with all three conditions—and the other is consent
16 which only requires compliance with condition (2), but not condition
17 (1) or (3). For example, after seeing a movie I decide to go and buy ice
18 cream, knowing that if the queue is long I will get back home late. In this
19 situation, I might not intend to get home late—in that I do not want to
20 get home late, nor do I go on to buy the ice cream *in order to* get home
21 late. Nevertheless, in choosing to get the ice cream I ‘consent’ to the
22 possibility of getting home late. This is the ‘active’ mode of consent, i.e.
23 consent to a result of my own actions. However, there is a second type
24 of situation in which we talk of consent: instances in which I consent to
25 another person’s conduct (either in relation to me or not). For example,
26 I consent to my partner’s request to stay late at work although I know
27 that this would mean that I would have to eat dinner alone. This is the
28 ‘passive’ mode of consent since it does not involve an action on the part
29 of the consenting agent (me). In this mode, consent does not even satisfy
30 condition (2), because it is not ‘my action’ that may bring about the
31 result. My action only gives permission to another person to make an
32 independent choice regarding his own actions. Theoretically, consent to
33 sex can fall into both active and passive modes. The agent can be either
34 an active participant in the sexual intercourse or a passive one.²³ How-
35 ever, instances of sexual intercourse which end up with criminal pro-
36 ceedings for rape and other sexual offences usually involve a rather
37 passive complainant who, at most, consents to someone else penetrating
38 her, while she lies down passively.

39 In general terms, the conditions required for consent can be sum-
40 marised as follows: (1) I believe that some action (either mine or another
41 person’s) may bring about a certain result; and (2) I *accept, or am willing*

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43 20 I agree with this part of Hurd’s discussion, above n. ; Alexander, above n. 6.

44 21 By which I refer only to ‘direct intent’.

45 22 R. A. Duff, ‘Intention, *Mens Rea* and the Law Commission Report’ [1998] Crim LR
46 147 at 149–50.

47 23 Although, if the agent is an active participant, we would usually talk of intention
48 rather than consent (even if, technically, penile penetration can only be done by
49 men). It is hard to think of an agent taking an active part in sexual intercourse
without ‘intending’ to have sex and without doing it *in order to* have sex
(conditions (1) and (3)).

1 to go along with these results.²⁴ These conditions distinguish consent from
2 intention in two important aspects: first the fact that in intention, but
3 not in consent, it is one's own actions that bring about the result; and,
4 secondly, the important difference between *want or desire* (for intention)
5 and *acceptance* (for consent). To consent, it is not necessary for me to *want*
6 the result (though I may very well 'want' it), but I am said to consent to
7 it even if I only accept that it may be brought about and do not act in
8 order to prevent it. I might not like the idea of eating dinner on my own
9 (that is, I do not *desire or want* it), but I nevertheless *accept it, or am willing*
10 *to go along with it*, when my partner asks my permission to stay late at
11 work. Thus, condition (2) of consent sets a lower level than that set in
12 condition (1) of intention.

13
14 (ii) *Equating the law regarding intoxicated offenders with that of intoxicated*
15 *victims*

16 The simple presumptive equation between intention and consent to sex
17 is misleading. Consequently, it is not possible simply to equate the law
18 regarding intoxication of offenders with the law regarding consent of
19 the victim. The law regarding intoxication applies to acts done by the
20 offender that further cause harm to another. The rationale, which
21 underlies the law of intoxication relating to offenders, should not extend
22 to victims. The classical situations to which the law regarding intoxica-
23 tion is applicable are those in which the offender lacks the relevant *mens*
24 *rea* due to his intoxication. In such situations it was held that where the
25 intoxication was voluntary an offender can be held liable for offences
26 that require basic intent, whereas if the intoxication was involuntary,
27 then he must be acquitted. The position is based on one of two theories
28 suggested in *Majewski*,²⁵ as summarised by Lord Mustill in *Kingston*:²⁶

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30 First, that the absence of the necessary intention is cured by treating the
31 intentional drunkenness (or more accurately, since it is only in the minority
32 of cases that the drinker sets out to make himself drunk, the intentional
33 taking of drink without regard to its possible effects) as a substitute for the
34 mental element ordinarily required by the offence. The intent is transferred
35 from the taking of the drink to the commission of the prohibited act. The
36 second rationalisation is that the defendant cannot be heard to rely on the
37 absence of the mental element when it is absent because of his own
38 voluntary acts. Borrowing an expression from a far distant field it may be
39 said that the defendant is estopped from relying on his self-induced
40 incapacity.

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43 24 See H. M. Malm, 'The Ontological Status of Consent and Its Implications for the
44 Law on Rape' (1996) 2 *Legal Theory* 147 at 148. See also Alexander, above n. 6 at
45 166 and *ibid.* at n. 3. Cf. Kazan's recognition that consent does not require a
46 positive attitude towards the object of consent, but only towards the act of
47 consenting itself: P. Kazan 'Sexual Assault and the Problem of Consent' in S. G.
48 French, L. M. Prudy and W. Teays (eds), *Violence against Women: Philosophical*
49 *Perspectives* (Cornell University Press: Ithaca, NY, 1998) 34.

25 [1977] AC 443.

26 [1993] 3 All ER 353 at 364.

1 Whichever reasoning best explains the law,²⁷ it is clear that the under-
2 lying principle in both explanations is the notion of some ‘prior fault’ of
3 the offender in getting drunk (and thus undertaking a risk of harming
4 another while being drunk). This is *prior* fault, rather than *regular* fault,
5 because it is fault at an earlier stage: before the crime is committed (as
6 the offender lacks *mens rea* at the time of the crime) and, consequently,
7 it is of a more general type: that the offender might do something—
8 anything—wrong while drunk. Thus, it is not the specific recklessness
9 towards the specific prohibited result (or type of result) which ordinarily
10 needs to be proven.

11 Where the intoxicated offender did have the necessary intention, the
12 law holds that ‘a drunken intent is still intent’. It appears that, with
13 regards to a voluntarily intoxicated offender, there are similarities be-
14 tween the reasoning of this rule and the reasons that underlie the
15 voluntary intoxication which prevented an offender from forming the
16 relevant *mens rea* (for offences of basic intent), i.e. the idea of prior fault,
17 though this time it is used in a somewhat different manner. The argu-
18 ment is that if an offender did form the relevant intention at the time he
19 commits the offence, then he cannot use his (voluntary) drunken
20 condition as a defence, because he voluntarily got drunk (or more
21 accurately, he intentionally took drinks without regard to their possible
22 effects, thus taking a risk of harming another).²⁸ In other words, the law
23 prevents him from raising the issue of his capacity to form (legally
24 meaningful) intention, though it is recognised that drunkenness may
25 diminish or extinguish his capacity to make choices, because of the
26 ‘prior fault’ in getting drunk.

27 The idea of prior fault makes sense when discussing the offender’s
28 liability, for he is the one causing harm. It does not, however, make
29 sense to refer to (prior) fault when discussing actions of victims. The
30 victim did not do anything that causes harm to another.²⁹ To equate
31 the victim’s consent to the offender’s intent is to extend the rationale
32 of the law relating to the offender’s intoxication onto the drunken
33 victim. It is to imply that there can be no recognition of the victim’s
34 drunkenness as negating her consent because there is some ‘fault’ in
35 voluntarily getting drunk. This, of course, makes no sense, getting
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37 ²⁷ But see criticisms on these rationales and suggestions for alternative rationales in
38 C. Wells, ‘Swatting the Subjective Bug’ [1982] Crim LR 209.

39 ²⁸ This can also explain why the extension of the rule that ‘a drunken intent is still an
40 intent’ to involuntary intoxication (see *R v Kingston* [1993] 3 All ER 353) was
41 widely considered to be harsh. It was felt that an offender who has been drugged
42 involuntarily should not be liable for his actions while drunk, even if he did have a
43 drunken intent. Indeed, recognising this, the court justified the rule on the basis of
44 public policy and the fear that it is easy for the defendant to raise this defence (if
45 intoxication would be recognised as a defence) and hard for the prosecution to
46 disprove (*R v Kingston* [1993] 3 All ER 353 at 370–1).

45 The rationale of prior fault is also evident where the intoxication is used as a
46 basis for the existence of another specific defence to the (proven) *mens rea*, such as
47 insanity or mistake (see, e.g., *R v O’Grady* [1987] 3 All ER 420; *R v Hatton* [2006]
48 Crim LR 353; *R v Fotheringham* (1989) 88 Cr App R 206, CA).

48 ²⁹ When a woman consents she chooses to forgo the moral objection to the boundary
49 crossing. But she does not *do* the harmful act—that conduct is done by the
50 perpetrator. (Cf. L. Alexander, above n. 6 and *ibid.* at n. 3.)

1 drunk, even very drunk, is not morally wrong (though it might not be a
2 wise thing to do). It may be argued that the focus of such a comparison
3 is not on the element of fault, but rather on the element of choice. A
4 victim who chooses to ingest intoxicants is exercising choice and has a
5 level of control over the passage of events, thus any sexual activity that
6 follows could be seen as a manifestation of choice, albeit an indirect
7 choice.³⁰ Yet, it is submitted, that this change of focus does not save the
8 argument. It might indeed be argued that the victim has acted stupidly.
9 She might have drunk being reckless to the possibility that she was
10 putting herself in a vulnerable position later on in the night in which she
11 will not be in full control of her actions. But that is all that it amounts
12 to—prior responsibility (and prior choice) to putting oneself at risk, to
13 becoming vulnerable, and the law should be designed to protect the
14 vulnerable even if they got into this vulnerable position stupidly and by
15 their own doing. The fact that a woman takes a risk does not mean that
16 she now is responsible for *all* the normal consequences of her actions,
17 including the validity of her consent.³¹

18 Further, viewing an act of getting drunk as an indirect choice to have
19 sexual intercourse amounts to saying that whenever women choose to
20 get drunk, they also implicitly consent to intercourse. As a matter of
21 reality, this is, of course, untrue. It has a touch of prejudice of the kind
22 recognised in statements like ‘she was asking for it’, which are made
23 against women dressed in ways that might be considered provocative.³²
24 The only valid conclusion that can be abstracted with certainty from the
25 general notion of voluntary intoxication is that the victim chose (pos-
26 sibly stupidly) to put herself in a vulnerable position.³³ The stupidity of
27 the victim does not diminish the responsibility of the offender. If any-
28 thing, in the context of sexual offences, it ought to increase his responsi-
29 bility because he took advantage of the victim’s vulnerability and
30 because the harm involved is a significant one. The law protects prosti-
31 tutes from being murdered even if they put themselves at risk by
32 choosing to work as prostitutes (or by their prior choices such as a choice
33 to take drugs which eventually brought them to engage in prostitution);
34 it protects homeowners from theft, even if they left the door to their
35 house unlocked.³⁴ Similarly, the law ought to protect people from being
36

37 30 Finch and Monro, above n. 1 at 786, though it should be noted that this position
38 was brought in a different context distinguishing between voluntary intoxication
39 and involuntary intoxication.

40 31 See Wertheimer, above n. 6 at 244–5.

41 32 See the result of a survey carried out by Amnesty International in 2005 which
42 shows that 30 per cent of people in the UK think that the woman is partially or
43 totally responsible for being sexually assaulted if she was drunk (even where no
44 consent is given at all): Amnesty International, *Sexual Assault Research Summary*
45 *Report* (London, 12 October 2005).

46 33 This is not to say that a woman may never choose to get drunk in order to increase
47 the likelihood of having sexual intercourse later on, but this intention is distinct
48 from, and additional to, the choice to get drunk.

49 34 But see Mathew Weait’s argument in the HIV context that protecting people in
cases like *Dica* ([2004] QB 1257) and *Konzani* ([2005] 2 Cr App R 14) stops people
from taking care of themselves. So, presumably, he would argue that girls would be
more likely to go out and get drunk and act stupidly if they thought the law
protected them from sexual assault by other people than if they knew it did not

1 raped even if they have intentionally or recklessly brought themselves
2 to a state in which they are incapable of giving a valid consent.

3 Alan Wertheimer argues that such examples differ from the situation
4 of drunken consent because whereas the prostitute can say that she
5 never gave consent to be killed (even if it would have been a defence to
6 murder), and the homeowner can say that although he left the door
7 open he did not give permission to the thief to come in, the drunken
8 woman cannot say that she did not give consent to sex—as a matter of
9 fact, she did. In the case of the drunken woman, but not in the case of
10 the prostitute and homeowner, it is necessary to assign the burden of the
11 complainant's consent to either the woman or the man: 'We cannot
12 simultaneously hold B responsible for the validity of her consent and
13 also say that A's behaviour is impermissible'.³⁵ But this assumes that her
14 drunken consent is meaningful in some sense. If it is accepted that the
15 influence of alcohol incapacitated her and prevented her from giving
16 valid consent, then she is *not* responsible for her consent (as opposed to
17 her responsibility for getting drunk). She is in a similar position to that
18 of the homeowner who became vulnerable through leaving the door
19 unlocked. The woman became vulnerable through getting drunk. The
20 only question then is whether the victim was able to give a valid
21 consent. It is necessary to look at all the circumstances relevant to her
22 capacity to consent, and the question of how these circumstances came
23 about (through to voluntary conduct of the victim or otherwise) is
24 irrelevant to the issue of 'capacity'.³⁶ Not surprisingly, the courts as far
25 back as *Lang* (now, quoted with approval in the more recent cases of *Bree*
26 and *H*) recognise this difference, stating that: 'The critical question is not
27 how she came to take the drink, but whether she understood her
28 situation and was capable of making up her mind . . . attention [should
29 have been focused on] the state of her understanding and her capacity to
30 express judgment in the circumstances'.³⁷ Thus, the courts, themselves,
31 reject the rationale based on the first interpretation of the phrase.

32
33 *(b) The second rationale—the general position that drunkenness does*
34 *not negate capacity*

35 On the second possible reading of 'a drunken consent is still consent',
36 the phrase should be interpreted more loosely as referring to the central
37 question of whether a drunken person is capable of giving a valid
38 consent. The judge and the prosecution in *Dougal* answered this ques-
39 tion in the positive: a drunken consent, so they held, is still (a valid)
40 consent. As the court in *Bree* says: 'All that was being said in *Dougal* was
41 that when someone who has had a lot to drink is in fact consenting to
42

43 and they had to look after themselves (see M. Weait, 'Knowledge, Autonomy and
44 Consent: *R v Konzani*' [2005] Crim LR 747). I am not persuaded that the correct
45 way to encourage women not to act stupidly is by the removal of protection against
46 such serious crimes as rape. This seems to me to legitimise the acts of the
47 perpetrators. I thank Rebecca Williams for pointing out Weait's position to me.

48 ³⁵ Wertheimer, above n. 6 at 245.

49 ³⁶ Though they might be relevant for the further requirement of 'freedom of choice'.

³⁷ *R v Lang* (1976) 62 Cr App R 50; *R v Bree* [2007] EWCA Crim 804, [2007] 2 Cr App
R 13 at [25]–[27]; *R v H* [2007] EWCA Crim 2056 at [25].

1 intercourse, then that is what she is doing, consenting . . .'.³⁸ Un-
2 fortunately, the court's attempt to provide a simple descriptive explana-
3 tion is misleading and incorrect. Indeed, when the drunken victim is
4 consenting, this is what she is doing—giving a *factual* consent. But the
5 judge in *Dougal* confuses this factual consent with *legal* consent required
6 under s. 74 of the 2003 Act. It is exactly the gap between factual consent
7 and legal consent which was at the basis of the angry public reaction to
8 the decision in *Dougal*. The way the court in *Bree* presents *Dougal* plays
9 on this confusion between the two concepts of consent and misses the
10 point. Indeed, the existence of factual consent is a necessary condition of
11 the existence of legal consent, but it is not a sufficient one. The court's
12 position (equating factual drunken consent with legal consent) seems to
13 go hand in hand with the perceptions of at least some people who think
14 that as long as the victim remains conscious she retains her capacity of
15 choice and has the responsibility to express positively her dissent to
16 intercourse.³⁹ They believe that the fact that a woman consumed a great
17 deal of alcohol does not extinguish her capacity to consent.

18
19 *(i) Accepted common practice*

20 One way to explain this stance is that it reflects public practice. In the UK
21 (as in many other countries) it is not uncommon for people to have sex
22 with a drunk—often very drunk—partner. Holding that a drunken
23 person is incapable of giving a valid consent would turn the conduct of
24 these people in many cases into a criminal offence and them into rapists
25 and sexual assaulters.⁴⁰ It might be hard to argue against common
26 practice, but the fact that it is a common practice is, of course, not a good
27 enough reason to maintain it, especially where significant harm is
28 caused to the victims. Criminal law has an important role to play in
29 challenging existing unwelcome social norms which cause harm, and
30 English criminal law has not shied away from its educational function in
31 other instances. Consider the defence to raping a wife accepted half a
32 century ago because in getting married the wife was regarded to have
33 given a general consent (which she cannot withdraw) to having sex
34 with her husband for the duration of their married life.⁴¹ Until 1970s
35 society did not even acknowledge the existence of marital rape. A study
36 in the US conducted in 1990 estimated that between 10 to 14 per cent of
37 married women in the US have been raped by their intimate partners in
38 the US.⁴² There is no statistical evidence available about marital rape

39 38 *R v Bree* [2007] EWCA Crim 804, [2007] 2 Cr App R 13 at [33].

40 39 See the views of the minority of the participants in the mock trials in Finch and
41 Munro's research, above n. 14 at 314.

42 40 See also the Rape Crisis Federation's position according to which this is due to the
43 social acceptability of alcohol intoxication and the relatively commonplace practice
44 of 'loosening women up' with alcohol as a precursor to making sexual advances,
45 and the results of a research in which 75 per cent of men were prepared to admit
46 that they had used alcohol to increase the likelihood of intercourse with an initially
47 reluctant woman: D. L. Masher and D. L. Anderson, 'Macho Personality, Sexual
48 Aggression and Reaction to Guided Imagery of Realistic Rape' (1986) 20 *Journal of*
49 *Research and Personality* 77–89; Finch and Munro, above n. 1 at 780.

41 See *R v R (Marital Rape)* [1992] 1 AC 599.

42 D. E. H. Russell, *Rape in Marriage*, revised edn (Indiana University Press: Ithaca, NY,
1990).

1 in the UK during that period, but it seems reasonable to assume that
2 marital rape was similarly acceptable in the UK at that time. This
3 research was conducted 20 years after the idea of marital rape has first
4 come into public focus, and one can only assume that in earlier years
5 more cases of marital rape took place because many of these men did not
6 view themselves as criminals, and considered their conduct to be legit-
7 imate. Probably, even in 1990 many men thought this was legitimate.
8 Nevertheless, in 1991, the House of Lords held that marriage can no
9 longer be a defence to rape, and many have further criticised the change
10 as being long overdue.

11
12 *(ii) Arguments of sexual autonomy*

13 Turning to the theoretical arguments that may support such a position,
14 the main argument focuses on the importance of sexual autonomy and
15 on the effect it would have on the ability to have sex with a drunken
16 partner. This reasoning seems to underlie Sir Igor Judge P's position
17 when he stated in *Bree*:

18 Both were adults. Neither acted unlawfully in drinking to excess. They
19 were both free to choose how much to drink, and with whom. Both were
20 free if they wished to have intercourse with each other. There is nothing
21 abnormal, surprising, or even unusual about men and women having
22 consensual intercourse when one, or other, or both have voluntarily
23 consumed a great deal of alcohol. Provided intercourse is indeed con-
24 sensual, it is not rape.⁴³

25 The concept of sexual autonomy is a complex one, and there is inherent
26 tension between its negative and positive dimensions. The positive
27 dimension entails respecting the freedom to make choices concerning
28 intimate sexual relations, whereas the negative dimension entails recog-
29 nition and protection of the right to refuse such relations. This is the
30 basis for the offence of rape and other sexual offences. These offences
31 are necessary in order to allow each woman to make her own choice as
32 to the people with whom she would like to have sexual intercourse, and
33 it is closely related to the protection of the woman's absolute domain of
34 sexual intimacy.⁴⁴ However, as Munro explains, 'setting high standards
35 for what qualifies as consent will thus protect negative at the expense of
36 positive autonomy, and vice versa'.⁴⁵ The argument advanced is that by
37 holding that drunken women cannot consent to sex, the State would
38 intrude into women's autonomy as it would fail to recognise the fact that
39 drunken women are capable of making decisions which they may very
40 well be happy with even when re-evaluating after sobering up, or else

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44 43 *R v Bree* [2007] EWCA Crim 804, [2007] 2 Cr App R 13 at [25].

45 44 For the current discussion it is unnecessary to take a stand as to the exact
46 relationship between the importance of women's choice and the domain of sexual
47 intimacy. For a further discussion on this topic, see H. Gross, 'Rape, Moralism and
48 Human Rights' [2007] Crim LR 220–1; J. Herring, 'Human Rights and Rape:
49 A Reply to Hyman Gross' [2007] Crim LR 228.

45 V. Munro, 'Concerning Consent: Standards of Permissibility in Sexual Relations'
(2005) 25 OJLS 335.

1 that they have got drunk knowing, willing (and possibly intending) that
2 it might lead to sexual intercourse. Women, so the argument goes,
3 should be left to make their own decisions as to whether or not they are
4 interested in having sex and the State should not be permitted to
5 intervene by failing to recognise some of their choices. Having sex while
6 being drunk is a common practice, and most women do not see them-
7 selves as being raped, i.e. as being involved in sex against their will. This
8 is especially true of people in a relationship who are having sex after a
9 night out in the pub. Do we wish to argue that in such situations they
10 may not have sex because, being drunk at the end of the evening, they
11 failed to consent? There is also the further fear of abuse of the law where
12 a woman might retrospectively revoke her consent upon sober re-
13 evaluation of the events, thus failing to reflect her state of mind
14 accurately at the time of the intercourse, which is the relevant state of
15 mind for criminalisation.

16 This argument seems to comprise three distinct claims about a
17 drunken consent. First, it is claimed that a drunken factual consent
18 should also amount to legal consent because the woman did not lose her
19 capacity to consent. A proof of this is that even when re-evaluating her
20 actions the following morning she would be happy with them. The
21 second related claim is that regardless of the capacity of the woman to
22 consent while being drunk, on re-evaluation of the factual consent
23 given while being drunk, the woman may be happy with her earlier
24 decision. Finally, there is a claim that some women become drunk
25 knowing and/or intending for it to enable them to give consent. State
26 intervention will reduce the sexual autonomy of women in all three
27 instances. The last argument of fear of abuse by retrospective evaluation,
28 falls into the scope of the first claim, because it assumes that the woman
29 was capable of giving a valid consent whilst drunk (hence the fear she
30 would *change her mind* once sober).

31 Thus, the court's position in *Bree* supports the positive dimension of
32 sexual autonomy, but this will inevitably come at the expense of its
33 negative dimension. I am not a keen supporter of paternalism and am
34 very wary of state intervention in order to protect people against their
35 will, especially in areas of sexual choices which are so important to a
36 person's wellbeing. Nevertheless, I think the argument advanced in the
37 name of (positive) sexual autonomy should be rejected. As noted above,
38 the argument in favour of (positive) sexual autonomy entails different
39 types of claims about consent. To answer these claims it is important to
40 identify the distinct issues that come up. The question of a drunken
41 consent involves both empirical and normative facts as well as issues of
42 public policy. The situation of drunken consent assumes the existence of
43 empirical (factual) consent, and the various arguments differ in the
44 types of claims they make: The first argument (that intoxicated women
45 have capacity to consent) is a claim about a normative fact, whereas the
46 latter two claims (that on re-evaluation women are happy with their
47 decision and that some women get drunk with the intention of increas-
48 ing the likelihood of having sex) are claims about preferred public policy.
49 These are two distinct issues that need to be addressed in order.

1 *On the normative fact* The first issue is whether, as a matter of (normative)
2 fact, a drunken person is capable of consenting, i.e. is capable of
3 freely choosing to have sexual intercourse. Once again, I stress that I am
4 not talking about someone who is tipsy having had one or two glasses of
5 wine, but rather of ‘a person who has had a lot to drink’ (for example,
6 binge drinking). Given that differences between people in the amount of
7 alcohol they need to consume to get drunk, it is impossible to define a
8 person’s drunkenness by the number of glasses of wine or beer, or even
9 by the amount of alcohol in the blood. Admittedly, there is no clear
10 definition for what amounts to being ‘really drunk’ and ultimately this
11 means that there would be a wide grey area.⁴⁶ However, the cases that
12 have come before the court (*Dougal*, *Bree* and *H*) were cases where it was
13 clear that the victims were really drunk: victims who are sick and
14 vomiting, and possibly unable to walk straight and talk coherently. In
15 *Dougal*, someone whose friends were so worried about her that they
16 asked a security guard to escort her back to her dormitory; in the case of
17 *Bree*, someone who was sick, lying on the floor of the shower in her
18 room vomiting; and in both cases, someone so drunk that the next
19 morning she could not recall the events of the previous night.⁴⁷ Is such
20 a person capable of consenting? Research shows that moderate to heavy
21 consumption of alcohol have similar effects to those of some of the other
22 drugs (for example, Rohypnol) often regarded as ‘date rape drugs’:
23 intoxication, disinhibition and amnesia (and eventually unconsciousness).⁴⁸
24 When people are very drunk, the law recognises their significantly impaired
25 ability to make choices, where such choices are of some significance: the
26 police are not allowed to interview a drunken person in such a condition
27 because in such a state, he or she does not understand what is happening.⁴⁹
28 The law prevents these people from driving because of the danger they
29 may pose to themselves and to others, given (among other things) their
30 impaired judgment. In contract law, a drunken person cannot make a
31 valid contract if he is incapable of
32
33

34 46 Though the definition has to be wider than that suggested by Elvin (2003), above
35 n. 15 at 525, according to which there is no capacity to consent when the
36 complainant’s knowledge and understanding are so limited that he or she is not in
37 a position to decide whether to agree. This is because this definition assumes many
38 of the issues criticised earlier. It does not take into account the fact that even when
39 the person understands her decision-making processes are distorted in ways that
40 negate her ability to reject the offer, and as such, it is submitted they negate her
41 ability to give meaningful consent.

42 47 The prosecution and the court ignored the evidence regarding the gap in the
43 victims’ memory, once it was established that they were not unconscious. Their
44 position suggests that the gaps in memory can only be used as circumstantial
45 evidence of periodic unconsciousness. In contrast, it is submitted that the gap in the
46 victims’ memory can be used as a circumstantial evidence of their extreme
47 drunkenness. See also C. Withey, ‘Female Rape—An Ongoing Concern: Strategies
48 for Improving Reporting and Conviction Levels’ (2007) 71 JCL 54 at 78.

49 48 T. Nutt, ‘Alcohol in the Brain: Pharmacological Insights for Psychiatrists’ (1999) 175
50 *British Journal of Psychiatry* 114–19; *The Advisory Council on Misuse of Drugs Report:
51 Drugs Facilitated Sexual Assault* (Home Office: 2007) 6; L. Slaughter, ‘Involvement of
52 Drugs in Sexual Assault’ (2000) 45 *Journal of Reproductive Medicine* 425 at 429. See
53 also, Finch and Munro, above n. 1 at 778.

54 49 Police and Criminal Evidence Act 1984, s. 66(1); Code of Practice C para. 11.18(b).

1 understanding the general nature of what is being agreed.⁵⁰ Section 74
2 of the Sexual Offences Act 2003 sets out what seems to be an even
3 higher standard for consent which involves a *capacity* to make *informed*
4 *'free choice'*. Alcohol distinctively alters a person's thought processes and
5 behaviour by affecting these exact capacities (though research shows
6 that the drunk or drugged person seems to be incapable of recognising
7 these changes and claims the only effect is a feeling of being drowsy).⁵¹
8 Rape involves a non-trivial risk of significant harm,⁵² and should there-
9 fore be treated in a similar way to the way drunkenness is treated in
10 other areas. Thus, it is submitted that a drunken person who has lost her
11 'brakes' and is unable to stop herself from acting out of character⁵³ does
12 not have capacity to consent: to make a 'free choice' requires an ability
13 to reject some of the options. A 'yes' is meaningless where no practical
14 option to say 'no' is available. This has already been recognised in the
15 interpretation of s. 74 in the case of *Kirk* with regard to consent provided
16 in situations where the victim thought she had no other choice.⁵⁴
17 Similarly, when, due to the effects of alcohol, a woman is unable to
18 reject the suggestion and say 'no' to sex, then she is *incapable* of making
19 a free choice (about saying 'yes'), and in more severe situations she is
20 incapable of understanding the nature and the quality of having sexual
21 intercourse with a specific person to which she is consenting. As she
22 does not have the capacity to consent, she cannot give valid consent. As
23 the Sturman Report explains, acting 'out of character' under the influ-
24 ence of alcohol is not merely the result of loosening the brakes, but
25 rather it is a result of changes (even if unrecognised by the person
26 herself) in thought processes and behaviour. It is the alcohol that gives
27 consent to intercourse and not the woman who has consumed it.⁵⁵
28 Munro points out that this position may create a problem for the law
29 because 'the law does not usually recognise retrospective revocation of
30
31

32 50 *Imperial Loan Co. v Stone* [1892] 1 QB 84. A further requirement is that the other
33 party to the contract knew of this incapacity. This would correspond to the *mens rea*
34 requirement of knowledge of lack of consent.

35 51 See above n. 48; see also Finch and Munro, above n. 1.

36 52 See J. Herring and M. Madden-Dempsey, 'Why Sexual Penetration Requires
37 Justification' (2007) 27 OJLS 467 at 475–81; cf. J. Gardner and S. Shute, 'The
38 Wrongness of Rape' in J. Garner (ed.), *Offences and Defences: Selected Essays in the*
39 *Philosophy of Criminal Law* (Oxford University Press: Oxford, 2007) 1.

40 53 As to the effects of alcohol and its resemblance to the effect of drugs used in date
41 rapes see Finch and Monro, above n. 1 at 777–81.

42 54 See *R v Terence Kirk* [2008] EWCA Crim 434 in which the victim, a 14-year-old girl
43 who ran away from home after being bullied by her brother and was living for
44 some time on the streets was so hungry that she agreed to have sex with the
45 defendant in return for £3.25 in order to buy some food. The court held that in
46 such circumstances her agreement amounts to a submission (due to lack of
47 options—as viewed by the victim).

48 55 P. Sturman, *Report on Drug-Assisted Sexual Assault* (Home Office: 1999) esp. 10. See
49 also Finch and Munro, above n. 1 at 774, 778. Cf. the Report by the Advisory
50 Council on the Misuse of Drugs, *Drug Facilitated Sexual Assault* (Home Office: April
51 2007) which argues that sexual assaults (including sexual activity by an assailant
52 with a victim who is profoundly intoxicated by his or her own actions to the point
53 of near unconsciousness) are most commonly facilitated by alcohol 'irrespective as
54 to whether it was consumed knowingly, or unknowingly, by a victim' (section
55 3.2.1).

1 consent based upon sober re-evaluation of events'.⁵⁶ This is a variant of
2 the argument for fear of abuse of the law by retrospective re-evaluation.
3 However, both claims confuse pragmatic questions of evidence (i.e. a
4 main way to prove the impairment in thought processes is by reference
5 to her state of mind after sobering up) with substantive questions of
6 what is involved in 'capacity' to consent. My argument suggests that a
7 drunken woman does not have such capacity as a matter of (normative)
8 fact. It is not the case that on re-evaluation the woman changes her
9 mind as to the sex she had the previous day, but rather that valid consent
10 was never given in the first place as she lacked the capacity to consent,
11 required in s. 74 of the 2003 Act. The only question that needs to be
12 asked is how drunk was the woman at the time she had sex. Subse-
13 quently, evidence of gaps in memory should not play against the victim
14 as in *Dougal and Bree*⁵⁷ or be at best ignored,⁵⁸ but rather count in her
15 favour as providing a further proof of the high level of alcohol in the
16 victim's blood. The pragmatic considerations of evidence is a different
17 issue that deserves a separate discussion at another time, but it can be
18 overcome quite easily.⁵⁹

19
20 *On public policy reasoning* Given the answer to the first question above,
21 it is necessary now to look at the second question: notwithstanding that
22 as a matter of (normative) fact a woman does not attain the standards
23 required for legal consent, are there any reasons of public policy that
24 would support holding a drunken consent valid?⁶⁰ That is, are there
25 reasons to estop her from claiming lack of capacity? Two or maybe three
26 claims of public policy have been made under the title of (positive)
27 sexual autonomy: first, that on re-evaluation after sobering up, some
28 women are happy with their drunken consent and the subsequent
29 sexual intercourse. The second claim is that some women become drunk
30 intending to increase the likelihood of having sex; they make a con-
31 scious choice to get drunk *in order* to facilitate their consent. To this can
32 be added the pragmatic aspect that comes up in the argument of fear of
33

34 ⁵⁶ Finch and Munro, above n. 1 at 778.

35 ⁵⁷ In which the court (at least in its application of the law to the facts) interpreted the
36 complainant's inability to remember the events that took place the previous night
37 as undermining her claims that she did not consent to sex.

38 ⁵⁸ Following *H*, in which the court held that the gaps in the complainant's memory
39 were not necessarily fatal to the prosecution's case (*R v H* [2007] EWCA Crim 2056
40 at [33]).

41 ⁵⁹ The fear is that women would claim that they lost their memory when they mean
42 they would rather not remember because it was a mistake and, on my reasoning,
43 their untruthful claims would help the prosecution. At the end of the day it is a
44 question for the jury to decide whether they believe the complainant or not. This is
45 no different from other types of testimonies as to the witness's state of mind (e.g. a
46 defendant's testimony as to his state of mind at the time of a crime). As long as
47 ability to remember is not the only evidence of level of intoxication used, there
48 should not be a problem, and other evidence could further support the woman's
49 testimony of loss of memory. Such evidence can be brought in the shape of
50 testimony from other witnesses about how much the complainant had to drink, her
51 behaviour etc.

52 ⁶⁰ In the same way that the law of intoxication as regards offenders refuses, as a
53 matter of public policy, to recognise the defence of intoxication where a person had
54 a drunken intent.

1 abuse of the law: that, in practice, proving that a woman was incapable
2 of consenting by reference to the fact that she acted ‘out of character’
3 when giving the consent is open to abuse by women, who at the time
4 consent was given were not so drunk as to render them incapable of
5 consenting (i.e. were capable of giving a valid consent), but later on
6 regretted their decision.

7 It is important to stress that to the extent that the claim of (positive)
8 sexual autonomy is a public policy argument (the second and third
9 claims of consent set out above) it comes only at the second stage, after
10 the facts (both factual and normative) are established. Where public
11 policy arguments conflict with the conclusions that would ordinarily be
12 derived from these facts, they need to be strong enough to override
13 them if they are to be followed. In this case, public policy arguments
14 need to overcome the fact that drunkenness makes a woman *incapable* of
15 making a ‘free choice’ and possibly *incapable* of understanding the
16 nature and quality of the (specific) act at the time she consented. It
17 is also important to bear in mind that refusing to recognise the validity
18 of a drunken consent does not simply violate the sexual autonomy
19 of the individual. It protects the *negative* dimension of this same value.
20 Furthermore, (positive) sexual autonomy is valuable only insofar as it
21 allows a capable individual to make valuable decisions as to her sexual
22 activity (we do not, for example, talk of sexual autonomy of a 13-year-
23 old girl or boy). But, as argued above, the drunken person may be
24 incapable of making such decisions and so would be excluded *a priori*. By
25 refusing to recognise the validity of a drunken consent, the State seeks
26 to protect the drunken person’s (positive) sexual autonomy and protect
27 her ability to make real choices when she is capable of making them.

28 This position does not mean that when a man has sex with a drunken
29 partner he is necessarily involved in an act of rape, and that every couple
30 who has sex after a night out is involved in an act of rape. Consent can
31 be given (either explicitly, or implicitly as learned from all the cir-
32 cumstances, and the existence of prior relationship can be one such
33 circumstance) at an earlier stage, before getting drunk.⁶¹ If such consent
34 was given, then the subsequent intercourse does not amount to rape.
35 This idea of prior consent is analogous to the evidential presumption
36 of unconsciousness set out at s. 75 (2)(d) of the 2003 Act. Presumably,
37 the only way to rebut this presumption is by pre-unconscious consent
38 to sex.⁶²

39 Thus, in order to establish whether the circumstantial element of lack
40 of consent was present at the time of penetration, two questions arise:
41 (1) was the victim drunk so as to make her incapable of giving a valid
42 consent? If so, then (2) did she consent to sex before getting drunk? If
43 so, then no crime is committed. If not, then the circumstantial element
44 of lack of consent was present at the time of penetration. It is important
45 to emphasise that the pre-intoxication consent required has to be to the

47 ⁶¹ It is important to stress that the consent referred to is distinct from a decision to get
48 drunk. As argued earlier in this article, such a decision is an insufficient basis for a
49 claim of consent.

49 ⁶² I wish to thank Michelle Dempsey for pointing out this analogy.

1 specific sex that will take place later on that evening, and that if the
2 consent is withdrawn at any later point (even when the person is
3 drunk⁶³), then the original consent will no longer hold.

4 What about the woman who on re-evaluation is happy with the
5 consent she had given, even if this consent is invalid? If the above
6 analysis is correct, rape has been committed; the woman was unable to
7 consent. This is similar to the situation where a 13-year-old girl consents
8 to sex with an adult and when confronted later on claims she is happy
9 with her decision (because, say, she really loves her 23-year-old boy-
10 friend). A separate question is whether such cases should be prosecuted.
11 Some may argue that there should be a prosecution in order to send a
12 clear message that having sex with a drunken woman without her prior
13 sober consent is a crime. This position can be further supported by
14 comparison with the prosecution of people for statutory rape. Others
15 may argue that adult women should be treated differently. The 13-year-
16 old girl does not have the faculties to judge the harm that was done to
17 her. However, when an adult woman sobers up, she regains her full
18 faculties and is best placed to judge if any harm was done to her. Thus,
19 although a crime has been committed (i.e. she had been *wronged*), there
20 is insufficient reason for the State to act against the will of the victim.

21 In any case, the message is clear: a drunken consent 'does not count'.
22 In choosing to have sex without having prior (sober) consent, a man has
23 sex without consent, which amounts to the *actus reus* of rape. This places
24 the man at risk of being prosecuted, subject to a later decision of the
25 woman not to complain, and the decision of the prosecution whether to
26 prosecute.

27 Admittedly, this does not completely resolve the concern that some
28 women get drunk in order to have sex, because in many cases the pre-
29 intoxication consent is not with regard to a specific person, but more
30 general in nature (that 'they will have sex later on that evening with
31 whoever they fancy').⁶⁴ The fear is that recognising such consent as
32 sufficient consent could undermine the requirement that the consent
33 required has to be specific (person and event). However, protecting the
34 positive dimension of the sexual autonomy of these women comes at
35 the price of not protecting the negative dimension of other women who
36 chose to get drunk without such intention—just because they wanted to
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41 63 Rejection while being drunk should be recognised as valid although the person
42 lacks capacity to consent in similar situations because even if this rejection is driven
43 by alcohol alone, the nature of this decision is to avoid something which has the
44 potential to harm.

45 64 See Alan Wertheimer's position arguing against the requirement of prior consent
46 because 'the pleasures of alcohol and sex are so closely intertwined for some that to
47 required contemporaneous sober consent would be unduly restrictive' and because
48 it 'would preclude many women from doing precisely what they want to do,
49 namely not to be required to consent before they become intoxicated' (Wertheimer,
above n. 6 at 257). The third reason given by Wertheimer in support of his position
(that taking advantage of a drunken person and having sex with her does not
amount to predatory behaviour) will be discussed later on in this paragraph.

1 enjoy themselves or because they had a bad day at the office. These
2 women suffer because society does not recognise the (grievous) harm of
3 rape that was caused to them, and continues to legitimise the behaviour
4 of preying men who take advantage of their drunken condition.
5 Wertheimer argues that because the disinhibiting effects of alcohol
6 are widely understood, a permissive approach should not be regarded
7 as introducing predatory behaviour in which 'A takes advantage of
8 B's ignorance'.⁶⁵ But this is a misrepresentation. The issue is not one
9 of ignorance, but of vulnerability. Predatory behaviour is a behaviour of
10 taking advantage of a person found in a vulnerable position. Women
11 who get drunk become vulnerable even if they get into this position
12 consciously. When men take advantage of such a situation, they act in a
13 predatory manner, and, therefore, when the law is willing to legitimise
14 such behaviour (by acknowledging a drunken consent as valid consent),
15 the law legitimises predatory behaviour. This is a question of getting the
16 balance between the positive and negative aspect of sexual autonomy
17 right. As a sole public policy consideration, it is not weighty enough to
18 tilt the balance and overcome the problem of lack of capacity to consent,
19 especially when accepting a less restrictive approach (which does not
20 require pre-intoxication consent) comes at the expense of women who
21 are being harmed and view themselves as victims of rape (and are
22 recognised as such as a matter of normative fact).
23

24 **3. Consent in other areas of criminal law**

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26 Finally, the issue of consent is not unique to sexual offences and has
27 been raised in relation to non-sexual offences against the person as well
28 as property offences. The position taken by the courts in both areas
29 seems to contradict that suggested by the court in *Bree* in stating that 'a
30 drunken consent is still consent'. The substantive reasons given to justify
31 the law in these other areas, as well as reasons of consistency within
32 criminal law, provide further support to the position that a drunken
33 consent ought not be a valid consent.
34

35 The possibility to consent to being harmed was widely discussed in
36 the case of *Brown*,⁶⁶ in which the defendants had engaged in consensual
37 sado-masochistic homosexual activity and were charged with assault
38 occasioning actual bodily harm and unlawful wounding, contrary to ss
39 47 and 20 of the Offences Against the Person Act 1861 respectively. The
40 House of Lords acknowledged that recognising consent as a defence to
41 these offences is a matter of public policy, but refused to recognise it in
42 the circumstances of that case.

43 For current purposes, I will leave aside the public policy arguments of
44 immorality, human degradation and the fear of spreading sexually
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48 ⁶⁵ Wertheimer, above n. 6 at 257.

49 ⁶⁶ [1993] 2 All ER 75.

1 transmitted diseases as well as the discussion of the various exceptions to
2 the rule, since they all assume the existence of a valid consent. Rather,
3 I wish to draw attention to the first reason given by Lord Templeman,
4 which questions the validity of the consent. Lord Templeman discusses
5 the fear that the consent of some of the participants was not given freely.
6 His argument is based on the fact that: 'drink and drugs were employed
7 to obtain consent and increase enthusiasm',⁶⁷ though he does not sug-
8 gest that the drink or drugs were given to those participants involun-
9 tarily. He then goes on to discuss the practice of giving the participant a
10 code word, which he could pronounce when excessive harm or pain
11 was being caused. Lord Templeman argues that this practice is in-
12 sufficient to ensure that there is real (valid) consent, saying that 'the
13 efficiency of this precaution, when taken, depends on the circumstances
14 and the personalities involved. No one can feel the pain of another . . .
15 The victims were degraded and humiliated, sometimes beaten, some-
16 times wounded with instruments . . .'.⁶⁸ Lord Templeman is careful to
17 stress that sado-masochistic homosexual activity is not just about sex,
18 but also about violence, and that his reasoning addresses the violent
19 elements of the activity more than the sexual elements. Contrary to
20 Lord Templeman's opinion,⁶⁹ it is submitted that this reasoning is simi-
21 larly applicable to the case of a drunken consent to sex.⁷⁰ the efficacy of
22 the precaution taken by the requirement of consent depends on the
23 circumstances and personalities involved. One such circumstance in
24 which the precaution is ineffective is where the consent given is by a
25 drunken person. The technical ability of the victim to refuse (i.e. the fact
26 that she is conscious and able to talk) is insufficient to ensure the
27 existence of real consent in such cases because of the effects of alcohol.
28 In such circumstances sexual intercourse degrades the victim and
29 humiliates her as can be seen from accounts of such victims after they
30 sober up (their perception and feeling of being raped). It might be
31 argued that there is an enormous difference between violent activity
32 and sexual activity (which is not accompanied with violence). The first
33 causes a person harm and the second is not harmful.⁷¹ Therefore, the
34 reasoning of Lord Templeman applies only to violent activity and cannot
35 be extended to sexual activity. Indeed, there is a difference between
36 violence and sex. The physical harm of violence will occur whether or
37 not the victim agrees to it, whereas the mental harm involved in the
38 offence of rape (without violence) will occur only if the victim does not
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42 67 Ibid. at 83.

43 68 Ibid. at 83.

44 69 Lord Templeman was ultimately content to assume that the victims' consent in
45 *Brown* was the kind of consent which would be adequate in a rape case to negate
46 the defendant's liability.

47 70 By which I mean the reasoning about the violence involved in sado-masochistic
48 activity. In no way do I endorse the view that the gender of the participants in the
49 sexual activity (or in sado-masochistic activity) matters in any way.

48 71 But see Herring and Madden-Dempsey, above n. 52, for the view that sexual
49 penetration is often harmful.

1 agree to sexual intercourse,⁷² but this difference does not change the
2 capacity to consent which is at the centre of Lord Templeman's first
3 argument. The consideration that 'drink and drugs were employed to
4 obtain consent and increase enthusiasm', and that this undermines the
5 validity of the consent given, holds with similar strength when discuss-
6 ing consent to sex.

7 I should stress that I disagree with the decision in *Brown* as far as it is
8 justified by reasons of conventional conservative morality and public
9 policy.⁷³ Such reasons, however, are based on the assumption that a
10 valid consent was given. On the other hand, if it was indeed the case that
11 some of the participants were drunk, and no pre-intoxicated consent
12 was given, then indeed there was no valid consent—not only to the
13 violence, but also to the sex.

14 Further support can be found in the law of theft. The approach of the
15 law of theft to the appropriation of property with the owner's consent
16 has been decided in the case of *Gomez*⁷⁴ and further extended in *Hinks*.⁷⁵
17 Appropriation, so it was held, can occur even when the taking is done
18 with the consent of the owner, be it a valid consent or one which was
19 obtained by deception, as long as the defendant acted dishonestly. The
20 underlying principle for these decisions was the wish of the court to
21 protect the vulnerable from exploitation.⁷⁶ These decisions attracted
22 wide criticisms, much of which I support.⁷⁷ However, it was not the basic
23 principle of protection of the vulnerable that was being attacked. In the
24 case of *Gomez* where the consent was obtained by deception, the criti-
25 cisms were based on the fact that the offence of obtaining property by
26 deception is better suited to deal with such cases and the fact that this
27 interpretation is inconsistent with the intention of the legislator. In the
28 case of *Hinks* (which involved a valid consent) the objections were based
29 on the conflict it created between civil law and criminal law, and the
30 uncertainty it created in leaving the conviction of theft dependent on
31 the (problematically defined) element of dishonesty. All these concerns
32 are inapplicable to drunken consent to sex, and thus what is left is the
33 general (applicable) principle according to which the law ought to
34 protect the vulnerable. If the courts were willing to go into so much
35 trouble to extend the law's protection of a person's property, even where
36 the existence of harm (at least harm to the interest in property) is
37 questionable, they ought to take a similar approach when it comes to the
38 more grievous harm entailed in rape. The courts (and Parliament)
39 should recognise the lack of capacity to consent to sex of drunken
40 women as a matter of fact (and consequently, the existence of harm to
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44 72 Cf. Gardner and Shute, above n. 52.

45 73 Unfortunately, discussing those reasons goes beyond the scope of this article.

46 74 [1993] AC 442.

47 75 [2000] 1 Cr App R 1.

48 76 Cf. A. Boggs and J. Stanton-Ife, 'Theft as Exploitation' (2003) *Legal Studies* 402 at
49 415–16.

77 Given space limitations I am prevented from discussing these reasons in greater
details.

1 these victims) and be very careful before they endorse public policies
2 that counter this reality.

4. The proposed interpretation and its implication on the reasonableness of the defendant's belief in her consent

7 From the above discussion of the second rationale of sexual autonomy
8 suggested in *Bree* for the rule that 'a drunken consent is still consent', an
9 alternative position has emerged. As a matter of normative fact, one
10 which is based on empirical and medical research, a drunken consent
11 should not be recognised as legal consent and that public policy argu-
12 ments to the contrary are not strong enough to ignore or override this
13 (normative) fact. At the same time, it is essential to recognise pre-
14 intoxicated specific consent as valid consent to the subsequent
15 (drunken) sex. Therefore, in order to establish the existence of the
16 circumstance of V's lack of consent, two questions need to be asked: (1)
17 was the victim drunk so as to make her incapable of giving a valid
18 consent? If so, then (2) did she consent to sex before getting drunk? If no
19 such consent was given, then it should be concluded that no consent to
20 sex was given in accordance with s. 74. In practical terms, the difference
21 between this proposal and the one recognised in *Bree* is only a matter of
22 degree: both recognise that the capacity to consent can evaporate before
23 a person becomes unconscious. However, a person should be considered
24 as too drunk to give valid consent at a much earlier stage than that
25 recognised in *Bree*, although the difficulties in identifying and setting out
26 a very clear rule as to what amounts to being drunk are recognised here.
27 Yet, this difference in the level of intoxication required to negate the
28 capacity to consent is a reflection of a deeper disagreement as to the
29 underlying assumptions and beliefs about the effects of alcohol and of
30 various values connected with the idea of sexual autonomy. These are
31 summarised by the *default position* set out in the shorthand summary of
32 the law according to which 'a drunken consent is still consent'. Whereas
33 the court in *Bree* held that 'a drunken consent is consent', it is proposed
34 that the default position should hold that 'a drunken consent is *not*
35 consent'.

36 When discussing this suggestion with colleagues, I encountered some
37 who were concerned with the implications of the position advanced in
38 this article on the *mens rea* requirements, fearing that it would result
39 with unfair convictions of defendants who did not possess the relevant
40 *mens rea* for rape. In this section, I will respond to these concerns and put
41 them to rest. Once it is accepted that 'a drunken consent is *not* consent'
42 then the defendant's state of mind should not create any special diffi-
43 culties. The law requires proof that the defendant did not reasonably
44 believe that the victim consented. According to s. 1(2) of the 2003 Act,
45 in making this decision we have to 'regard all the circumstances, includ-
46 ing any steps [the defendant] has taken to ascertain whether B cons-
47 ents'. If the defendant is aware that the woman had 'a lot to drink' and
48 is drunk (as was the case in both *Dougal* and *Bree*), it would no longer be
49 reasonable to believe that she can give a valid consent. This is true, even

1 if the woman has consented while being drunk. It should be clear to the
2 defendant that a drunken woman is incapable of making a *valid* consent
3 given her drunken condition. This is obviously true where the defend-
4 ant encourages the woman to drink more alcoholic drinks in the hope
5 that it would increase the likelihood of having sex with her, but it is
6 similarly true if the defendant is not encouraging the woman to get
7 drunk. Many people admit that they have ‘taken advantage’ of the
8 drunken condition of women.⁷⁸ The fact that they admit that there is an
9 element of ‘taking advantage’ is a proof that they are aware of the effects
10 of alcohol on the ability to consent or, more accurately, the diminishing
11 ability to reject, sexual intercourse.⁷⁹

12 What if X’s intention was only to encourage the woman to relax and
13 not to get her drunk to the point of being incapable of validly consent-
14 ing? What matters is not X’s initial intention, but how drunk does he
15 think the woman is when she consents to have sex with him. Where a
16 man genuinely misjudges the level of drunkenness of the woman,
17 thinking that she has not passed the point in which she loses her
18 capacity to consent, then in accordance with s. 1 of the 2003 Act and
19 subject to the reasonability of his belief, he would not have the neces-
20 sary *mens rea* and would not be convicted of rape. However, when he is
21 unsure of the effect of the drink has had on the woman and on her
22 capacity to give a valid consent, then sex should be avoided. If the man
23 went on and had sex with the woman based on her drunken consent,
24 and it turns out that his suspicion that she is so drunk as to lack capacity
25 to consent was correct, then, following the general rules of wilful
26 blindness, there is no defence. In both *Dougal* and *Bree*, the defendants
27 were aware that the complainants were very drunk: in *Dougal*, the
28 security guard was asked by the complainant’s friends to escort her back
29 to her room as she was too drunk to get there on her own; and in *Bree*,
30 the defendant was helping the complainant who was continually vomit-
31 ing by washing her face and hair. Note that the question to be asked is
32 not merely whether the complainant consented, but whether he was
33 aware that she was drunk (and thus had lost her capacity to consent).

34 35 **5. Some concluding remarks**

36
37 It is unknown if the prosecution in *Dougal* would have been able to
38 convict the defendant had they decided to continue with the case to its
39 conclusion. However, the argument that ‘a drunken consent is still
40 consent’ advanced by the prosecution and approved by the judge in
41 Swansea Crown Court, and more recently by the Court of Appeal in *Bree*

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43 78 Masher and Anderson, above n. 40; P. Y. Martin and R. A. Hummer, ‘Fraternities
44 and Rape on Campus’ in P. B. Bart and E. G. Moran (eds), *Violence Against Women:
45 The Bloody Footprints* (Sage Publications: Newbury Park, CA, 1993) 114 at 122.

46 79 This does mean that there may be borderline cases which make it past the *actus reus*
47 test, but fail at the *mens rea* test, because it was not apparent enough to the
48 perpetrator that the complainant was not *legally* consenting when she was
49 apparently *prima facie* consenting in fact. But even in such cases by correctly
identifying the missing element, society also recognised the harm caused to the
complainant (as it recognises that the *actus reus* of the offence indeed occurred).

1 and in *H*, is erroneous. It is submitted that consent, as defined in s. 74 of
2 the 2003 Act, requires the (shorthand) conclusion that 'a drunken
3 consent is *not* consent' where the woman is very drunk.

4 The uproar that followed reports of *Dougal* in the media and also
5 plummeting rape convictions, which dropped from 33 per cent of re-
6 ported cases in 1977 to just 5.4 per cent in 2005, brought the govern-
7 ment to review the law and to try to boost convictions. In the
8 Consultation Paper published in March 2006,⁸⁰ the government pro-
9 posed, among other things, to introduce a new statutory definition of
10 capacity which would clarify the law on drunkenness and consent and
11 define the circumstances in which a woman can be considered too
12 drunk to give informed consent. In an unpublished response to the
13 Consultation Paper, the Council of Circuit Judges dismissed all pro-
14 posals, including the proposal for a new definition of consent. The
15 Council argued that the definition of capacity should be left undefined.
16 As one of the judges explained:

17 The line [between capacity and incapacity] is something that is probably
18 best left to a jury to decide on all evidence . . . The trouble with over-
19 complicating things is the more you over complicate it the less likely it is
20 that anybody will ever get it right. In the long run the average jury of
21 twelve people know when drink means that you're incapable and when it
22 means you're not.⁸¹

23 At the same time, however, judges seem to acknowledge public dissatis-
24 faction with the current state of things. *Bree* provided the judges with an
25 opportunity to make a stand and push the law in the right direction.
26 Giving the judgment of the court, Sir Igor Judge P repeated the Council
27 of Circuit Judges' opinion against the introduction of a new definition of
28 consent, stating:

29 The practical reality is that there are some areas of human behaviour which
30 are inapt for detailed legislative structures. In this context, provisions
31 intended to protect women from sexual assaults might very well be con-
32 flated into a system which would provide patronising interference with the
33 right of autonomous adults to make personal decisions for themselves.⁸²

34 Yet, whilst he made an effort to provide a rather sympathetic inter-
35 pretation to the *Dougal* case, he recognised, at least in principle, the
36 possibility that women, while still conscious might be too drunk to be
37 capable of giving valid consent to sexual intercourse. Unfortunately, as
38 argued above, the application of this general principle onto the facts of
39 the case was not completely in line with the principle itself. This was
40 corrected in *H*, which was decided shortly afterwards.⁸³ The Solicitor
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45 80 Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims—Justice for*
46 *Victims of Rape* (Home Office: London, Spring 2006), available at http://www.cjsonline.gov.uk/the_cjs/whats_new/news-3299.html, accessed 9 June 2009.

47 81 As quoted in the *Guardian*, 23 January 2007, available at <http://www.guardian.co.uk/crime/article/0,,1996585,00.html>, accessed 9 June 2009.

48 82 *R v Bree* [2007] EWCA Crim 804, [2007] 2 Cr App R 13 at [35].

49 83 *Bree* was decided on March 2007, and *H* was handed down in July that year.

1 General viewed the judgments as clarifying the law on consent.⁸⁴
2 Though these two judgments are an important step in the right direc-
3 tion, it is submitted that they do not go far enough: they were willing to
4 recognise that women (as well as men) may lose their capacity to
5 consent well before they lose consciousness, but maintained that a
6 drunken consent is still consent even when a woman is very drunk.
7 Moreover, the most the court was willing to do was to admit that
8 evidence of impaired memory is not fatal to the prosecution case.
9 Instead, the court should have advanced the use of such evidence as a
10 sufficient proof of the high level of drunkenness in which a woman is
11 incapable of consenting. At the end of the day, the court appears to
12 legitimise public practice of having drunken sex, rather than recognise
13 the harm that may be caused to drunkenly consenting women and warn
14 against it.

15 The strong opposition of the Council of Circuit Judges to any of the
16 further measures suggested in the review that followed *Dougal*, which
17 left unanswered the difficulties in attaining convictions for rape, as well
18 as the distinct reasoning given in *Bree* in support of the Council of Circuit
19 Judges' position, suggest that the reasons given are simply a cover to the
20 more basic traditional-male prejudice position according to which 'a
21 drunken consent is still consent', however drunk the woman is. In a
22 society in which close to 30 per cent believe that women are partially
23 responsible for being sexually assaulted (against their will) if voluntarily
24 drunk, obviously, if a woman agrees to sex, she must be held responsible
25 for her decision—even if, being drunk, she lacked the capacity to make
26 it. This view, it is submitted, should pass from the world along side other
27 prejudices.

28 As a general rule, the Council of Circuit Judges is correct in its doubts
29 concerning legislative reforms that attempt to give a very detailed ac-
30 count as to what should amount to a valid consent, and it should be left
31 to the members of the jury to use their common-sense understanding of
32 the term.⁸⁵ Unfortunately, in the case of the capability of a drunken
33 woman to consent to sex, the plummeting rate of rape convictions
34 proves that common sense seems to fail,⁸⁶ whether it is due to common
35 practice coupled with ignorance as to the effects of alcohol on decision-
36 making processes or because of some theoretical position. This article
37 has shown how the existing legislation may be sufficient if more guid-
38 ance to juries is given by presiding judges, and with further expert
39 evidence regarding the effects of alcohol on a drunken woman's mental
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43 84 See her announcement made on 28 November 2007 (published in *Convicting Rapists*
44 *and Protecting Victims—Government Announces New Measures*, CJS publications,
45 available at http://www.cjsonline.gov.uk/the_cjs/whats_new/news-3624.html, accessed 9
46 June 2009.

47 85 But note that in *Bree* the reason given for a rejection of detailed legislation was not
48 the fear of over-complication, but rather arguments of paternalism, with which has
49 been dealt with earlier in this article.

49 86 Though admittedly, it is impossible to isolate only one reason for the reduction in
rape convictions.

1 capacities.⁸⁷ Section 74 allows—and even requires—a more drastic
2 interpretation, which recognises the drunken woman’s incapacity to
3 consent. Yet, if such a ‘market failure’ (in recognising incapacity to
4 consent and, consequently, in convictions) is not being rectified by the
5 courts, it is necessary for the legislature to intervene and give more
6 specific guidance. In such circumstances, it is very unfortunate that the
7 government, which has decided to press ahead with most of its plans to
8 reform the rape laws despite strong opposition from the judiciary, has
9 caved in on its proposal for a new statutory definition of capacity and
10 will not go ahead with it.

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46 ⁸⁷ Note that the recommendations of the government’s Consultation Paper (above n.
47 ⁸⁰) involved the introduction of expert evidence concerning the psychological
48 reactions of rape victims, but said nothing about the type of expert evidence
49 suggested above. (For the recommendations, see the Solicitor General’s
announcement, above n. 84.)