'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.

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

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.

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

Section 1 below sets the legal framework for the discussion pointing to an important distinction between factual and legal consent and to the language of the relevant sections arguing that they set the conditions for legal rather than factual consent. The current position of the law as developed in the cases of *Dougal*,[2] *Bree*[3] and *H*[4] is then presented. Section 2 criticises the current law and its interpretation of s. 74 for being too restrictive, by examining two possible theoretical rationales, mentioned in the judgments, for the court's proposition that 'a drunken consent is still consent': the first is an analogy with the law relating to intoxicated offenders, and the second is the general argument that this position recognises the positive aspect of sexual autonomy. It is argued that the first rationale is unsound because of the existence of some important differences between the *consent* given by the victim and the *intention* of the offender. Discussing the second rationale, the arguments that relate to the existence of valid consent as a matter of normative fact and arguments that involve public policy considerations are distinguished. It is submitted that questions of the first type should be discussed first, as they are questions of facts. Once the drunken person's incapacity to consent is established as normative fact, Section 2 below goes on to examine whether considerations of public policy can override these facts. It is concluded that they cannot. From the criticisms discussed, an alternative position emerges: a much lower level of intoxication (than that required by the courts) negates capacity to consent, and that this should be reflected by a default position that 'a drunken consent is *not* consent'. Subsequently, a two-step process is set out for the jury: (1) was the victim drunk so as to make her incapable of giving a valid consent; and, if so, (2) was there pre-intoxication consent? If the answer for both questions is in the negative, then it must be concluded that no (valid) consent to sex has been given. This, it is argued, is in line with, and required by, the current law. Section 3 below argues that the need for consistent interpretation of the idea of 'consent' across criminal law

1 See E. Finch and V. Monro, 'Intoxicated Consent and the Boundaries of Drug Assisted Rape' [2003] Crim LR 773, 782–3; cf. N. Dixon, 'Alcohol and Rape' (2001) 15 *Public Affairs Quarterly* 341.
2 *R* v *Dougal*, unreported, November 2005, Swansea Crown Court.
3 *R* v *Bree* [2007] EWCA Crim 804, [2007] 2 Cr App R 13.
4 *R* v *H* [2007] EWCA Crim 2056.

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

1. The present law

The law that governs situations of (voluntary) drunken consent is set in ss 74 and 75 of the Sexual Offences Act 2003 (hereafter 'the 2003 Act'). Section 75(2)(d) creates an evidential presumption of lack of consent where the victim is unconscious. It is also widely recognised that a person who has had one or two glasses of wine, or a pint of beer, is capable of giving a valid consent to sex. The central question for consideration here is whether a person who is found in between these two extremes, i.e. when the person is very drunk but is not unconscious (or to use Sir Igor Judge P's terminology in *Bree* 'someone who has had a lot to drink'[5]), is capable of giving a valid consent. Peter Westen distinguishes between factual consent and legal consent. Factual consent consists of factual state of mind and/or an expression of acquiescence. It is also factual in nature, i.e. 'a factual concept is one that organizes our experiences with natural events without constituting a normative judgment about people's ensuing moral or legal relationship to others'.[6] Legal consent is the set of rules which defines situations in which a person is legally deemed to have consented whether or not this is factually the case.[7] So, put another way, the question, is whether a factual drunken consent should be recognised as a legal consent. Section 74 of the 2003 Act sets out the conditions for legal consent, stating that:

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

Thus, the answer to the question just presented should be focused on the capacity of the drunken person to choose freely and consent. The language of s. 74 necessitates the interpretation of the term 'capacity to consent' as referring to legal conditions rather than to factual-technical inability to consent. If the word 'capacity' only referred to the technical

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

6 P. Westen, *The Logic of Consent* (Ashgate: Farnham, 2004) 4–5. For current purposes it is not necessary to discuss whether in the context of sexual offences (and more generally, in criminal law) the relevant conception of consent should be a person's 'state of mind'—i.e. subjective attitude or feeling that one experiences internally on a first person basis—or a person's objective expression: words or conduct, by which she expresses her choices to others. For further discussion on this, see e.g. H. Hurd, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121; L. Alexander, 'The Moral Magic of Consent II' (1996) 2 *Legal Theory* 165; J. Simmons, *Moral Principles and 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.

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

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

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

The problem in *Bree* is that although the court acknowledged, in principle, the vanishing capacity to consent, it did not apply it to the facts of the case. During the trial, the prosecution changed their position: initially they alleged that the defendant had sex with the complainant while her level of intoxication was so great that she was unconscious.

8 If her factual drunken consent is not regarded a legal consent, i.e. it is not a 'valid' consent, then it does not matter whether or not she has consented, and subsequently her failure to remember her acts that evening does not matter or undermine the prosecution's case.

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

10 Ibid.

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

This position also reflects the practical attitude taken by jurors. Recent research found that in a set of mock trials in which the victim was described as follows: '. . . while conscious and communicative, she was confused, having trouble walking, slurring her words, and the defendant admitted that [the victim] was largely unresponsive as he undressed her', most jurors concluded that she did not consent to intercourse since she lacked the capacity to do so under s. 74.[14] However, the varying reasons given by the jurors in support of their conclusion suggest that in less extreme situations their answers might change.

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

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

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

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

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

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

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

2. The two rationales for the court's position in *Bree* and their flaws

(a) The first rationale—analogy to the law of intoxication relating to offenders

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

(i) The difference between intention and consent

The comparison between the victim's consent and the law regarding intoxication is wrong. Such a comparison assumes that consent equates to intention, an assumption which is very controversial,[19] and needs further explanation. Going into the details of the relationship between consent and intention is a complex matter which deserves a separate

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].
17 *R v Kingston* [1993] 3 All ER 353.
18 *R* v *Bree* [2007] EWCA Crim 804, [2007] 2 Cr App R 13 at [32]–[36].
19 For example, see Hurd, above n. 6, for the view that intention and consent are similar, and Wertheimer, above n. 6 at 243–4, for the view that intention and consent are not similar concepts.

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

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

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

21 By which I refer only to 'direct intent'.

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

23 Although, if the agent is an active participant, we would usually talk of intention rather than consent (even if, technically, penile penetration can only be done by 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)).

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

(ii) Equating the law regarding intoxicated offenders with that of intoxicated victims

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

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

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

25 [1977] AC 443.

26 [1993] 3 All ER 353 at 364.

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

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

The idea of prior fault makes sense when discussing the offender's liability, for he is the one causing harm. It does not, however, make sense to refer to (prior) fault when discussing actions of victims. The victim did not do anything that causes harm to another.[29] To equate the victim's consent to the offender's intent is to extend the rationale of the law relating to the offender's intoxication onto the drunken victim. It is to imply that there can be no recognition of the victim's drunkenness as negating her consent because there is some 'fault' in voluntarily getting drunk. This, of course, makes no sense, getting

27 But see criticisms on these rationales and suggestions for alternative rationales in C. Wells, 'Swatting the Subjective Bug' [1982] Crim LR 209.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

35 Wertheimer, above n. 6 at 245.

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].

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

(i) Accepted common practice

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

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

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

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

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

(ii) Arguments of sexual autonomy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

understanding the general nature of what is being agreed.[50] Section 74 of the Sexual Offences Act 2003 sets out what seems to be an even higher standard for consent which involves *a capacity* to make *informed* '*free choice*'. Alcohol distinctively alters a person's thought processes and behaviour by affecting these exact capacities (though research shows that the drunk or drugged person seems to be incapable of recognising these changes and claims the only effect is a feeling of being drowsy).[51] Rape involves a non-trivial risk of significant harm,[52] and should therefore be treated in a similar way to the way drunkenness is treated in other areas. Thus, it is submitted that a drunken person who has lost her 'brakes' and is unable to stop herself from acting out of character[53] does not have capacity to consent: to make a 'free choice' requires an ability to reject some of the options. A 'yes' is meaningless where no practical option to say 'no' is available. This has already been recognised in the interpretation of s. 74 in the case of *Kirk* with regard to consent provided in situations where the victim thought she had no other choice.[54] Similarly, when, due to the effects of alcohol, a woman is unable to reject the suggestion and say 'no' to sex, then she is *incapable* of making a free choice (about saying 'yes'), and in more severe situations she is incapable of understanding the nature and the quality of having sexual intercourse with a specific person to which she is consenting. As she does not have the capacity to consent, she cannot give valid consent. As the Sturman Report explains, acting 'out of character' under the influence of alcohol is not merely the result of loosening the brakes, but rather it is a result of changes (even if unrecognised by the person herself) in thought processes and behaviour. It is the alcohol that gives consent to intercourse and not the woman who has consumed it.[55] Munro points out that this position may create a problem for the law because 'the law does not usually recognise retrospective revocation of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

specific sex that will take place later on that evening, and that if the consent is withdrawn at any later point (even when the person is drunk[63]), then the original consent will no longer hold.

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

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

Admittedly, this does not completely resolve the concern that some women get drunk in order to have sex, because in many cases the pre-intoxication consent is not with regard to a specific person, but more general in nature (that 'they will have sex later on that evening with whoever they fancy').[64] The fear is that recognising such consent as sufficient consent could undermine the requirement that the consent required has to be specific (person and event). However, protecting the positive dimension of the sexual autonomy of these women comes at the price of not protecting the negative dimension of other women who chose to get drunk without such intention—just because the wanted to

63 Rejection while being drunk should be recognised as valid although the person lacks capacity to consent in similar situations because even if this rejection is driven by alcohol alone, the nature of this decision is to avoid something which has the potential to harm.

64 See Alan Wertheimer's position arguing against the requirement of prior consent because 'the pleasures of alcohol and sex are so closely intertwined for some that to required contemporaneous sober consent would be unduly restrictive' and because it 'would preclude many women from doing precisely what they want to do, 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.

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

3. Consent in other areas of criminal law

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

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

For current purposes, I will leave aside the public policy arguments of immorality, human degradation and the fear of spreading sexually

65 Wertheimer, above n. 6 at 257.
66 [1993] 2 All ER 75.

transmitted diseases as well as the discussion of the various exceptions to the rule, since they all assume the existence of a valid consent. Rather, I wish to draw attention to the first reason given by Lord Templeman, which questions the validity of the consent. Lord Templeman discusses the fear that the consent of some of the participants was not given freely. His argument is based on the fact that: 'drink and drugs were employed to obtain consent and increase enthusiasm',[67] though he does not suggest that the drink or drugs were given to those participants involuntarily. He then goes on to discuss the practice of giving the participant a code word, which he could pronounce when excessive harm or pain was being caused. Lord Templeman argues that this practice is insufficient to ensure that there is real (valid) consent, saying that 'the efficiency of this precaution, when taken, depends on the circumstances and the personalities involved. No one can feel the pain of another . . . The victims were degraded and humiliated, sometimes beaten, sometimes wounded with instruments . . .'.[68] Lord Templeman is careful to stress that sado-masochistic homosexual activity is not just about sex, but also about violence, and that his reasoning addresses the violent elements of the activity more than the sexual elements. Contrary to Lord Templeman's opinion,[69] it is submitted that this reasoning is similarly applicable to the case of a drunken consent to sex:[70] the efficacy of the precaution taken by the requirement of consent depends on the circumstances and personalities involved. One such circumstance in which the precaution is ineffective is where the consent given is by a drunken person. The technical ability of the victim to refuse (i.e. the fact that she is conscious and able to talk) is insufficient to ensure the existence of real consent in such cases because of the effects of alcohol. In such circumstances sexual intercourse degrades the victim and humiliates her as can be seen from accounts of such victims after they sober up (their perception and feeling of being raped). It might be argued that there is an enormous difference between violent activity and sexual activity (which is not accompanied with violence). The first causes a person harm and the second is not harmful.[71] Therefore, the reasoning of Lord Templeman applies only to violent activity and cannot be extended to sexual activity. Indeed, there is a difference between violence and sex. The physical harm of violence will occur whether or not the victim agrees to it, whereas the mental harm involved in the offence of rape (without violence) will occur only if the victim does not

67 Ibid. at 83.
68 Ibid. at 83.
69 Lord Templeman was ultimately content to assume that the victims' consent in *Brown* was the kind of consent which would be adequate in a rape case to negate the defendant's liability.
70 By which I mean the reasoning about the violence involved in sado-masochistic activity. In no way do I endorse the view that the gender of the participants in the sexual activity (or in sado-masochistic activity) matters in any way.
71 But see Herring and Madden-Dempsey, above n. 52, for the view that sexual penetration is often harmful.

agree to sexual intercourse,[72] but this difference does not change the capacity to consent which is at the centre of Lord Templeman's first argument. The consideration that 'drink and drugs were employed to obtain consent and increase enthusiasm', and that this undermines the validity of the consent given, holds with similar strength when discussing consent to sex.

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

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

72 Cf. Gardner and Shute, above n. 52.
73 Unfortunately, discussing those reasons goes beyond the scope of this article.
74 [1993] AC 442.
75 [2000] 1 Cr App R 1.
76 Cf. A. Bogg and J. Stanton-Ife, 'Theft as Exploitation' (2003) *Legal Studies* 402 at 415–16.
77 Given space limitations I am prevented from discussing these reasons in greater details.

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

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

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

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

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

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

5. Some concluding remarks

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

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

79 This does mean that there may be borderline cases which make it past the *actus reus* test, but fail at the *mens rea* test, because it was not apparent enough to the perpetrator that the complainant was not *legally* consenting when she was 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).

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

The uproar that followed reports of *Dougal* in the media and also plummeting rape convictions, which dropped from 33 per cent of reported cases in 1977 to just 5.4 per cent in 2005, brought the government to review the law and to try to boost convictions. In the Consultation Paper published in March 2006,[80] the government proposed, among other things, to introduce a new statutory definition of capacity which would clarify the law on drunkenness and consent and define the circumstances in which a woman can be considered too drunk to give informed consent. In an unpublished response to the Consultation Paper, the Council of Circuit Judges dismissed all proposals, including the proposal for a new definition of consent. The Council argued that the definition of capacity should be left undefined. As one of the judges explained:

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

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

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

Yet, whilst he made an effort to provide a rather sympathetic interpretation to the *Dougal* case, he recognised, at least in principle, the possibility that women, while still conscious might be too drunk to be capable of giving valid consent to sexual intercourse. Unfortunately, as argued above, the application of this general principle onto the facts of the case was not completely in line with the principle itself. This was corrected in *H*, which was decided shortly afterwards.[83] The Solicitor

80 Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims—Justice for 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.

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.

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

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

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

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

As a general rule, the Council of Circuit Judges is correct in its doubts concerning legislative reforms that attempt to give a very detailed account as to what should amount to a valid consent, and it should be left to the members of the jury to use their common-sense understanding of the term.[85] Unfortunately, in the case of the capability of a drunken woman to consent to sex, the plummeting rate of rape convictions proves that common sense seems to fail,[86] whether it is due to common practice coupled with ignorance as to the effects of alcohol on decision-making processes or because of some theoretical position. This article has shown how the existing legislation may be sufficient if more guidance to juries is given by presiding judges, and with further expert evidence regarding the effects of alcohol on a drunken woman's mental

84 See her announcement made on 28 November 2007 (published in *Convicting Rapists and Protecting Victims—Government Announces New Measures*, CJS publications, available at *http://www.cjsonline.gov.uk/the_cjs/whats_new/news-3624.html*, accessed 9 June 2009.

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

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

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

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