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Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent

*Christine Chambers Goodman**

I. INTRODUCTION

She sees him across the room, and he catches her eye, returning her smile. She raises her glass, as does he, and they toast one another silently. Soon, he joins her in the line at the bar and buys her another drink. They talk and dance and drink and flirt. Hours later, he walks her home, and he reaches for her at the door. Enjoying the kissing and caresses, she lets him slide her keys out of her hand. He opens her apartment door, lifts her up, and gallantly carries her over the threshold, setting her on the couch. She thinks about how lucky she is to have caught his eye tonight. The kisses and caresses resume as she murmurs, "It's getting late." Suddenly, she feels something cold and realizes that he is reaching into her pants, tugging them down, as he slides his hand inside. She says, "Wait. I need to sleep." He says, "I've been waiting to do this all night." She closes her eyes. Moments later, she feels a sharp pain piercing her body. Stunned, she cannot speak or move. It is too late.

In allegations of rape and sexual assault the issues of consent and resistance are slippery ones, which become even more so when alcohol is added to the scenario. Drinking is a social activity for many, and "so it is not surprising that when one party is consuming alcohol, the other party is consuming it as well."¹ The tendency for mutual intoxication, combined with the fact that alcohol is present in approximately fifty percent of situations involving allegations of sexual assault and rape, make it even more important that society

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1. Valerie M. Ryan, Comment, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 CAL. W. L. REV. 407, 411-12 (2004) (citations omitted).

address the ongoing problems that intoxication has on a woman's ability to resist or consent to sexual activities.²

This Article endeavors to provide some guidance to courts and juries in evaluating whether there was valid consent to intercourse when alcohol has been consumed by one or both parties. In doing so, this Article will attempt to address the more difficult cases involving scenarios that are closer to the line dividing consent from non-consent. Consequently, this Article will not address the so-called "easier" cases involving substantial force, coercion, threats, weapons, or situations where one party administers intoxicants in an effort to incapacitate a victim to the point where consent cannot be obtained.³

Because of the varied effects alcohol has on perceptions, this Article proposes a sliding-scale approach toward evaluating consent that would establish an appropriate level of explicit consent that varies with the number of drinks or level of intoxication of the parties. It may be appropriate to raise the level of explicitness required to constitute effective consent with the number of drinks or level of intoxication of the parties.

To help establish the applicability of a sliding-scale approach, this Article will address the issues of when explicit consent is sufficient as well as how to deal with problems surrounding a woman's use of equivocal language when providing consent. When an affirmative "Yes, I am sure," will be the only sufficient indication of consent will depend on the circumstances, because levels of intoxication will vary based upon the size and weight of the individuals, their alcohol tolerance, and other factors. Therefore, any standard must be a flexible one. A sliding scale provides an opportunity for the jury to consider the level of intoxication and its relation to the appropriate or reasonable level of explicitness required for adequate consent by mandating a more unequivocal, more affirmative yes the more the female has had to drink. In other words, more explicit consent will be required the greater the amount of alcohol consumed. This

2. Ryan explains that "researchers have determined that approximately half of all sexual-assault victims, and half of all sexual-assault perpetrators drink alcohol before an offense occurs. Specifically in the context of acquaintance rape, alcohol is usually involved." *Id.* at 411; see also Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 142-46 (2002) (explaining that there are a large number of cases involving men sexually assaulting women who were intoxicated).

3. For an overview of statutes regarding offender induced incapacitation, see Falk, *supra* note 2, at 156-87, which discusses these laws by categories.

sliding scale also may be applied to men, recognizing that the male is more responsible for obtaining the requisite level of explicitness for effectively legal consent, the fewer number of drinks he has consumed in the relevant time period.

The verbal resistance issue also demonstrates the usefulness of a sliding scale when evaluating non-consent. When a woman says no, that should mean no, which is increasingly, though not universally, understood. However, should “I don’t think we should” when she has had a few drinks be the equivalent of no? Should falling onto the bed without saying yes be the equivalent of no when she has had a lot to drink? Should we consider a softer no, or a less explicit no as sufficient evidence of non-consent, the more alcohol the woman has consumed? This formulation would parallel the suggestion above in that it would be better to require a more explicit yes when more alcohol has been consumed. While we cannot develop a formula for the exact number of drinks consumed in a particular time period, this Article seeks to develop some guiding standards and suggests that ambiguous consent becomes more ambiguous, and less able to constitute adequate consent to negate a charge of rape, the more alcohol that a female has consumed.

Another option that bears consideration in dealing with the close cases that result from voluntary intoxication is to focus on the force, “forcible compulsion,” or threat of force element that is a part of many rape and sexual assault statutes. The sliding scale could be employed here as well by requiring a lesser showing of force to satisfy the force element when either of the parties has consumed alcohol. Indeed, in some jurisdictions no force need be shown when the woman is too intoxicated to consent effectively. However, the level of alcohol consumption necessary to trigger the rape by intoxication claim is very high and also must be such that her intoxication was known or should have been known to the male.⁴ Unfortunately, that cut-off does not protect a significant number of women who are not severely intoxicated and who could, and perhaps should, be protected by a sliding-scale approach.

4. See, e.g., CAL. PENAL CODE § 261(a)(3) (providing a definition of rape which does not contain any force or resistance requirement when the victim is prevented from resisting by an intoxicating substance and the perpetrator knows or should reasonably know of the victim’s condition); see also discussion *infra* Part II.C.

Even in states where statutes omit any explicit reference to resistance, courts still implicitly consider resistance as evidence of force or of non-consent and a lack of resistance as evidence of consent. Interestingly, some courts apply a sliding scale, expecting (or implicitly requiring) less resistance the greater the implicit or explicit force used.⁵ This Article suggests that alcohol consumption should trigger a sliding scale on the issue of resistance also. Alcohol, like fear, can have an impact on a woman's ability to resist. Some women are unable to move and almost temporarily paralyzed when confronted with a physical attack, and thus it is reasonable to consider that some women similarly may be less able to resist when under the effects of alcohol. The reasons for this diminished ability to resist will be addressed in Part III below.

A sliding-scale approach also serves to protect the male interests as well by requiring more evidence of force when only a minimum amount of alcohol has been consumed. A woman who drinks regularly and has one glass of wine on a particular evening should not be able to claim that she was paralyzed, or in an alcohol-induced depressive state that prevented her from saying no, without some other evidence of coercion or force leading to the sexual encounter. This issue will be explored in Part IV below.

Perhaps the most radical proposition in this Article is the following: silence never should be adequate to constitute consent when either of the parties has consumed alcohol. As many authors and researchers have noted, alcohol is often involved in sexual activities, both consensual and non-consensual. Why not curtail the ambiguity to which silence is so susceptible and require affirmative consent of some type to counteract the effects of alcohol, including the distortion of perception and increase in risk-taking?

Part II of this Article provides background on the various conceptions and definitions of consent generally, in the rape context specifically, and then in the context of intoxication. Part III analyzes

5. See *State v. Rusk*, 424 A.2d 720, 728 (Md. 1981) ("That a victim did not scream out for help or attempt to escape, while bearing on the question of consent, is unnecessary where she is restrained by fear of violence."); *McQueen v. State*, 423 So. 2d 800, 802-03 (Miss. 1982) ("Appellant did not threaten to injure prosecutrix The evidence presented . . . is legally insufficient to support a conviction for the crime of *forcible* rape."); *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1346-48 (Pa. Super. Ct. 1992), *aff'd in part and vacated in part*, 641 A.2d 1161 (Pa. 1994) (finding evidence insufficient to convict defendant of rape when victim did not resist and did not allege "threats or mental coercion").

studies about the effects of alcohol consumption on the behaviors of men and women and the double standard as to responsibility that exists between the genders. Part IV then describes the sliding-scale proposal and analyzes how this proposed reallocation of risks results in a more just administration of rape law. Part V concludes the Article.

II. BACKGROUND

This section provides a brief description of the different conceptions of consent generally and some background on consent in the context of rape law specifically. It then describes the specifics of intoxicated consent.

A. A Brief Introduction to Consent Generally

There are many ways of conceptualizing the general idea of consent.

One common understanding of consent is that one “authorizes” another to act in an area that is part of one’s domain, e.g., giving power-of-attorney to another [or] . . . giving permission to another to cross over a boundary of one’s own. . . . In the case of rape, as in other areas, consent turns a criminal act into a noncriminal one.⁶

This “boundary crossing” aspect of consent has duration and scope limitations.⁷ For instance, one who consents to the loan of personal property on one occasion and provides permission for another to cross that personal boundary is not deemed thereby to have consented to any subsequent loans or gifts.⁸

H. M. Malm also provides a useful summary of the different conceptualizations of consent. One such understanding is consent as willingness, which is described as “more along the lines of ‘willing to

6. Joan McGregor, *Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law*, 2 LEGAL THEORY 175, 192 (1996) (“Consent must, then, be deliberate and voluntarily, since its explicit purpose is to change the world by changing the structure of rights and obligations of the parties involved. . . . Within the sovereign zone of our domain, all others have a duty to refrain from crossing over without our permission. Consent cancels that duty, at least in regard to the specific acts consented to, and for specified time.”).

7. *Id.*

8. *Id.* (“Giving consent to someone does not mean that, forever after, that person rightfully has access to that part of the person’s domain. If I let you use my car today, you are not violating my right by using it today. However you have no claim over it tomorrow.”).

go along with' or 'accepting' than either 'wanting' or 'desiring.'"⁹ Malm describes this notion of consent as important to understanding "implied" or "tacit" consent, which he defines as "consent given by *refraining* from an act rather than performing an act."¹⁰ The idea here is that willingness to go along is sufficient for consent in some circumstances. According to Malm, "[C]onsent is best defined as the signification of a mental state, rather than as the mental state itself. . . [because] the mental state associated with consent comes in degrees, whereas consent does not."¹¹ As Malm explains, consent does not get stronger simply because there are more reasons supporting it, or less strong because there are fewer reasons to support it.¹² One's feelings leading to consent may be very strong or not very strong but still produce the same result once the threshold between non-consent and consent has been crossed.¹³

That threshold to consent can be crossed based on morally appropriate, or morally inappropriate stimuli, and, as differentiated by Malm, between immoral means of obtaining consent that would invalidate consent and those that would not.¹⁴ For example, a benefit such as admission to graduate school in exchange for sex would not invalidate consent.¹⁵ Although such an exchange may be immoral in other ways, consent can be manifested by the willingness to submit in exchange for a greater benefit than the detriment suffered.¹⁶ Willingness to submit based on a cost-benefit calculation, however, can invalidate consent when those "costs" are disproportionate, or "sufficiently immoral," such as consenting due to a threat to kill a third person.¹⁷

9. H.M. Malm, *The Ontological Status of Consent and Its Implications for the Law on Rape*, 2 LEGAL THEORY 147, 148 (1996).

10. *Id.*

11. *Id.* at 149.

12. *Id.*

13. *Id.*

14. *Id.* at 150–55.

15. *Id.* at 151.

16. *Id.* Alan Wertheimer also recognizes that "[i]t is a mistake to think that consent always works 'to make an action right when it would otherwise be wrong,' if 'right' is equivalent to 'morally worthy' or 'justified.'" Alan Wertheimer, *What Is Consent? And Is It Important?*, 3 BUFF. CRIM. L. REV. 557, 560 (2000) (citation omitted). He uses the example of exchanging money for sex, which may be morally wrong but does not constitute the crime of rape—even though the exchange of money as a basis for consent is morally wrong. *Id.*

17. Malm explains:

It appears as though society is left with two choices: “we must either stipulate an artificially limited range of acts as acts that will count as consent, or be willing to live with a broader, fuzzy-bordered range and run the risk of ambiguity and mistake, in particular cases, as to whether the person consented.”¹⁸ Malm suggests that the more appropriate choice would be placing limitations on manifestations of consent, particularly in circumstances where the presence or absence of consent has serious ramifications.¹⁹ The artificially limited range would be reserved “for activities that have significant consequences and are such that a mistake about consent cannot be corrected prior to the realization of those consequences.”²⁰

Malm then provides a standard for evaluating whether consent has been obtained in the more high-stakes situations with this “general rule”: “the more the nonparadigmatic act is open to other interpretations ([that is], as done for reasons other than to signifying [sic] willingness to [consent to] a particular activity), the less justified we are interpreting it as an act of consent.”²¹ For instance, test driving a car is not consent to consummate a purchase contract for the car, and attending an open house is not consent to enter into escrow on the home.²² Test driving and house hunting can be *precursors* to the eventual consummation of the “contract” (for those who have decided which to purchase and simply want to take one last look before “signing on the dotted line”), or they can be

Either the offer was sufficiently immoral to preclude consent, in which case the woman was raped or assaulted, or it was not sufficiently immoral, in which case the woman consented and no wrong was done. In contrast, a non-normative account of consent allows us to explain such judgments in terms of the choices one makes *relative* to one’s options. The woman was wronged both by having an option-closing offer imposed on her without her consent (with the forced choice creating a psychological harm that is independent of the offerer’s ultimate action) and by the action imposed on her after her choice was made. But the degree of the latter harm is limited to the degree of the lesser of the evils that were open to her, because only the lesser was unavoidable.

Malm, *supra* note 9, at 153–54. The issue of coercion arises here as well but is beyond the scope of this Article.

18. *Id.* at 154.

19. *Id.*

20. *Id.* The author gives examples of surgery or selling a house at a specific price as “activities with significant consequences.” *Id.* at 155.

21. *Id.* at 155.

22. *See id.* at 154–55.

substitutes (for those who just want to drive a sports car past a former lover or want to dream about a mansion that is not within one's budget). Malm's suggested standard supports the sliding scale that this Article recommends by addressing the impact of potential ambiguity in interpretations about the presence or absence of consent generally. The next step is to apply this consent scale to the crime of rape.

B. Consent in the Context of Rape

If, as Malm suggests, consent is "a signification of a mental state"²³ and that mental state can have various levels, the problem becomes ascertaining at what point the line from nonconsent to consent has been crossed when evaluating the criminality of sexual relations. In an effort to address this problem, many traditional rape statutes and common law standards require that the sexual act occur "without her consent," which thereby requires the prosecution to affirmatively prove the lack of consent.²⁴ In other jurisdictions, the lack of consent is not an explicit statutory requirement; rather, the presence of consent operates as an affirmative defense.²⁵ In either case, it is important to have a legal definition of consent.

Some states have attempted to address this problem by providing a definition of what constitutes valid consent. For example, California's rape statute defines consent for cases in which consent is used as an affirmative defense, as "positive cooperation in act or attitude pursuant to an exercise of free will." The statute further adds, "[t]he person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."²⁶ Falk praises California's statute and recommends that other states use similar language that incorporates "the use of descriptive words such

23. *Id.* at 149.

24. *See, e.g.*, *State v. Rusk*, 424 A.2d 720 (Md. 1981); and *State v. Alston*, 312 S.E.2d 470 (N.C. 1984).

25. *See, e.g.*, Cal. Jury Instructions Criminal 10.35 (West 2008).

26. *Id.* The statute further provides that "[a] current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under [sections for rape, spousal rape, sodomy, or unlawful sexual penetration]." *Id.*

as informed, knowing, or reasoned, in characterizing the nature of the consent required in sexual assault cases.”²⁷

In addition to our need for consent definitions, consistent standards are also needed with regard to who bears the responsibility of communicating consent. Current interpretations require the male to have some level of awareness of the lack of consent. Because, however, our culture views women as more responsible than men when it comes to inciting sexual desire, the vital assumption seems to be “that the man merely misread the woman’s signals.”²⁸ Consequently, the view persists that “[t]he woman, not the man, has the responsibility for clear communication.”²⁹ Because our society allows this seemingly double standard to exist, rape is one of the few crimes where jurors often blame the victim.³⁰

In response to the double-standard problem, Professor Ross proposes that rape statutes articulate a legal standard of conduct that would govern how a person is to act when confronted with “manifestations of possible non-consent to sexual conduct.”³¹ The

27. Falk, *supra* note 2, at 199–202. For example, the Sex Offenses Statute in Kansas sets out definitions for several terms but fails to include any definition of consent, KAN. STAT. ANN. § 21-3501 (West 2008), even though rape is defined as “intercourse with a person who does not consent.” KAN. STAT. ANN. §§ 21-3501-02 (2007).

28. Andrew Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN’S L.J. 3, 30 (2000).

29. *Id.* Taslitz explains why the mechanistic view of sexual emotions is wrong. *Id.* at 31–34. The next portion of the article then goes on to discuss the race issues involved, particularly of the alleged rape by a black man of a white woman. *Id.* at 35–43.

30. See, e.g., LINDA FAIRSTEIN, *SEXUAL VIOLENCE IN THE WAR AGAINST RAPE*, 133–34 (1993).

A major obstacle in the path of both the complaining witness and the prosecutor, then, is the archaic societal attitude, which remains so disturbingly pervasive, that sexual assaults are victim-precipitated crimes. This is the only category of criminal conduct that is perceived to have happened because of the victim’s actions, not the assailant’s. ‘What was she wearing?’ ‘How much did she have to drink?’ ‘What was she doing there at that hour of the night?’ Any one of those factors may have facilitated the rapist’s goal, but it was *his* criminal conduct that was solely responsible for the assault.

Id.

31. Beverly J. Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 825 (1996). Ross cites Vandervort, who suggests that “judges and prosecutors reinterpret the meaning of nonconsent and incorporate into its definition, as an element of the crime, the standard of conduct required by the law when a person confronts manifestations of possible nonconsent to sexual contact.” *Id.* (citing Lucinda Vandervort, *Mistake of Law and Sexual Assault: Consent and Mens Rea*, 2 CANADIAN J. WOMEN & L. 233, *passim* (1987–1988)). Ross continues, “Thus, an element of sexual assault would be any action taken to coerce sexual contact when a person does not *explicitly* affirm her

question then becomes what actions or words should trigger the “possibility of non-consent” and put the potential defendant on notice to inquire further or risk committing the crime of rape. For some, only express dissent operates as a trigger indicating non-consent. Malm notes that often times “a woman is presumed to have consented unless she has provided a *clear* expression of *dissent*. Thus, the utter absence of any positive sign of consent would not be enough to establish nonconsent, nor would it be enough if some mild signs of dissent were added to it.”³² This Article, however, adopts the view that some evidence of dissent, even mild evidence of dissent, should be adequate to put the defendant on notice that any continued action towards sexual intercourse may be non-consensual or forced.³³

Consistent with Malm’s observations, many judges and juries view the fact of submission without struggle, resistance, or the lack of additional physical force as evidence of affirmative consent rather than the simple absence of evidence of non-consent. In part this view is prevalent because many people believe that sexual intercourse is generally a good thing,³⁴ and because consensual sex is a rather

consent. Lack of such an explicit affirmance of consent would be, *as a matter of law*, nonconsent.” *Id.* She explains that this re-characterization would not require additional legislation but rather would fall under the mistake of law doctrine, which generally does not operate as an effective defense. *Id.* at 825–26.

32. Malm, *supra* note 9, at 155 (emphasis in original).

33. See, e.g., Daphne Edwards, Comment, *Acquaintance Rape and the “Force” Element: When “No” Is Not Enough*, 26 GOLDEN GATE U. L. REV. 241, 279 (1996). As Edwards explains, the courts

display an inability to recognize that if the victim has said “no,” and the perpetrator continues, the next physical action is in itself coercive. The assailant *knows* the victim has refused, and thus his action can only be characterized as intentionally coercive and threatening. His actions, at this point, speak louder than words: by ignoring her “no,” he is telling her *she will participate*.

Id.

34. While the focus of this research has been on female’s consent to intercourse, we must not overlook that males sometimes succumb to intercourse against their will as well. One scholar describes a University of Washington study that found that:

undergraduate males report having unwanted and coerced sexual activity in levels comparable to their female counterparts. Though the men do not report being physically forced to have sex, they report feeling powerless to stop their partners, being worn down by a partner’s arguments, as well as being plied with drugs or alcohol.

Patricia Novotny, *Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?* 1 SEATTLE J. SOC. JUST. 743, 746 (2003) (citations omitted). Thus, Novotny reminds us that

common occurrence, it is more appropriate to have to prove the less-common occurrence of non-consensual sex.³⁵ Malm cautions that this assumption of consensual sex as an everyday common activity “would have a chance of succeeding only if *indiscriminate* sex were part of everyday life. For, after all, the negative definition of consent presumes that a woman has consented to have sex with any and every man.”³⁶

Rather, more commonly, parties who are attracted to one another are the ones who have sexual intercourse. As such, a default presumption of consent would make more sense if it was triggered by attraction rather than acquiescence. If there is no evidence of attraction, the default presumption should be non-consent, unless or until there is affirmative evidence to the contrary. For instance, Lois Pineau provides a hypothetical of a woman out on a date having an okay time, who wants to cuddle or snuggle, while the man expresses his frustration about how she is leading him on, as he whines for sex.³⁷ Fighting her paradoxical feelings, the woman eventually succumbs, but does not consent, leaving us “unsure whether her mere reluctance, in the presence of high-pressure tactics, constitutes non-consent.”³⁸ Pineau analyzes the reasoning behind this woman’s actions, relying upon the notion that attraction is an implicit requisite of agreement in sexual relations. The author opines that if “she was not attracted to the kind of sex offered by the sort of

“the view that sex is always a win-win proposition for men may no longer make common sense.” *Id.* at 747. The author concludes:

[O]ne aspect to solving the rape problem is to increase women’s agency in sex, generally enabling women to embrace and act on their own desires, or not. This increased agency may itself be viewed as a form of resistance. So women can make the phone call, can make the first move, can even, perhaps, push a reluctant male partner to go further than he wants. The corollary may be a reduction in male agency, or at least more fluidity, in the power relationships as they play out between individuals. In particular, men may not always want to have sex, and when they do against their wishes, it injures them.

Id. at 749.

35. Malm, *supra* note 9, at 157–58 (citing Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1087–184).

36. *Id.* at 156. Malm continues, “Moreover, the above claim cannot explain why the crime of rape is treated differently from other crimes in which nonconsent is an element or consent a defense. As Susan Estrich points out, ‘Visiting (trespass with consent) is equally everyday, as is philanthropy (robbery with consent) and surgery (battery with consent).’” *Id.* (citing Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1126 (1986)).

37. Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & PHIL. 217, 222–23 (1989).

38. *Id.* at 223.

person offering it[,] [t]hen it would be *prima facie* unreasonable for her to agree to have sex” without some other sort of positive benefit in exchange.³⁹ Pineau concludes, “Thus, where the presumption is that she was not attracted, we should at the same time presume that she did not consent. Hence, the burden of proof should be on her alleged assailant to show that she had good reasons for consenting to an unattractive proposition.”⁴⁰

Courts already consider the issue of attraction when evaluating the defendant’s culpability. Estrich recognizes that “[w]omen as well as men have been taught and come to believe that if a woman ‘encourages’ a man, he is entitled to sexual satisfaction,” and “leading him on” in his perception often can be enough encouragement.⁴¹ This perceived sense of entitlement rings especially true when the defendant himself is physically attractive. For instance, jurors find it hard to believe that an attractive defendant would resort to rape.⁴² With this background on consent in the context of rape allegations, let us now consider consent in the context of intoxication.

39. *Id.* at 224. Pineau continues, “[U]nreasonable, that is, unless she were offered some pay-off for her stoic endurance, money perhaps, or tickets to the opera. The reason is that in sexual matters, agreement is closely connected to attraction.” *Id.*

40. *Id.*

41. SUSAN ESTRICH, REAL RAPE 100 (1987). Estrich concludes:

Conduct is labeled criminal “to announce to society that these actions are not to be done and to secure that fewer of them are done.” It is time—long past time—to announce to society our condemnation of simple rape, and to enforce that condemnation “to secure that fewer of them are done.” The message of the law to men, and to women, should be made clear. Simple rape is real rape.

Id. at 104. Estrich continues:

Or, as Ann Landers put it in 1985, “the woman who ‘repairs to some private place for a few drinks and a little shared affection’ has, by her acceptance of such a cozy invitation, given the man reason to believe she is a candidate for whatever he might have in mind.” From sociological surveys to prime-time television, one can find ample support in our society and culture for even the broadest notions of seduction enforced by the most traditional judges.

Id. at 100 (citations omitted).

42. FAIRSTEIN, *supra* note 30, at 135. Fairstein states that “colleagues and I have now heard hundreds of times—especially when middle-class, professional defendants stand up in the courtroom—the murmurs of prospective jurors or public onlookers saying, ‘I can’t believe it—he doesn’t *look* like a rapist.’ or ‘He doesn’t look like he’d have to *force* someone to have sex with him.’” *Id.*

C. The Validity of "Intoxicated Consent"

It is important to examine some interpretations of the validity of intoxicated consent, as well as some studies regarding perceptions of intoxication and how it affects consent. In his seminal work on the issue of consent, Alan Wertheimer identifies and evaluates five different claims about intoxicated consent.⁴³ He begins with the "impermissibility claim," which states that it is impermissible to engage in relations with someone who is intoxicated, regardless of whether the intoxication is self-induced.⁴⁴ Some state statutes have specifically defined rape to include situations where a person cannot resist due to intoxication.⁴⁵ For instance, the California Penal Code provides that rape occurs when "the victim is prevented from resisting by an intoxicating, or anesthetic substance or any controlled substance, and this condition was known, or reasonably should have been known by the accused."⁴⁶ Thus, a man who knew or should have known that the woman was too intoxicated to resist will be culpable for committing rape, because it is impermissible to engage in sexual intercourse with a woman who is so intoxicated that she could not resist if she did not want to consummate the act of intercourse.

In the majority of jurisdictions, however, a man bears responsibility for rape of an intoxicated person only when he administered the intoxicants to her, and not when she ingested them of her own accord.⁴⁷ This means that

43. ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 232 (Cambridge Univ. Press 2003).

44. *Id.*

45. Ryan, *supra* note 1, at 414. In analyzing California's rape by intoxication statute, Ryan explains that "the main issue is whether the victim had the capacity to exercise the reasonable judgment required to give legal consent. If 'the level of intoxication of the resulting mental impairment was so great that the alleged victim can no longer exercise reasonable judgment,' then the victim was prevented from resisting." *Id.* at 415–16. Ryan recognizes only one third of the states provide protection to victims who voluntarily become intoxicated. *Id.* at 414.

46. CAL. PENAL CODE § 261 (Gould 2003). *See also* Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 126–27 (1994) ("[T]he judge often instructs the jury to consider whether the intoxication prevented effectual resistance, thereby precluding consent. The law may also require less showing of resistance is typically necessary to prove nonconsent in cases where the victim was intoxicated.").

47. Falk, *supra* note 2, at 173. The article explains:

a woman who was voluntarily intoxicated could not use this provision as the basis for a rape allegation. This is true even though the man knew or would be expected to know that she was incapacitated due to intoxication. From this perspective, the woman's self-induced intoxication rescues the man accused of rape by intoxication because he cannot be prosecuted. Therefore, the woman assumes the risk of rape if she is voluntarily intoxicated.⁴⁸

Statutes of this kind provide one example of the extra responsibility placed on women for intoxicated sexual encounters as opposed to the decreased level of responsibility that is placed on men.

The administration of intoxicant requirement present in most state statutes, in contrast to California's statute which places greater responsibility on the male, imposes too great a burden on women

47 of the 56 American jurisdictions reviewed here expressly include rape of intoxicated or drugged victims in their sexual offenses. Three jurisdictions, Georgia, Massachusetts and the military, rely on case law; six states protect mentally or physically incapacitated persons without mentioning drugs or other intoxicants. *But two thirds of these jurisdictions require that the defendant administer the intoxicant for criminal liability before attaches.* The remaining states focused instead on the inability of the victim to appraise the sexual nature of the conduct or to consent. The most common approach to defendant's *mens rea* with respect to the incapacitated condition of the victim is to require knowledge the victim is incapacitated. About twenty percent of the jurisdictions emphasize the central question of consent and the connection between consent and victim incapacity in one form or another.

Id. (emphasis added).

48. Ryan, *supra* note 1, at 415. Ryan explains the implication of the New Jersey statute: [W]hen the woman is voluntarily intoxicated, the man's voluntary intoxication is not a factor at all because the woman's intoxication rescues him from being prosecuted for rape. As a result, when the parties are mutually and voluntarily intoxicated, the woman assumes the risk of responsibility for rape; she is responsible for staying sober during sexual encounters.

Id. at 420. Ryan concludes:

Therefore, when the parties are voluntarily intoxicated, the law should be interested in evaluating both sides of the story to understand the context of the sexual encounter before deciding whether the man committed rape. It appears that the most significant factor in this determination is the level of the woman's intoxication and whether or not her severe intoxication was apparent. If the woman displayed physical manifestations of her incapacity, then it seems reasonable to hold the man responsible, even if his own intoxication clouded his perception of the situation. However, if the intoxicated woman does not actually demonstrate her severe intoxication, then the man cannot be expected to evaluate the woman's ability to provide legal consent. Under this latter scenario, it does not seem reasonable to hold the man responsible for rape, especially if the woman verbally consented to sexual intercourse.

Id. at 429.

during intoxicated sexual encounters. Legislatures potentially could revise these statutes. Professor Falk proposes that for other jurisdictions such as New Jersey, “[t]he operative incapacity language of the intoxication provisions in sexual assault statutes should focus directly on consent because, after all, sexual offenses protect citizens from unwanted, nonconsensual sexual activity.”⁴⁹ She also suggests that jurisdictions should prohibit activity with persons so intoxicated they are incapable of giving informed consent, as California has done.⁵⁰ According to Falk, jurisdictions could easily accomplish this reform if legislatures would “simply omit the administration language common” to many of these provisions.⁵¹ Then, when a woman buys her own drinks, and the male had nothing to do with her intoxication, the incapacitation provision still would provide some recourse for any resulting non-consensual intercourse.

Wertheimer’s second claim is that even if an intoxicated person consents to sexual intercourse, the consent is invalid because intoxication undermines the capacity for valid consent, which he calls the “intoxication claim.”⁵² Thus, a man is culpable for committing

49. Falk, *supra* note 2, at 199. Falk recognizes that California and some other states have incorporated a consent standard, stating that:

As the statutes excerpted above indicate, a number of jurisdictions have already crafted their provisions to emphasize consent. Some of these provisions require that consent be reasoned, informed, knowing or legal. Others stress the importance of various cognitive or volitional abilities in the context of assessing consent. California’s definition emphasizes two important considerations in arriving at a notion of informed or knowing consent. First, to make a reasoned choice to participate in the proposed activity, the person must have sufficient information (knowledge) about the proposed activity, including the type of sexual contact involved, the identity of her sexual partner, and, perhaps even, information about the HIV-status of her partner. Second, that choice must be the product of her free will and not the result of various forms of coercion; California’s statute captures this notion in the use of voluntariness. Minnesota’s tripartite formulation—withhold consent, withdraw it, or communicate nonconsent—is helpful because it emphasizes that consent is a continuing activity not a one-time event.

Id. at 199–200.

50. *Id.* at 201.

51. *Id.*

52. WERTHEIMER, *supra* note 43, at 232. The author makes an important distinction between the kinds of substances that may have a positive bearing on one’s decision to engage in these types of relations by explaining the difference between “substance-affected” consent and “intoxicated consent.” *Id.* at 235. Intoxicated consent is a subset of substance-affected consent. The distinction is that a woman giving intoxicated consent has distorted judgment whereas a woman that has substance-affected consent that is not from intoxication does not have distorted judgment. *See id.* at 236. Substance-affected consent occurs whenever some sort of substance has any sort of impact. *See id.* A common example could be that a person has a

non-consensual intercourse even if the woman consents, if intoxication invalidates her consent. The California statute also illustrates this intoxication claim because, according to Ryan, it provides that “the man assumes the risk of committing rape when the parties are mutually and voluntarily intoxicated and they engage in sexual intercourse. In other words the man is responsible for ensuring that the woman stays sober, or at least does not become heavily intoxicated, during sexual encounters.”⁵³ Thus, if the woman is heavily intoxicated, her consent will not count, and the man can be culpable for rape.

As applied, however, the California statute does not place a substantial portion of the risk with the man simply because the standard for evaluating whether a man knew or should have known is a very high one.

As one California prosecutor explained from her experience prosecuting rape by intoxication cases, the intoxicated victim must be so ‘out of it’ that she does not understand what she is doing or what is going on around her. It is not a situation where the victim just ‘had too much to drink.’⁵⁴

When intoxication is not severe enough as to result in unconsciousness, or “being totally out of it,” the rape by intoxication statute is not available, and thus a prosecutor must either prove the force or threat of force and resistance requirements to find that a crime was committed. Thus, the greater burden is placed on the man only where the woman is that “out of it,” resulting in a fairer allocation of blame by holding the man, who was less intoxicated (as he would have to be in order to consummate the act), more responsible. Moreover, if a woman is truly “out of it,”

headache and ingests Advil, which then makes the headache feel better so that she is later willing to consent to sexual activity. The medicine has not had an impact on the sexual behavior, yet it makes a person comfortable enough to engage in the activity. On the other hand, drugs with aphrodisiac properties would not only affect consent, but they also can constitute intoxicated consent. The author explains, “[W]e may prefer to understand intoxicated consent as referring to cases in which B’s ingestion of a substance increases the probability that she will token consent or will token consent for reasons that do not reflect her stable preferences or, perhaps, her higher-order preferences about her stable preferences.” *Id.*

53. Ryan, *supra* note 1, at 416.

54. *Id.* at 415–16. She states that while “[t]he statute does not require that a victim become so intoxicated that she is physically unable to speak or display a lack of actual consent. . . . mere intoxication ‘to some degree,’ or intoxication that ‘reduced the [woman’s] sexual inhibitions’ is not sufficient.” *Id.* at 416.

then she might not even know what is happening and thus may never pursue criminal charges.

Wertheimer's third and fourth conceptions of consent are closely related and build on each other. The third conception is entitled the "responsibility claim" and stands for the proposition that if the intoxication is voluntary or self-induced, then the individual is responsible for his or her own intoxicated behavior.⁵⁵ While the fourth conception arises from the third and is entitled the "responsibility entails validity claim,"⁵⁶ which states that if the intoxicated individual is responsible for his or her own behavior, "it follows that intoxicated consent must be treated as valid."⁵⁷ In evaluating Wertheimer's fourth claim, Kelman explains that Wertheimer's view as "if members of the group (while sober) would typically prefer their consent to be valid (while drunk), it should be valid."⁵⁸ Wertheimer expects that sober people would prefer that their consent to receive a tattoo while intoxicated be invalid, while most sober women would prefer their consent to sex while intoxicated be valid.⁵⁹ The difference is that the result of a tattoo is pain and permanent disfiguring of the body, whereas the result of intoxicated sexual intercourse is, in Wertheimer's view, a relatively pleasurable experience without any long term physical consequence.

55. Wertheimer, *supra* note 43, at 232. Wertheimer also explains what he calls the "flow-through" view, which holds a person responsible for decisions they make post-intoxication if that person was able to control her behavior pre-intoxication. *Id.* at 240. Under the flow-through view, we hold her responsible post-intoxication ("time-2") for different decisions if she had the opportunity pre-intoxication ("time-1") to guide her post-intoxication decisions because responsibility "flows through" to the different time periods. *See id.* at 241. The flow-through view recognizes that:

we can justifiably ascribe responsibility to an agent for voluntary intoxicated behavior if she had the requisite volitional and epistemological capacities at the appropriate prior time. On the flow-through view, moral responsibility does not chronologically track the agent's psychological capacities. If an agent has a fair opportunity at Time-1 to control or guide her behavior at Time-2, then our moral response to her use of those opportunities at Time-1 flows through to her behavior at Time-2, even if she is unable to guide or control her behavior at Time-2.

Id. at 240-41.

56. *Id.* at 232.

57. *Id.*

58. Mark Kelman, *Thinking About Sexual Consent*, 58 STAN. L. REV. 935, 953 (2005) (reviewing ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* (2003)).

59. *Id.*

Kelman uses a hypothetical case to explain the problem in Wertheimer's rationale,⁶⁰ stating that

Wertheimer believes that the fact that women would seem to go to parties with frat boys knowing that they risk tokening a drunken consent means that women prefer a world in which their drunken consent will count, but that assumption seems plainly wrong. We really do not observe the women's behavior in a world in which they could go to the parties anyway without having their consent immunize the men from legal (or quasi-legal disciplinary) liability or moral opprobrium. The behavior could merely tell us that women value going to parties more than they devalue the expected losses from the sex. They could be better off still if they could decouple sexual risk from a social life."⁶¹

Thus, the "responsibility entails validity" claim does not hold up to closer scrutiny as a rationale for validating intoxicated consent when the other options are foreclosed.

Although Wertheimer justifies the responsibility claim by citing the scenario of how voluntary intoxication is not an excuse for criminal liability, voluntary intoxication does in fact operate to reduce perceptions of responsibility for offenders in some cases.⁶² For instance, some studies have shown that juries find men less responsible for the rape of an intoxicated woman than of a sober woman, and men who are intoxicated receive less blame for rape and other violent criminal acts than men who are sober,⁶³ which is counter to the responsibility claim for crimes generally. The next section of the Article (Part III) discusses the differential effects of

60. Kelman begins with an assumption that women's preferences would be (in this ranking order): first, drinking at frat parties but not having sex even if intoxicated consent is given; second, drinking at frat parties and having sex if consent is given; and third, not attending frat parties, or not drinking at them, or not having sex. *Id.* at 969. If the women's highest order preference is number one and the lowest order preference is number three, but because their highest preference is not an option actually available to them in the real world of fraternity parties, their apparent selection of option two cannot be interpreted as a preference for option two over option one. *Id.*

61. *Id.* at 970.

62. See WERTHEIMER, *supra* note 43, at 239. Wertheimer explains, "[o]n one view, we refuse to recognize voluntary intoxication as an excuse for wrongdoing because intoxication never (or rarely) defeats the agent's 'ability to reason about his obligations and to act in accordance with those obligations.' Call this the *reasoning view*." *Id.*

63. See Georgina S. Hammock & Deborah R. Richardson, *Blaming Drunk Victims: Is It Just World or Sex Role Violation?*, 23 J. APPLIED SOC. PSYCHOL. 1574 (1993). This brief article summarizes the results of research performed in the 1980s.

alcohol on men and women, as well as the difference in the standard applied to men and women when judging their levels of responsibility for crimes (both as victims and perpetrators).

Wertheimer's fifth claim is the "consistency claim," which states that in fact "if people should be held responsible for wrongful acts committed while intoxicated, then we must also treat [the purported intoxicated victim's] consent as valid."⁶⁴ The consistency claim, however, does not provide a coherent argument for validating intoxicated consent because this argument is circular. If it were true that men are held less responsible for rape when the victim is intoxicated, then Wertheimer's consistency claim would require that women bear less responsibility for their consent given while intoxicated. If intoxicated women are deemed to bear less responsibility in that circumstance, then intoxicated consent would not be valid under those circumstances, and a rape may have occurred. If female intoxicated consent is invalidated at the same rate that male intoxication diminishes male responsibility, then an increased number of instances of sexual intercourse will be classified as rape. If so, then more men would be responsible for their intoxicated conduct. Based on the limited empirical studies in this area, the consistency claim appears to then paradoxically require the consent of intoxicated females to be deemed valid. Therefore, the consistency claim would be impossible to fully implement because each time one side's responsibility was adjusted to conform to the other's, that fact of adjustment would lead to another imbalance, which would then require another adjustment.

Each of these claims has flaws, and Wertheimer concludes that a "substantive morality argument informed by empirical investigation," rather than logic, should determine whether intoxicated consent should be valid.⁶⁵ That empirical investigation will require an analysis of the effects of alcohol on perception, understanding, and behavior. The next section provides that analysis.

64. WERTHEIMER, *supra* note 43, at 233. Wertheimer begins from the premise that some unambiguous token of consent has been given, whether it is verbal or behavioral, and thus does not address unconscious or semi-conscious consent or situations where non-consent is explicitly displayed. *Id.*

65. *Id.*

III. THE INFLUENCES OF INTOXICATION

Unlike the blanket assumptions that Wertheimer gives of not allowing intoxication to nullify consent, alcohol consumption should be considered in determining consent because of its effects on both the perpetrator and the victim. "Alcohol and drugs distort reality, cloud judgment, and slow reactions, causing men and women to expose themselves to dangers or disregard social constraints that might otherwise influence them."⁶⁶ In addition, people have individual expectations about the impact of alcohol on sexual relations, "which include the beliefs that alcohol increases sexual arousal, loosens women's sexual inhibitions, and increases men's feelings of power and dominance."⁶⁷ Studies have confirmed the manifestation of such expectations by demonstrating that men as well as women can become more aggressive after consuming alcohol.⁶⁸

Like the all-too-common excuse "she asked for it," women who are intoxicated are deemed to have been even more responsible in having brought the situation upon themselves "because their drunkenness constitutes a violation of appropriate behavior for their gender."⁶⁹ Jurors and judges succumb to this "blame the victim" mentality as well.⁷⁰ Some of the reluctance of judges and juries to

66. Ryan, *supra* note 1, at 412 (quoting ROBIN WARSHAW & MARY P. KOSS, *THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE* 11 (Harper & Row 1988)).

67. Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 *STAN. L. REV.* 115, 120 (1994).

68. Ryan, *supra* note 1, at 412. Ryan's article further explains, "Many people experience an increase in aggressive behavior due to the consumption of alcohol." *Id.*

69. Hammock & Richardson, *supra* note 63, at 1575. Hammock and Richardson explain that, in general, female intoxication is viewed more negatively than male intoxication; ingestion of alcohol by a female leads to a label of deviance. One reason for this negative view comes from traditional female gender role expectations. For the most part, these expectations center on home and family; drunkenness within these contexts is viewed quite harshly. Indeed, Hammock and Richardson found that the character of the victim was rated more negatively when she was intoxicated. Thus, intoxicated females are viewed negatively and might be attributed more blame for their victimization because their drunkenness constitutes a violation of appropriate behavior for their gender. *Id.* (citations omitted). The authors' explanation of female intoxication gives the reasons for the observer to feel less sympathetic towards this female victim and may indicate that she behaved in an inappropriate way, such that in a just world certain harms might justifiably befall her. *Id.*

70. Alison West explains,

There is also a reluctance on the part of judges and juries to convict if there is any indication of 'victim misconduct.' Examples of misconduct include drinking and

convict may be because of equivocal feelings demonstrated by the alleged rape victim, particularly when the perpetrator and the victim were previously acquainted.⁷¹ In the specific context of sex crimes, this conclusion applies as well, that “[i]ntoxication excuses men, but intoxicated women are perceived as bearing greater responsibility for being raped.”⁷² In analyzing social myths on juries and some other

how the victim dressed. The trier of fact evaluates the credibility, trustworthiness and overall believability of the victim. Weighing the witness’ credibility is standard in all trials, however, in a rape case, the trier of fact often sets out with an eye towards disbelieving the victim’s story, particularly when the victim knew her rapist. Indeed, even if no misconduct is found, juries are loath to point an accusatory finger at someone whose only crime may have been misunderstanding the word ‘no.’ When the parties know each other, the reluctance to convict escalates.

Alison West, *Tougher Prosecution When the Rapist Is Not a Stranger: Suggested Reform to the California Penal Code*, 24 GOLDEN GATE U. L. REV. 169, 187 (1994).

71. *Id.* West recognizes:

[M]any nonstranger rape victims are reluctant to use the word ‘rape’ when describing their assault. This is true even though all the factors that comprise the crime of rape are present. These victims do not perceive themselves as rape victims because they know their rapists and were not physically harmed. A [news] magazine study identified three common traits in nonstranger rape victims that prevented them from perceiving what happened to them as rape: (1) when the rape took place between dating partners, 2) when prior consensual sexual intimacy occurred between the rapist and the victim, and 3) when minimal violence was involved. These three traits, coupled with the victim’s subsequent experience of shame, guilt and reluctance to seek help, often contribute to the under-reporting of nonstranger rape.

Id. at 177–78.

72. Kramer, *supra* note 67, at 121. *See also* Deborah Richardson & Jennifer L. Campbell, *Alcohol and Rape: The Effects of Alcohol on Contributions of Blame for Rape*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 468, 468 (1982). This article also discusses the notion that

perceivers exaggerate the responsibility of the victim in order to restore notions of a just world while other studies have demonstrated that derogation of the victim’s character may serve the same purpose. Intoxication on the part of the victim may serve as a cue that facilitates use of either strategy, thus resulting in perceivers attributing more responsibility and/or derogating the character of an intoxicated victim.

Id. at 469 (citation omitted). They recognize that the “just world” consideration is not applicable to the offender because “alcohol consumption by an offender is considered an extenuating circumstance of nonculpability because it is assumed that alcohol interferes with the ability to distinguish right from wrong. Consideration of intoxication as an ‘extenuating circumstance and nonculpability’ may lead to a decrease in blame to a drunken offender.” *Id.* One of the studies upon which this article was based involved female and male undergraduates enrolled in psychology classes who were given different scenarios in which a male party guest offered to help clean up a woman’s apartment after the party, initiated sexual advances, struck her, and then raped her when she refused his advances. *Id.* at 469–70. Later, the experimenters changed the language of the story to provide subtle clues as to the levels of intoxication of the

studies that were performed in the 1980s and 1990s, Kramer also explains that the intoxicated offender was considered less culpable than a sober offender, while the intoxicated woman was considered more blameworthy than a sober woman.⁷³

The Article now turns to a brief examination of studies on the effects of alcohol consumption on men and woman separately. The first sub-section will focus on the effects of alcohol on females, and then the next sub-section will analyze the impact of alcohol on males, as well as on males' reactions to females who have ingested alcohol.

A. When Alcohol Lowers the Female's Understanding of the Situation and Her Ability to Resist, the Risk of the Act Occurring Without Consent Increases

One interesting point about the effects of alcohol on women is that women hold different views on intoxication and sex than what society would generally attribute to them. The majority of women responding to questionnaires did not believe that drinking was a declaration of sexual availability or that it made them less choosy about their partners or more sexually aggressive.⁷⁴ While they believed that it made them less inhibited about sexual relations, they also believed that it did not make them less inhibited in partner choice.⁷⁵ Nevertheless, some of the studies found that "intoxicated women are perceived as bearing greater responsibility for being

offender or the victim or both. *Id.* at 470. Next, these subjects were asked to determine the level of responsibility or relative blame of the victim, the perpetrator, and the situation. *Id.* In addition, they were asked to consider what the police should do and what the police would do if the assault were reported. *Id.* Based on their analysis, the authors concluded,

[I]t appears that the effect of the offender's intoxication was to place greater blame on the situational factor of alcohol and less on the offender himself. [The] [v]ictim's intoxication had no effect on participants' attributions of relative blame. As noted above, the victim received an extremely small proportion of the relative blame for the incident (12%).

Id. at 471. In addition, "the victim was rated as less moral . . . and more aggressive . . . when she was drunk than when she was sober. Participants also reported liking her less . . . and perceived themselves to be less similar to her . . . when she was drunk than when she was sober." *Id.* at 472. While many of the "participants thought the offender *should* be charged with rape" (approximately 84%), "only 16% thought he actually *would* be [charged with rape]." *Id.*

73. Kramer, *supra* note 67, at 131.

74. *Id.* at 121.

75. *Id.*

raped.”⁷⁶ This disconnect between the women’s own perceptions of their conduct and the reaction of society is based on sometimes-erroneous perceptions of how alcohol affects women.

One effect of alcohol consumption is that “[i]ntoxication may blur a woman’s understanding of the situation”⁷⁷ When a woman does not understand her situation—for instance, that her partner is trying to get her to perform sexual acts that she may not be comfortable with—she is less likely to expressly dissent to any “preliminary activities.”⁷⁸ While some women engage in preliminary activities as a *precursor* to sex, others engage in preliminary activities as a *substitute* for sex. During preliminary activities that are a *substitute* for sex, a woman who does not understand that her partner considers the preliminary activity to be a *precursor* to sex, is less likely to manifest any express dissent to the activities, because she is doing exactly what she wants to do—that is, engage in intimate activities that do not culminate in sexual intercourse. If the woman understood that her partner expected those preliminary activities to culminate in intercourse, and she did not wish to engage in intercourse, she would be aware of her need to manifest dissent, or to stop the activities before they escalated too far. However, because alcohol affects the woman’s capacity for understanding her situation, she may not realize the need for express dissent when engaging in preliminary activities while intoxicated.

This impact on understanding leads some women who have been drinking to get into situations that they would not voluntarily seek out when sober. The irony is that such women are judged by the standard of a sober woman, who would be in those situations only if she put herself there voluntarily. Judging the intoxicated woman by the standard of a sober woman is unfair, given how alcohol impairs her understanding of her situation. For instance, Malm recognizes that in the acquaintance rape context, “a sort of willingness seems to be presumed that if one did not wish to be with a particular man one could leave before the relations escalated,” and this presumption provides some justification for the requirement that the prosecution

76. *Id.*

77. Sara Gill, *Dismantling Gender and Racial Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA WOMEN’S L.J. 27, 67 (1996).

78. For purposes of this Article, a “preliminary activity” is one that involves some intimacy, such as touching, kissing, cuddling, or fondling.

prove a lack of consent.⁷⁹ However, the converse is not necessarily justified, because the presumption “cannot be used to defend the requirement that a woman show clear signs of *dissent* in order to establish nonconsent.”⁸⁰ Some would argue that a voluntarily intoxicated female who follows a man to his home or dorm room, has actively consented to be where she is because a sober woman would not do so unless she was interested. Nevertheless, many of the stories will tell not of the female who explicitly consents to joining him in his room, or on his bed, but rather of the female who merely acquiesces in the male’s inquiry as to whether she would like to “rest for a while,” or “come in and sit down so we can talk in private,”—neither of which constitutes consent to sexual activity.⁸¹ The lack of active dissent should not be able to constitute its opposite—consent⁸²—particularly when the woman’s ingestion of alcohol can have an impact on her understanding of the need to show dissent.

An additional impact alcohol consumption has on women is that when their risk aversion mechanism is partially or wholly disabled as a result of that consumption, the mens’ potential interpretation that the activity was a *precursor* that suggests consent to intercourse may lead the women to go farther down the path before recognizing the increasing risk of unwanted sexual intercourse that flows from her consent to preliminary activities that she intended to be a *substitute* for intercourse. This decrease in risk aversion results in more risky behavior, such as going to the apartment of a new acquaintance or to

79. Malm explains that this presumption of willingness,

[G]rounds a presumption of active consent. But to defeat such a presumption, one need not show (or learn) that the person actively dissented—the presumption is defeated if we show (or learn) that the particular person did not take active steps to get there—i.e., that she did not actively consent. Thus, with respect to the law on rape, the presumption in question could be used to explain why the state should carry the burden of proving that the woman did not actively consent to sexual intercourse.

Malm, *supra* note 9, at 157.

80. *Id.*

81. This again raises the point of willingness to go along, made in McGregor’s article about having specific knowledge that one is consenting to the particular activity. See *supra* note 6 and accompanying text.

82. See Malm, *supra* note 9, at 157. Malm concludes that “if consent is the signification of a particular mental state through the performance of an act, then, prima facie, it makes no sense to define consent in the negative—as the failure to perform another sort of act (active dissent).” *Id.* at 159.

the bedroom of an old acquaintance.⁸³ Accompanying a man to his room or to a private place away from the rest of the party should not be considered an expression of *consent* to sexual relations. It may be consent to preliminary activities, but those can be either a *precursor* or a *substitute* for sexual relations. Kramer explains that “when a woman is visibly intoxicated, a man may interpret friendly or flirtatious behavior as an invitation to sex. Believing that alcohol reduces women’s inhibitions, the man may read her behavior as a demonstration of her true but disguised desire for sexual activity.”⁸⁴

The effects of alcohol consumption not only may hinder a woman’s ability to perceive risk but also may “hinder her ability to resist,” even if the woman does realize that the man is interpreting her behavior as a *precursor*, when she intends it to be a *substitute*.⁸⁵ Existing rape jurisprudence already implements a sliding scale of sorts for force when resistance is at issue. Historically, resistance was the main way to prove force. However, as the laws and their interpretations have evolved, courts have recognized that the resistance requirement was a bit arcane, and many states have dropped any explicit reference to resistance in the elements of the statute.⁸⁶ Still, some states maintain that reference to resistance in

83. Ryan notes that “[a]nother study discovered that, as a contributing factor to this danger, intoxicated women who were raped ‘reported that their intoxication made them take risks that they normally would avoid.’” Ryan, *supra* note 1, at 412. *See contra*, William H. George & Jeanette Norris, *Alcohol, Disinhibition, Sexual Arousal, and Deviant Sexual Behavior*, 15 ALCOHOL HEALTH & RES. WORLD 131 (1991). When there is an expectation of consuming alcohol or alcohol is consumed in a small amount, women tend to be put more on guard, at least when alcohol is consumed in small quantities; in this scenario the authors found women to be “more anxious and less self-disclosing.” *Id.* at 134. George and Norris explain how social barriers are lessened regarding avoiding conflict, which results in intoxicated men taking greater risks as their conflict avoidance mechanisms becoming disinhibited. *Id.* at 137. *See also* Claude A. Steele & Robert A. Josephs, *Alcohol Myopia: Its Prized and Dangerous Effects*, 45 AM. PSYCHOL. 921, 924 (1990). Steele and Josephs explain that the “primary determinants of social behavior during intoxication, as during sobriety, are the internal and external cues that become salient to the actor,” and those cues can inhibit responses. *Id.* When alcohol impacts the processing or recognition of those cues, the responses may not be inhibited and risky behavior can result.

84. Kramer, *supra* note 67, at 120–21.

85. *See* discussion *supra* notes 9, 78 and accompanying text.

86. In describing the evolution of the consent and resistance requirement, one author notes, “where there was fear of deadly violence, the standard was slightly relaxed. In cases in which guns or knives were brandished by attackers, the utmost resistance standard was not required.” Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory and Rape Law Is Turned on Its Head*, 11 WIS. WOMEN’S L.J. 37, 54 (1996).

defining the threat of force as one that is sufficient to overcome a reasonable person's ability to resist.⁸⁷

The resistance requirement, while not explicit in more modern rape statutes, except to demonstrate the severity of a threat, remains a part of the courts' and juries' analysis in determining whether the force element was met, with the rationale being that: (1) the greater resistance, the greater force must have been used to overcome the will; (2) the less resistance, the less force; and (3) in the absence of resistance, either there is no force, or the force is so severe that resistance would be futile.⁸⁸ Thus, a woman who is raped at gunpoint is not expected to provide any substantial physical resistance, based on the recognition that resistance in the face of a deadly weapon likely would be futile, if not also fatal.⁸⁹ On the other hand, when the force is less, such as pushing the woman onto the bed and sitting on her, the failure to provide some physical resistance is usually fatal to any rape allegation.⁹⁰ Even in situations that do not involve an intoxicated female, many courts find that a female who does not physically resist was not forced.⁹¹ This result is disappointing given greater resistance may lead to a possibility of even greater harm to the victim.⁹²

87. See *supra* notes 5, 77 and accompanying text.

88. See *generally* *McQueen v. State*, 423 So. 2d 800, 806–07 (Miss. 1982) (Broom, J., dissenting).

89. See *State v. Rusk*, 424 A.2d 720, 726–28 (Md. 1981).

90. *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1346–48 (Pa. Super. Ct. 1992) (arguing that there was insufficient force given that the victim did not fight harder when there was little danger of more serious physical injury).

91. See, e.g., Edwards, *supra* note 33, at 277–79. Edwards provides an illustration of this concept in her discussion of *Goldberg v. State*, 395 A.2d 1213 (Md. Ct. Spec. App. 1979), in which an 18-year-old victim went to defendant's studio because he was going to help her be a model. He pushed her on the bed and removed her clothes and as he raped her she was crying. Explaining this case, Edwards states that "the *Goldberg* court held that the 'force' element had not been satisfied because there was no evidence that the defendant was going to *physically harm her*. The victim's pleas to be left alone, and the defendant's physical actions overriding those cries, were insufficient to establish 'forceful' behavior." *Id.* at 279.

92. Edwards then describes *McQueen*, 423 So. 2d 800 (Miss. 1982), where the defendant raped his 14-year-old sister-in-law at a secluded spot. The author explains that:

[B]ecause the defendant did not physically force the victim to comply and the victim failed to physically resist, the 'force' element was not satisfied. In sharp contrast, the dissent argued that the physical resistance should not be required. In addition, the dissent explains that it 'is lamentable but true that too many times cases come before this Court showing the poor rape victim kicked, screamed, and physically fought to the bitter end—she became victim of a homicide following a rape.'

Id. at 285 (citing *McQueen*, 423 So.2d at 806–07 (Broom, J., dissenting)).

The problems with resistance for sober victims suggest the additional difficulties resistance requirements pose for intoxicated victims. The diminished ability of an intoxicated victim to resist is caused by several factors. First, as mentioned earlier, some studies have shown that alcohol consumption leads some women to take greater risks than they would when sober.⁹³ Consequently, when a woman takes greater risks, she may feel more invincible and less vulnerable to harm. However, when she does suffer harm because of those greater risks, she may also feel more at fault for her own lack of caution contributing to that resulting harm. Thus, when a woman takes the risk to go home to the apartment of a male after both have been drinking, she may feel like “nothing bad is going to happen.” Then when he starts to engage her in unwanted sexual activities, she is not able to resist as well as she would have been able to do when sober. Secondly, her verbal resistance (simply saying no, or repeating it) may be shut down or hampered by the depressive effect of the alcohol consumption. This may be especially true for those women who try to avoid confrontation. Thus, when a man provokes a verbal confrontation over issues such as “leading him on” or being “a tease,” the woman may simply succumb, rather than engage in the tiring but important conversation about consent.

When the victim is intoxicated, less force is needed to get her to succumb and less resistance is possible given the effects of alcohol. Kramer explains that even when a woman “fails to become physically affectionate, since alcohol is a depressant, the woman may be less able to resist unwanted sexual advances. Her lack of resistance may sound like a resounding ‘yes’ to a man who subscribes to the traditional model of male aggression and female submission.”⁹⁴ This lack of resistance ends up being used as evidence of affirmative consent, as discussed above.⁹⁵

In sum, women who consume alcohol may take greater risks and may have less understanding of circumstances and situations, which makes them less likely to appreciate the need for resistance or dissent. Nevertheless, because of the unique impact that alcohol has on decision-making skills, the fact that the woman voluntarily consumed alcohol should not be the deciding factor as to whether

93. Ryan, *supra* note 1, at 412.

94. Kramer, *supra* note 67, at 121.

95. *See supra* notes 4, 85–92 and accompanying text.

sexual intercourse was voluntary. The degrees of appreciation and understanding will vary with the level of alcohol consumption and individual tolerance. When engaging in preliminary activities, these effects can have a substantial impact on misperceptions about the existence and scope of consent, particularly for women who engage in these preliminary activities as substitutes rather than as precursors to intercourse. These combined effects of alcohol consumption put some women at greater risk for unwanted sexual intercourse.

B. The Risk of the Male Misperceiving "Consent" Is Greater When He Has Consumed Alcohol

What do we do about the intoxicated male? From a physiological perspective, medical researchers have formulated a theory about "alcohol myopia," which is based on the idea that alcohol disinhibits the mechanism that regulates conduct as to socially accepted behaviors. Alcohol myopia also involves eliminating conflict with a perception of permission, and missing cues about unwillingness.⁹⁶ In short, based on this theory, males who have more to drink are less likely to feel conflict about engaging in socially unacceptable behaviors, and therefore are more likely to engage in such conduct.

Alcohol myopia causes "intoxicated males [to] . . . be less aware of whether the female consents and [they] may become more sexually aggressive than when sober."⁹⁷ A more aggressive male may make repeated and more intense requests for sex than a sober male, and unfortunately, the defendant's pressure or repeated requests is not really considered in the issue of determining whether the consent was voluntary under rape law. Drawing the analogy to consent in the Fourth Amendment, stop and search context, one author notes that "repetitive requests are considered part of a courting game; the law

96. Alcohol myopia is a theory based on evidence that:

[A]lcohol impairs attention, cognition, and information processing. It proposes that a person is more likely to exhibit a socially "excessive" behavior when intoxicated, if that behavior ordinarily is one that presents a conflict. By decreasing the person's ability to process information, alcohol eliminates the conflict the person would experience related to the behavior. This is referred to as alcohol myopia, and, supposedly, greater intoxication leads to greater myopia which leads to greater disinhibition.

George & Norris, *supra* note 83, at 137.

97. Gill, *supra* note 77, at 67.

considers it to be seduction not rape.”⁹⁸ But when repeatedly harassed by an intoxicated and aggressive male, who ignores a woman’s pleas to “calm down,” or “take a cold shower,” the woman may feel forced to engage in sex without consenting to do so. Men who become more forceful or violent may be more likely to disregard their partner’s feelings, thus the effects of alcohol myopia may lead to more non-consensual intercourse.⁹⁹

Alcohol myopia also applies to lower levels of consumption because a man may be willing to rationalize his sexual behavior after drinking. Researchers note that “[i]t is conceivable that when alcohol is consumed in low dosages, a person exploits the alcohol excuse to lead to sexual disinhibition. When alcohol is consumed in higher dosages (although not so high as to suppress sexual arousal completely), alcohol myopia becomes alcohol’s main contribution to sexual disinhibition.”¹⁰⁰ Thus, a male may over-rely on the “alcohol excuse” to rationalize behavior that is more sexually aggressive than he would normally feel is appropriate, because he expects his behavior to be effective. This expectation may cause him to actually change his behavior simply because his inhibitions about sexual aggression have been reduced—even when he did not consume enough alcohol for the alcohol itself to change his behavior.¹⁰¹

98. Kasubhai, *supra* note 86, at 72. In describing the differences between manifestations of consent in the rape context and the Fourth Amendment search context, Kasubhai writes that the U.S. Supreme Court “determined that the duration of consent may be restricted by an explicit withdrawal of consent, or by actions of the accused which implicitly withdraw such consent.” *Id.* at 71. Kasubhai also acknowledges that while “consent to Fourth Amendment searches cannot be imputed from one instance to another,” in a rape case retracting consent does not work unless there is a finding of force because there is no prohibition against imputing consent in one instance to another instance where the parties are in a relationship.” *Id.* at 71–72. Another difference she explains is as follows: “the perpetrator is not obligated to obtain express consent before his intrusive violation and subordination of a woman,” and yet explicit consent is not required in rape law. *Id.* at 72.

99. Ryan, *supra* note 1, at 412 (“An intoxicated man may become less attuned to the woman’s desires while becoming more forceful and violent than he would generally act if sober. Some studies demonstrate that a man’s consumption of alcohol significantly increases the probability that he will attempt to rape his companion.”).

100. George & Norris, *supra* note 83, at 137 (“Alcohol can influence the expression of deviant and non-deviant sexual behavior; however, this influence is shaped by numerous qualifying conditions, such as dosage, gender, and expectancy.”).

101. Some feel that men assume the risk of non-consensual sex when they drink too much alcohol. For instance, Wertheimer contrasts the intoxication of the male in the situation stating, “We can say that A puts himself at risk for liability for behavior that he would have avoided if sober,” though he recognizes that this is merely the beginning of the discussion. Wertheimer, *supra* note 16, at 583. Others believe that alcohol use excuses socially excessive

This brief analysis of the effects of alcohol on males and females provides the additional background necessary to formulate a new standard for evaluating intoxicated consent. The next section sets forth the proposed standard.

IV. A PROPOSED STANDARD FOR EVALUATING CONSENT WHEN ONE OR BOTH PARTIES HAVE IMBIBED ALCOHOL

This Article suggests that the most straightforward approach to solve the problems identified above would be a sliding scale where the level of explicitness for consent rises with the level of alcohol consumption. For instance, if a woman has had four or five alcoholic drinks in two hours, she would have to be more explicit in stating her agreement to engage in sexual relations than would a woman who has consumed one or two drinks in that same two-hour period. When people consume few drinks, their less-explicit expressions of consent can be adequate. Less-explicit expressions, such as words or deeds that indicate interest or attraction but that fall short of explicit agreement, may adequately protect the parties' interest in engaging in voluntary sexual intercourse. This flexibility would satisfy the concern of some that requiring a verbal sexual contract of sorts detracts from the amorous experience and will hinder some women and men from being able to participate in consensual sexual experiences.

A. At One End: Explicit Verbal Consent When Either Party Is Intoxicated?

Based on the research above, this Article supports the proposition that "individual circumstances of a sexual encounter

behaviors in men, including sexual behaviors, but at least one study demonstrates that society does not necessarily support the "excuse conferring property" of alcohol. *See, e.g.*, George & Norris, *supra* note 83, at 136. The authors caution about some underlying assumptions with this theory, stating,

it assumes men consider alcohol consumption to be a viable excuse for deviant sexual indulgence, and that once drinking commences this expectancy influences their behavior. While questionnaires have established that people generally believe alcohol enhances or disinhibits sexuality, studies have not yet established that people endorse alcohol's excuse conferring properties. In addition there is only modest support for the idea that previously held expectancy about alcohol can affect behavior after drinking.

Id. (citations omitted).

must be understood and evaluated before holding either the man or the woman responsible for a rape allegation when both parties were voluntarily intoxicated.”¹⁰² One way to make the evaluation of circumstances more straightforward would be to require explicit verbal consent when either of the parties is voluntarily intoxicated. Because “there is no bright line test for determining how much alcohol or drugs inhibits a person’s ability to consent, there must be a bottom line.”¹⁰³ That bottom line, as suggested by Seidman and Vickers, is that “if alcohol is present, non-consent must be presumed unless a woman makes an explicit verbal statement she wishes to engage in sexual intimacy that includes penetration.”¹⁰⁴ If explicit verbal consent were required, then there would be less ambiguity and less room for misinterpretations that may lead to allegations of rape when the parties are intoxicated.

Some may say that this requirement of explicit consent and presumption of non-consent goes too far, and will prevent people from having consensual intercourse simply because so often alcohol is a part of sexual relations. However, this requirement is not that all parties remain sober; “[w]omen do not have to be cold sober to engage in consensual sexual intimacy, but they ought to be sober enough to say yes. If a woman is not sober enough to say yes, then no consent should be presumed.”¹⁰⁵ This rule may seem difficult to implement during the course of such encounters as other authors have addressed, but only to the extent that we accept the notion that women may prefer not to say yes when they mean yes,¹⁰⁶ or that

102. Ryan, *supra* note 1, at 429.

103. Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next 30 Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 486 (2005).

104. *Id.* at 486–87.

105. *Id.* at 487.

106. *See infra* Part IV.C. For instance, Wertheimer concludes that we should reject the impermissibility claim for the following reasons:

Not to protect predatory males or to hold women accountable for their irresponsible behavior, but because it does a better job of balancing the positive and the negative autonomy of women than a more restrictive approach. First, the pleasures of alcohol and sex are so closely intertwined for some that to require contemporaneous sober consent would be unduly restrictive. Second, because the disinhibiting [sic] effects of alcohol are widely understood, a permissive approach does not reduce predatory behavior in which A takes advantage of B’s ignorance. Third, to insist on sober ex ante consent to subsequent intoxicated consent would preclude many women from doing precisely what they want to do, namely not to be required to consent before they become intoxicated.

women strongly prefer to indicate their consent in other ways. It seems overly patronizing to suggest that women cannot (or do not) give consent when they are sober, out of some sense of guilt, and therefore would be deprived of any sexual relations if they were required to fess up and make their consent known before the cocktails arrived.

B. The Limits on Explicit but Inebriated Consent

The next question is how to decide whether one is sober enough that a yes means a yes. When should a yes not mean yes? When is a woman too intoxicated to give effective consent? Just as consent to an auto purchase contract could be invalidated on the grounds of incapacity to consent based on intoxication, so too should intoxication invalidate even explicit consent if the woman was not capable of understanding her situation. In the easy cases of severely intoxicated women, some statutes provide protection when the man knew or should have known about her level of intoxication, but the majority of states provide this protection *only* when the accused administered the alcohol to the woman.¹⁰⁷ If the level of intoxication is not enough to implicate the incapacitation ruling (or when the intoxicant was self-administered and therefore is not actionable under most state statutes), some protection is still needed for the woman who might say the word “yes” without meaning or understanding fully its implications for subsequent sexual intercourse.

In analyzing the conflicting issues over whether intoxicated consent should be valid, Professor Kelman considers reactions of autonomy theorists as to

how we should conceive of why women, when drunk, may sometimes token consent to sex to which they would not consent when sober. Broadly speaking, one could argue that intoxicants impact emotion, desire, and/or cognition. To the degree they merely impact emotion or desire, intoxicants simply pose problems of inconsistent wills.¹⁰⁸

WERTHEIMER, *supra* note 43, at 257. This last sentence is the most troubling because it suggests that there is no harm without considering all the potential instances under which there can be harm.

107. *See supra* note 45 and accompanying text.

108. Kelman, *supra* note 58, at 977.

The implication is that intoxicated and sober women may, when balancing the same considerations, reach different results due to the intoxication. A rational approach would require that consent be valid when the woman's cost-benefit analysis leads to *the same* decision about sexual relations, whether she was intoxicated or sober. The act is not "against her will," given the decision that she has affirmatively made. In this way, we avoid requiring the male to be a "mind-reader," and validate intoxicated consent in some situations. Nevertheless, we still might hope that men will ask the follow up question ("Are you sure? You have been drinking and I don't want you to regret this.") before proceeding in the face of intoxicated, but explicit, consent.

Another approach would be to say that an "intoxicated woman is simply incapable of totaling up costs and benefits as well as a sober woman."¹⁰⁹ Under this view, intoxicated consent should not be valid because the intoxication partially incapacitates the woman's deliberative process such that she is not able to weigh and measure all of the costs and benefits before making her decision to consent. This conclusion is consistent with current law in some jurisdictions on the issue of incapacitation, but only when the incapacity is severe. The proposed sliding-scale approach suggests that the definition of incapacity be softened to include room for a partial incapacity that affects the deliberative process without wholly shutting that process down, as seems to be required under the current "she must be so out of it," standard described above.¹¹⁰

109. *Id.* Kelman discredits another rationale explaining the following:

The autonomy theorist would argue that the intoxicated woman is simply not competent to make such an *important* decision that is (adequately likely) to be wrong for her. I am dubious that anyone sincerely adopts this strategy. To do so would require ascertaining, for instance, whether the inebriated Ivy League college girl is still 'smarter' than most women—all permitted to legitimately grant sexual consent—are when sober. Alternatively, of course, competence is doing no work at all: the fact that the expected value of decision is negative is completely driving the decision that she could not be making her choice competently.

Id. at 978.

110. *See supra* notes 45–46 and accompanying text. Under California's incapacity standard, the male must know or should have known about the level of incapacity of the female in order for the act to constitute the crime of rape, so we may need to keep that qualifying language here, such that the male is not charged with rape if he did not know, and should not have known about the female's partial incapacity. If that is the case though, then we may swallow up any effectiveness of changing the standard to partial incapacitation because the risk stays with the female when she tokens consent when intoxicated, unless she is so "out of it" that the male should have known that she did not have the capacity to consent.

A softening of the standard also would help to lessen the effect of the double standard. When the man is so severely intoxicated that he is “out of it,” it is unlikely that he would be able to consummate the sexual act. Even if he tries to force himself on the woman, he likely will not be able to accomplish penetration. In contrast, the female can still be penetrated, even if she is completely “out of it,” as in nearly unconscious, or even not quite so out of it that she can still experience what is happening. She may not be “with it” enough to withdraw her consent or stop the rape from occurring, yet under current standards this partial incapacitation often fails to provide a firm factual basis for a subsequent rape prosecution. A sliding scale would provide room for the jury to evaluate how intoxication levels less than “completely out of it” can influence or obviate express consent.

Another approach to consider is Wertheimer’s argument that intoxicated consent should be valid if women would prefer, when sober, that their later intoxicated consent be valid, which is based on his assumption that many women prefer to have sex when intoxicated, rather than when sober.¹¹¹ This approach may provide more protection for intoxicated consent than would be ideal.

Noting that not all women agree with Wertheimer’s position, Kelman suggests that a regime allowing women who desire to have valid, intoxicated consent engage in sexual relations will increase women’s well-being.¹¹² Those women who would prefer that their

111. As noted above, Wertheimer states that women would prefer that their drunken consent be valid as consent, if you ask them when they are sober, because many women do not want to be responsible for their decisions to consent to intercourse, and the alcohol relieves them of that responsibility. If drunken consent were not acceptable, however, then men would be risking too much to have sex with drunken women, and the women would get less sex, and that would be a lower-level preference than that of having drunken consent be valid. *See supra* note 55 and accompanying text.

112. Kelman, *supra* note 58, at 969–70. In analyzing the question of whether intoxicated consent should be valid, Kelman provides a useful thought-experiment by reviewing the issue of intoxicated consent as one of power, rather than one of incapacitation. While “we may think it’s sensible to delegitimize (legally or morally) drunken consent,” Kelman recognizes that another option would be to force “women to exercise more self control in granting consent once drunk,” because he foresees a greater harm resulting from a regime that in effect required the fraternity boys to hold sex-free parties for drunken women. *Id.* at 970. Kelman explains that

we may think the mechanism that focuses exclusively on the frat boys will harm B’s more than one that focuses on forcing the women to exercise more self-control in granting consent once drunk or one that facilitates their capacity to make the same choices when drunk as they would make in advance.

intoxicated consent be invalid can exercise greater self control or have their friends help them to ensure that they do not give consent when intoxicated.¹¹³

So which is the better approach: to create a standard that validates intoxicated consent in advance, such that certain actions or deeds constitute consent, or to have the jury decide *post hoc* whether the intoxicated consent should have been valid or invalid after analyzing the particular circumstances of the encounter? Based on what we know about alcohol decreasing both a woman's ability to resist, as well as her ability to understand that resistance might be necessary, it is not likely that most women, when sober, would choose to have their failure to dissent substitute for actual consent when they are intoxicated. It seems that the better alternative would be to let the jury consider the circumstances and make a determination to validate or invalidate consent. The circumstances for jury consideration should include (1) the amount of alcohol consumption by each party, (2) the level of intoxication

Id. He continues, "This may be a matter of telling Bs that they had better focus, even when drunk, because the men will not be deterred from following their expressed wishes; it may be a matter of finding a designated sober girlfriend to keep them from following frat boys to their rooms." *Id.*

113. *Id.* at 970.

Women-focused mechanisms may (depending on the empirics) seem superior if we believe that women do not have uniform tastes: a rule that focuses on changing A's behavior will cause welfare losses for the subset of women who gain from having sex while drunk, while one that focuses on changing B's behavior will permit those who gain utility (over the course of their lives) by having inebriated sex to do so.

Id. Based on the power dynamic, Kelman is troubled by the inconsistency in Wertheimer's rationale for the validity of intoxicated consent and the invalidity of coerced consent; however, a discussion of coercion is beyond the scope of this Article. The basic dichotomy is as follows: Wertheimer explains that intoxicated consent should be treated as valid if when they were sober they would prefer that to be the case, but he does not follow the same procedure when talking about coerced consent. Intoxication, in Wertheimer's view, is an issue of competence, but Kelman finds a logical inconsistency in these two approaches, stating:

If he is willing to admit the women's intoxicated consent to sex should not count, at least so long as they would prefer to have the option that it does not count, *even though they're not morally entitled to a world in which boys host sex free parties for them*, it is unclear why he thinks that moral entitlement does any work in thinking about 'coercion' and power.

Id. at 971. The implication of this statement seems to be that coerced consent should be valid if they would prefer to have the option of coerced consent being valid in advance because there is no moral entitlement to a coercion-free environment. We cannot expect sexual relations to be coercion-free, and some women would choose that their coerced consent be valid, such as when the coercive force involves harm to a loved one, or a benefit like admission to graduate school.

demonstrated by each party, (3) the level of explicitness of the consent, (4) any verbal or conduct evidence of non-consent or dissent such as resistance, ambivalence, or reluctant acquiescence, and (5) testimony about whether any preliminary activities were intended as precursors or substitutes for intercourse. An evaluation of all of these factors will help the jury to determine when and whether explicit but inebriated consent is adequate to constitute legal consent in each particular case.

C. Resolving Ambiguity in the Vast Middle Ground

In between the explicit yes or explicit no is the more interesting analysis of when equivocal actions or words should be adequate to constitute consent. The sliding scale also should apply to equivocal words and many actions, such that the greater the level of intoxication, the less likely that equivocal words or deeds can be considered sufficient to constitute proper consent. The more drinks one has consumed in the relevant time period, the more likely that only explicit consent will be valid.

Some might say that it would not be reasonable to require men to make the determination of what level of explicitness is required for consent to be valid. This is particularly true where the woman does not demonstrate or manifest the severity of her level of intoxication, or when the man has no knowledge as to how many drinks the woman has consumed over the relevant time period.¹¹⁴ When there is doubt, however, it would seem equally reasonable to err on the side of requiring explicit consent. A firm “yes, I do” will be substantial evidence to establish consent.¹¹⁵

So what are the standards for determining whether words or deeds are sufficiently equivocal to require a more explicit statement to constitute adequate consent? First, an inquiry is needed into whether the victim intended such conduct to substitute for an assertion about consent (I do, or I will). If so, the second inquiry should be whether the consent was to “preliminary activities,” as

114. Ryan, *supra* note 1, at 429 (explaining why it is not reasonable to hold men responsible when a severely intoxicated woman does not demonstrate the severity of her intoxication).

115. Although there are situations in which even a “yes” by a severely intoxicated person should not be adequate for consent, and the section above discussed the point at which explicit consent would be invalid. *See supra* Part IV.B.

discussed above, or to consummating sexual intercourse. If that consent was to preliminary activities, then the next inquiry is whether those preliminary activities were interpreted by the victim as a precursor to intercourse, or as a substitute for intercourse. If she intended her consent to be to preliminary activities as a substitute for intercourse, and she consumed alcohol prior to or during the encounter, then only her explicit consent to intercourse should be acceptable to override the limited scope of her initial consent. If her consent was to the preliminary matters as a precursor to intercourse, then less explicit statements or conduct would be needed to confirm her consent to intercourse, even though she had consumed alcohol prior to or during the encounter.¹¹⁶

Some may argue that this approach is overly complex, and too difficult for intoxicated individuals to understand. That would be true for those who have significant intoxication levels, and the judge or jury would have to make the determination as to whether that level was substantial enough to obviate consent. For those women who are less intoxicated, such that they can remember how they felt on the question of precursor and substitute activities, applying this approach would be relatively straightforward.

Turning to the resistance and force issue, this Article recommends that the existing sliding scale for force used by courts in rape cases generally should be applied in intoxication cases. This sliding scale would require the prosecution to show less force to satisfy the force element the more alcohol the victim had consumed at the time. Similarly, less evidence of resistance should be necessary to show non-consent when the victim has consumed more alcohol. For instance, a sober woman may give a firm “no!” whereas that same woman, when intoxicated may say something like, “I’m not sure about that,” or, “I don’t think we should.” This milder form of verbal resistance may be all that the intoxicated woman feels is necessary (given the distortion of her perception and understanding of her situation), or it may be the only manifestation of dissent that she is capable of expressing (given how alcohol can lower the ability to resist). At higher levels of intoxication, these statements should constitute adequate resistance based on the sliding scale. Conversely,

116. This analysis is putting aside the situation where she becomes so intoxicated that only explicit consent will suffice, or so severely intoxicated that she is deemed incapable of giving effective consent to intercourse, which has been addressed above. *See supra* Part IV.B.

when the victim has had only a minimal amount of alcohol, these statements may not be enough to satisfy the resistance issue because they likely would not be enough under the current standards. This sliding-scale approach takes into account the specific effects of alcohol consumption on women that can prevent or dampen resistance and lead to non-consensual intercourse with a lower level of force.

D. Silence Will No Longer Be Sufficient Evidence of Consent If Alcohol Was Consumed

Another form of “equivocal conduct” to consider in evaluating consent in sexual encounters is the failure to speak, or the presence of silence. Silence is subject to interpretation and can mean assent or dissent, depending upon the circumstances. In important matters, however, silence is only deemed to be assent, or concurrence, in the case of adopted admissions. For instance, if a statement is made by another and a reasonable person would have responded to the statement if untrue, one’s failure to respond suggests a tacit admission that the statement was true.¹¹⁷ Even in that particular situation, an inquiry into the totality of the circumstances is warranted to ascertain whether the silence can and should be deemed to be assent. That inquiry includes ensuring that the person heard and understood the significance of the statement made.¹¹⁸

At other times, silence occurs because there has been no inquiry by the other party; no statement or question requiring a verbal response. Some suggest that a rape charge should be available when the perpetrator was “consciously aware that his conduct may be wrongful,” or, “willfully blinded” by “male self-deception” and purposefully did not inquire about consent;¹¹⁹ such as when he meets

117. See CAL. EVID. CODE § 1221 and committee notes (West 2007).

118. *Id.*

119. See Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 388 (2005) (“Although further research is needed, I will argue in the following Sections that male self-deception about whether a woman has consented to sexual intercourse is plausibly widespread and is morally worse than ordinary forms of criminal negligence.”). He explains the concept of self-deception and uses the example of a conscious commitment to helping the deserving poor while having anxiety about financial security and states that “our unconscious mind might routinely encourage awareness of instances in which the condition of the poor seems to be due to their own lack of initiative and ignore contradicting information. This information-gathering bias enables us to limit our charitable contributions.” *Id.* at 395. However, “[o]ur refusal to do so contains an element of intention

someone at a party, whose “inhibitions are lowered” by her alcohol consumption.¹²⁰ As things escalate, “he finds himself not wanting to ask her if she is really sure that she wants to have sex. He is afraid that she might say no.”¹²¹ This failure to inquire can result in silence being the only evidence of consent or non-consent, and the crucial question to examine is why silence is defaulted to consent in acquaintance rape situations particularly. Given the effects of alcohol consumption described above, including its alteration of one’s capacity to understand the need for resistance, and its tendency to make males more aggressive and less sensitive to their partner’s needs and desires, a presumption that silence constitutes consent is especially dangerous when the alleged victim was intoxicated. Accordingly, it is this Article’s proposition that there is no principled reason why silence should be presumed to constitute consent, in the absence of conduct that suggests consent to preliminary activities as a precursor to, rather than a substitute for, intercourse.

McGregor disagrees with the notion that silence should never constitute consent, and provides a five-part test for analyzing whether silence can constitute consent in a particular circumstance.¹²² For silence to constitute consent, McGregor proposes that the following conditions must be met: (1) awareness that one is giving consent, (2) knowledge that silence is an expression of consent and the substance of what that consent entails, (3) intention to consent by silence, (4) being “given a reasonable amount of time to respond,” and (5) “the means of dissent must be reasonably easy to perform.”¹²³ In evaluating the reasonableness of expressions of dissent, she explains that “we need to know the baseline of the person to judge when a state of affairs is an evil or

though that does not mean that we unconsciously ‘intend’ to lie to ourselves in the same sense that we use the word when referring to conscious thoughts.” *Id.* at 396.

120. See Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Consensual Sex*, 42 WAKE FOREST L. REV. 1087, 1120–21 (2007).

121. *Id.* at 1121. “He does not understand any of her body language as protests. They have sex. Unlike previous scenarios, this is a defendant who was aware of the risk that she did not consent. He was aware that she may not consent if asked, and he proceeded with the sexual contact anyway.” *Id.* Based on this scenario, Duncan concludes that “[t]his should constitute rape, particularly considering the perpetrator’s state of mind.” *Id.* She argues for recklessness to be the required mental state for a forcible rape conviction, and to have a separate offense for nonconsensual sex without force. *Id.* at 1124–25.

122. McGregor, *supra* note 6, at 175.

123. *Id.* at 194.

benefit for them” to help us decide whether silence should constitute consent.¹²⁴ McGregor’s factors, however, would be difficult to establish in the specific context of intoxicated sexual encounters because apparent silent consent may be a misunderstanding by the woman of the actions performed by the man. For instance, it is less likely that one of the intoxicated parties will make a statement such as, “we’re going to have consensual sex now,” which would implicate the adopted admission rationale. More commonly, no statements are made, but actions are engaged in, and consent is imputed from specific acts such as returning a kiss, assisting with the removal of clothing, or using protection.¹²⁵ Actions too are subject to interpretation, and some are more suggestive of consent than others, but many actions can be misinterpreted when the female feels or fears the presence of force and the male does not realize her fears.

Depending upon the level of intoxication, a woman may not be aware that her silence will constitute consent, and she may not be aware that being silent means sexual intercourse will follow, nor may she intend that result. If the woman sees “preliminary activities” as a substitute rather than as a precursor to sexual intercourse, she may be even less aware that her silence indicates consent to not only preliminary activities, but also to intercourse. The reasonableness of the amount of time to respond should be extended substantially when dealing with intoxicated decision makers because the greater the level of intoxication, the more difficult it is to express dissent. Thus, even if McGregor’s test were adopted, it would not provide a satisfactory mechanism for evaluating whether silence by an intoxicated individual should constitute consent based on the depressive effects of alcohol and the increased risk taking associated with alcohol consumption. Words, rather than actions, would help to clarify ambiguities. If we do not go so far as to require explicit verbal consent, another important re-allocation of the risks would involve declassifying silence as a form of consent in sexual relations where

124. *Id.* at 197 (talking about the difference between deserved evil, i.e., a prison term for a crime one committed, and undeserved evil, such as consent to sexual relations in exchange for a passing grade).

125. *See also* Ian Ayres & Katherine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 625–27 (2005) (describing a case where a grand jury refused to indict, and despite the secrecy of the proceedings, one grand juror explained that “some jurors believe that the woman’s act of self-protection [by requesting a condom] might have implied her consent,” and the subsequent public outcry and statutory revisions since then).

one or both parties have consumed alcohol, as has been suggested by other scholars as well.¹²⁶ In short, silence never should constitute consent in intoxicated sexual encounters.

V. CONCLUSION

This Article has proposed a sliding scale for evaluating whether consent should be valid in acquaintance-rape situations when one or both parties have consumed alcohol prior to or during an intimate encounter. This sliding-scale approach suggests that the more alcohol that has been consumed, the more explicit manifestations of consent must be, although at some point, even explicit consent will not be adequate when the woman is intoxicated to the point of incapacity. In addition, this sliding scale would amend the application of many existing rape and sexual assault statutes in several ways. First, explicit consent is not required under most existing statutes but would be required in some circumstances under this approach. More equivocal words or conduct will be permissible evidence of consent at the lower levels of alcohol consumption. Second, this approach would reduce the level of intoxication necessary to trigger a relaxation of the force and resistance requirement and provide protection not only for the severely intoxicated, but also for those at lower levels of intoxication who are unable to effectively resist due to alcohol consumption. Existing statutes omit the force and resistance requirements when the intoxication is severe, or when the intoxicant was administered by the defendant, but this standard would provide protection even when the intoxicant was voluntarily ingested. Finally, this Article recommends that silence be inadequate to constitute consent when either party has consumed more than a *de minimis* amount of alcohol. Current standards use silence as evidence of consent in some cases. Incorporating this sliding-scale approach into jury instructions, as well as reported judicial decisions, would help to protect more women from the dangers of intoxication during intimate activities.

126. See, e.g., Seidman & Vickers, *supra* note 103, at 484–85 (“[I]t is crucial that silence be eliminated as an indicator of consent, and that consent be defined, as it is in other areas of the law in which consent is an element.”).

