Rape is sex without consent. To rape somebody is to have sex with them without their consent. This can happen in two ways: the person can fail to give their consent, or they can be incapable of giving their consent. Think about young (pre-pubescent) children. It doesn’t matter whether a child says “yes, I’d like to have sex with you” to an older (30-year-old) person. If the 30 year-old has sex with them, they have still committed rape. The child does not have the knowledge, reasoning capacities, or the emotional maturity to grant consent. Such people are not competent to consent.

The same situation can arise with respect to persons who are severely intoxicated on alcohol or other drugs. Those people can lack the competency to consent.

Dixon: consider two limiting cases.

– In case I, Pat drinks so much that they pass out; and Sam has sex with their incapacitated body.
– In case II, Pat drinks two glasses of wine over the evening, has their inhibitions lowered, and responds favorably to Sam’s sexual advances. The next morning, Pat regrets what they have done. They wish they had resisted Sam’s sexual advances.

Dixon says that case I is clearly rape, and case II is clearly not rape. Even though Pat’s inhibitions were lowered, they are still capable of giving their consent.

Moreover, even if they weren’t capable of giving their consent, so that the Sam did in fact rape Pat (the actus reus of rape occurred), Sam could not have been reasonably expected to have known this, so Sam cannot be convicted of intentionally raping Pat (the mens rea of rape did not occur).

* Actus Reus is Latin for “guilty act.” It refers to the badness of the act performed.
* Mens Rea is Latin for “guilty mind.” It refers to the badness of the motivation of the agent who performed the act.

Dixon thinks that, even if case II satisfies the actus reus for rape, it does not satisfy the mens rea for rape.

However, there are more interesting cases to consider. Consider case III:

– Case III: Pat has had far too much to drink. Their words are slurred and they are unsteady on their feet. Sam happens upon Pat in this state of intoxication, and makes sexual advances upon Pat. Pat acquieses, and they have sex. Did Sam rape Pat?
Katie Roiphe and Camilia Paglia: No. Pat should be treated as an autonomous adult who is responsible for the consequences of their choice to use drugs or alcohol. Pat is also solely responsible for communicating to Sam if they don’t want to have sex.

– Dixon: even if drinking alcohol put Pat in a position to be raped and made it more likely that they would be raped, and even if Pat is an autonomous adult, that doesn’t mean that Sam didn’t do anything wrong. Taking a walk through Central Park at 3 am raises the chances that you will be mugged, but that doesn’t mean that we should let the mugger off the hook.

Lois Pineau: While Roiphe and Paglia are correct that Pat has an obligation to communicate to Sam their desire to either have or not have sex, Sam also has an obligation to make sure that Sam has consented to having sex. And, if Sam is not reasonably confident that consent has occurred, then they should not have sex with Pat.

– If Pat is severely intoxicated, as in case III, then Sam should not be reasonably confident that Pat has given consent, and should not have sex with Pat.