AFFIRMATIVE CONSENT, BY WAY OF THE INTOXICATION “DEFENSE”

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This short essay makes a general point about criminal law by making a specific point about the ongoing and important project on sexual assault law by the American Law Institute (“ALI” or “the Institute”). In spring 2016, the ALI fought a floor battle over the core difficulty of affirmative-consent provisions—their reliance on objective definitions of “consent.” Rejecting the recommendation of its reporters, the Institute adopted a subjective definition of “consent,” focusing on whether the partner was “willing” to engage in the sexual activity in question. Without any change in proposed statutory language, the reporters’ draft presented during the spring 2017 annual meeting signals an approach that would undermine the Institute’s preference for a subjective definition of consent. The mechanism is a reversal of the reporters’ previous position on the intoxication defense. That reversal would return to the reporters’ preferred objective approach to “consent” in the large percentage of cases in which the accused is intoxicated.4

I. SUBJECTIVITY AND THE INTOXICATION DEFENSE

Adopted in 1962, the Model Penal Code (“MPC”) greatly limited criminal liability based on objective or negligence standards. All but the most impractical of affirmative consent provisions impose liability in conflict with this preference for subjective culpability. An objective but vague definition of “consent” invites factfinders to ask, “[d]id the part-

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4. See id.
ner’s actions reasonably signal the partner’s willingness?” This is a perfectly natural way for factfinders to engage in their law-making task. Faced with a vague prohibition, the factfinder thinks, “[w]hat is the harm we’re trying to avoid, and what indicia would typically suffice to avoid that harm?” But the result primarily differs only in form from doing what the MPC generally rejected: defining the social harm clearly (sex in the absence of a partner’s willingness) and imposing liability for those who risk that harm negligently.

Perhaps negligence provisions can achieve a deterrent benefit. To fully informed and reflective actors, negligence provisions convey the message that even if actors are unaware they are doing something wrong, their conduct will be evaluated with the benefit of hindsight. Generally, however, the MPC took the position that whatever deterrent benefits might result from shifting from subjective to objective liability standards, the resulting unfairness was too great a cost to achieve that deterrent through the condemnation and harsh treatment of criminal sanctions.

The MPC’s most significantly deviates from a subjective approach in its intoxication provision, Section 2.08. While parts of that provision deserve the label “defense,” in crucial part the provision imputes liability by denying evidence of intoxication whatever the force it might otherwise have to support an actor’s claim to have been subjectively unaware of the riskiness of the actor’s conduct. Section 2.08(2) elaborates on how recklessness, the MPC’s default mental state, interacts with voluntary intoxication. It reads, “[w]hen recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.”

Since the beginning of the ALI project, its reporters have rejected Section 2.08(2). In Preliminary Draft No. 3, Section 213.0(8) states: “Recklessly’ shall carry only the meaning designated in Model Penal

7. Id. at 517.
8. I argued that the problem may be worse, because it is more likely the factfinder will employ simple tort negligence. When the MPC did impose negligence liability, it required gross negligence. See, e.g., Model Penal Code § 2.02(2)(d) (1985).
11. For example, Section 2.08(4) creates a true defense for those whose intoxication is pathological or not self-induced if “by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.” Model Penal Code § 2.08(4) (1985).
12. Paul H. Robinson, Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine, 71 Va. L. Rev. 1, 36 (1985) (“The Model Penal Code would impute recklessness to the drunker who at the time of his imbibing is unaware of any risk that he may kill or even beat his wife.”).
14. Id.
15. See Cole, supra note 6, at 538.
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Code § 2.02(2)(c). The provisions of Model Penal Code § 2.08(2) shall not apply to this Article.16

The draft presented to the ALI in May 2017, Tentative Draft No. 3, includes some definitions but omits Section 213.0(8).17 The commentary reveals that the provision is not among those omitted because it was unchanged.18 A footnote reads:

Section 2.08(2) of the 1962 Code states that when “the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial” for elements that require proof only of recklessness. In other words, although “recklessness” requires that the actor be subjectively aware of a substantial risk, the Code permits the factfinder to hold an actor responsible, when the actor lacks awareness of a substantial risk that the other person has not given consent, if the actor would have been aware had he or she been sober.19

Earlier drafts did not license drunken assaults by rejecting application of MPC Section 2.08(2).20 The effect was limited.21 Actors unaware of their partner’s lack of consent would be judged in light of that unawareness, regardless of whether voluntary intoxication contributed to it.22 But, the focus was entirely cognitive.23 Intoxication can also affect volition.24 It can incline an actor to run risks or behave selfishly.25 But those effects of intoxication are not addressed by Section 2.08(2), largely because the law usually ignores volitional problems.26 Hence, rejecting Section 2.08(2) would not create a general, “because-I-was-drunk” defense.

The commentary to Tentative Draft No. 1 laid out the robust case against Section 2.08(2)’s rule allowing imputation of recklessness from

17. See Model Penal Code; Sexual Assault and Related Offenses § 213.0(8) (Am. Law Inst., Tentative Draft No. 3, Apr. 6, 2017).
18. See id.
19. Model Penal Code; Sexual Assault and Related Offenses § 213.4 illus. 9 n.91 (Am. Law Inst., Tentative Draft No. 3, Apr. 6, 2017); see also id. at 45: The actor’s own intoxication also bears on liability. When an actor who is sober neither knows nor recklessly disregards a substantial risk that the other person did not consent, the mental state required for liability under Section 213.4 would not be satisfied. But when an actor fails to recognize the lack of consent because of intoxication—that is, when the evidence proves beyond a reasonable doubt that the actor, if not intoxicated, would have known of the substantial risk that the other person did not consent—then the mental state required under Section 213.4 would be met and the actor could be found guilty.
21. See id.
22. See id.
23. See id.
25. See id.
26. Involuntary intoxication and duress are among the rare exceptions.
intoxication, a case that had impressive supporters during debate on the MPC.\textsuperscript{27}

That Section introduces an anomaly into the culpability and grading provisions of the Code, insofar as it attributes subjective awareness and the corresponding degree of liability to a defendant who, by definition, lacks that awareness. As the commentaries to the 1962 Code acknowledged, “it is precisely the awareness of the risk… that is the essence of [the actor’s] moral culpability,” and thus “a special rule” positing awareness of a risk that proves “greater in degree than that which the actor perceives at the time of getting drunk… is bound to [result in] a liability disproportionate to culpability.”\textsuperscript{28}

The premise of Section 2.08, which in effect equates awareness of the risks entailed in heavy drinking with awareness of a substantial and unjustifiable risk of causing a particular kind of harm (such as death or, in the present instance, unwanted sexual intrusion), has been a target of forceful criticism; one scholar considers this equation “often preposterous.”\textsuperscript{29}

But the reporters did not embrace the robust version of the critique, the version stating that punishment is inappropriate for actors who lack “moral culpability.”\textsuperscript{30} Instead, they defended Section 2.08(2) generally on the grounds that the negligent drunk actor should be punished, even if the degree of punishment should be less than that of the subjectively culpable.\textsuperscript{31} “The approach of Section 2.08 arguably can be understood as a response to the drafting problems that would be entailed in specifying a negligent mens rea and a corresponding penalty provision for every offense in the Code.”\textsuperscript{32} This problem did not arise in Preliminary Draft No. 3, however, because that draft created separate crimes, with lower punishments for those who negligently committed sexual assaults\textsuperscript{33} (though notably not for those who negligently failed to perceive that their partners were too drunk to be able to express unwillingness).\textsuperscript{34} Subsequent

\textsuperscript{27} See Erin Price, The Model Penal Code’s New Approach to Rape and Intoxication, 48 U. PAC. L. REV. 423, 435 (2017) (footnotes omitted) (endorsing the rejection of § 2.08(2)). The members of the Advisory Committee for the 1962 MPC did not unanimously agree on isolating “recklessness” as mens rea element irrefutably by evidence of intoxication. Judge Learned Hand and other members saw no significant reason for carving out this special rule. Judge Hand was of the view that if, as defined in Section 2.02(2)(c), recklessness requires that a person “consciously disregard a risk,” then evidence of severe drunkenness should be permitted to negate the actor’s consciousness of the risk. Since awareness of the risk is the root of moral culpability, when that awareness is absent the result is a liability much higher than the degree of culpability.

\textsuperscript{28} See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES at 75-76 (Am. Law Inst., Tentative Draft No. 1, Apr. 30, 2014) (citations omitted).

\textsuperscript{29} See id.

\textsuperscript{30} See id. at 77.

\textsuperscript{31} Id. § 213.5.

\textsuperscript{32} Id. at 78; see also id. at 79.

Two reasons drive this determination, one related to pragmatic problems of proof and the other to moral reservations about dramatically expanding the net of liability. With regard to proof, intoxication
drafts abandoned the negligence crimes but, until the most recent draft, continued to reject Section 2.08(2).34

By embracing Section 2.08(2), the latest draft requires the same kind of objective inquiry into “consent” that the Institute rejected in spring 2016 in the cases in which the actor is under the influence.35 In those cases, a factfinder must ascertain whether an actor, unaware of a substantial risk of a partner’s unwillingness,36 “would have been aware had he been sober.” In theory, this inquiry might be slightly different from asking whether a reasonable person would have appreciated a substantial risk of the partner’s unwillingness. In theory, the factfinder might ask whether that particular actor, given the actor’s sober attitudes about how to evaluate evidence and draw inferences, would have interpreted a situation had he been sober. In practice, however, a factfinder will likely lack reliable evidence on that score. While the actor might testify to what he thought at the time he acted, even he may be unable to say with any confidence how he would have evaluated the situation had he been sober. Indeed, some actors might truthfully say, “I don’t know because I’ve never had sex when I’ve been sober.”37 In a situation like this, the factfinder has no alternative but to ask how a reasonable person generally would have evaluated the situation.

II. IMPACT OF AN OBJECTIVE TEST FOR CONSENT

How extensive is this potential replacement of the Institute’s subjective test of consent with the objective inquiry of section 2.08(2)? That depends in part on how many cases involve intoxication, which depends manifests in a sliding scale of external cues that are often difficult to determine objectively. Already a jury will be asked to make a difficult factual judgment as to whether a complainant's intoxication rose to a level that impeded an expression of unwillingness. One protection against a concern about 20-20 hindsight or overreaching by prosecutors and juries resides in the mens rea standard, which requires the factfinder to determine that the defendant was at least aware of a risk of that degree of impairment. Moreover, there is a clear relationship between the jury's finding of actual impairment and the defendant's mens rea on that score. Even if an accused claims lack of awareness, a jury confronted with persuasive evidence of the complainant’s impairment may reject the accused's self-serving assertion and find that he or she was, in fact, aware. In contrast, the space for a jury to determine that although the complainant lacked the capacity to express unwillingness, the accused was not (but should have been) aware of that fact, is exceptionally narrow, and thus fraught with concerns about compromise or sympathy verdicts.

34. See, e.g., MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(4) (AM. LAW INST., Preliminary Draft No. 5, Sept. 8, 2015).
35. See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(4) (AM. LAW INST., Tentative Draft No. 3, Apr. 6, 2017).
36. “Unwillingness” is a useful but somewhat misleading shorthand. Consent is defined in terms of “willingness.” A person who has given no thought to a sex act is not “willing” to engage in that act; “unwillingness” as used here is not intended to imply that the partner must have thought about and rejected the sex act for consent to be lacking.
37. Cf. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES at 54 (AM. LAW INST., Preliminary Draft No. 3, Oct. 30, 2013). (testing vitiating consent whenever a partner would not have consented to intercourse but for intoxication “would transform many happy couples into regular sexual offenders”).
in part on how “intoxication” is defined. We already know that many troubling cases in the college setting involve significant intoxication on the part of both parties.\footnote{For a recent effort to address the problem of the intoxicated partner, see Kevin Cole, Sex and the Single Malt Girl: How Voluntary Intoxication Affects Consent, 78 MONTANA L. REV. 155 (2017).} And, the definition of “intoxication” in section 2.08 includes even modest drinking.\footnote{\textsc{Model Penal Code} § 2.08(5)(a) (1985) (“‘[I]ntoxication’ means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.”).}

One might fairly ask at this point why sexual assault should be special when it comes to the rules on intoxication. The MPC’s intoxication rules were not substantially different from prevailing rules before, which often made intoxication irrelevant to disproving general criminal intent (while relevant to disproving specific intent).\footnote{See The Criminal Defense of Intoxication, JUSTIA, http://www.justia.com/criminal/defenses/intoxication (last visited Sept. 24, 2017).} So, Section 2.08(2) did not introduce a new and noxious element to the criminal law. Even those who think section 2.08(2) should be eliminated from the MPC might have qualms about eliminating it piecemeal, beginning with sexual assault law. While eliminating section 2.08(2) would not create a general because-I-was-drunk defense, some might fear that allowing reliance on intoxication evidence to contextualize claims of mistake would be misinterpreted as rejection of the law’s insistence that drunken actors resist alcohol-fueled urges.\footnote{\textit{Cf.} Price, supra note 27, at 436.}

On the other hand, if actors are prevented from offering evidence of their own intoxication, the risk exists that they will be viewed, incorrectly, as calculating predators who deserve harsh sanctions. This risk is less significant in cases like homicide, in which we doubt that many actors will scheme \textit{ex ante} to make it appear that they caused death accidentally (as opposed to avoiding detection altogether).

Moreover, crude rules might be accepted when they apply to unusual circumstances.\footnote{\textit{Cf.} N. Sec. Co. v. United States, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting) (creating the oft-cited adage that “[g]reat cases, like hard cases, make bad law”).} Homicides—criminal and otherwise—are too common, but less common than sex.\footnote{Compare \textsc{Kenneth D. Kochanek et al., Ctr. Disease Control \& Prevention, \textit{Deaths Final Data for 2014}, 44 tbl. 10 (2014) (estimating 15, 872 total homicides in 2014), with \textsc{Jennifer L. Truman \& Lyn Langton, U.S. Dept. Just., \textit{Criminal Victimization, 2014}}, 2 tbl. 1 (2014) (estimating 284, 350 rapes/sexual assaults in 2014).} Particularly as the law of sexual assault is properly refined to protect autonomy interests, the problems are aggravated. We might think there are few cases in which an intoxicated actor is unaware that he is making a threat or employing force to compel intercourse. On the other hand, as threats and force sensibly become unnecessary for conviction, intoxication more plausibly might contribute to mistakes about a partner’s willingness. (Cases in which the partner does not say “stop” are the pertinent ones, since the draft sensibly requires that verbal resistance be respected, and whether a person
says “stop” is another of those facts regarding which intoxication is unlikely to preclude awareness.)

Finally, rejecting MPC section 2.08(2) in the new sexual assault proposals is not really a repudiation of the Code’s original approach. The ALI enacted section 2.08(2) in 1962 in connection with a Model Penal Code that required greater culpability than recklessness for a sexual assault conviction. In the absence of threats or force, the MPC imposed criminal liability for violations of sexual autonomy only when the actor “knows that the contact is offensive to the other person.” Since the provision required the actor’s knowledge, Section 2.08(2) would not have applied. Making liability turn on recklessness is sensible, but to do so in addition to applying section 2.08(2) is effectively to expand the scope of the intoxication provision.

III. CONCLUSION

The problems of intoxicated sex are substantial. Education is justified about the circumstances that lead people to regret sex later, and about the circumstances that lead partners to regret sex immediately. But as an educator, the criminal law is harsh. Applying the intoxication “defense” to expanded crimes will make them even harsher.

44. Of course, intoxication might lead to problems recalling what happened the next day—a significant problem in sexual assault proceedings. A failure of recall is different from not understanding facts at the time.
45. See Price, supra note 27, at 426-31.
46. See id.
47. Model Penal Code § 213.4(1) (1985); cf. id. §§(4)-(5) (special rules for partner under 10 years old or impaired by the actor’s surreptitious intoxication of partner).