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### **Abstract**

Drunken sex is common. Despite how common drunken sex is, we think very uncritically about it. In this paper, I want to examine whether drunk individuals can consent to sex. Specifically, I answer this question: suppose that an individual, D, who is drunk but can still engage in reasoning and communication, agrees to have sex with a sober individual, S; is D's consent to sex with S morally valid? I will argue that, within a certain range of intoxication, an individual who is drunk can give valid consent to have sex with an individual who is sober.

### **Keywords**

Consent; Intoxication; Competence; Alcohol; Sex

### **Sober Thoughts on Drunken Consent: Intoxication and Consent to Sexual Relations**

Drunken sex is common. Humans like to drink alcohol, they like to have sex, and alcohol often makes sex more likely. Despite how common drunken sex is, we think very uncritically about it. In this paper, I want to examine one aspect of the morality of drunken sex, namely whether drunk individuals can consent to have sex. In recent years, there has been considerable debate and controversy in both the popular media and the scholarly community about whether intoxicated individuals can give morally valid consent to have sexual relations. Although no laws have been passed to criminalize intoxicated sex, numerous universities have adopted strict policies that ban *any* kind of intoxicated sex. I hope to shed light on the issue of intoxicated consent. Specifically, I answer the following question: suppose that an individual, D, who is drunk to a substantial degree but can still engage in reasoning and communication, agrees to have sex with a sober individual, S; is D's consent to sex with S morally valid? I will argue that, within a

certain range of intoxication, an individual who is drunk can give valid consent to have sex with an individual who is sober.

In broad strokes, my argument for this conclusion comes in two parts. First, I argue that there is no compelling reason to think that D cannot give valid consent to have sex with S. But, this may not be enough. D may be capable of giving valid consent, and it could still be true that S should not act on D's consent, even if it in fact is valid. In the second part of my argument, I argue that S can permissibly act on D's consent.

In section I, I clarify the question that I am asking. In section II, I describe the relevant background and literature. In section III, I outline stipulations. In section IV, I outline what I take to be an exhaustive list of reasons one might give to support the view that drunk people cannot give valid consent to have sex, and I argue that each of them fails. In section V, I outline and reject reasons one might give for thinking that S should not act on D's consent even if it is valid. In section VI, I address whether the stipulations from section III can be relaxed while still allowing my argument to succeed. Lastly, in section VII I address the implications that my argument has for university policy.

Before proceeding, I will note what I am not arguing. I will argue that an individual who is intoxicated can give valid consent to have sex with a sober individual, even if they are strangers. This is controversial. For that reason, I'd like to explicitly state that my position *does not* entail that date rape is permissible, nor is it denying that women are frequently abused due to alcohol on college campuses. I reject these views. As will become clear, drugging and raping someone violates many of the stipulations that will govern the cases I discuss. I am concerned only with cases in which the drunken individual *genuinely wants to have sex*. I defend the view that such an individual can validly consent. This is compatible with the extreme wrongness of sexual assault and rape that occur to women who are intoxicated and who do not want to engage in sexual relations.

## **I. The Question:**

It is obvious that very low levels of intoxication (i.e. one drink) do not undermine an individual's ability to give valid consent, and it is obvious that extreme levels of intoxication (i.e. when a person has consumed enough alcohol to be non-communicative) do undermine her ability to give valid consent. This is the case, because a low level of intoxication does not undermine an agent's control over her actions, and an extreme level of intoxication does undermine an agent's control over her actions.<sup>1</sup> The debate about intoxicated consent concerns cases between these two extremes.<sup>2</sup> I refer to this area as the 'gray area.' Essentially, the debate about intoxicated consent concerns cases in which D, who is intoxicated at some level in the gray area, says 'yes' to having sex with S, who is sober. If a drunk person asks a sober person to have sex with her, can the sober person act on this token of consent and have sex with the drunk person? Or, as Wertheimer puts it, does "yes means yes" when one party is intoxicated?<sup>3</sup>

It is important to distinguish this question from several different but related questions. Although it will come up briefly in one section, I will not be asking whether drunkenness is a legal or moral excuse for criminal behavior.<sup>4</sup> That is an important but different question. I am asking whether an individual's ability to consent is undermined by intoxication, not whether intoxication renders one off the hook for immoral actions. Another set of questions I won't address directly concerns whether having intoxicated sex is incompatible with virtue or whether it is scummy to engage in drunken sex. Although these are certainly important questions, I'm concerned with the permissibility of intoxicated consent, not with these virtue-based questions. Lastly, I will not address the question of whether universities should adopt affirmative consent policies. My view is neutral with regard to the debate about affirmative consent policies. It could be the case that drunk individuals are not competent to consent, in which case their

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<sup>1</sup> It may also be true that extreme intoxication undermines consent for a reason other than removing control.

<sup>2</sup> Dixon (2001, 341) describes the question and the gray area in a very similar way.

<sup>3</sup> Wertheimer, 2001, 373.

<sup>4</sup> There is an extensive literature on this topic. Much of this literature either addresses legal questions about punishment and intoxication, or it addresses the question of blame and intoxication broadly. Both of these approaches are distinct from the issue of intoxicated consent to sex. For a discussion of these other issues, see Dimock (2009, 2011) Husak (2012), Cowan (2008), and Cole (2017).

affirmative ‘yes’ is not morally transformative, and it could be the case that drunk individuals are competent to consent but can communicate this consent without using language.<sup>5</sup>

## II. Background and Literature So Far:

Despite the importance of this topic, there is relatively little written in the philosophical literature on the moral status of drunken sex. In the sparse literature, Dixon and McGregor have endorsed the view that drunk sex is not permissible. Hurd has defended the view that drunken sex is permissible.<sup>6</sup> Beyond these very few articles, philosophers have not discussed the connection between alcohol and consent. I hope to fill this gap in the literature.

Practically speaking, the law does not address the question of drunken sex directly. The law does recognize a crime called rape by intoxication, but this crime requires the victim to be extremely intoxicated beyond the gray area and often requires that the victim’s intoxication is involuntary, meaning that this law is not relevant to the kind of drunken sex that I want to analyze.<sup>7</sup> The law appears to have little directly to say on the questions addressed in this paper.

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<sup>5</sup> For a recent discussion of affirmative consent policies, see Dougherty (2018).

<sup>6</sup> Wertheimer wrote an excellent exploratory piece on the issue of drunk sex, but he finishes without reaching a definitive conclusion on its permissibility. I should add that McGregor’s endorsement of this view comes only in a short aside in an examination of a related issue.

<sup>7</sup> Ryan describes the conditions of rape-by-intoxication as the following: “If a woman is ‘mentally incapacitated’ or ‘rendered incapable of effectually resisting’ due to intoxication, then the man who engaged in sexual activity with the woman may be guilty of rape. Under these circumstances, the intoxicated woman is considered incapable of giving legal consent to intercourse because her ability to exercise reasonable judgment is impaired. Almost every state has adopted legislation that in some way prohibits the use of alcohol to facilitate unlawful sexual intercourse. Rape that occurs when the victim is intoxicated can be divided into two offenses: (1) administration of alcohol to the victim, causing her incapacity, followed by nonconsensual sex; and (2) voluntary intoxication of the victim, which causes her incapacity, followed by nonconsensual sex. Approximately two-thirds of states require that a perpetrator, who engages in sexual intercourse with an intoxicated victim, administer the intoxicating substance to the victim before assigning criminal liability for rape, which means that only one-third of the states afford protection to victims who voluntarily become intoxicated and are subsequently raped. In other words, the majority of states assign the risk of rape to the woman when she is voluntarily intoxicated. Because the majority of states hold that nonconsensual sexual intercourse with a voluntarily intoxicated woman does not constitute rape, she is responsible for remaining sober during sexual encounters. Only a minority of the states assign the risk of committing rape to the man when he engages in nonconsensual sex with a voluntarily intoxicated woman” (414).

Although the law has not addressed sex in the gray area, universities have begun to widely adopt policies on the issue. Many universities have passed policies that prohibit any amount of sex while intoxicated. Here are a few representative examples:

**Beloit College:** Consenting to sexual activity requires non-intoxicated, verbal, mutually understood communication, free of threats, intimidation or other coercion. . Having sex with someone you know to be, or whom you should know to be, below their normal cognitive function is a violation of the Beloit College Sexual Assault policy; sexual contact with anyone who is inebriated, mentally or physically impaired, or incapacitated is a violation of this policy.<sup>8</sup>

**University of Tulsa:** When drugs and alcohol are involved, clear consent cannot be obtained. An intoxicated person cannot give consent.<sup>9</sup>

**Ohio University:** Drugs and alcohol can affect a person's ability to make decisions, including whether or not they want to engage in sexual activities. This means that if someone is intoxicated, they **cannot** give consent.<sup>10</sup>

Given the lack of philosophical literature, the lack of legislation, and the strong actions being taken by universities, it is more important than ever to discuss whether drunken sex can be consensual sex.

### III. Stipulations:

To cut out some clutter, I will make a number of stipulations. In case these stipulations strike the reader as over-idealized, I later discuss which stipulations can be relaxed without my argument failing.

*First*, S and D are adults. *Second*, S and D have no history of sexual relationship and are acquaintances or strangers. *Third*, D is drunk. *Fourth*, D's drunkenness falls into the gray area. To be more specific, the gray area refers to the amount of intoxication where one is clearly impaired but where one can still engage in basic reasoning and can communicate one's desires. *Fifth*, S is sober or intoxicated at some level below the gray area. *Sixth*, D's drunkenness is voluntary, meaning that she knowingly and willingly consumed the alcohol. *Seventh*, S is aware that D is intoxicated. *Eighth*, S consents to have sex

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<sup>8</sup> Beloit College, n.p.

<sup>9</sup> The University of Tulsa, n.p.

<sup>10</sup> Ohio University, n.p. Emphasis original.

with D. *Ninth*, D either asks S to have sex or agrees when asked if she would like to. *Tenth*, no other consent invalidating features (i.e. coercion, deception, etc.) obtain in this situation.

Finally, one terminological note: there is a difference between consent and valid consent. Both involve agreement, but valid consent is the kind of consent that makes an action permissible when it otherwise wouldn't have been. In this paper, whenever I discuss consent, it should be assumed that I am discussing valid consent, unless I explicitly distinguish between consent and valid consent at a given point

#### **IV. Reasons Why D Might Not Be Able to Give Valid Consent:**

In this section, I'll outline what I take to be an exhaustive list of the reasons one might give to explain why intoxication renders D's consent invalid. Specifically, these are features of D's intoxicated situation that might render her unable to give a valid 'yes' to sex. My aim will be to show that none of these are sufficient conditions for undermining D's consent to sex.

One might think that there is a better methodology for answering the question of whether intoxication in the gray area undermines one's consent; this superior methodology is the following: if we agree that extreme intoxication does undermine consent, then we should find out what it is about extreme intoxication that undermines consent and then determine if this consent-undermining feature obtains in the case of gray area intoxication. This seems like a more direct way of answering the question rather than canvassing a number of possible reasons against the validity of drunken consent in the gray area. I believe that the methodology used in this paper is better for several reasons. *First*, I would like my view to be as pluralistic as possible. Were I to identify a single factor of extreme intoxication that undermines consent, this would require making a more substantive determination about the matter than I would like. Under my methodology, I am able to canvass all of the conceivable views for why gray area intoxication undermines consent and argue against them. Were I to pick just one reason why extreme intoxication undermines consent and then apply it to gray area intoxication, my argument would have less appeal to

potential interlocutors who are not swayed by that one reason. *Second*, I think that this alternative methodology would produce a very similar paper to the one I've written here. Suppose that I were to argue that extreme intoxication undermines consent, because it makes the agent's behavior extremely irrational. Then, on this new methodology, I would apply this back to gray area consent and argue that gray area intoxication doesn't render agents sufficiently irrational to undermine their consent. At this point, the objector would very likely say, "but what about other potential reasons to think that gray area consent is invalid?" Then, I would have to rule out those other options. And, that would duplicate much of the paper as I have set it up currently. The reason for this is that, on this method, I would only have determined that extreme irrationality is sufficient to undermine consent; I would still have to rule out other possible sufficient conditions for why extreme intoxication undermines consent.

*1: Alcohol Undermines Consent, Because It Impairs D's Reasoning.<sup>11</sup>*

The thought here is that being intoxicated impairs one's reasoning to the point of rendering this person unable to consent to having sex. When drunk, D simply cannot engage in the requisite reasoning in order to make the consensual decision to have sex. This seems like the most likely candidate for something that would invalidate intoxicated consent. So, even if D says 'yes' and wants to have sex, she lacks sufficient reasoning ability to *really* make this decision.

Several objections can be raised to this line of reasoning. First, there are other stimuli that cause us to be bad at reasoning but which, intuitively, do not undermine consent; alcohol, I argue, should be treated no differently than these other stimuli. I focus specifically on the influence that run of the mill emotions have on decision making. Social psychology and behavioral economics have forcefully shown that our emotions strongly impact our decisions. This influence is not unlike the influence that alcohol has on our decision-making abilities.

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<sup>11</sup> Whenever I say, "alcohol undermines consent, because it....," I mean this to be shorthand for "alcohol always undermines consent, because..."

Our emotions, much like alcohol, affect our ability to make appraisals of risk, probability, and future emotions. As Loewenstein and Lerner note in a widely cited literature review:

A well-replicated finding is that people in good moods make optimistic judgments and choices and people in bad moods make pessimistic judgments...people who read happy newspaper articles subsequently made more optimistic judgments about risk than people who read sad articles.<sup>12</sup>

Immediate emotions influence people's perceptions not only of the likelihood of different outcomes but also of how they will feel about those outcomes.<sup>13</sup>

And, as Lerner et al. point out in another highly cited literature review:

Fearful people tend to see greater risk, and angry people tend to see less risk.<sup>14</sup>

Similar to alcohol, our emotions, via what psychologists refer to as incidental affect, have downstream effects on our rationality. Loewenstein and Lerner note that "affect that is unrelated to the decision at hand-can have a significant impact on judgment and choice."<sup>15</sup> Or, as Lerner et al. put it, "researchers have found that incidental emotions pervasively carry over from one situation to the next, affecting decisions that should, from a normative perspective, be unrelated to that emotion."<sup>16</sup> Perhaps most notably, "carryover of incidental emotions typically occurs without awareness."<sup>17</sup>

Lastly, like alcohol, whatever emotions we are experiencing at the time of decision heavily influence us. This is particularly vivid in the following example:

An experiment conducted in the wake of the 9/11 terrorist attacks tested whether these patterns would scale up to the population level. A nationally representative sample of US citizens read either a real news story (on the threat of anthrax) selected to elicit fear or a real news story (on celebrations of the attacks by some people in Arab countries) selected to elicit anger, and then participants were asked a series of questions about perceived risks and policy preferences...Participants induced with fear perceived greater risk in the world, whereas those induced with anger perceived lower risk, for events both related and unrelated to terrorism. Participants in the anger condition also supported harsher policies against suspected terrorists than did participants in the fear condition.<sup>18</sup>

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<sup>12</sup> Loewenstein and Lerner 628.

<sup>13</sup> Loewenstein and Lerner 628.

<sup>14</sup> Lerner et al. 807.

<sup>15</sup> Loewenstein and Lerner 619.

<sup>16</sup> Lerner et al. 803.

<sup>17</sup> Lerner et al. 803.

<sup>18</sup> Lerner et al. 807.



There are many more ways in which emotions bias us. I choose these few ways, because they track many of the features of intoxication that might render D too irrational to consent. Emotions, much like alcohol, make us bad at assessing the risks and rewards of our situation, bad at assessing if we will be happy with our decisions, they make us subject to our past feelings, and make us heavily swayed by whatever feeling is on our minds at the moment of decision.

The point that I'm making is that despite the irrational influence of our emotions, it seems clear that we can still consent when our emotions affect us. The same should be true of alcohol. Overall, when I am angry, my reasoning is highly impaired, but I can still consent. When I am hungry, my reasoning is impaired, but I can still consent, etc. To put the point differently, if alcohol undermines consent because it impairs our reasoning, then our emotions also undermine our consent. This is implausible. So, it can't be just the fact of some significant impairment to our reasoning abilities that explains why alcohol undermines consent.

Second, depending on where we set the standard of reasoning ability required for consent, drunk people may meet it. Surely, there is some level of impairment caused by alcohol that does render consent invalid. Where is that line drawn? I suggest that it is sufficient for D to consent if D understands what she is consenting to, can understand the potential consequences of what she is consenting to, and if no other consent invalidating features are true of her situation. This standard seems plausible in general; if an adult of normal cognitive ability understands what she is agreeing to, and if she can understand the potential consequences, she should be able to consent to the action in question, barring some extreme negative consequence that might justify paternalism toward her. This seems to be the standard that we intuitively apply to normal judgements about consent. For example, we might think that a Jehovah's Witness is making a terrible decision by not accepting a life-saving blood transfusion, but so long as she understands what she is doing and what the potential consequences are, then she should be able to do it. Returning to alcohol, given that D's drunkenness is in the gray area, it is not so severe that she cannot understand what

she is doing or its likely consequences. So long as D can do both of these things, then she is sufficiently rational to meet the standards of valid consent.

Third, Hurd argues that consent given in the gray area of intoxication is valid. Her argument runs as follows: first, she argues that voluntary intoxication does not release D from criminal liability. As she argues, if D were to voluntarily become intoxicated and cause a large amount of damage to S's property, D's intoxication would not release her from the obligation to pay damages to S. Then, Hurd argues that because of this, D's voluntary intoxication should not invalidate her consent. As she says:

If...our refusal to recognize voluntary intoxication as an excuse [for criminal liability] rests on the conviction that such intoxication never (or rarely) defeats a defendant's ability to reason about his obligations and to act in accordance with those obligations, then we should not recognize voluntary intoxication as a condition that defeats prima facie consent because such intoxication presumably does not render the plaintiff any more incapable of guiding his actions in accordance with reason.<sup>19</sup>

In short, the best reason we have for holding D responsible for criminal damages she causes while drunk is that she can still reason about what she is doing and can still be responsible for his decisions. Hurd then argues that this extends to intoxicated consent to sex; D can still reason about his decisions and can still be held responsible for them. Thus, D can give consent to sex while intoxicated. Or, as Wertheimer summarizes Hurd's reasoning, "if people should be held responsible for wrongful acts committed while intoxicated (including acts of violence against women), then we should also treat [D's]...consent as valid."<sup>20</sup>

Hurd's argument can be made more plausible by appealing to a more intuitive case. Suppose that D is married, gets drunk at a bar, and has sex with S (who is not her spouse). Again, D's drunkenness is in the gray area, and no other consent-invalidating features obtain. It seems clear that D has done something wrong and that she owes an apology to her spouse. This intuition only makes sense if D, while drunk, can be held responsible for her behavior. If D can be held responsible when she's drunk, then this entails that

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<sup>19</sup> Hurd, 141.

<sup>20</sup> Wertheimer, 2001, 374-375. It should be noted that Wertheimer is critical of Hurd's position.

she has the cognitive wherewithal to validly consent to the thing that she's being held responsible for. After all, it would be odd to say that D is responsible for an action but that she could not validly consent to that action.

Hurd's argument will strike many as wildly controversial and close to victim-blaming. This is not the case. Hurd is not saying that because a woman is drunk, this therefore exonerates a man who has sex with her when she is incompetent. Rather, a charitable interpretation of Hurd's argument is that she is discussing a level of intoxication that falls into the gray area. If so, then Hurd is only claiming that an individual who is drunk but who can still understand the consequences of her decisions ought to be held responsible for any damages they cause and that this entails that a similarly drunk individual should be regarded as able to give valid consent. So understood, I don't find Hurd's argument implausible.

Based on these three reasons, I conclude that the impairment to our reasoning caused by alcohol cannot be why alcohol invalidates consent.

*2: alcohol undermines consent, because it causes weakness of will:*

At a very basic level, weakness of will is when an agent doesn't want to do something but does it anyway. For example, I know that an extra cookie is bad for me, and I don't want to have one. But, when faced with a plate of cookies at a reception after a talk, I cave and eat one. This is a case of weak-willed action. I did not do what I ultimately wanted. One might think that something like this is going on in the case of intoxication. Alcohol might have an effect similar to weakness of will, in that it makes a person do something against her all-things-considered desires due to the influence of some kind of emotion or passion.

The problem with this view is that weakness of will obviously does not undermine consent. My consent is valid when I eat the second cookie. Even though I don't want to do it, it's still consensual. There's not much I can say here except that if weakness of will is sufficient to undermine one's consent, then extra-marital affairs are not blameworthy (because the cheater couldn't control himself), people who

spend too much while shopping have been taken advantage of by shop owners, and people who break their diets are not acting consensually. In short, this criterion has absurd implications. Unless weakness of will truly strips all agency from an individual, which no plausible account of weakness of will holds, then it does not undermine consent.

*3: alcohol undermines consent, because it causes D to act against one of her sober desires:*

Suppose that, when sober, D would not have wanted to have sex with S. But, when drunk, D does want to have sex with S. Alcohol causes D to act in such a way that she would not have acted if she were sober.

Perhaps this is why D's intoxicated consent is not valid consent.

But, there are clear cases of consensual action that fit this description. This response overgeneralizes and proves too much. Consider the following cases:

**Run:** going on a run can give us endorphins, which can cause us to be more happy and thus more likely to agree to things than we otherwise would have been. Suppose that S would not agree to sell his car to J without a boost of endorphins, but after S's run, he feels so elated that he changes his mind and sells J the car.

It seems absurd to say that S's consent was violated in this transaction.

**Depression:** S has depression and feels too sad and weary to consent to having sex with his partner. S takes an anti-depressant and decides that he wants to have sex with his partner. It seems absurd to say that we cannot count S's consent as valid while he is on anti-depressants, even though he antecedently did not want to do this.

The moral of the story is that there are clear cases in which, because of the influence of a chemical agent, an individual does something that she otherwise would not have done but in which her actions are obviously consensual. So, this can't be the reason that alcohol invalidates consent.

*4: alcohol undermines consent, because it causes D to act against one of her strongly held sober desires:*

This is the same reasoning as 3, but instead of just any desire, suppose that D has a strongly held sober desire to not have sex with S. For example, suppose that D thinks that S is a scummy or otherwise bad person and would never, emphatically, have sex with S while sober. But, now, when drunk, D consents to

have sex with S. Perhaps alcohol undermines D's consent, because alcohol causes D to do something that she otherwise strongly desired not to do.

Again, there are clear cases in which actions fit this description but are intuitively consensual.

There are clear cases in which an individual acts against her firmly held convictions because of the influence of a chemical stimulus but in which her consent is valid. Consider these cases:

**Drunk Vegetarian:** a vegetarian who strongly believes that eating meat is a moral travesty and who believes that consuming factory farmed meat is tantamount to murder is drunk in the gray area. She has not eaten all day and finds herself at a friend's house where her friend is cooking hamburgers on the grill. The vegetarian, who is hungry at an extreme level and drunk, smells the meat cooking and suddenly decides to eat a hamburger. This action goes against the vegetarian's strongly held desires.<sup>21</sup>

It seems implausible to say that when she asked her friend, 'can I have a burger?' that he violated her consent by giving her a burger. Although this talk of consenting to take the burger may sound unintuitive, it is parallel to the case of sexual consent. The issue is whether the 'yes' of a drunk person, to a hamburger or to sex, is morally valid and if the offerer, whether offering sex or a hamburger, violates the drunk person's consent by acting on her 'yes.' Thus, simply because something goes against our strongly held desires does not mean that we cannot consent to it. This intuition can be further pumped:

**Enticing Employment:** S is morally averse to working in marketing, as she finds that it deceives people. But, while on the job hunt, she is offered an incredibly high salary to work at a marketing firm. Even though it violates her strongly held desire to not work in marketing, S agrees to work at the marketing firm.

**Impulsive Tattoo:** S strongly desires to not have a tattoo. But, after going through a very rough breakup, S impulsively decides to go get a tattoo, full of sadness and remorse.

**Adult Mini-Van:** S is a young parent who strongly desires to not own a mini-van. But, it eventually becomes clear to S and his wife that they must purchase a mini-van in order to accommodate the size of their growing family. So, they buy a mini-van.

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<sup>21</sup> There is actually a real pattern behind this case. According to some (popular level) sources, many vegetarians do eat meat when they are drunk. A British website conducted a survey of 1,789 people in the UK who identified as vegetarians. The results were as follows: "over a third of respondents (37%) admitted that they did so. The remaining 63% of respondents were adamant they never ate meat when drunk. Respondents who disclosed they had eaten meat when drunk were asked to disclose how often they did so: 1. Every time you are drunk on a night ought-34%. 2. Fairly often-26%. 3 Rarely-22%. Occasionally-18%" (Evison).

In each of these cases, an individual acts in conflict with her strongly held desires due to some kind of external influence. But, it seems clearly absurd to say that S did not give consent in these cases. So, even if D acts against her strongly held sober desire to not have sex with S, this does not undermine her consent.

*5: alcohol undermines consent, because it causes D to be subject to framing effects:*

Framing effects are ubiquitous in our lives. One might think that consent can be undermined by framing effects and that alcohol creates a kind of framing effect. A framing effect occurs when an individual “would express different preferences towards the same option, given the same information about that option, depending only on whether that information is expressed as a gain or a loss.”<sup>22</sup> Framing effects can be both trivial and extremely serious. For example, “consumers who are more likely to use credit than cash when the price difference between them is described as a discount (gain) for using cash, but are more likely to use cash when that same difference is described as a surcharge (loss) for using credit, are vulnerable to a framing effect.”<sup>23</sup> And, in a more dire case, “a patient who consents to a medical intervention when its prognosis is described as 90% chance of survival but who would dissent if it were instead described as 10% chance of mortality is subject to a framing effect.”<sup>24</sup>

There is compelling empirical evidence that alcohol causes drunk people to be more susceptible to framing effects. If framing effects can invalidate consent, then this might be why alcohol invalidates consent.

In the empirical literature on alcohol, there is a well-documented phenomenon called alcohol myopia. Briefly, alcohol myopia can be described as follows:

Alcohol does not act as a general disinhibitor, as is commonly thought. Rather, alcohol leads people to attend to only the most salient cues in the environment, whether they are inhibiting or

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<sup>22</sup> Chwang, 271. The idea of a framing effect was first introduced in Kahneman and Tversky’s classic 1979 paper. For further discussion of the effect of framing effects on consent, see Hanna (2011) and Cohen (2013).

<sup>23</sup> Chwang, 271.

<sup>24</sup> Chwang, 271.

disinhibiting (impelling). If impelling cues are present, the target behavior will be more likely, but if inhibiting cues are present, the behavior will be less likely. Past research has shown that either aggression (Zeichner & Pihl, 1979) or prosocial behavior (Steele, Critchlow, & Liu, 1985) can be increased or decreased by alcohol intoxication, depending on what types of cues are made salient.<sup>25</sup>

The theory of alcohol myopia states that when intoxicated, a person is more likely to attend to only the most salient cues in the environment. That is, when faced with the conflict about whether to drink and drive, an intoxicated person is more likely to see only the pros or the cons, depending on which type of cue is most salient. If inhibiting cues are most salient, alcohol intoxication should decrease the likelihood that one will drink and drive. However, if impelling cues are most salient, alcohol intoxication should increase the likelihood that one will drink and drive.<sup>26</sup>

In short, when an individual is experiencing alcohol myopia, she tends to see mainly the pros or mainly the cons of a proposed behavior, depending on whether she is exposed to a certain kind of impelling or disinhibiting cue. So, in the context of sex, this might involve a person who is aware of the other's drunkenness framing a sexual offer in such a way that highlights the benefits. For example, S might say to D, "you should have sex with me, lots of girls I've slept with say I'm really good," as opposed to S saying, "you should have sex with me, only some of the girls I've slept with had a bad time." It may be the case that D would consent if S says the first statement and she would not consent upon hearing the second. Thus, alcohol may cause a framing effect, which may invalidate D's consent to sex with C.

Here, I will clarify in more detail what this line of reasoning is saying and then will argue that there is compelling reason to think that it fails.

First, it is important to clarify under what conditions framing effects would invalidate consent. There are two possibilities: either S knows that he is causing D to be subject to a framing effect, or he does not know this. If S does not know that his offer puts D into a framing situation, it seems clear that he is not acting in a blameworthy way. If, by accident, he says something that frames his sexual offer in such a way that induces D to say, 'yes,' there is nothing nefarious about his behavior. We would have no reason to say that he has acted wrongly, at least not on the grounds of framing effects. But, if S knew

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<sup>25</sup> MacDonald et al., 974.

<sup>26</sup> MacDonald et al., 974

about alcohol myopia and then tried to manipulate D with this knowledge, this seems to threaten D's consent.<sup>27</sup>

I now argue that, even if D is subject to framing effects when drunk, her consent is still valid. First, there is compelling reason to think that, in general, framing effects do not undermine consent. What background condition of consent are framing effects supposed to negate? They don't involve coercion (they are just words),<sup>28</sup> they don't prohibit the rationality of the agent (you can think about it for as long as you want), and they don't deceive the agent (they are just logically equivalent ways of saying the same thing). So, *prima facie*, they don't undermine consent. The burden of proof should be on the objector to show that framing effects do undermine consent.

Also, if we say that framing effects undermine consent, we can't just say it in the sexual case. So, if there are cases of framed consent that are valid, then this gives us reason to doubt that it undermines consent in the sexual case. Consider the following cases of sober framing effects from Chwang:

My consent to the purchase of a bicycle can remain valid even if (a) the vendor reports that 90% of its riders are satisfied and (b) I would not have consented had the vendor instead reported that 10% of its riders are dissatisfied. As a second example, it is perfectly permissible, though perhaps underhanded, for an advertisement to report 'four out of five dentists agree' rather than 'one out of five dentists disagree'. And, to return to an earlier example, my consent to use credit instead of cash can remain valid even if I think of my decision as forgoing a discount rather than as incurring a surcharge. In other words, in a wide range of ordinary cases the moral requirements for valid consent are quite lax: valid consent can be uninformed, and it can be subject to framing effects.<sup>29</sup>

Second, there is compelling reason to believe that, in a sober sexual encounter, framing effects don't undermine consent. Imagine a framing effect in a sober sexual encounter: A tells B, "in research that I've anecdotally conducted, 90% of women I sleep with are happy that they did so," vs. "in research I've

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<sup>27</sup> Of course, if framing effects do undermine consent, this kind of sexual interaction would be blameless but would not involve valid consent.

<sup>28</sup> One might object that words can be coercive. While I have serious doubts about this view, it seems clear that the words involved in framing effects not coercive. If words could be coercive, the coercion would lie in what the speaker is threatening to do. In a framing effect, there is no even apparent threat. For a general discussion of whether words can be coercive, see Conly (2004).

<sup>29</sup> Chwang 274.



conducted, 10% of women I sleep with report being dissatisfied with me.” It doesn’t seem like this would invalidate A having sex with B, even if she would not have had the other version been said. If this consent is valid, then framing effects cannot be the reason that drunken consent is invalid.

Third, even if framing effects undermine D’s consent to sex, this is not very relevant. In the end, I suspect that framing effects rarely happen in sexual cases. If framing effects are the reason alcohol undermines consent, this will show that alcohol rarely undermines consent. After all, it is rarely true that the people in sexual interactions involving alcohol are trying to manipulate each other via framing effects. Also, people who want to engage in drunken sex could just avoid the use of framing effects and would thereby not be doing anything wrong. And, this wouldn’t cover cases in which D is the one who asks for sex from S.

*6: alcohol undermines consent, because at some later time, D regrets having intoxicated sex with S:*

Here, the line of reasoning is that, because D does something while under the influence of alcohol that she later regrets, this makes her consent in the moment invalid.

This fails for the simple reason that it’s obvious that regret, on its own, does not invalidate consent. For example, if a sober person were to buy a house and then regret buying it a week later, this is not grounds for her to claim that the realtor violated her consent.

*7: alcohol undermines consent, because it causes D to be over-confident in her abilities:*

One might think that alcohol undermines consent, because it causes a false sense of invincibility in the intoxicated person, which makes her think that she’s not as drunk as she is. However, the empirical literature suggests that this is false:

We tested the notion of drunken invincibility, which suggests that intoxicated participants may overestimate their own driving ability, thereby assuming that the dangers normally related to drinking and driving would not affect them. We did not find any evidence for this phenomenon—participants who had been drinking were aware that they would not drive as well as the average

person, whereas participants who were sober estimated that they would drive better than the average person.<sup>30</sup>

*8: alcohol undermines consent, because it causes us to change our beliefs about morality or to be worse at moral reasoning:*

One might claim that it is not just that alcohol causes people to act against their sober moral beliefs; rather, alcohol perhaps causes people to change their moral beliefs temporarily. Perhaps this undermines intoxicated consent.

Again, this is too strong. Consider this case:

**Intro Student:** a bright undergraduate takes an intro to ethics course in her freshman year. She reads Singer's arguments for the moral necessity of donating money to the poor. In a moment of being emotionally convinced by Singer, she donates a sizable amount of money to Oxfam. But, a few minutes later, she comes up with what seems to her to be a compelling objection to Singer's moral principle, and she changes her mind to think that her donation was not obligatory.

It seems clear to me that this student's consent was not violated by Oxfam; thus, a temporary change in moral beliefs does not undermine consent.

*9. alcohol undermines consent, because manipulation is involved:*

Manipulation is not essential to drunken sex, but it may often occur in the midst of drunken sex, and drunkenness may make D more susceptible to being manipulated. Perhaps drunken sex is not consensual when manipulation is involved.

This line of reasoning fails for several reasons. First, being made more susceptible to manipulation is not unique to alcohol. Many other things make us more susceptible to being manipulated but do not undermine consent. For example, being in love with someone may make us more easily manipulated, but this does not seem to undermine consent. Second, manipulation in general does not undermine consent. When I discuss manipulation, I have in mind the phenomenon that occurs when A

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<sup>30</sup> MacDonald et al, 1995, 982

does not deceive or coerce B but packages information in such a way that is more likely to procure B's consent but which B would otherwise not take as a reason to consent. Manipulation is a frequent occurrence in business transactions that are clearly consensual. And, for the same reasons that framing effects don't undermine consent (they are not coercive, not deceptive, and do not make the recipient less rational) manipulation also does not undermine consent.

I take it that I have considered an exhaustive list of reasons why one might believe that intoxication in the gray area undermines D's consent. I conclude that there are no good reasons to think that D is unable to give valid consent to have sex.

#### **V. Reasons That S Should Not Act on D's Consent, Even If It's Valid:**

The previous section concluded that the best reasons for thinking that D cannot give valid consent fail. But, what about S's situation? It might be the case that D can consent, while S is never justified in acting on this token of consent. I consider several reasons why this could be the case.

##### *1. S cannot act on D's consent, because it is too morally risky:*

Perhaps D can validly consent, but S will never have sufficient justification for knowing that D has consented. If S were to have sex with D without having a justified belief that D had consented, this would be seriously morally wrong. Recently, Dixon has argued that considerations of moral caution bid S to not have sex with D. His argument runs as follows:

**P1:** it is permissible for S to have sex with D, only if S is justified in believing that D's consent is valid.

**P2:** if D is at the intermediate intoxication level, then S cannot be justified in believing that D's consent is valid.

**C:** thus, it is impermissible for S to have sex with D.<sup>31</sup>

One might wonder why S needs positive justification that D's consent is valid instead of only needing the absence of evidence that D's consent is invalid (i.e. the absence of defeaters for the belief that D's consent

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<sup>31</sup> Although this argument is from Dixon, I borrow the decision theoretic formulation from David Boonin.

is valid). While there are certainly domains in which belief is innocent until proven guilty, consent is not such a domain. To permissibly have sex with someone else, we must have undefeated justification that they have given valid consent.

One way to understand P1 is in terms of a decision theory matrix with the following options:

	S has sex with D	S does not have sex with D
D's consent was valid	D's desire for sex is fulfilled, and D's rights are not violated.	D's rights are not violated, but D's desire for sex is frustrated.
D's consent was invalid	D's rights are violated.	D's rights are not violated, but D's desire for sex is frustrated.

Essentially, S is uncertain about whether D is in the gray area; for this reason, there is a non-zero probability that him acting on her 'yes' would amount to violating her rights. And, because a rights violation is always worse than D's desire for sex being frustrated, it seems like even a modest amount of moral caution would bid S to not have sex with D.<sup>32</sup>

While I'm sympathetic to Dixon's proposal, I think it proves too much. Depending on what is required for S to have justified belief that his sexual partner has consented, it may turn out that no sex is ever permissible. In any sexual interaction, there is always a non-zero probability that one partner's consent is not valid. So, if just this is sufficient to render the sex impermissible (because one party lacks justification that the other's consent is valid), then all sex is impermissible. This proves too much. But, if we relax the standard of what it means to be justified in believing that one's partner has given valid consent, then it may turn out that drunken sex passes the test. After all, S is aware of the argument from the previous section, he should be no more cautious about having sex with D when she is extremely happy or sad than he is when she is drunk. So, on a more relaxed standard of being reasonably sure,

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<sup>32</sup> Something like this argument is mirrored in the University of Michigan's consent policy: "The use of alcohol or other drugs may impair either party's ability to determine whether consent has been sought or given. If one has doubt about either party's level of intoxication, the safe thing to do is to forego all sexual activity." The Utah State University has a very similar policy as well.

which would likely include the possibility of consensual happy or sad sex, S can be reasonably sure that D has given valid consent.

Given this, I conclude that there is no sufficient reason concerning moral caution to bid S to not act on D's 'yes' to have sex with him.

*2. S cannot act on D's consent, because drunken sex is so wrong that it overrides consent:*

One might object that S should not act on D's consent, because although their sex would be consensual, it would be so wrong for non-consent based reasons that it would be all-things-considered impermissible. Recall that consent is only a some-things-considered moral transformative, meaning that consensual acts can be all-things-considered impermissible. Perhaps drunken sex fits into this category.

What might be the relevant wrong involved that would make otherwise consensual sex so wrong that it's impermissible? Some candidates that will fail immediately are worth getting out of the way to start. Drunken sex cannot be rendered all-things-considered impermissible by the fact that D will experience regret or negative emotions later. It's certainly not good for D to feel those things, but in general, negative ex-post emotions do not undermine previously consensual decisions and make them so wrong that they are impermissible. For example, suppose that someone buys a new car on an impulse, regrets it, attempts to return it, but then remembers that the dealership has a strict no returns policy. This person will surely feel immense regret, but this regret is not sufficient to render the salesman's behavior impermissible.

It is also important to note that negative emotions and regret are not essential to drunken sex. There are presumably many drunken sexual encounters that are remembered fondly by their participants. Perhaps the issue is not just that D will experience regret or negative emotions; instead the objection could be that S has good reason to know that these negative emotions will occur. Suppose that S knew before having sex that it would be consensual but that D would regret it the next day and would

experience intense emotional distress about her decision. Would this be sufficient reason for S's action to be impermissible?

No, I do not think this would make S's action impermissible. Although it is certainly not virtuous to knowingly engage in behaviors that one knows will cause emotional distress to others, this is not so strong of a reason as to prohibit those actions. For example, the owners of fast food restaurants surely know that drunk customers who consent to buy their products in the moment will experience regret the next morning at their unhealthy decision. And, for any given human romantic relationship, there is a very strong chance that it will end with a breakup and the sadness that accompanies it. By this line of reasoning, entering into a relationship would be wrong, because the partners would know that there is a substantial chance that it would result in severe emotional distress to the other person.

Here, the objector might try to make the example much more high stakes. Consider the following case:

**Affair Regret:** suppose that A is good friends with B. B is having marital stress and comes to A for consolation. After becoming drunk, B initiates sex with A. A knows that B will experience immense regret the next day if they have sex.

It seems that even if A can validly consent to sex with B, B ought to not have sex with A. While I agree with this intuition, I think that alcohol is not doing any of the work. Suppose we revised Affair Regret so that B is not drunk at all but is instead heavily influenced by extreme emotions. It seems equally clear to me in that case that B should not have sex with A. Given this, it appears that alcohol is not doing the work in explaining why sex is wrong in Affair Regret; instead, A's special relationship with B explains why their sex is wrong. Thus, this case does not show that drunken sex is so wrong that it's impermissible.

Lastly, and I think most plausibly, drunken sex might be so wrong to be impermissible, because it involves a failure of virtue on S's part. Suppose that A goes to bars with the explicit purpose of finding drunk women and seducing them. There is something very scummy and vicious about this behavior. Would this kind of sexual vice be sufficient to make consensual sex so bad that it's impermissible? I think the answer is no. Again, it seems that alcohol is not doing the work in this case. Suppose that instead of

seeking out drunk women, A seeks out sad women who are alone on Valentine's Day or sad women who have just ended a relationship? This seems equally vicious as the previous case, but I do not feel the pull of this behavior being so bad that it renders otherwise consensual sex impermissible.<sup>33</sup> Furthermore, it's important to note that this kind of sexual vice does not characterize most of the drunken sex that likely occurs in the world. I suspect, although I cannot confirm, that most drunk sex occurs in a spur of the moment situation without much antecedent planning. So, readers who are swayed by the concern that vice undermines otherwise permissible sex can still adopt my view while excluding the cases of drunken sex that do not involve such vicious motivations, of which I'm sure there are many, perhaps even the majority.

*3. S cannot act on D's consent, because S is responsible for D's drunken decisions:*

One might think that even if D can give valid consent to S, S should not have sex with D because S bears a strict responsibility for any decisions that D makes. So described, this sounds strange. It will help to introduce the example that motivates this argument. In the 1990s, in the case of *Hakimoglu v. Trump Taj Mahal Associates*, the plaintiff (Hakimoglu) sued the Taj Mahal casino for allowing him to gamble after he had become too drunk to be responsible for his actions. Hakimoglu's lawyers argued that the Taj Mahal violated the dram shop liability law, according to which bartenders who overserve a patron bear a strict liability for any damages caused by this patron.<sup>34</sup> Hakimoglu argued that the casino allowed him to incur damages by overserving him in just the way that a bartender might wrongfully overserve a patron

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<sup>33</sup> The normative power of consent is such that it will often override the wrongness of vice, even if this viciousness is a wrong-making feature of the situation. Additionally, I'm inclined to say that a behavior can be permissible although vicious because there are clear cases of this phenomenon. For example, perhaps A and B are going to get into a fistfight. Let's stipulate that A has a good reason to fight B, i.e. it's for a noble cause. In this situation, it seems completely permissible for A to choose to run away instead of fighting. But, perhaps running away from a fight that defends a good cause is vicious, in particular cowardly.

<sup>34</sup> Ryan describes dram shop law in the following way: "Dram shop statutes impose a duty upon tavern owners to patrons and third persons sustaining injuries resulting from the tavern's negligent service of alcohol to visibly intoxicated customers" ( 1258).

who later gets into a car accident.<sup>35</sup> Although the court ultimately ruled against Hakimoglu, the general principle he advanced is plausible.

How is this a reason that D cannot act on S's token of consent? Suppose that Hakimoglu's drunkenness was in the gray area, and due to the effect of alcohol, he did something that he regretted deeply and gambled away a lot of money. Does this entitle him to recoup the lost money? Similarly, if D is drunk in the gray area and has sex with S but deeply regrets it the next day, is it the case that S did something impermissible? Why might one think that the casino or S have done something impermissible to Hakimoglu or D respectively? I see two possible explanations for why something impermissible may have occurred: (1) S harmed D, or (2) S is responsible for any harms that occur to D.

First, suppose that S harms D in having sex with her. Physical harm would violate the stipulations of this paper (as violence would be coercive). But, perhaps a lot of emotional harm is caused to D as a result of having drunken sex. So long as D can still consent, it seems implausible to me that negative emotions or regret after the fact could be so severe as to render S's actions impermissible, as I argued in the previous point.

Second, it could be the case that S is responsible in a special way for any emotional harms that occur to D. Although emotional harms to D may not be sufficient to make sex between S and D impermissible, it could also be the case that due to D being drunk, S acquires additional responsibility over the harms that befall D. If S knowingly allowed D to get drunk or is planning on having sex with someone who he knows is drunk, it could be the case that he has a special responsibility for emotional harms that befall D. Similar to how the bartender has a special responsibility for any harms that befall the overserved patron, S may have a special responsibility for any harms that befall D. Essentially, a

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<sup>35</sup> Ryan summarizes this reasoning as follow: "dram shop liability seems to be applicable to casinos. When a tavern serves alcohol to a visibly intoxicated patron and allows him or her to drive home, causing physical injury in an automobile accident, the tavern may be liable for these injuries. Similarly, when a casino serves alcohol to a visibly intoxicated gambling patron and allows him or her to continue gambling, the patron suffers economic injury. The policy behind dram shop liability is the protection of innocent victims and intoxicated patrons from injury or property damage caused by the alcohol server's negligence" (1270).



bartender is not responsible for the harms that befall a person who gets drunk at their own house and then gets in a car accident, but a bartender is responsible for a person who gets very drunk at their bar and gets in a car accident. The reason for this is that the bartender has a special responsibility for the conduct of people that she serves alcohol to.

Suppose that this is true; this objection still does not succeed. First, even if this were sufficient to make a consensual behavior impermissible, it is not always the case that drunken sex results in emotional harm. Second, even if S is responsible in some kind of loco parentis fashion for harms that may befall D, this still does not seem strong enough to make their sex impermissible.

*4. S cannot act on D's consent, because third parties would be justified in preventing D from having sex with S:*

Consider the following case:

**Friend Intervention:** A and D are good friends and have gone to a bar together. At the bar, they meet S, who flirts with D. A knows that D is drunk. D tells A that she is going to leave with S to have sex. A decides to intervene with mild physical restraint and verbal persuasion to prevent D from going home with S. D wants to have sex with S but does not fight very hard against A's physical force, and she decides to go home. The next day, D is grateful that she did not have sex with S and thanks A for intervening.

I think that A's intervention was justified, but this does not mean that sex between D and S would not have been consensual. It does not follow from the fact that A was justified in using paternalistic influence on D that D could not have consented to have sex with S. It is perfectly coherent to say that D could consent but that she could still be thankful that A intervened to prevent her from making a decision that she would regret. Furthermore, it seems that our judgments in this case are biased by the fact that Friend Intervention involves a special obligation, namely friendship. If we were to revise the case so that A is a stranger who observes the situation and intervenes to stop it, I do not think we'd have the intuition that A's intervention is justified. In fact, we would think that a stranger is not justified in using any kind of physical force to prevent another person from making a consensual decision.

5. *S cannot act on D's consent, because it is analogous to statutory rape:*

One might object in this way: suppose that D is 25-years-old and suppose that being in the gray area of intoxication were to lower her cognitive abilities to that of a 15-year-old. If S is allowed to have sex with D while she is drunk, would this entail that statutory rape is permissible? Since statutory rape is not permissible, this would be a serious problem for my view.<sup>36</sup>

I do not think that my view has this implication for several reasons. *First*, I think it is incredibly unlikely that the cognitive impairment associated with gray area intoxication is sufficient to set a 25-year-old's cognitive abilities back to age 15. This would certainly have to be argued for. *Second*, suppose that we were to stipulate that this unlikely conclusion is correct and that a drunk 25-year-old is on a cognitive par with a 15-year-old. There would still be compelling reasons to prohibit statutory rape while allowing drunken sex for people 18 and over. The likely harms to a minor from having sex with an adult are so high that even if the minor can give valid consent, the sex would be harmful enough to justify a prohibition against it. For adults, these harms are not as likely to occur. For example, there is compelling evidence that so-called willing adult-child sex (i.e. when the child is not violently coerced into the sexual encounter) still severely harms the child; children who have had the experience of willing sex with an adult are likely to encounter the following harms: compared with children who aren't victims of ACS (adult-child sex), victims of ACS are significantly more likely to suffer from major depression, with one study suggesting that female victims of ACS are twice as likely to suffer from depression as non-victims.<sup>37</sup> Compared with non-victims, victims of ACS have been found to be twice, and in one study, three times more likely to have attempted suicide.<sup>38</sup> In contrast with non-victims, victims of ACS have less education and lower income,<sup>39</sup> are nearly three times more likely to be in an abusive relationship as

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<sup>36</sup> I am thankful to an anonymous referee for raising this point.

<sup>37</sup> Beitchman (et al.), 1992, 106 and Rohde, 2007, 878.

<sup>38</sup> Dube, 2005, 430 and Beitchman (et al.), 1992, 107.

<sup>39</sup> Currie, 2010, 111.

an adult,<sup>40</sup> and are more likely to develop personality disorders.<sup>41</sup> The list could go on. The likely harms of adult-child sex are immense, so much so that they make adult-child sex clearly wrong, even if it is consensual. It seems undeniable that an action with these likely harms is impermissible, even if it is consensual. And, again, I still think that it is highly unlikely that intoxication impairs adults to the point where they are on a cognitive par with children. *Third*, I feel the intuitive force of the idea that age qua age is a morally relevant trait. So, if this intuition is reliable, then the bare fact that the 15-year-old is 15 and that the 25-year-old is 25 would explain why sex is permissible for the latter but not for the former, even if their cognitive abilities are on a par.

## **VI. Can the Stipulations Be Relaxed?**

The argument in this paper was based on a number of stipulations about drunken sex. Although I do not think these stipulations are unreasonable, they might exclude a number of relevant cases of drunken sex that may commonly occur in reality. In this section, I discuss which of my stipulations can be relaxed and have my argument still succeed.

Stipulations one, three, four, and seven through ten clearly do not exclude any relevant cases.

The second stipulation (that S and D have no history of sexual relationship and are either acquaintances or strangers) does not exclude any relevant cases. After all, if sex between S and D is justified when they have no sexual history and barely know each other, presumably the standard would get lower when these assumptions are relaxed. In general, people who have a history of sexual relationship or who know each other well are better at interpreting each other's sexual cues, body language, and preferences. Essentially, it seems that the epistemic bar for knowing that another person has consented is higher when this person is a stranger. Thus, this stipulation does not bar my account from reaching any difficult or relevant cases.

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<sup>40</sup> Beitchman, 1992, 108.

<sup>41</sup> Beitchman, 1992, 109.

Stipulation five (that S is sober or intoxicated below the gray area) excludes the common case in which both parties are drunk in the gray area. I made this stipulation as an initial way of making the topic more precise, but this stipulation is not essential to my argument succeeding. If one drunk person can give valid consent to a sober person, then it seems to follow that two drunk people can give valid consent to each other. It would be strange if two people who can give valid consent could not give valid consent to each other.

Stipulation six (that D's drunkenness is the result of her own voluntary behavior) may exclude some relevant cases. One might think that this stipulation excludes the common case in which S buys alcohol for D, and D drinks it. However, so long as D is still able to make voluntary decisions, consuming alcohol that D has given her would be voluntary, even though it was given to her by another person. So long as she can still make voluntary decisions, D can choose to not drink the alcohol that S gives her. If she chooses to drink it, then the decision is voluntary. This would be true even in a case where S is supplying D with alcohol for the explicit purpose of getting her drunk to make sex more likely. So long as D is voluntarily consuming the alcohol, the source and the source's intentions should be irrelevant for assessing if D's drunkenness is voluntary. One might also think that this stipulation excludes the common case in which S puts more alcohol than D asked for or is conventional in her drink. This case, I believe, falls outside the scope of my analysis, because although D's consumption would be voluntary, S has deceived her.

## **VII. Implications for Policy:**

I've argued that competent adults who are drunk can give morally valid consent to have sex with each other. As I've noted, many universities have begun to make this behavior liable to punishment and expulsion. When these policies are enforced by public institutions, I believe that they are unjust. Public institutions should not enforce rules that criminalize legal and otherwise permissible behaviors. When these rules are enforced by private institutions, they are not necessarily unjust, but they needlessly

penalize consensual behavior. These policies are not unjust at private institutions, because private institutions are within their rights to regulate the conduct of their employees and patrons, so long as these individuals knew these rules going in. However, these policies still seem highly misguided. They needlessly punish consensual behaviors in the name of protecting consent. For that reason, these policies fail to live up to their own goal. Of course, if universities have some reason other than consent to ban drunken sex (perhaps a religious prohibition), that makes sense.<sup>42</sup> But, banning drunken sex on the grounds that it is not consensual is wrongheaded. Such a policy leads to a situation in which individuals who have engaged in consensual sex are expelled from school, have their studies interrupted, and are marked as sexual offenders.

One might object that, even if S and D can validly consent to have sex, it is a best practice for universities to ban drunken sex. Drunken sex is surely more likely than sober sex to lead to assault or rape. Perhaps, on this basis, universities would be justified in banning it to prevent the chance that it would lead to assault or rape. I think this is misguided. It seems very unlikely that simply banning drunken sex would prevent students from getting drunk and having sex. Beyond this, it is in general wrong to ban a consensual behavior on the grounds that allowing this behavior would lead to an increase in bad actions. If this principle were applied broadly, alcohol would be banned altogether, as it makes vehicular homicide more likely. This principle is too strong and should be rejected.

Lastly, as I've noted before, the account developed in this paper is neutral with regard to the debate on affirmative consent on college campuses.

## **Conclusion:**

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<sup>42</sup> Public universities are bound to neutrality about the good. Institutions funded by the public should not take a stance on what the good life is or try to legislate virtue. Thus, these universities should not ban drunken sex. And, even if they advertise their rules that ban it in advance and the students are aware of it, these rules would be wrong on the grounds of violating neutrality. Perhaps those rules in the status quo are consensually agreed to, but they are wrong on other grounds. Private organizations have no obligations of neutrality about the good. So, they have the right to prohibit a permissible behavior on their property, so long as doing so advances their institutional mission. I see this as part of their right to freedom of association.

There is no good reason to think that D cannot give valid consent, and there is no good reason to think that S cannot act on D's consent. Thus, drunken sex is permissible.

The field of sexual ethics is experiencing a renaissance, which has no doubt been caused in part by the increased cultural awareness of how bad our sexual practices have historically been. As we expand our theoretical understanding of the ethics of sex, we need to be willing to follow the argument where it leads. Many universities have made their decisions before seeing where the argument leads. This is, I believe, deeply misguided. At the end of the day, the field of sexual ethics should shy away from the view that competent adults who say 'yes' to sex should be barred from having sex. As I've argued, drunk adults are competent.

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