BOOK REVIEW

The Conceptual Structure of Consent in Criminal Law

THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT. By Peter Westen. Aldershot and Burlington, Ashgate, 2004. Pp. viii, 383. $119.95 (cloth).

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† Professor of Law, The Honorable Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law. I thank Larry Alexander and Doug Husak for helpful comments. In this review, I follow Westen's practice of referring to the victim as (female) S, and to the perpetrator as (male) A. This nomenclature is convenient and reflects demographic realities, but of course both S and A can be of either gender.

INTRODUCTION

In a series of writings over his career, Professor Peter Westen has subjected important legal and moral concepts to rigorous exegesis and critique. Equality,[1] unconstitutional conditions,[2] waiver and forfeiture,[3] and duress[4] are just some of the objects of his penetrating analysis. Now he has turned his gaze to consent.

The idea of consent is pervasive, in ordinary language, in morality, in law. In the criminal law, and especially the criminal law of rape and sexual assault, conceptual and normative disputes about how consent should be understood are both common and difficult to resolve, inevitably resulting in intractable factual disputes about whether consent exists in a given case. The task of Westen's book is to show that conceptual confusion about the meaning of consent is rampant, and that conceptual clarity would permit a sharper focus on the significant issues about which we really disagree. In this task, he succeeds admirably.

In a comprehensive, wide-ranging exploration of legal doctrine and policy, Westen demonstrates beyond cavil that legislators and commentators frequently confuse different senses of consent, or use the term inconsistently. He also

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1. Peter Westen, Speaking of Equality: An Analysis of the Rhetorical Force of "Equality" in Moral and Legal Discourse (1990); Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982). Responses to Westen's critique of the use of equality arguments include Kent Greenawalt, How Empty Is the Idea of Equality?, 83 Col. L. Rev. 1167 (1983); Kenneth W. Simons, Equality As a Comparative Right, 65 B.U. L. Rev. 387 (1985); Kenneth W. Simons, The Logic of Egalitarian Norms, 80 B.U. L. Rev. 693 (2000).

2. Peter Westen, The Rueful Rhetoric of "Rights," 33 UCLA L. Rev. 977 (1985); Peter Westen, "Freedom" and "Coercion"—Virtue Words and Vice Words, 1985 Duke L.J. 541.

3. Peter Westen, Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another, 66 Iowa L. Rev. 741 (1981); Peter Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L. Rev. 1214 (1977).

4. Peter Westen & James Mangiafico, The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters, 6 Buff. Crim. L. Rev. 833 (2003).

reveals the variety of legislative approaches to consent. Some explicitly define it as a subjective mental state, others as an objective expression of an acquiescing state of mind, and still others leave the matter obscure.

In response to this pervasive confusion, Westen provides his own highly illuminating framework. The book displays many virtues: originality, subtlety, honesty, a willingness to question received wisdom. It is sprinkled with vivid examples, drawn from a remarkable range of sources: case law and psychological case studies, fairy tales and film, not to mention fanciful philosophical thought experiments. These illustrations enliven a painstaking analysis that could otherwise be forbiddingly dry. The doctrinal exploration, too, is impressively wide. A range of different statutory approaches are examined, encompassing the laws of many different states and of European nations as well.

I do have some significant reservations about Westen's framework, and I believe that some of his specific arguments are incomplete or unsound. But I have no doubt that his analysis will be a necessary point of departure for any serious future scholarly inquiry into the concept of consent in criminal law.

This review is organized as follows. After a brief exegesis of his overall framework, I proceed to a closer analysis of its various elements. A later section addresses his controversial claim that both "force" requirements and "resistance" requirements are essentially gratuitous. A conclusion follows.

I. BRIEF EXEGESIS OF THE FRAMEWORK

The following chart summarizes the framework that Westen recommends for analyzing problems of consent to sexual relations.

Factual consent [or "actual" consent[5]]	
Factual attitudinal consent (FAC) (unconditional preference, conditional preference among available alternatives, or "indifference")	**Factual "expressive" consent (FEC)** (A's interpretive community understands S's words and conduct to satisfy FAC)

Legal consent [or legally binding consent]				
Prescriptive consent		**Imputed consent** (legal fictions of consent)		
Prescriptive attitudinal consent (requires FAC and additional conditions of competence, etc.)	**Prescriptive expressive consent** (requires FEC and additional conditions of competence, etc.)	**Constructive consent** (S does not consent to x but voluntarily participates in a social practice that includes x)	**"Informed" consent** (S consents to a risk of x rather than to x itself)	**Hypothetical consent** (S would have consented if she had been capable of doing so at the time)

In simplified terms, and disregarding for now some of Westen's careful qualifications, the categories are used as follows. A person S gives factual consent to sexual relations with A if she chooses that option as what she most prefers under the circumstances. Thus, factual consent comprises not only S's eager, active response to A's initiative, but also her reluctant and passive submission to his advances. And unenthusiastic acquiescence counts as factual consent not only when the reluctance stems from milder forms of pressure such as fear that A will otherwise be in a foul mood, or will break off the relationship, but also when it

5. In a recent article, Westen restates some central themes from his book. Peter Westen, Some Common Confusions about Consent in Rape Cases, 2 Ohio St. J. Crim. L. 333 (2004). In the article, unlike the book, he employs "actual" consent as an important category. Unfortunately, its scope is uncertain. He seems to use "actual" consent to describe factual, empirical consent, see id. at 349, but elsewhere he contrasts "actual" consent with "imputed" consent, thus apparently using the category to encompass all forms of non-imputed consent, both factual and prescriptive consent. See id. at 337.

stems from a threat of serious violence if she fails to submit. Needless to say, factual consent is not a sufficient condition of legally valid consent that will preclude criminal liability, since every jurisdiction prohibits acquiescence induced by threats of violence. But it is, Westen contends, ordinarily a necessary condition.

Factual *attitudinal* consent (FAC) occurs when S subjectively agrees to sexual relations, while factual *expressive* consent (FEC) occurs when S expresses FAC—by, for example, verbally agreeing to have sex, or engaging in other types of conduct by which she objectively expresses her positive desire or acquiescence. But again, neither of these two forms of factual consent is sufficient for legal consent.

The concept of *prescriptive* consent identifies those instances of factual consent (whether attitudinal consent or factual expressive consent) that do constitute legally binding consent. For example, a fourteen-year-old girl who eagerly engages in sex with an adult gives both attitudinal consent and "expressive" consent, but she doesn't prescriptively consent, because states require additional conditions before factual consent is deemed legally valid, including the condition of being of sufficient age and maturity to be competent. And competence, along with freedom and knowledge, is a basic condition of legal consent. Similarly, a woman who agrees to have sex (and thus factually consents) only to avoid A's threat of serious injury does not satisfy a critical condition of freedom—freedom from violent threats in deciding whether to engage in sexual relations—required to convert factual into legal consent. And a woman who is defrauded by a man impersonating her husband into believing that she is having intercourse with her husband might fail to satisfy the condition of sufficient knowledge.

Prescriptive consent is divided into two categories, depending on whether it incorporates as a necessary element factual attitudinal or factual expressive consent. Thus, if a jurisdiction makes legally valid consent depend on whether a woman actually subjectively chose sex as the

best option under the circumstances, it is employing the concept of prescriptive attitudinal consent. If instead it makes consent depend on whether a woman gave outward expression to her subjective preference, it is employing the concept of prescriptive expressive consent.

Finally, Westen identifies three categories of consent that he considers "fictional," in the sense that legally valid consent is imputed to S even though she fails to satisfy the standards of prescriptive consent that, for Westen, are the only genuine conception of consent. The first such category is constructive consent—a rule of law to the effect that voluntary participation in a social practice in which x occurs is treated as legal consent to x. In this category falls the traditional marital exemption from rape, which deemed a married woman to consent to acts of violence by her husband, even if she did not satisfy the criteria for consent that would have applied had she not been married to him. A second category Westen denominates "informed consent," or what is more commonly described as assumption of risk. Here, S does not give either factual or prescriptive consent to the conduct x that would otherwise be criminal (sexual relations or a physical contact), but instead merely consents to the *risk* of x. (A professional hockey player does not choose to be pummeled when a fight breaks out, but he might legally consent to the risk of such a contact or injury.) The third category, hypothetical consent, is counterfactual: it deems S to consent, even though she did not actually do so (in the sense of either attitudinal consent or "expressive" consent), if S would have consented had she been capable of doing so at the time. (An unconscious patient might be deemed to consent to emergency medical treatment under this standard.)

II. CLOSER ANALYSIS OF THE ELEMENTS

It is worth taking a closer look at the details of Westen's arguments for the framework, both to see its value and to identify some problems with his account.

A. *Factual Attitudinal Consent*

Westen's account of factual consent is initially counterintuitive. For he counts as instances of factual consent decisions by victims of terror and violence to submit to sex rather than risk suffering future physical harm, even death. To be sure, he does distinguish "compulsion," by which he means A's use of physical force to overwhelm S. (I will note some problems with "compulsion" below.) And, of course, his categorization of this scenario as "consensual" is heavily qualified: the jurisdiction might (and indeed, every jurisdiction does) further provide that mere factual consent of this sort is insufficient for legally valid consent. Still, one might wonder why he dignifies with the label "consent" a decision by a victim of threatened violence to acquiesce to the coercer's demands.

But this classification is not as absurd as it might first seem. One reason why Westen employs the factual consent category is this: it usefully reminds us that S might be subject to any of a broad range of pressures on choice, only some of which are illegitimate and vitiate consent. That is, one can easily fall into the mistake of thinking that legally valid consent to x requires that S eagerly embrace x as that which she desires or chooses in an unqualified way, i.e., that which she would also desire or choose if she believed she was facing a different and more favorable set of options. But this view is too narrow, Westen emphasizes, for it would entail that a woman does not legally consent to sex if she chooses it only because she prefers this to her partner breaking up with her, or even if she merely prefers this to waiting until later in the evening and thereby temporarily disappointing her partner. (For in each case, she does not obtain what she *most* prefers—the ability to decline intercourse without suffering the loss of the relationship, or the ability to decline intercourse at a particular time without suffering the emotional harm of upsetting her partner.) Even if a jurisdiction chooses to embrace such a stringent standard for valid consent, no

jurisdiction currently does so, and Westen wishes to give an account of consent that makes sense of the full range of plausible doctrinal approaches. And he is quite right that, under current law, individuals are very often treated as legally consenting to sex in the face of certain types of constraint or pressure even if what they would most prefer is not to be faced with any negative consequences whatsoever from their choice.[6]

A second legitimate reason for employing the factual consent category is that it accurately describes how people often employ the term. And since people do use the term this way, it is important to distinguish quite clearly the very different meanings of factual and legal consent, so that legislators, judges, jurors, lawyers, and commentators do not assume that mere factual consent is legally sufficient simply because it does, indeed, count as a type of consent.

Westen gives numerous examples where "consent" is used in a merely factual sense but is improperly given undue weight for legal purposes. One famous instance is the so-called condom case, in which a Texas grand jury refused to issue a rape indictment even though the defendant was a stranger who suddenly attacked the victim with a knife; jurors might have been swayed by the circumstance that the victim agreed to submit to intercourse with the defendant if he would wear a condom (1-2). Such factual consent obviously does not constitute legal consent, but the grand jury might not have understood the distinction. Another telling instance is *Blair v. State*, a case in which the defense lawyer successfully confused the jury by falsely implying that

6. As he lucidly explains, the relevant question is not whether the victim "really wants" to engage in x:

> In reality, . . . a subject *S* who reluctantly submits to conduct, *x*, both *does* and *does not* want *x*. On the one hand, she really wants *x*, in that she consciously chooses *x* for herself under the circumstances, "all things considered." On the other hand, she really does not want *x*, in that she would not choose *x* if, counterfactually, she were not being subjected to pressures from which she wishes she were free. (233)

factual consent is legal consent.[7] The lawyer emphasized a police officer's explicit statement in a police report that the victim, who said she had been threatened with violence, "consented" after the defendant said he wanted to have sex. On the stand, the police officer struggles to explain himself, agreeing that "consent" was the terminology he used, and then explaining, "That was, I believe, an error on my part. 'I submitted' would have been the proper word, rather than 'consent.'"[8] Westen concludes: "[B]ecause the police officer realized that the defense counsel was exploiting the ambiguity to mislead the jury about what he meant, the officer was forced to repudiate a perfectly sensible use of 'consent' on his part by stating that he meant to say 'submitted'" (312).

Fair enough. But one could also draw a different conclusion. Perhaps using the term "consent" in the factual sense is simply too confusing. Perhaps, in other words, Westen should recommend a *change* in usage, by legal actors and others. "Factual consent" could then be replaced by alternative language, such as factual "agreement," "choice," "acquiescence," "willingness," or "submission." At the very least, it seems clear that the language employed in criminal legislation should explicitly differentiate factual from legally valid consent, using the term "consent" only to identify legally valid consent, and using alternative language in lieu of factual "consent."[9]

An analogous terminological difficulty is the criminal law's "voluntariness" requirement. This requirement is a very minimal one: it requires that the actor have control over, or a substantial capacity to control, his movements, but it does not require that the actor's choice to act be free of unfair or coercive threats. So a decision to assist a criminal in order to avoid a threat of death counts as a

7. 735 P. 2d 440 (Wyo. 1987), discussed at 310-12.

8. Id. at 442-43.

9. Occasionally Westen himself endorses this last suggestion, e.g. 340 (suggesting that statutory language might be clearer if "incapable of consent" were defined as "physically unable to communicate *unwillingness* to submit to [the] act . . .").

"voluntary" act, although of course it might be excused by the doctrine of duress. Now we could have two "voluntariness" doctrines: minimal voluntariness (analogous to factual consent) and legally sufficient voluntariness, defined as a (minimally voluntary) choice that is not unduly coerced (analogous to legal consent). But it is much less confusing to employ "voluntariness" for one idea and "duress" for the other; and a similar disambiguation of "consent" would be preferable.

Turning to the details of Westen's account of factual consent, his analysis is quite illuminating. As he suggests, factual consent can properly include not only S's unconditional enthusiasm but also her conditional preference: "given the circumstances that she believes exist, she consciously prefers sexual intercourse to what she believes to be the alternative" (29)—for example, she prefers intercourse to serious injury or death (on one extreme) or to disappointing her lover by waiting until later (at the other).[10] Westen also argues, against several commentators, that factual consent does not and should not depend on S possessing a subjective attitude by which she consciously *authorizes* what would otherwise be a moral and legal wrong. Westen is persuasive here. Although legal consent has the *effect* of permitting A to do what would otherwise infringe S's legal rights, it hardly follows, Westen

10. The language "conscious preference" is more apt than the language of "desire" that Westen sometimes employs here, for several reasons. First, S might choose intercourse with great reluctance, and thus with none of the positive affect implicit in "desire." Second, a desire need not be an occurrent mental state. If I desire to marry Christine, then fall asleep, it is not the case that while asleep, I no longer desire to marry her. By the same token, if my desire is, "Please kiss me, Christine, when you enter the room, whether or not I am asleep," it would be incorrect to say that when she does kiss my slumbering hulk, I do not desire this. This is relevant to Westen's later claim that a sleeping or unconscious S does not factually consent. The claim is plausible but difficult to maintain if desire rather than conscious preference suffices for factual consent. (That claim is consistent with my consenting to be kissed in the last example, since I give prospective consent, a form of consent that is independent from contemporaneous consent, as Westen lucidly explains in a later chapter.) And third, the language of "desire" is susceptible to the mistaken view that if a woman experiences sexual desires and feelings of arousal when she is violently forced to have sex, she factually consents. (Westen properly rejects this view (36).)

correctly claims, that S's state of mind must itself consist of consciously granting A legal permission (31). After all, S might be completely ignorant of her legal rights, or might even mistakenly believe that she lacks the authority to give legal consent, and yet her state of mind of acquiescence might be sufficient to constitute legal consent (32).

Torts scholars will find Westen's argument familiar. "Express" assumption of risk consists in an explicit waiver of one's legal right to sue in case a risk materializes, but this is sharply distinguished from "implied" assumption of risk, which (in jurisdictions that still recognize it) consists in a knowing and voluntary choice to confront a risk.[11] One can impliedly assume a risk without expressly assuming it, and vice versa. (If I choose to ski a very challenging course, this can consist in implied assumption of risk even if I believe that notwithstanding my choice, I retain the legal right to sue;[12] and if I sign a valid waiver of liability when joining a health club, I am barred from recovery even if I am unaware of the particular risk that caused my injury, so long as the waiver encompassed the risk of that injury.)

The most interesting subcategory of factual consent recognized by Westen is "indifference." This is a state of mind, not of indecisiveness, but of affirmative willingness

11. See Kenneth W. Simons, Reflections on Assumption of Risk, 50 UCLA L. Rev. 481, 487 (2002).

12. But there might be a disanalogy between criminal law and tort conceptions of authorization. In criminal law, Westen points out, a jurisdiction might want to require subjective authorization, which would then be a subset of factual consent. "Mental states of authorizing are nothing more than mental states of desire, plus awareness of one's right to refuse" (33). Then it would be contradictory for S to say "I do not authorize you to kiss me, but I fervently desire that you do so." But tort law does not employ the notion of subjective authorization in this way, at least when consent *to a risk* is at issue. One can subjectively decline to waive a right to sue and yet act in such a way as to impliedly assume a risk (as in the skiing example in the text). Note, finally, that there is nothing in the slightest contradictory in S wanting to have sex with A but also wanting A to be prosecuted for it. (This is precisely what occurs in one of the final, pivotal scenes in the 1994 film noir, *The Last Seduction*.) But in this last example, presumably Westen would say that S did legally authorize sex, though she also wishes the legal system would ignore her authorization or would mistakenly treat her as not having given such authorization. (In the film, S pretends not to consent and secretly records the encounter in order to frame A for rape.)

to delegate the decision to another. A jurisdiction might well decide to count such indifference as factual consent with respect to sexual relations, but not with respect to termination of one's life support by a doctor (30); for the latter, it might require either unconditional endorsement or conditional preference. Thus, Westen believes that an unconditional or conditional preference always suffices for factual consent, while indifference might or might not suffice (31).

One striking benefit of the indifference conception is its ability to explain and legitimize some of the spontaneous decisions that frequently occur in sexual encounters. Although Westen does not develop this point, I believe that this idea of delegation of decision making helps explain why it can be acceptable for a couple that has agreed to a certain level of sexual intimacy to permit one party to initiate a surprising and novel form of sexual encounter (such as a different mode of sexual contact or of intercourse). To be sure, one could conceptualize the permissibility of such decisions by requiring S only to consent to "sexual intercourse" rather than to "sexual intercourse with the woman on top" or to "anal intercourse," and so forth. Yet we avoid some of the difficulties of accurately characterizing the object of S's consent if we expand the meaning of factual consent to encompass indifference. So even if S only meant to acquiesce (in the sense of conditional or unconditional preference) to vaginal intercourse with A in the "missionary" position, and even if that is the most appropriate level of generality at which to characterize her factual consent, the broader idea of indifference or delegation of decision making permits us to count as factual consent S's express or implied authorization to A to initiate other sexual contacts—e.g., those of a similar level of physical intimacy.

Nevertheless, Westen's analysis of indifference as a type of factual consent presents some potential difficulties, of interpretation and also of substance. First, indifference to x in Westen's sense does not really amount to S's choice

of x under the circumstances, or even to S's desire for x. It is not enough to point out, as Westen does, that in such a case, S desires what A desires, and thus in some sense consciously chooses x (conditionally, in case A desires it). Although we could indeed speak of such a case as involving voluntary submission or acquiescence, characterizing this as a choice or desire for sexual intercourse is an exaggeration. Still, it might indeed be appropriate to say in this case that S acquiesces in x, and in that less robust sense "consents" to x.

Second, Westen's analysis of indifference has a crucial implication for a highly controversial issue in contemporary rape law. Presumably one reason (among many) for the view of some jurisdictions that (to put it crudely) only a "yes" means "yes"[13] is that only an *affirmative* verbal or nonverbal expression of preference genuinely constitutes sufficient consent. Such a jurisdiction might conclude that a woman who is merely indifferent in Westen's sense, who passively permits sexual acts without affirmatively welcoming or choosing the act, or without preferring the act to the alternatives, is not acting with sufficient autonomy to have legally consented. And it might so conclude even if the woman explicitly says to the man, "I don't care what you do; go ahead [with sexual intercourse] if you want to."[14] It is, of course, highly controversial whether this approach goes too far, criminalizing conduct that is insufficiently culpable and effectuating a notion of autonomy that is overly paternalistic. But Westen's framework should be

13. See In re M.T.S., 609 A.2d 1266 (N.J. 1992). See also Wis. Stat. § 940.225 (2005), recognizing as third-degree sexual assault nonconsensual intercourse, and defining consent as "words or overt actions by a person . . . indicating a freely given agreement to have sexual intercourse . . . ." Of course, another reason for the *MTS* view is the difficulty of distinguishing indecision or psychological paralysis from genuine willingness to permit the sexual conduct to occur.

14. Whether *MTS* would criminalize sexual intercourse in this scenario is unclear. But suppose a first date in which A persists over an extended period of time in seeking S's consent to sex, and S repeatedly declines, but eventually is worn down and says, "Well, OK, do what you want to do," still hoping that he will give up. She then submits to sex. It is possible that this would not count as "affirmative" and "freely-given" permission.

capacious enough at least to make this approach conceptually intelligible.

Westen might reply as follows. His framework does not assume that factual consent is legal consent. A "'yes' means 'yes'" jurisdiction might conclude that indifference counts as factual consent but not legal consent. But this conclusion does not fit the rest of Westen's approach, under which factual consent fails to qualify as legal consent only if it does not satisfy prescribed conditions of competence, knowledge, and freedom, and it does not seem plausible to characterize the failure to give affirmative consent as an instance of incompetence or lack of sufficient freedom. Alternatively, and more plausibly, such a jurisdiction might say, at the outset, that only unconditional or conditional preference, not indifference, counts as factual consent, at least in certain circumstances (such as the first sexual encounter between S and A).[15] While Westen identifies this possibility, he should clarify that this is at the very heart of one important contemporary debate about the proper scope of criminal liability for sexual assault.

Third, I wonder whether Westen too quickly dismisses the possibility that S's actual indecision (as opposed to her decision to delegate the choice to A, as he characterizes "indifference") should count as a (fourth) *possible* category of attitudinal consent. Because his framework is meant to apply to all forms of sexual contact, not just sexual intercourse, I think it is at least an open question whether a jurisdiction should criminalize A's conduct in this scenario: A asks S for a kiss, S says nothing because of hesitation or indecision, and A proceeds to kiss her. Indeed,

15. A refined and contextual approach is much more plausible than the absolute view that indifference is never sufficient for legal consent. So even in a jurisdiction that ordinarily requires one of the two core types of factual consent, i.e., unconditional or conditional preference, in some cases indifference might be a third option. Perhaps in the first sexual encounter between S and A, one of the two core types of factual consent should be required, while in later encounters, indifference suffices. Or perhaps a core type of factual consent should be required with respect to the first instance of (any form of) sexual intercourse, while indifference suffices for new forms of sexual intercourse that the individuals have not previously practiced.

whether A's proceeding to engage in sexual intercourse with S in the face of her indecision should count as rape (or some other crime) is also a question that some jurisdictions would answer negatively.

To be sure, Westen does have another route to a conclusion of non-liability in these cases. He can say that they fall within a larger category of cases in which S constructively consents, one of Westen's three categories of fictional consent (which I discuss further below). For various policy reasons, including protection of the non-culpable, a jurisdiction might elect to deem S to consent here, even though she doesn't really consciously acquiesce to the contact or intercourse (just as a fastidious football fan who prefers not to be touched by other fans and is deemed to consent to minor, predictable physical contacts does not actually acquiesce to such contacts, an example discussed further below). But this solution seems ad hoc. Don't we want a general rule about acts of physical and sexual contact by A in the face of S's indecision? Doesn't that general rule reflect a general principle about the proper scope of S's autonomy, rather than a fiction of non-consent? I think it would be more straightforward to classify indecision as a fourth category of consent that a jurisdiction might (or, of course, might not) elect to recognize, depending on the sexual assault policies that it endorses.

Towards the end of his discussion of attitudinal consent, Westen identifies the minimal cognitive and volitional content of S's preference for x that he believes is required for attitudinal consent.[16] Let me briefly comment

16. Westen identifies the minimum *cognitive* content of factual consent as follows: "the description of the conduct she has in mind is an instance of what the criminal statute at issue describes to be the conduct that it prohibits in the absence of legal consent" (41). Thus, if S decides to have sex with A whom she believes is her husband but is actually an impersonator, then whether this counts as factual consent depends on whether the statute defines the prohibited act as sexual intercourse *simpliciter* or as sexual intercourse with a specifically chosen partner. Of course, even on the former interpretation, S's factual consent is not necessarily legally valid consent; A's fraud about his identity might vitiate factual consent.

on the volitional requirement, since Westen here makes a surprising but, I believe, convincing claim: S can factually consent to x even if (without knowing this) she is completely unable to prevent x. Drawing on Meir Dan-Cohen's distinction between subjective willing and selecting from within a set of genuine options, Westen argues that only subjective willing is required for attitudinal consent. He imagines variations of the Snow White story, in which "Snow Blanche" and "Snow Bianca" appear to be asleep but are conscious, yet still are unable to prevent the prince's kiss. Suppose Snow Blanche unconditionally wishes to be kissed by him, because she would like to be kissed by him even if she were not under a spell. And suppose Snow Bianca only conditionally wishes to be kissed as the best option then available to her (i.e., the only way to avoid continued paralysis). Both should be understood as factually consenting despite their inability to prevent the kiss (44-45).

This is an important and underappreciated point, especially in the context of less intimate forms of sexual contact. If S says to A, "please kiss me," he or she might well be unable to prevent a kiss that immediately follows. S might also subjectively welcome an impetuous, completely unexpected kiss by A (222). And by the same token, as Westen points out, disabled individuals who wish to have sexual intercourse with their partners yet are physically unable to prevent it certainly should not need to fear that their partners have committed rape.

One last issue about attitudinal consent concerns the range of the relevant choice set over which we evaluate S's

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At several places in the book, Westen's analysis illuminates the cognitive requirements for both factual and legal consent, especially with respect to the problematic distinction between fraud in the factum and fraud in the inducement, but I do not have the space to address the arguments here.

Westen also identifies a minimum degree of *competence* required for factual consent—namely, "a minimal capacity to adjudge what one desires for oneself under the circumstances as one perceives them to be" (35). He later emphasizes that jurisdictions require additional conditions of competence (for example, minimum age requirements) to be satisfied before they will treat factual consent as legal consent.

preferences. Clearly enough, Westen intends to include all the options that A presents to S, including unpalatable threats if S does not submit and attractive benefits to S if she does. But he also indicates that he includes as options actions that S herself could take to avoid the options that A presents (see 87). So S factually consents not only when she agrees to have sex in order to avoid a threat of physical harm, or to obtain a job benefit, but also when she submits rather than taking the affirmative step of pushing him away—or, for that matter, rather than taking the extraordinary step of killing him with a knife, if that would prevent intercourse.

Now this might seem unproblematic, insofar as factual consent is merely the first step of analysis. So just as an affirmative decision by S to submit to sex rather than face a violent threat will certainly not satisfy the "freedom" condition required for legally valid consent, so her decision not to push A away or not to kill him when she has the opportunity to do so might not satisfy that condition. Yet there is a certain awkwardness to this way of framing the issue. Suppose A meets S at a party, takes her to his room, initiates minor sexual contact, then makes it clear that he is about to initiate sexual intercourse. Suppose S is then passive and silent, but wishes he would stop. Suppose she also believes he will stop if but only if she slaps him. On Westen's account, she factually consents if she does not slap him but submits passively to his initiative. (Indeed, she also factually consents if she believes he will stop if but only if she mortally wounds him with a knife, which she declines to do.)

Of course, the jurisdiction might have a rule to the effect that preference for submitting to sex when the only practical alternative is resistance to the utmost, or even resistance entailing A's death, is not sufficiently "free" to qualify as legally valid consent. But that is a strange conception of "freedom," and it seems much more straightforward to deny at the outset that S's option of taking affirmative steps to avoid A's advances (even to the point of violently disabling A) is within the choice set for

determining factual consent. With such a denial, we can say that when S does not express a conscious preference for submitting to sex *over any alternatives offered by A* (because A offers no other alternatives), then S does *not* unconditionally or conditionally prefer sex to any relevant alternative, and factual consent is lacking from the outset.

I raise this point because it will be crucial later in examining and critiquing Westen's controversial claim that resistance requirements are entirely unproblematic because they are merely logical corollaries of a jurisdiction's force requirement.

B. Factual "Expressive" Consent

We have thus far been discussing attitudinal consent. But Westen persuasively argues that a distinct category of factual consent, factual *expressive* consent, is also commonly used in legal and academic discourse, ordinary language, and criminal legislation—for example, when courts say that S "expressly consented" or "verbally consented." (If, however, they say that S "communicated consent" or "conveyed consent," they are referring to what is being expressed, that is, to attitudinal consent (65).) In Westen's view, "expressive" consent is properly defined by reference to what A's interpretive community (essentially, a reasonable person in A's shoes[17]) would understand the words and conduct of S to mean, and not by reference to what A alone understands them to mean, nor by reference to what S intends them to mean.

Westen describes two extremely provocative cases that clearly illustrate the distinction between attitudinal consent and "expressive" consent. In the first, *People v. Burnham*, the victim enticed passing motorists to have sex in order to avoid her husband's threat of violence (of which the strangers were unaware).[18] In the second, *People v. Bink*, the victim, a prison inmate who had been previously

17. For some reason, Westen avoids the more familiar "reasonable person" language, but his notion appears to be substantially equivalent.

18. 222 Cal. Rptr. 630 (1985), discussed at 139-40.

raped by the defendant, worked with the jail authorities to entrap the defendant: he pretended to be in fear of physical harm and allowed the authorities to secretly observe the defendant commit sodomy, knowing that the police would be able to intervene before the defendant could actually make good his violent threat.[19] As Westen persuasively analyzes the cases, the strangers' sexual contact in *Burnham* involved "expressive" consent but not attitudinal consent: although the victim did not subjectively acquiesce, she did actively express such acquiescence to the strangers.[20] By contrast, the sexual encounter in *Bink* involved attitudinal consent but not "expressive" consent: although the victim did subjectively acquiesce in order to entrap defendant, his outward expression was of non-acquiescence.

Given his definitions, Westen draws two conclusions. First, "expressive" consent is derivative of attitudinal consent, insofar as what must be "expressed" in some manner is any of the species of attitudinal consent that the jurisdiction recognizes (unconditional preference, conditional preference, and perhaps "indifference"). Second, attitudinal consent defines the actus reus of rape, while "expressive" consent is best understood as defining the mens rea. Thus, in *Burnham*, since S was not subjectively

19. 444 N.Y.S.2d 237 (N.Y. App. Div. 1981), discussed at 140.

20. In a footnote, Westen makes the interesting argument that we would have attitudinal consent, and not merely "expressive" consent, in *Burnham* if the victim, in order to avoid her husband's threats, had to actually succeed in having sex with the stranger rather than merely trying to do so. For in that case, she would have preferred sex as the best she could do for herself in the circumstances, and thus would have factually consented attitudinally as well as expressively. Moreover, Westen argues, the strangers would not have imposed a wrongful harm on her, since they would have done what she believed best for herself, and they were not responsible for her predicament (165 n.18). I agree that this would be a case of attitudinal consent in Westen's terms, but it is less clear that this would be a case of legally valid consent. Whether it should count as legal consent does not matter much if (as in the actual example) the strangers lack mens rea. But suppose a variation of the facts in which they were negligent in not realizing that she was just going along to avoid her husband's threats. Shouldn't they be liable, not just for attempted rape, but for rape (assuming that the jurisdiction requires a mens rea of negligence as to non-consent)? Note that if they are only liable for attempted rape, that also seems to be true of the husband—an implausible result.

willing and did not give attitudinal consent, the actus reus of rape is satisfied; but since she did not express that unwillingness by the words or conduct the jurisdiction requires under "expressive" consent, the strangers in that case lacked the mens rea for rape. Conversely, in *Bink*, since the defendant might reasonably have understood S to have not expressed subjective willingness, though actually, S was subjectively willing, the defendant cannot be guilty of the actus reus of rape, and this is indeed what the court held.[21] However, Westen points out that Bink might be guilty of attempted rape (161-62).

Westen goes on to explain, convincingly, that the venerable "moral luck" problem applies in this context. That problem—whether a defendant should suffer lesser punishment because the legislatively proscribed harm fortuitously fails to occur, even if he still has the requisite mens rea as to the harm—arises here only if lack of consent is understood as a question of actus reus, but not if it is understood as an issue of mens rea (156-57). In other words, the question whether Bink should be punished less because of the fortuity, from his perspective, that his victim consented (in the sense of attitudinal consent), is answered

21. Nevertheless, *Bink* could be interpreted differently. The victim's decision to entrap the defendant by engaging in sex might be interpreted as factual consent but not legally valid consent, given the very constrained alternatives the victim faced. (Suppose he reasonably doubted that the jail authorities could adequately protect him from defendant if he did not cooperate in the entrapment scheme.) Indeed, suppose a different case in which A rapes S, and S then pretends to agree to further sex with him, but only in order to keep him in her apartment for a few more minutes, when she expects her husband to return home and be able to apprehend A. It surely would be reasonable for a jurisdiction to consider the second act of intercourse rape, because of the conditions under which the factual agreement to engage in intercourse was secured.

A more straightforward case than *Bink* of attitudinal consent but no "expressive" consent, in which attitudinal consent is much more clearly also sufficient for legal consent, would be a case in which the victim unconditionally wants to have sex with A, but conveys this by words or conduct that should be taken by someone in A's position as nonacquiescence. (Imagine a case of a serious language barrier. Or consider Westen's example of A unknowingly joining a swinger's club one of whose members, S, expresses sexual interest in A with unusual signals of interest that A does not (and has no reason to) recognize. If A then proceeds to suddenly kiss and fondle S, then S has given attitudinal consent, but not "expressive" consent (74).)

affirmatively if one accepts the moral luck principle *and* if attitudinal consent eliminates the social harm of rape. But if only "expressive" consent, not attitudinal consent, eliminates the social harm of rape, the question is answered negatively.

Westen's first conclusion is certainly plausible: an expression must be an expression of something, and analytic simplicity is served by defining "expressive" consent precisely in terms of attitudinal consent. But the second conclusion, understanding attitudinal consent as vitiating actus reus and "expressive" consent as vitiating mens rea, is not nearly so obvious. For it depends on a definition of "expressive" consent that might be too narrow, and on an understanding of the actus reus of rape that is controversial, in light of contemporary debates about the proper scope of rape law.

At the risk of adding unnecessary complexity to Westen's already intricate model, I suggest that there are at least three categories of factual consent, not two. I also believe that it is intelligible for a jurisdiction to conclude that the social harm of rape occurs when either of two of these three types of factual consent is missing. Accordingly, Westen's conclusion that that social harm occurs only when *attitudinal consent* is lacking is too narrow—at least, it is too narrow to explain the social policies that some jurisdictions purport to favor in modern sexual assault law. Let me explain.

Westen is undoubtedly correct to expand factual consent beyond attitudinal consent (S's subjective but unexpressed willingness or preference), and to focus on S's communication of consent as an important type of factual consent. But a paradigm communication in the current context has *two* components—an intention to communicate by S, and an interpretation or understanding of that communication by A. Westen emphasizes only the second component. Yet a jurisdiction might have reason to recognize either or both components as a conception of factual consent. Thus, I would replace factual "expressive" consent with the following two categories of factual consent:

FSEC: Factual *subjectively expressed* consent (where S employs words or conduct by which she intends[22] to communicate her attitudinal consent)

FOC: Factual *observed* consent (where an observer—either A, or A's "interpretive community," or a reasonable person in A's shoes—understands S's words and conduct to satisfy attitudinal consent)[23]

Sometimes a jurisdiction might want to require (before it will find legal consent) the outward expression of subjectively expressed consent, rather than attitudinal consent, in order to assure that acquiescence reflects a relatively firm, rather than fleeting or changeable, state of mind.[24] The very act of

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22. *Burnham* is a clear case of such an intention.

It might be appropriate to expand this definition to S's employing words or conduct by which she intends to communicate her attitudinal consent, *or that she expects others to understand as attitudinal consent (even if she does not so intend them)*. I don't pursue this complication.

23. Indeed, a comprehensive approach would include a fourth category as well. The actus reus of rape could be defined either by lack of attitudinal consent or by lack of subjectively expressed consent. (It is even possible to define it as lack of observed consent, though this is the least plausible alternative.) And observed consent could be subdivided into two corresponding categories: where the observer understands S's words and conduct to satisfy attitudinal consent (Westen's "expressive" consent fits here), and where he understands them to satisfy subjectively expressed consent. But I will spare the reader further subcategories.

24. This function is somewhat analogous to the act requirement's function of ensuring that a defendant's criminal intention is seriously entertained and not fleeting, or the function of actus reus requirements of attempt in ensuring that a defendant is seriously committed to a criminal plan. Of course, here the absence of a "firm" state of mind leads to the conclusion that the victim has not consented, and thus that the defendant *can* be criminally punished.

Westen argues that there is no need to build into factual consent a requirement that the mental state be firm, unequivocal, or stable. If S is indecisive, or in a paralyzing panic, or if she is vacillating such that she does not factually consent at the time she submits to intercourse, then a jurisdiction could decide that she simply lacks factual consent (159). In any event, he points out, a requirement that A have mens rea with respect to S's lack of factual consent helps protect against unfair punishment in such circumstances.

Perhaps Westen is correct about the proper understanding of attitudinal consent, and perhaps in some circumstances even a fleetingly experienced unwillingness to acquiesce should make a sexual encounter criminal. But I think the complexities and possible different views of desirable policy here reinforce the

communicating, which requires some self-consciousness and some effort to articulate feelings, at least renders it more likely that the underlying state of mind communicated is more stable. But a jurisdiction might go one step further and require observed consent—that an observer (perhaps a reasonable observer) recognize that S factually consents—either because lawmakers want to protect defendants they view as less culpable, or because they believe that the victim should try to *effectively* communicate her preferences to the other. (Observed consent is what Westen calls "expressive" consent, but I use a different label to emphasize the perspective of the observer; "expressive" consent is ambiguous in this regard, for it could refer either to the communicator S or to the observer.)

To place subjectively expressed consent in context, compare the way in which a jurisdiction might choose to deal with a different crime involving a victim's mental state. If it is a crime, or an aggravated element of a crime, to terrorize a person, the victim's state of mind is of course directly relevant: the actus reus is satisfied only if she actually is put in a state of terror, though the mens rea can be satisfied (and an attempt conviction obtained) even if she is not put in such a state, if the defendant intends that effect on the victim (or perhaps if he believes or should believe that his conduct will have that effect). Indeed, in the law of sexual assault, the question whether S has submitted "because of fear" of violence from A arises frequently, and should receive a similar analysis: the actus reus requirement of "threat of force" is satisfied if S was actually in fear, and submitted for that reason, while the mens rea requirement can receive separate analysis. (Again, even if S does not actually submit due to fear, perhaps A should be guilty of attempted rape if he intended to cause her submission through fear; and perhaps, in the rare case when the defendant is reasonably ignorant of the fact that he induced S to submit by fear, he should be acquitted.)[25]

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value of recognizing subjectively expressed consent as another category of factual consent.

25. Westen provides a nice analysis of the confused approach of some

In these two examples, terrorizing and inducing consent by fear, no one would seriously suggest that the victim must affirmatively express or communicate her subjective state of terror or fear in order to have suffered the social harm in question. In other words, there is no good reason to adopt the analogue of subjectively expressed consent here. But in cases where S passively submits to sex with A, many jurisdictions and many commentators do conclude that the social harm of sexual assault is not implicated if S could have communicated non-consent but failed to do so. The social policy—albeit a controversial one—is that each participant to sexual conduct has a responsibility to communicate their preferences to the other, absent some significant incapacity, and that the criminal law should not intervene when this responsibility has not been met. This policy is better captured by the proposed subjectively expressed consent category than by Westen's attitudinal consent and "expressive" consent categories.

To see in more detail how my approach differs from Westen's, consider a case in which S says and means "yes" or "no" to A's request for a form of sexual intimacy, but A literally does not hear her (and a reasonable person in his position also would not have heard her). Under Westen's approach, the only factual consent questions we ask are whether S was subjectively willing (attitudinal consent) and whether a reasonable person would have interpreted her as having conveyed subjective willingness ("expressive" consent, which I treat as a subcategory of observed consent).[26]

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jurisdictions on these issues. Some conclude that a conviction for rape by threat requires a "reasonable fear" by the victim. But this is ambiguous: it could refer to the defendant's reasonable belief that the victim submitted out of fear, but it could also refer to whether the victim's actual fearful reaction was a reaction that a reasonable person in her situation would have had. As Westen points out, there is no good reason for the second requirement, so long as the defendant was actually aware that the victim, however "unreasonably" or surprisingly, was subjectively fearful and submitted only for that reason (320-21).

26. I believe that Westen's terminology, factual *expressive* consent, is unfortunate: although Westen means to restrict it to an actual or hypothetical observer's understanding of S's state of mind, it more naturally connotes what S intends to express.

But suppose a jurisdiction wants to codify the approach that "only 'yes' means 'yes,'" i.e., that only an affirmative expression of acquiescence (by words or conduct) immediately preceding sexual intercourse suffices for legal consent.[27] Although controversial, this approach is one that some jurisdictions and many commentators support. One reason (among many) for this view is that only such an affirmative expression of preference genuinely constitutes sufficient consent. S's passive submission to a sexual act without affirmatively welcoming or choosing the act arguably is not an instance of a sufficiently robust type of agency or autonomy to count as legal consent, just as passive submission to a medical procedure is clearly not enough to count as legal consent.[28]

It is much more difficult to model this approach and all of its plausible variants on Westen's account than under my suggested approach.[29] Suppose, once again, that the jurisdiction wants to reinforce a community norm that even in situations when A is not threatening S with any disadvantage if she says "no" to his initiatives, "only 'yes' means 'yes'"—i.e., only affirmative words or conduct by which S expresses acquiescence (only an especially unambiguous, affirmative instance of subjectively expressed consent) will count as legal consent. Then it would make sense to define the actus reus of rape as sexual intercourse absent affirmative subjectively expressed

27. See Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law 261-73 (1998).

28. See id. at 270. Of course, there are other reasons for this view, including the difficulty of distinguishing indecision or psychological paralysis from genuine willingness to permit the sexual conduct to occur.

29. Westen asserts at one point that no jurisdiction uses what I call the subjectively expressed consent approach (70). But this seems incorrect: New Jersey law (as interpreted in MTS, 609 A.2d 1266 (N.J. 1992)) appears to employ this approach, and the same might be true of other states' explicit requirements of "freely-given" consent. See, e.g., Wisc. Stat. § 940.225(4) ("'Consent,' as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact."). See also Cal. Penal Code § 261.6 (Deering Supp. 2003) ("[C]onsent shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will.").

consent. And then the jurisdiction has the option to require negligence, recklessness, or even knowledge as the requisite mens rea. (It might plausibly choose knowledge that S has said "yes" or has by her conduct expressed affirmative permission in order to offer greater protection to defendants who are unfamiliar with the novel legal actus reus requirement.[30]) But it is difficult to see how Westen can convey these different mens rea variations within his model, for he largely neglects the subjectively expressed consent category, and he defines "expressive" consent too simply as posing only the question whether A was reasonable or unreasonable (i.e, negligent) as to whether S gave attitudinal consent.[31]

Accordingly, his general point, that attitudinal consent pertains to actus reus while "expressive" consent pertains to mens rea, is inaccurate. To be sure, a jurisdiction could decide to organize its sexual offense crimes that way. But it might also have reason to recognize other variations in what counts as the social harm of rape (lack of subjectively expressed consent, not lack of attitudinal consent), and what counts as adequate mens rea.[32] Some jurisdictions

30. In *MTS*, the court interpreted the New Jersey statute as requiring, for the actus reus of rape, affirmative permission, while requiring, for the mens rea, only negligence as to whether such permission had been given. But the requirements are independent; the second hardly follows from the first, and a mens rea requirement of recklessness or knowledge is also defensible. 609 A.2d 1266 (N.J. 1992).

31. Westen's careful definition of "expressive" consent and of the relevant perspective of the observer is a composite, encompassing the beliefs that the actual defendant has, as well as beliefs that a reasonable person would acquire (72). But it would be better to employ a definition that permits a jurisdiction to disaggregate knowledge, recklessness, and negligence, in case it wishes to employ a mens rea other than negligence.

Westen does acknowledge that "expressive" consent (as he defines it) offers a less precise measure of an actor's guilty mind than the combination of attitudinal consent and a mens rea requirement offers. As he notes, the latter but not the former approach can impose attempt liability on the malicious actor who has good grounds for believing that the woman acquiesces yet intends that the intercourse be without her acquiescence (145).

32. I also find problematical Westen's way of conceptualizing the difference between actus reus and mens rea. In his view, where A has some form of mens rea but S has given factual and legal consent, A causes a dignitary harm rather than a material harm (149-52, 161-63).

believe that the optimal policy (a) gives some, though limited, protection to potential victims' autonomy interests by requiring them to say "no," and (b) at the same time facilitates sex by those who prefer not to have to say, or very clearly communicate, "yes." Other jurisdictions are more concerned about protecting victims who find it very difficult to say "no." These questions should not be decided or made unduly confusing by stipulative definition.[33]

Of course, if the absence of subjectively expressed consent or of some other type of communication of consent is taken to negate the social harm of a crime, then the question whether S satisfied the subjective standards of attitudinal consent is simply legally irrelevant. Just as contract law considers the private, subjective beliefs of the parties to be irrelevant (as Westen acknowledges), a jurisdiction could take the same view of private beliefs

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But the difference between lack of "expressive" consent and lack of attitudinal consent, or more generally between lack of mens rea and lack of actus reus, need not be conceptualized in this way. Yes, typically the more egregious A's mens rea, the more dignitary harm he causes to S. But suppose a case in which A sexually assaults S, who is unconscious and never regains consciousness. There still is good reason for punishment here. To be sure, the case could be conceptualized as involving dignitary harm to the community as a whole. But that seems just a roundabout way of saying that a person who acts with such disrespect for others deserves severe condemnation and punishment. The linkage to "dignitary harm" seems contingent and unnecessary.

In his separate article, Westen goes so far as to treat larceny as imposing only a "dignitary" harm, because its actus reus is satisfied by a temporary deprivation of property, which is a derivative form of harm, as compared to the primary harm of permanent deprivation. Westen, supra note 5, at 346. But unless we classify as merely "dignitary" every inchoate crime (such as burglary or possession) or indeed every crime that punishes the causation of a statutorily defined harm in part because this could lead to further social harms (such as treason, bribery, or hate crimes), I would think that the social harm of a temporary deprivation of property should fall on the "material harm" side of the distinction between externalized harm in the world, on the one hand, and a mere belief that one is bringing about that harm (or some other culpable mens rea as to bringing about the harm), on the other.

33. Indeed, even if we confine ourselves to Westen's two categories, attitudinal consent and "expressive" consent, a jurisdiction should not necessarily assume that mens rea requirements and "expressive" consent are coextensive. It could decide, for example, to require recklessness or knowledge as to attitudinal consent, even though a requirement of "expressive" consent is, on Westen's account, essentially equivalent to a requirement of negligence with respect to attitudinal consent.

about consent to rape or other crimes.[34] For an example where this view might be plausible, consider one of Westen's illustrations: Jane expresses voluntary acquiescence to A but secretly expects and hopes that A will regard her expression as a joke (163). Certainly in contexts other than rape, such as physical battery, a legal rule that public communication defines the wrong is defensible. Note, too, that once we redefine the social harm in this way, a mistake of fact about attitudinal consent that was once legally relevant now becomes, in effect, an irrelevant mistake of law. In a jurisdiction in which "only 'yes' means 'yes,'" if A makes a reasonable mistake in believing that S unconditionally desired sex with him, the mistake is legally irrelevant if S did not affirmatively express agreement. And if A doesn't realize that absent affirmatively indicated agreement, he could be guilty of rape, then that, too, is an irrelevant mistake (about the scope of the criminal law).

The broader framework that I have suggested also more easily accommodates additional permutations. For example, a jurisdiction might employ "only 'yes' means 'yes'" for the first sexual encounter between individuals, or their first act of sexual intercourse, or for any use of extrinsic force during the sexual act, but it might not require such affirmative expressions of consent if the couple has a prior sexual history.

To be sure, Westen might use the reasonable person (or interpretive community) rubric to capture the idea of subjectively expressed consent. Perhaps it is just not reasonable for A to think S has given attitudinal consent unless he observes that S has tried to express attitudinal consent by word or conduct; inferring attitudinal consent from silence is just "unreasonable." But I seriously doubt that this is in all cases the correct understanding of what a "reasonable" interpreter would infer. Moreover, this

34. For an example of a jurisdiction that explicitly relies on the contract analogy in defining consent to rape, see State v. Smith, 554 A.2d 713, 717 (Conn. 1989) ("[W]hether a complainant has consented to intercourse depends upon her manifestations of such consent as reasonably construed.").

approach submerges the critical normative questions within the murky category of reasonableness. If a state's social policy, one that it wishes to announce and reinforce, is the rule of behavior that "only 'yes' means 'yes,'" it is far more perspicuous to say so directly.

Westen is not without other resources to articulate the "only 'yes' means 'yes'" approach, but his framework handicaps him. Suppose a case in which S does not satisfy the criteria of attitudinal consent, does not say anything in response to A's initiatives, and passively submits to intercourse. Jurisdictions differ about whether this should count as a crime of sexual assault. On my approach: (1) a jurisdiction that wishes to criminalize this conduct (even if A honestly and reasonably believes that attitudinal consent is present) would say that legally valid consent to sexual assault requires subjectively expressed consent, which is lacking here, and which A will usually know is lacking; but (2) a jurisdiction that does *not* wish automatically to criminalize such conduct would say that, while legal consent requires only attitudinal consent, in this scenario A would often have a defense of lack of mens rea as to S's lack of attitudinal consent. Yet Westen's approach cannot readily model or explain these results.

Westen does explicitly analyze two topics relevant to the current discussion—the Antioch College version of "only 'yes' means 'yes,'" which actually goes so far as to require a *verbal* affirmative permission, and the similar debate over whether "'no' always means 'no.'" With respect to the Antioch policy, Westen points out that under speech act theory, saying "yes" in response to a request for sex is an assertive illocutionary act that is a paradigmatic form of expressive consent (79). But, he observes, this characterization says little about the normative desirability of a "yes" requirement, which many rape reformers reject as too narrow a test of legally valid consent, but which others find insufficient (79). And in the end, Westen believes that the Antioch approach is not really a definition of factual consent at all. Instead, he says, it reflects a judgment that legally valid consent is not satisfied by

either attitudinal consent or "expressive" consent, but instead must take the form of a very specific type of "expressive" consent, verbal affirmative permission (77).

Although I agree with most of what Westen says here, I am unpersuaded by his characterization of the Antioch policy as identifying an instance of attitudinal consent that fails to satisfy further criteria of legally valid consent. The Antioch approach is concerned precisely with which kinds of communications and expressions of acquiescence or preference suffice for factual consent, which is a precondition for legal consent. And although, as we will see in more detail later, there are a number of reasons that factual consent can fail to qualify as legally valid consent—reasons of lack of competence, knowledge, or freedom—a jurisdiction might well endorse the affirmative permission approach for reasons that do not fall into these three categories.[35]

Let us turn to what Westen says about a different bright-line norm, "'no' means 'no.'" Westen points out that this slogan means different things to different people. Employing speech act theory, he explains that the slogan is ambiguous. It can be a *declaration*: by uttering "no," the woman thereby brings about the state of affairs in which the man is required to stop or else be guilty of rape. But it could instead be an illocutionary act: by uttering "no," the woman is indicating something about her intention—normally, that she wants the man to stop, but in some cases, perhaps something else (such as "not yet, but keep trying") (82). Interestingly enough, Westen observes, the declarative sense can be satisfied even in cases where the woman does not subjectively want the man to stop, because by uttering the words "no" to an explicit or implicit request

35. If some version of subjectively expressed consent were recognized as an alternative type of factual consent, S would still need to satisfy the additional conditions of competence and the like in order to validly consent. The Antioch policy and similar approaches certainly do not imply that a clear "yes" is always sufficient for legal consent (for example, if this is in response to an explicit threat of violence, and the demand, "Do you want to be hurt or do you want sex?").

for sex, the woman actually changes the legal status of the man's subsequent act, whatever her intentions.

This analysis is parallel to my analysis above of "only 'yes' means 'yes.'" In both situations, the actus reus of rape or sexual assault can be defined in terms of explicit words or expressive conduct by S: "yes" grants legal consent (at least in certain circumstances), and "no" denies it. And in each case, this legal conclusion can follow without regard to S's attitudinal consent. This is a perfectly defensible method of analysis, if one rejects Westen's belief that attitudinal consent (in his sense) must always be the cornerstone of legally valid consent. As I have explained, there is at least as much reason to reject that belief as to endorse it and then struggle to fit these two approaches within Westen's other categories of constructive (fictional) consent or of insufficient competence, knowledge, or freedom to legally consent.

C. Prescriptive Consent

In his discussion of prescriptive consent, Westen argues that three additional conditions are needed in order to transform mere factual consent into legally valid consent—specific conditions of freedom, knowledge, and competence. I will review some of the valuable analysis that he provides here, but will defer until later a discussion of his most controversial claims about the (in)significance of force and resistance requirements.

Addressing the "freedom" condition, Westen offers a useful analysis of different possible conceptions of "wrongful threats."[36] Because factual consent is only a

36. More precisely, Westen draws a distinction between two kinds of (what he calls) "wrongful force"—(1) wrongful threats, which are conditional and pressure S to acquiesce in order to avoid the coercer making her situation worse; and (2) wrongful oppression, which is unconditional and causes S to believe that under the circumstances, acquiescence is preferable to nonacquiescence. An example of the latter is where A makes S a captive and terrorizes her over a period of time in such a way that eventually she prefers having sex with him to the alternatives, although she does not do so in response to a threat (184). This is an illuminating conceptual distinction; however, the first category is far more important in

minimal requirement and does not by itself exclude as "nonconsensual" even the most extreme threats of violence, we need some additional principles to distinguish such threats from relatively innocuous, noncriminal threats such as a threat to break off a relationship. As Westen points out, neither a predictive baseline nor a no-worsening baseline is adequate: an actor might condition sex with S on a threat not to help save S's child, but we might still consider the threat illicit (182). Instead, Westen proposes a normative baseline: a threat is wrongful if it would leave S "in a worsened position as measured by the worst position in which the criminal offense at issue allows a person to leave another as a result of the latter's refusal to acquiesce to x" (183; italics omitted). Alas, this proposal seems to beg the question; for what we are looking for is a substantive account of what that "worst position" is, or should be. (A jurisdiction could choose a predictive baseline, or a no-worsening baseline, or a baseline of "the worst position in which that jurisdiction's laws otherwise permit a person to leave another" (182, emphasis omitted),[37] or something else.) If Westen's point is that jurisdictions differ in the approaches they take here, that would be worth emphasizing; and he might also offer advice about the policies and principles served by the respective different approaches.

Westen then distinguishes, and excludes from the category of "wrongful force," instances of *compulsion*, where A overpowers S when S either is not in a position to make any decision (for example, she is asleep or unconscious) or when S is unable to prevent A from accomplishing intercourse (185). In such a case, A brings about intercourse without any act of will on S's part. Now Westen's usage here is rather artificial: he concedes that compulsion is an instance of force "broadly speaking" (185), but it seems more accurate to say that his exclusion of compulsion from "force" is using the latter term very

practice.

37. This is Wertheimer's proposal, which Westen rejects (182). See Alan Wertheimer, Coercion 217-21 (1987).

narrowly indeed.[38] Also, the term "compulsion" usually connotes the use of physical force in order to overcome S, contrary to her desires; but Westen also wishes to use the term in cases when S invites or desires A's acts of "compulsion." (A more accurate phrase might be "overwhelming physical strength."[39]) Nevertheless, terminology aside, Westen does offer a plausible reason for the distinction: S could (on exceedingly rare occasions, he should add!) actually subjectively welcome compulsion, so even if she does not have power to prevent A's acts, she might legally consent to them.[40]

Westen's analysis of compulsion is subtle but important. For it also helps explain why, during acts of intercourse, when commonly one participant is physically unable (for brief periods of time) to prevent penetration, we need not be in the awkward situation of first analyzing the interaction as presumptively unjustifiable compulsion and then explaining this away if but only if it is an instance of advanced consent. (This scenario of acquiescence to compulsion is even more common in acts of sexual contact short of intercourse.) For in such cases, the participants might not have considered and explicitly acquiesced to the acts in advance, yet it would clearly be incorrect to conclude that the compulsion makes the act rape, if S welcomed the compulsion.[41]

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38. In another respect, however, Westen uses "force" extremely broadly, as any form of pressure on S's choice, as we shall see.

39. Westen, supra note 5, at 350.

40. Here, Westen imagines a (significant!) variation of the famous *Morgan* case in which the woman's husband was telling the truth: she really did welcome the acts of the airmen in surprising her in bed, holding her down, and successfully having intercourse with her. DPP v. Morgan, [1975] 2 W.L.R. 913, discussed at 186. A more common and credible example of his point would be where a woman agrees with her partner to be passive in a type of rough sexual intercourse such that she could not prevent intercourse even if she later wanted to.

41. But the question remains: should we distinguish "wrongful" from legitimate compulsion, a distinction we do draw with threats? Or are compulsion and threats radically different, as Westen implies? With compulsion, S has no power to prevent A's acts. With threats, S does have this power, but her choice is not legally "free" in those instances where the threat is wrongful. So with threats, when S gives factual consent, this might or might not be legal consent. But with compulsion, Westen seems to say, *if* this is one of the unusual cases in which S

Westen's analysis of the "knowledge" requirement is also enlightening. Fraud, he points out, undermines legal consent "by . . . misleading S into believing that subjective acquiesce[nce] to x is more beneficial than it really is" (188).[42] And he provides an excellent analysis of the well-known case, *Boro v. Superior Court*.[43] In *Boro*, the defendant pretended to be a doctor and duped the highly gullible victim into believing that she was suffering a fatal disease which could only be cured either by sleeping with him or by undergoing painful and expensive surgery. The court reluctantly concluded that the defendant did not commit rape because the defendant's fraud merely misrepresented the future benefits of his action. Westen cogently critiques the state court's analysis of the case solely in terms of fraud:

> In reality, . . . the harm Boro inflicted on Ms. R is better classified as . . . sexual intercourse by "force" or "threat." After all, Boro did not simply mislead Ms. R regarding the future benefits of having sexual intercourse; rather, he instilled fear in her by causing her to believe that her position had conditionally so changed for the worse that she was induced, illicitly, to acquiesce to sexual intercourse that she would otherwise have eschewed. (189)

Westen concludes that when fraud induces acquiescence, the fraud vitiates consent "if *S* is induced by *A* or a third person to acquiesce to *x* as a result of such false beliefs regarding *A* or *x* . . . that preclude a person who relies upon them from being able to decide whether engaging in *x* with *A* is truly in his or her interests" (189). Unfortunately, this is more an analytical placeholder than

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gives factual consent, this will always be legal consent, too (unless her knowledge or competence is insufficient).

I believe that Westen is correct here: if S welcomes compulsion in a context where A does not at the same time threaten a worse alternative, there seems no basis for describing the compulsion as wrongful.

42. This passage contains one of a significant number of typographical errors in the book. Presumably these will be corrected in a subsequent printing.

43. 210 Cal. Rptr. 122 (1985).

a usable criterion. It does not resolve whether lying, or misleading statements, or mere omissions, can suffice; nor whether the requisite false beliefs include not only such compelling examples as a belief that A does not have AIDS, but also less compelling ones, such as a belief that A is unmarried, or that A truly loves S, and the like.

Finally, Westen persuasively argues, against objections, that *competence* is a third condition of prescriptive consent, independent of the other two conditions (189). Young children, he points out, can be freed from pressures and provided specific information, but their acquiescence is still legally insufficient for legal consent, because "they are too young to be able to assess their long-term interests"(191); and the same may be true of adults whose judgment is impaired by intoxicants or mental disabilities.

D. Prospective and Retrospective Consent

One of the most fascinating chapters in the book concerns the legal validity of consent that is given not contemporaneously with x, but either prospectively or retrospectively. As Westen explains, Anglo-American law strongly privileges contemporaneous assessments, but sometimes does recognize noncontemporaneous assessments, though it does so much more frequently for prospective than for retrospective consent (248).

With respect to prospective consent, Westen draws an important distinction between cases in which S will later be incapable of consent (e.g., where S executes a living will, or where S consents to surgery during which S will be unconscious) and cases in which S will later be capable of consent.[44] The latter category includes the classic story of

44. Westen says that that the rationale for allowing prospective consent when S will later be incapable of consent is that this will enhance S's overall well-being (250). This explanation seems too crude. Suppose S decides in a living will not to permit extraordinary efforts to keep him alive. His rationale might be to save his family expense or emotional trauma; to be legitimate, these reasons need not be understood as contributing to S's overall well-being.

Odysseus and the Sirens: Odysseus instructs his crew to tie him to the mast and to ignore his later pleas to be untied, so that he can hear the Sirens but not succumb to their deadly entreaties. It also includes cases such as a timid skydiver prospectively requesting to be pushed out the door over the objection he knows he will raise at the time. In this category of cases, Westen explains, the actor's prospective consent, in order to be valid, must be irrevocable. Moreover, this category includes both reciprocal agreements (such as plea bargains and commercial contracts) and unilateral decisions to give up rights in order to protect one's own interests. Westen points out that jurisdictions are legitimately more reluctant to permit irrevocable prospective consent when the commitment is nonreciprocal rather than reciprocal (252).[45]

The proper analysis of *retrospective* consent, Westen observes, is especially difficult to discern. Consider three of Westen's examples. First, suppose S1 and A1 are lovers. One night, S1 awakes to discover that A1 is (without any prior agreement) having sexual intercourse with her. Suppose she immediately embraces him, saying "This is nice—we should do it this way again" (254). Second, Westen recalls the famous scene from *Gone with the Wind*, in which Rhett Buttler seizes his wife Scarlett O'Hara during an argument and carries her struggling up to the bedroom. In the morning, she is full of love for Rhett. Westen points out that without regard to whether the sexual intercourse that we can assume occurred was consensual, Scarlett clearly did not factually consent at the time to the physical assault of being carried up the stairs. Third (and here Westen addresses an example from Joel Feinberg), suppose S3 is violently attacked by A3, who is

45. See 252-53:

> Significantly, jurisdictions tend to [permit irrevocable nonreciprocal commitments] only with respect to subjects who reasonably believe beforehand that, though they may retain some competence to assess their own interests by the time of the event, their competence at that time will be substantially diminished, whether because of fear . . . , psychological pressure . . . , or other perceptual impairment . . . .

then a stranger. She presses rape charges. But she gradually falls in love with him, drops charges, and concludes that if she had known him as well then as she knows him now, she would have consented (255). We might be inclined to deny that a harm has been done to S1, to Scarlett (with respect to being carried, while struggling, up the stairs), or (most controversially) to S3. Such cases, Westen explains, demonstrate the paradoxical quality of retrospective consent.

In the third example, Westen persuasively argues, the retrospective feelings of S3 do not render the initial act harmless; rather, although S3 now forgives A3, she may still feel she was initially harmed. Perhaps she would have acquiesced to what he did given what she now knows, but this doesn't mean she did acquiesce (256). On the other hand, Westen believes that the first two examples do involve a form of retrospective consent that vitiates the harm to the victim. In the case of Scarlett:

> Scarlett appears not to feel assaulted at all. She seems to feel that Rhett knew better than she did what she wanted for herself. Like other people who are forced into situations they later come to embrace, Scarlett seems pleased in retrospect that Rhett disregarded her opposition, pleased that Rhett did something that she now embraces as a furthering of her interests, though she failed to realize it at the time. (256)

This is a controversial analysis. It is defensible; as Westen says, Scarlett can be analogized to a religious cult member who is later grateful that his parents deprogrammed him because they knew what was in his interests better than he did (256). But we should also bear in mind the concrete social context of this particular change of heart. Some will plausibly object that the retrospective acquiescence of a woman in Scarlett's situation should not be treated as legal consent because she cannot reliably judge what is in her own best interest, given the violent and misogynistic pressures she continues to face. (However, Westen's model can accommodate this

objection—for example, by declaring that in some instances of retrospective consent, S lacks sufficient competence, or even, and more radically, by presuming lack of competence in all such instances.)

Still, retrospective consent does pose a difficulty that contemporaneous and even prospective consent do not: with retrospective consent, there is a period of time (from the time of x to the time of the retrospective consent) during which S suffers wrongful harm (257). Yet this difficulty dissolves, according to Westen, once S gives retrospective consent. For at this point, he says,

> the conduct is something that *S* chooses for herself and, hence, something that not only is *no longer* a wrongful harm to *S* but that is no wrongful harm . . . *at all*. Thus, when Scarlett decides after the fact that she wants Rhett to have done to her what he did to her, Rhett's actions not only cease to *be* a wrong to Scarlett, but cease to *have been* a wrong to her. (257)

I'm not sure the problem can be dissolved so easily, however. Understanding consent in this tenseless sense, as "what S wants A to have done to her," simply papers over the problem. S can now be *glad* that A did something that she earlier opposed, but I don't think she can "want" or "choose" something that she cannot influence, i.e., A's past conduct. And this is not merely a linguistic point. Whether S's later wishes and attitudes should always have priority over her earlier ones in assessing her best interests or in protecting her autonomy is an open question. At the very least, ceteris paribus conditions need to be observed; obviously a later preference that is less knowledgeable, competent, or free than the earlier one might be ignored. But the problem is deeper, for it seems to implicate questions of personal identity over time. Thus, suppose the "prior" person knows that she is likely later to embrace a person who violently attacks her in a particular way (perhaps based on an earlier experience), and is likely to view the attack as not harmful at all; and suppose she hates this about herself. If this happens again, and she

does come to embrace the person, does her retrospective consent serve her overall interests? Wouldn't we want to permit her to precommit not to let this situation happen again in the future? But wouldn't such a precommitment plausibly serve her long-term interests and her autonomy?

A similar problem arises with Westen's analysis of the objection that if we recognize retrospective consent, we must recognize retrospective *non*-consent (where S acquiesced at the time of x but at some later time rejects x, such that she does not factually consent at the later time[46]). Westen points out that mens rea requirements protect A here, but he concedes that from S's perspective, retrospective non-consent "causes her to have suffered all along the primary harm that the offense of non-consent seeks to prevent" (260). Once again, however, it is fair to ask why the later views of S necessarily control what was in S's interests, and, indeed, to ask what it means to speak of "'S's interests" *simpliciter*, over and above S's interests at time one or at time two. And the answer, presumably, will depend on the time frames, and on the reasons why the later judgment might better represent S's long-term interests. S's reflection for a few days is less likely to lead to better judgment than her reflection over a few years. And the judgment of a fifty-year-old might take priority over that of his twenty-year-old predecessor, but the judgment of a ninety-year-old might not deserve priority over that of his fifty-year-old counterpart.

Westen points out that jurisdictions almost always decline to give effect to retrospective consent, for a number of plausible reasons (257).[47] But perhaps the substantive

46. I confess to some puzzlement with Westen's analysis here, given his definition of factual consent. If at a later time S views x favorably, while at the time she did not factually consent to it, how can the later view count as *actual* factual consent, since S does not, at this later point in time, have an option to acquiesce to x, a past event? This seems instead to be an instance of *hypothetical* consent, where S is answering the counterfactual question, "Would I have acquiesced to x at the time it occurred, if I then had had the feelings I now have about A?"

47. Westen thoughtfully identifies three reasons. First, A will typically still satisfy the mens rea requirement, even when S retrospectively consents. (But,

problems I have mentioned are, or at least should be, additional reasons for pause. (Westen also acknowledges that jurisdictions have good reason to insist that retrospective consent be a *settled* state of mind (262); but this acknowledgement is in tension with his rejection of a similar requirement for contemporaneous consent, as I discuss above.)

E. Constructive Consent

As noted above, Westen identifies three categories of consent that he considers "fictional," in the sense that they impute legally valid consent to S even though she fails to satisfy the standards of prescriptive consent: constructive consent, "informed" consent, and hypothetical consent. "Like all legal fictions," Westen claims, "fictions of prescriptive consent can be replaced with functionally equivalent rules that make no reference to consent" (272). I agree with Westen that these three categories differ significantly from standard prescriptive consent, but I believe that he fails to appreciate their similarities to prescriptive consent and why, in most instances, they all still deserve the name "consent," and indeed could not be adequately understood without reference to consent, at least in the broad sense of the term. In this and the next two sections, I will try to defend this objection.[48]

Westen points out, on rare occasions A might know or reasonably believe that S will subsequently retrospectively consent, so in these cases, he should not be guilty; in the other cases, however, he should be guilty only of attempt, since retrospective consent eliminates the actus reus element of nonconsensual harm.)

Second, it is often difficult to distinguish true retrospective consent from S's desire not to prosecute, or S's decision to forgive. And third, retrospective consent is especially arbitrary because it could in principle occur at any time—the day after, weeks later, even years later—and could, whenever S changes her mind about whether she has experienced harm, repeatedly transform vitiated harm into legally recognized harm and back again.

48. Westen does acknowledge that the fictions serve a function: the three types possess common features, and "further some of the same values of personal agency that underlie acts of prescriptive consent" (272). Still, he underemphasizes or loses sight of this point in his later analysis, as we shall see.

Let us begin with constructive consent—a rule of law that, according to Westen, does not really depend on consent at all, yet is framed in terms of consent. (Sometimes, he points out, the overbroad term "implied consent" is used for this idea.[49]) One of Westen's example is wonderfully colorful: the "Fastidious Football Fan" likes to watch games but hates any physical contact with other fans, and publicly so states while in the stands. Nevertheless, the law will deem him to consent to such contacts (322); indeed, remarkably, Westen discovers an explicit Delaware criminal statute that so provides.[50] As another example, a jurisdiction that requires drivers suspected of drunk driving to give blood alcohol tests might justify this as based on the driver's "implied consent" or "constructive consent" to the test (277). Even if it were clear that a particular driver objected to this policy, the policy might be upheld based on this "fictional" rationale.

Westen correctly asserts that applying a consensual rationale in these circumstances stretches that rationale beyond the rationale for prescriptive consent, and surely cannot depend on the mere fact that the driver engaged in some type of voluntary act. But he also acknowledges that "the principle that underlies rules regarding compulsory blood-alcohol testing shares a family resemblance to the principle that underlies defenses of prescriptive consent" (278-79). For the driver "voluntarily participated in a social practice [of driving] in the expectation of benefiting from it . . . the benefits of which depend upon the willingness of participants to make certain personal sacrifices," including

49. Westen helpfully observes that "implied consent" can mean either "imputed (or constructive) consent" or consent implied in fact. (This ambiguity causes confusion in tort law, as well.) The latter type of consent simply refers to a subset of prescriptive expressive consent, where S employs words or language that, as conventionally understood, indirectly imply acquiescence—for example, a patient says "start the anesthesia," implying that he is willing to begin the procedure of having his tooth pulled (274).

50. "Any person who enters the presence of other people consents to the normal physical contacts incident to such presence." Del. Code Ann. tit. 11, § 451 (1999), discussed at 322.

obeying traffic rules and accepting blood-alcohol tests when drunk driving is suspected (278).

Still, Westen treats prescriptive consent to an act x of sexual intercourse as a more fundamental and more genuine form of consent than constructive consent to a social activity. In the latter case, although S consents to the package, he does not consent to each of its elements; he might prefer to be able to drive without being subject to drunk-driving tests, or (in the case of the Fastidious Fan) to watch sporting events without any risk of physical contact from fellow fans.

But I think the contrast is overstated. After all, factual consent to x, which is a precondition of actual (rather than imputed) prescriptive consent, itself includes conditional preference; and yet conditional preference, like constructive consent, involves S's consenting to a package but not to each of the package's elements. That is, when S conditionally prefers x, a state of affairs including sex with A, over y, a state of affairs excluding sex with A but including some detriment that S would prefer to avoid, she might consent to x quite reluctantly, simply to avoid that detriment. (Suppose S consents to sex only to avoid A breaking off the relationship.)

Moreover, in a surprisingly wide range of cases, sexual contacts are better understood as instances of constructive consent and not as instances of the narrower idea of prescriptive consent. If S and A enthusiastically kiss at time T1, and A unilaterally kisses S at time T2, only moments later, this will be treated as constructive consent, even if S then subjectively objects; but it will not be treated as constructive consent if T2 occurs after they have broken up, or if it occurs a year later (A and S having never developed a relationship), and so forth. By the same token, if A unilaterally follows the kiss at T1 with a slightly more intimate gesture moments later, that, too, will most likely fall within constructive consent;[51] but the same is not true

51. But this might not be true in a jurisdiction or institution strictly applying the "only 'yes' means 'yes'" approach to *any* "escalation" of sexual intimacy (e.g., the rules that Antioch college applies).

if A unilaterally follows the kiss with an aggressive act of sexual penetration. Complex social conventions are very important here in determining what forms of sexual contact are considered acceptable instances of constructive consent, even if they are not instances of factual consent.

And finally, I think we tend to assume too readily that what S consents to is precisely x (say, the act of sexual intercourse). Quite often, what S is really consenting to is a package including x, but not to x itself. Of course, all cases of conditional preference involve consent only to a package. But even some cases of unconditional preference might best be understood, not as consent precisely to x, but as consent to what x will facilitate, or consent to a physical act very similar to x. Thus, if S sleeps with A because she thinks this will help maintain a relationship (but without any threat by A to cut off the relationship if she does not), while regretting that she has to have sex on this occasion, it seems that she is consenting to the package including x, but not unconditionally consenting to x itself. Or, if she agrees to sex with a longtime partner, believing that this will involve her being more active and aggressive than A (which is their usual pattern), but on this occasion A surprises her by taking a more active role, we might conclude that she didn't expect or consent to precisely that physical interaction, though after the fact, she has no complaint. Again, in order to characterize this as an instance of legal consent, we might need to rely on constructive consent (or at least retrospective consent).[52]

Whether we view a particular instance of constructive consent as essentially dissimilar from prescriptive consent, or instead as having a close family resemblance, does matter. Consider a doctrine often conceptualized as "implied" or constructive consent: the traditional marital exemption from rape, which deemed a married woman to consent to acts of violence by her husband, even if she did not satisfy the criteria for consent that would have applied

52. Westen does recognize some difficulties in determining the requisite specificity of "x" (see 195-201), but I believe that these problems are more pervasive than he suggests.

had she not been married to him. The exemption, Westen points out, still survives in some form in many jurisdictions (275). Westen claims that a jurisdiction can frame the marital exemption in terms of actus reus without reference to consent, by simply excluding married women from eligible victims; or it can invoke a fiction of prescriptive consent (275-76). But I believe that the choice of frame is significant: by invoking the "fiction" of *consent*, and explicitly deeming the married woman to consent, the jurisdiction is asserting two things: first, that her situation is normatively equivalent to that of a woman who actually consents (thus, the imputation) insofar as both count as legal consent; and second, that the reason for this normative equivalence is a family resemblance between the cases, i.e., a set of justifying principles that are at least broadly similar and that fall within *some* plausible, generic conception of consent.

To be sure, Westen is entirely correct in pointing out that the marital exemption does not rely on actual proof that the woman factually (prospectively) consents, in either the attitudinal or expressive sense (323). Accordingly, he is also correct that one cannot persuasively reject the marital exemption merely on the ground that most married woman do not actually factually consent in either sense to acts of violence that would otherwise be rape. But I think he misses part of the traditional rationale for the exemption, which presumably was to consider a woman's decision to marry as a voluntary waiver of a wide array of rights she would otherwise have, in deference to her husband's interests. Of course, this is not a rationale that we consider legitimate today. But it is indeed a type of consensual rationale, and this helps explain why treating the marital exemption as an aspect of (rather than a completely arbitrary "fiction" of) consent once seemed sensible.

Westen also notes a fallacious argument that some courts employ to reject the marital exemption—the argument that one can discredit the doctrine as a valid form of legal consent simply by showing that it is a fiction of prescriptive consent. Rather, Westen explains, courts

must show that this is an *unacceptable* fiction, unlike, say, the Delaware statute that treats a person as consenting to the minor physical contacts incident to his entering the presence of others (325). This is an important point. Instances of constructive consent are much more prevalent than is generally realized, as Westen's and my own examples show. But the problem has received too little attention and analysis. Accordingly, courts tend to rely on ad hoc intuitions more than principle in distinguishing the situations in which criminal liability will and will not be excluded. (A very similar problem arises in tort law as well; instead of articulating criteria of assumption of risk, courts today often relegate the problem to the obscure multifactor inquiry that the "limited duty of care" category requires.[53]) My endorsement of the vague concept of "family resemblance" (a concept that Westen also acknowledges) merely points in the direction of a more promising and more principled analysis.

F. "Informed" Consent (Assumption of Risk)

Westen's second category of imputed consent is what he calls "informed consent." Here, he is discussing what courts in tort cases usually denominate assumption of risk.[54] These are cases in which S knowingly accepts a risk of x but does not factually or legally consent to x itself (280). Thus, suppose x is a harmful side-effect of surgery. If

53. See Simons, supra note 11, at 498-503.

54. In tort law, "informed consent" is more often used to describe the doctrine, whether analyzed as battery or negligence, imposing tort liability for performing a medical procedure p without obtaining the patient's adequate consent to p, in the sense that the medical practitioner does not sufficiently inform the patient of p's nature and risks. By contrast, Westen uses the phrase in a very special sense. Westen is instead considering whether S consents *to the harm x resulting from p* in either of two situations: (a) where S agrees to the medical procedure (or physical contact) p, and would agree to p even if S realized that the risk of harm x resulting from p was a certainty; (b) where S agrees to p, but would *not* agree to p if S realized that the resulting risk of x was a certainty (282). In Westen's view, (a) is a straightforward case of prescriptive consent to x, while (b) cannot be so analyzed. Rather, if (b) does not result in criminal liability, it is because S has given "informed consent" to x (or, I would say, has validly assumed the risk of x).

S agrees to surgery, and would agree to surgery even if he knew for certain that x would occur, then he prescriptively consents to x. In effect, Westen treats this as a conditional preference case: although S would surely prefer to obtain the benefits of the surgery without the side effect, he is willing to suffer the side effect to obtain the benefit, just as S might be willing to have sex with A in order to keep a relationship intact but might most prefer not to be faced with the choice. By contrast, if S agrees to surgery but is only willing to accept *a small risk* of x, not a certainty, in order to secure the benefits of the surgery, then S does not prescriptively consent to x. If his agreement is nevertheless deemed to be legally sufficient consent, it must be an instance of a different category of consent than prescriptive consent.

Moreover, Westen continues, this different category, of "informed" consent, demands a different analysis: S validly consents to a risk of x only if he has sufficient knowledge of the risk, and only if he is justified in taking the risk (283). It is not socially justifiable to engage in street fighting, so a brawler has no valid "informed consent" defense that the other fighter agreed to the fight and knew of the risks of serious injury; but it can be justifiable to engage in competitive boxing, so a boxer indeed has a valid defense that the other boxer knew of the risks of harm. The justification, according to Westen, depends on a balancing of the social benefits of the activity with the activity's risks of harm. Westen concludes:

> Ultimately, of course, rules of informed consent are legal fictions. The fiction is that because persons prescriptively acquiesce to *risks* of *x*, they also prescriptively acquiesce to *x itself*. (283)

Westen is correct to point out that the prescriptive consent and "informed consent" categories are distinct, and demand distinct analysis. But I believe that he understates the commonality between the two concepts, and exaggerates by calling assumption of risk (or "informed consent") a "fiction" of prescriptive consent.

Let me begin with three preliminary observations. First, notice an intriguing and surprising aspect of Westen's analysis here: prescriptive consent, it turns out, is a much broader concept than his initial definition might suggest. And one consequence of this broad definition of prescriptive consent is that "informed" consent need not be invoked as frequently as one might have imagined.

Specifically, Westen indicates that prescriptive consent to x does not require that S hope for or even expect x to occur. Rather, it suffices that S *would* have preferred to engage in the relevant act had S believed that x was certain to occur (even if in fact, when she decided in favor of the act, she believed the probability of x to be much less than a certainty). For example, if S would prefer even the certainty of suffering a broken finger to not playing a game of high school football, then we need not rely on "informed" consent to preclude the criminal liability of another player, for S does give prescriptive consent (even if S believed and hoped that the injury would not occur) (281).

This is a subtle and significant point. Still, even this broader conception of prescriptive consent will very often not be instantiated in surgical situations, or even in contact sports. If x is a serious and permanent injury, of course, S would almost never prefer x (nor any package of which x was a part). And even if x is merely a physical contact or minor injury, often S would not prefer x, if the preference set is defined in a temporally limited way, as what S would choose on that single occasion.[55]

In the second place, notice that the sports and medical procedure fact patterns that Westen is addressing under "informed" consent are quite different from most of the sexual assault scenarios in which the issue of consent

55. Notice how sensitive the prescriptive consent characterization is to the time dimension. If we ask, "Would you play a game of football knowing that an unusually hard hit will happen?," the answer might be no; if we ask, "Would you play a season of football, knowing that an unusually hard hit will occur at some point during the season?," it might be yes. Indeed, if we ask, "Would you play basketball for ten seconds, knowing that you will get knocked hard to the ground?," the answer might be no; but if we ask, "Would you play a game knowing that this will occur once during the game?," the answer might be yes.

arises: S typically wants the benefits of the game, or the procedure, and regrets that any risk of harm exists, while both participants in sexual relations often unconditionally desire sex. Nevertheless, some scenarios in the sexual context are more analogous: when A places S in a threatening or merely uncomfortable choice situation, S might prefer to avoid sex yet choose it in order to avoid a greater burden or obtain a benefit (such as continuation of the relationship). Still, these last scenarios will not often involve S acquiescing to a mere *risk* that (undesired) sex will occur;[56] after all, if S expresses agreement, it is normally within A's power to complete the sexual act with acquiescing S. Thus, assumption of a mere risk of x will rarely be at issue when x is sexual intercourse or sexual assault.[57]

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56. A very different set of issues arises when it is claimed that S, by dressing provocatively, or walking alone in a city at night, or inviting a man to her room, or agreeing to an act of prostitution, is assuming the risk of rape by A. For here, S's prior conduct does not reflect or express any willingness that rape or even a risk of rape occur. Put differently, A's conduct remains a wrong to her, even if she realizes that her choices increase the risk of rape. Indeed, I believe that A's conduct would be a wrong to her, and her decision to engage in the "risky" conduct would not amount to a legal defense of consent, even if her mental state and conduct would satisfy the standards of *prescriptive* consent (i.e., even if she still would have walked alone at night or invited the man to her room had she believed it virtually certain that she would thereby suffer a sexual assault). We can account for these conclusions by saying that she is clearly entitled to freedom of action in these situations, so even if she satisfies the criteria of factual consent, she does not satisfy the condition of freedom required for legal consent. (In tort law, courts recognize a "plaintiff no-duty" rule: the victim has no duty not to walk alone at night, even if this conduct increases the risk of harm; accordingly, the victim's conduct is ignored in any comparative fault judgment. See Ellen M. Bublick, Citizen No-Duty Rules: Rape Victims and Comparative Fault, 99 Colum. L. Rev. 1413 (1999).)

57. Here are some rare examples:

(1) S is uninterested in sex tonight, and verbally agrees to sex only because her partner A insists, and only because she believes that A will very probably lose interest due to fatigue. Thus, she has acquiesced in only a small risk that A will initiate sex.

(2) A threatens S with serious violence; S contemplates resisting, but decides to acquiesce only because she thinks a passerby will very likely arrive in time to prevent A from engaging in intercourse. Thus, she knowingly takes a small risk that A will commit a rape.

But it is very doubtful that the legal validity of S's consent in these cases should turn on whether she prescriptively consents to sex (i.e., she believes sex is

Third, note that comparing consent to sexual assault with consent to risks of harm in medical procedures and in recreational or sporting activities to some extent compares apples and oranges. The criminal law defense of consent to rape or sexual assault focuses on whether S has acquiesced to the act of sexual intercourse or sexual contact, and not whether she has consented to the emotional or physical harms (or the risks of such harms) that might result from that contact. But the defense of consent to assault or battery focuses on whether S has acquiesced to the harm resulting from a medical procedure or from a physical contact (or to the risk of such harm); for it is often not disputed that S acquiesced to the procedure or the contact itself, and in any event the crime of assault typically prohibits, not merely causing a nonconsensual physical contact, but bringing about a specified physical injury. These distinct legal definitions of the prohibited actus reus help explain why the issue of assumption of risk arises much less often in sexual assault prosecutions. (Nevertheless, lack of awareness of risk can become legally relevant even in a sexual assault case if the jurisdiction finds acquiescence to sex legally inadequate because S lacks sufficient knowledge of the resulting risks from sex—for example, when A has concealed or lied about his HIV-positive condition.)

Nevertheless, although the characteristic factual contexts of assumption of risk and prescriptive consent differ, the underlying rationales for precluding criminal liability in the two categories are quite similar, and much more similar than Westen suggests. In each, minimal conditions of competence, freedom, and knowledge are required. And to a significant extent, the differences in

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certain to occur, or she would consent had she so believed) or only assumes the risk of x (she believes sex is much less probable). In the first scenario, S would likely have legally consented regardless of whether she gave prescriptive consent or instead only assumed the risk; and in the second scenario, S would undoubtedly *not* have given legal consent regardless of the type of case. It is difficult to conceive of a sexual assault case in which prescriptive consent would not be recognized but (on otherwise similar facts) assumption of risk would be recognized.

criteria are only questions of degree, merely reflecting the differences in the probability of the harm that S is willing to accept. For reasons of space, I will merely sketch out this argument.

In a case of assumption of risk, although S would not consent to a certainty of x under the circumstances, he does consent to some specified level of risk (say 5%) of x under the circumstances; and we could easily define the requisite criteria of assumption of risk analogously to the criteria of prescriptive consent. Thus, we can say:

(1) S must unconditionally or conditionally prefer a 5% risk of x, or must "indifferently" leave that choice of risk to A;

(2) perhaps the law should consider whether S has expressed that preference (see discussion of subjectively expressed consent, above), or should consider how a reasonable observer would understand the preference; and

(3) the preference must satisfy specified criteria of competence, knowledge, and freedom.

Of course, insofar as S is only willing to take this smaller risk, it is much more likely that the risk will be considered justifiable and thus that a knowing acceptance of the risk will constitute legal consent. Agreeing to a 5% chance of serious permanent injury in a wrestling match might be justifiable and qualify as legal consent, while agreeing to a 100% probability might not and might not so qualify.[58] But the *nature* of the analysis is not fundamentally different in the two contexts.

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58. When Westen speaks of "justifiability" here, presumably he is indicating that the choice fails to satisfy either the "freedom" or "competence" criterion, i.e., if the state determines that the risk is "unjustifiable," in effect it is concluding that S's acceptance of such a risk is not sufficiently "free" (given the constraints he faces) or is not sufficiently "competent" (given the very serious setback to his welfare). Alternatively, perhaps Westen is addressing pure paternalistic justifications, and would treat them outside his basic framework, as follows: even if S's choice satisfies all the usual criteria of competence, knowledge, and freedom, the state sometimes has an overriding interest in deciding what is best for S. On either view, however, justifiability can be understood similarly when S consents to x and when S consents to a risk of x.

The rationales for permitting relatively low-level risk taking include respect for autonomy and freedom of choice, notwithstanding predictable and significant risks to the welfare of the participants. In other words, with both high-level and low-level risks, a critical question in judging whether it is permissible for an actor to pose the risk, and whether another actor's knowing acceptance of the risk counts as legal consent, is whether the state has a sufficient interest in overriding the actors' preferences. What are the appropriate scope and limits of state paternalism?

Accordingly, insofar as Westen might be suggesting that a utilitarian cost-benefit judgment is required to determine the permissible range of self-endangering conduct, the suggestion is both descriptively inaccurate and normatively incomplete if not erroneous. Or, to use Westen's terminology, the concept of a risk's "social benefits" is complex; it can and should include considerations of autonomy. Prescriptive consent itself need not depend on utilitarian analysis: to a considerable extent, the law permits individuals to make autonomous choices that arguably do not serve their own best interests, or the best interests of society, and thus do not further utility (however understood). For example, actors might choose to engage in very "rough" sex that they will later regret, or to have sex in order to prolong a psychological unhealthy relationship, or to undergo cosmetic surgery that they realize will cause very painful and prolonged side-effects, or to participate in boxing or wrestling. For similar reasons, the legal validity of assumption of risk does not depend on a judgment that the choice is "reasonable" or "justifiable" in the sense of promoting social utility.[59]

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59. For further discussion of this theme, see Simons, supra note 11, at 505.

Westen discusses my own account of assumption of risk in a footnote (299-300 n.43). On that account, S assumes a risk in tort law if and only if S prefers the risky alternative that A provided to the less risky alternative that A tortiously failed to provide (and that most potential victims would prefer). So if passenger S encourages driver A to speed, S would be precluded from tort recovery on my "risk-preference" account, while passenger T who did not have or express such a preference would be entitled to recover. Westen questions whether this account

Finally, recall Westen's claim that ultimately "informed" consent rests on a legal fiction that because S consents to the risk of x, she gives prescriptive consent to x itself. Here I must disagree. Assumption of risk or "informed" consent is not a fiction at all. For no thoughtful observer believes that by factually or legally consenting to a risk of x, one necessarily factually or legally consents to x itself. Rather, the decision to treat both as legally valid forms of consent is an obvious case of the law having (good or bad) reasons for treating one form of consent the same for purposes of criminal liability as another.

Consider Westen's helpful definition of "fiction," provided in another section of the book:

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should apply to criminal law, and indeed seems to question the validity of the account in any context: he asserts that the risks that A offers to S are either unjustifiable or justifiable, so S's personal risk preference should be irrelevant.

But I believe that intermediate categories exist, where the activity offered by A is neither justified for all who encounter it, nor unjustified for all who encounter it. If the activity is skating on a very rough ice skating surface, perhaps this is wrongful to offer to most skaters, but not to those skaters who fully prefer this because it provides an extra challenge or because they have unusual skill. Put differently, traditional assumption of risk could be recharacterized as a selective no-duty rule: in the above example, A owes a duty of care to T but not to S. See Simons, supra note 11, at 500.

On the other hand, it might also be true, as Westen suggests, that the criteria for barring tort recovery on the basis of assumption of risk properly differ from the criteria for precluding criminal liability on that basis. Perhaps criminal law should ordinarily look at assumption of risk wholesale, not retail, treating A's actions as unjustifiable or justifiable, period, without regard to S's preferences. In my example, if S encourages A to speed, S can't recover in tort in states that take traditional assumption of risk seriously. But in criminal law, perhaps we should just determine whether A is criminally negligent or reckless in subjecting S to this risk, whether or not S agrees to it in some sense; for in criminal law, we are concerned with A's responsibility to the public, while in tort, we are also or instead concerned with S's right to obtain relief from A. (Even if, on the facts, A endangered only S, criminal law can legitimately be concerned with punishing A.) Indeed, precisely because traditional tort assumption of risk often involves A posing unjustifiable risks to some (but not to others who consent to the risk), A's conduct is often appropriately subject to criminal regulation, even if those others are not legally entitled to tort damages if injured.

Another illustration of the difference between tort and criminal law approaches to these issues is the treatment of injuries from illegal fights. Some states provide that even participants in illegal fights who are subject to criminal prosecution are not subject to tort liability, because of the choice of the victim to participate.

> A fiction is a misrepresentation, a statement of something that, on its own premises, is necessarily false. In expressing a legal fiction, a speaker consciously or unconsciously refers to the absence of a certain fact as the occurrence of that very fact. (292)

In this sense, assumption of risk is hardly a fiction. It is a straightforward idea, easily understood. And its definition and analysis can be perfectly parallel to the definition and analysis of prescriptive consent.[60]

G. Hypothetical Consent

Westen describes hypothetical consent as a category of imputed consent in which "*S would* have prescriptively consented to *x* or to a risk of *x if S* had had the opportunity, which *S* did not" (284). He points out that the idea is used, though somewhat differently, both in moral and political theory, and in criminal law. In political theory, consent "is at most a conceptual device for *formulating* new criminal offenses, not an interpretive device for *giving meaning* to the term 'consent' under existing offenses" (285). And Westen nicely summarizes the precise assumptions of criminal law's version of the concept as applied to a subject who might have once been competent but at the time of x is not.[61]

Westen explains that medical treatment of unconscious or incompetent patients is often justified by this type of hypothetical consent, which (unfortunately) is frequently identified by the unhelpful label "implied consent." The difficult questions here are when an

60. Westen does acknowledge that both assumption of risk and prescriptive consent rules enhance S's autonomy by immunizing A from criminal liability (284). This recognition is hard to reconcile with his assertion that assumption of risk is a fiction.

61. The assumptions include: considering everything known about S including her distinct values and idiosyncrasies; imagining that for a brief moment, S regains her competence (or gains new competence) and decides how she wishes to be treated when her incompetence reoccurs; and supposing that S has the benefit of the information about her condition that those responsible for her welfare now have (285).

advanced directive not to treat will negate hypothetical consent, and what type of presumptions should be employed, e.g., in favor of life-saving treatment.

Hypothetical consent is, of course, distinct from actual consent. As Ronald Dworkin observed in the context of political justification, "[A] counterfactual consent is not some pale form of consent. It is no consent at all."[62] And one might therefore expect Westen to emphasize the fictional and misleading nature of hypothetical consent. Interestingly enough, he does not. In response to others' objection that hypothetical consent is a dangerous legal fiction, Westen argues that it is indeed a fiction, but it need not be a dangerous or misleading one. Westen acknowledges that determining hypothetical consent requires a counterfactual inquiry that is sometimes difficult to answer. Nevertheless, "a counterfactual statement is not a fiction because it is not invariably false, and it does not refer to a thing by anything other than what it is, namely, a counterfactual" (292). What is fictional about hypothetical consent, Westen continues, is that it invokes counterfactual facts that plausibly are true of S (that she would have consented) in order to attribute to S facts that could not possibly be true (that S actually did give prescriptive consent) (293). But this is not a dangerous fiction, Westen believes, insofar as it is not misleading. And there is indeed widespread recognition that incompetent and unconscious persons do not actually choose medical treatment for themselves.

I largely agree with Westen's analysis here, but I would give greater emphasis to the value of at least certain legal fictions. One of the reasons that this particular fiction is not misleading is that it is an appropriate, persuasive analogy. To be sure, even a completely arbitrary fiction need not be misleading. If we decided to call A's justifiable self-defense against S an instance of S's "consent to defensive force," and if everyone understood that the new label was merely that, then the fiction would not be

62. R.M. Dworkin, A Matter of Principle 278 (1985).

misleading. But it would also be pointless. And the legal fictions of consent that Westen identifies do have a point: to identify different types of consensual behavior that deserve equivalent legal treatment.

Westen does recognize that fictions of Y can be beneficial in the way I have suggested, by revealing the underlying values that Y and the fiction of Y have in common. He indicates that the fiction of hypothetical consent is valuable because it "convey[s] what the decision regarding [an incompetent patient] shares with decisions regarding competent patients on life support, namely, that both are entitled to be treated as much as possible as agents of their own well-being" (293). Westen's acknowledgement has wider significance: in most of the imputed consent contexts that he addresses, the argument against criminal liability rests on similar values of respecting S's autonomy and agency, and protecting A from criminal sanction when his actions demonstrate such respect.[63]

III. THE CONTROVERSIAL CLAIMS

Perhaps the most striking and provocative claims in the book are these (related) assertions:

(1) A force requirement is largely coextensive with a simple non-consent requirement. Accordingly, force is essentially a gratuitous concept, and the controversy

63. In his conclusion to the imputed consent chapter, Westen wonders why states do not use direct legislative language, rather than fictions of consent, to address constructive, informed, and hypothetical consent; and he offers a proposed statute that would embody this direct approach. In his view, the direct approach would lead to a narrower definition of non-consent than the current approach, under which courts often create fictions of non-consent to encompass these categories, in the absence of explicit statutory provisions (296).

Although I am not so sure that Westen's approach would necessarily provide a narrower definition of non-consent, it would indeed be an improvement in clarity and fair notice. In this regard, it would be similar to what we see in modern sexual assault statutes, which carefully distinguish which types of incompetence, threat, and coercion vitiate consent, and which are therefore an improvement over older, more opaque statutes that courts sometimes treated, through interpretation, as reaching very similar results.

over whether to eliminate the force requirement is based on a fundamental conceptual confusion.

(2) Resistance requirements are themselves merely logical corollaries of wrongful force and non-consent requirements, and therefore are not problematic; at least, they are no more problematic than the force and non-consent requirements to which they correspond. But for this reason, explicit resistance requirements are also gratuitous, since they are no more than a logical implication of wrongful force requirements.

Although there is a germ of truth to both claims, the claims are also misleading, for they fail to capture what is distinctive about contemporary objections to force and resistance requirements, as we shall see.

A. Force

As noted above, Westen employs the term "wrongful force" to encompass all wrongful threats that illegitimately pressure S to acquiesce in x. This is a very broad understanding of the term, for it encompasses such varied examples as a high school principal's conditioning a student's graduation on submitting to sex, or (in a jurisdiction that forbids this) a boyfriend using mere emotional pressure to induce consent.[64] It is much wider than what was undoubtedly the original meaning of the term in traditional rape statutes, namely, an immediate threat of significant physical violence.

It might be defensible to employ the term in a very specialized sense, and some jurisdictions do use the term surprisingly broadly,[65] though it certainly seems that the term "wrongful threat" would be more accurate.[66] But the

64. See Commonwealth v. Meadows, 553 A.2d 1006, 1013 (Pa. Super. Ct. 1989), discussed in Schulhofer, supra note 27, at 91-93, 121-24.

65. See 31 Pa. Cons. Stat. Ann. § 3101 (2006) (defining forcible compulsion as "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied").

66. Insofar as Westen also means to encompass the rare instance of what he calls "wrongful oppression," see supra note 36, that term could be used, when appropriate.

more important difficulty is with how Westen evaluates the legal relevance of wrongful "force," as he broadly construes the term.

Westen points out that the analysis of wrongful "force" to acquiesce can sometimes seem paradoxical. What if S subjectively consents to be pressured to subjectively acquiesce to x? (202). The answer, Westen persuasively argues, depends on the jurisdiction's particular version of legal paternalism. All jurisdictions, he notes, unconditionally prohibit some pressures on acquiescence no matter how much S welcomes them (e.g., pressuring a masochist into the choice of sex and being murdered or seriously maimed); while all only *conditionally* prohibit other types of pressures, i.e., they prohibit certain pressures only if S does not welcome them (e.g., a college wrestler legitimately employing physical force in order to induce the other wrestler into a physically vulnerable position).

But Westen's further analysis of the force requirement is more questionable. The debate over whether women are better protected by laws against force or against non-consent, he says, "rests on false conceptual premises" (208), for either "force" or "non-consent" can easily incorporate the jurisdiction's view of when pressures on subjective acquiescence are wrongful.[67] At the same time, he decries as confused the popular belief that controversial questions about force requirements can be eliminated by instead making it a crime to act without S's consent (232).[68] Westen

67. Westen mentions two exceptional cases, where he concedes that "non-consent" must be used in lieu of (or at least as part of the definition of) "force":

(1) Where A uses compulsion to achieve intercourse against S's wishes or acquiescence (for here, since compulsion that S factually consents to is not unlawful (e.g., a disabled S), we must use the language of non-consent to identify when compulsion is indeed unlawful); and

(2) Where A employs a threat, but the threat is only conditionally criminal (e.g., the state permits a threat of moderate pain such as a spanking if but only if S prescriptively consents to it) (210).

68. In his introduction, Westen refers to the debate over the best way to reform rape law between Susan Estrich (arguing for a revitalized conception of consent) and Catherine MacKinnon (arguing for prohibitions on force and rejecting the use of the concept of consent). Here, too, he objects that the

asserts that this belief is incorrect because when S has been pressured into sex, questions of force are not independent of legally valid consent; they are *constitutive* of legal consent (232). Even without an explicit force requirement, in other words, a jurisdiction would have to determine, as part of its non-consent requirement, what pressures to acquiesce are illegitimate.

Westen is correct to underscore that in many cases, force and non-consent are closely related, or even interchangeable. But he overstates the relationship. In the first place, as an historical matter, the movement in many jurisdictions from a "force" requirement to a less demanding "non-consent" requirement has actually meant a substantive change from requiring that the pressure on S take the form of a violent threat to requiring much less (e.g., the "'no' means 'no'" approach, or counting as wrongful various types of nonviolent threats such as retaliatory or coercive deprivation of legal rights or loss of certain important benefits). Of course, Westen wants to use "force" to encompass pressures other than violence, but to that extent, he misrepresents what at least some advocates mean to accomplish by replacing a "force" requirement with a broader "non-consent" requirement.

Second, Westen's approach cannot really explain the modern approaches that count A's actions as sexual assault when he does not pressure S with any type of threat yet proceeds to engage in intercourse despite S's non-acquiescence. In both the "'No' means 'no'" and "Only 'yes' means 'yes'" approaches, A need not make any explicit threat or impose any explicit type of pressure; the very point of these approaches is to recognize the woman's right to decide and to forbid A's action if she affirmatively indicates non-acquiescence, or if she has not affirmatively indicated acquiescence.

Westen does have a reply, but I think it is an unpersuasive instance of definitional fiat. If a jurisdiction

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difference between the approaches is rhetorical, not substantive, and that it is "normative confusion" to think otherwise (3).

treats "no" as "no" even in the absence of any other kind of force or pressure (such as a threat of violence, or of another detriment or of loss of a benefit), then, according to Westen, the jurisdiction is treating a man who continues to proceed with intercourse despite verbal objection as using "force" in the sense of "illegitimate pressure." For he is required to stop when she says "no"; so by continuing, he is necessarily improperly pressuring S.[69] (And the "Only 'yes' means 'yes'" approach would be analyzed similarly.)

But stretching the meaning of "force" this far is quite misleading. Even the broadest sense of "force" requires a "threat": A must put S to a choice of x or something else (call it "y") and S must submit to x in order to avoid y. Yet this often is not an apt description of the situation and of S's state of mind when she says "no" but A persists until he has had intercourse. What S wants is simply not-x, i.e., not having intercourse. To say that she has chosen to acquiesce to x in order to avoid the threat of y misrepresents the phenomenology of her state of mind concerning her submission. She need not feel that she will be made worse off if she does not submit, in order to feel violated by his persisting. To be sure, if S persistently and sincerely says "no" while A keeps proceeding, it is possible that she is submitting because of an implicit threat of something else—of violence, or of some other illegitimate burden. But she also might simply be unwilling to have sex. In short, a jurisdiction that wishes to criminalize A's conduct here should be entitled to do so even if A's conduct cannot plausibly be characterized as imposing a threat.[70]

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69. In his words:

> Some jurisdictions regard the pressures that actors bring to bear upon women to induce them to submit to sexual intercourse despite their saying "no" as wrongful pressures. Others do not. In jurisdictions that do, actors are guilty of sexual intercourse by force and without consent. In jurisdictions that do not, actors are guilty neither of using force nor of having sexual intercourse without consent. (344)

70. Nor can Westen escape this objection by characterizing the physical conduct intrinsic to the act of intercourse itself (such as penetration) as wrongful "force," for as Westen persuasively argues: "The wrongful force with which the law of rape is concerned, including wrongful force in the form of physical contact,

Interestingly enough, at the very end of the book, Westen objects to the use of "force" to describe instances of non-consent that are due, not to the actor's lack of sufficient freedom to warrant treating factual consent as legal consent, but to the actor's lack of sufficient competence or knowledge: "It would be simpler and more perspicuous to start and finish with legal consent as the controlling standard" (346). Indeed it would. But it would also be more perspicuous to treat the situation I have described, of a passive victim who submits to sex despite her opposition, as nonconsensual simply because legal consent requires the actor to treat a "no" (or even lack of a "yes") seriously, on pain of criminal liability, and not because her submission legitimately qualifies as induced by wrongful "force."

Now Westen has another possible reply: in this scenario, S has not given factual consent, so a jurisdiction can easily decide that legal consent is also lacking. But I do not believe that this response is available to him, given his view of factual consent. In this situation, jurisdictions that believe "'no' always means 'no,'" or "only 'yes' means 'yes'," want to treat A's conduct as sexual assault or rape *even if S knows that she might have an effective alternative to submitting to sex with A*—for example, pushing him away, or screaming at him, or simply walking out the door. And yet, on Westen's view, her conditional preference for submission over these alternatives means that she factually consents to sex. (I will say more about this below.) And, finally, since (as I have argued) her preference cannot plausibly be viewed as induced by a wrongful threat, the conclusion must be that she *has* given both factual and legal consent. (The only other arguments available to Westen here that might preclude considering S's factual consent to be legal consent—that S lacks "competence" to

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consists of wrongful pressure to acquiesce to the physical contact of sexual intercourse, not the physical act of sexual intercourse itself" (229). But cf. In re M.T.S., 609 A.2d 1266 (N.J. 1992) (controversially holding that the statutory "force" requirement is satisfied by the physical contact intrinsic to the act of intercourse itself).

consent, or that she is the subject of "compulsion"—are dubious on their face.[71])

Still, perhaps Westen's model could account for a jurisdiction's choice to impose criminal liability in this scenario if he did not characterize as factual consent a decision to submit to sex rather than take advantage of opportunities to avoid sex. The latter characterization, of course, directly relates to how a *resistance* requirement should be understood, and when, if ever, it is normatively acceptable. Accordingly, I turn to Westen's controversial analysis of that doctrine.

B. Resistance

Westen frames the resistance question carefully and elegantly. When A wrongfully threatens S, he presents her with three options:

> (1) to submit to an act of sexual intercourse that she abhors,
> (2) to refuse to submit and suffer the very harm, e.g., a brutal beating, with which she is wrongfully threatened, or
> (3) to resort to evasions by which she can successfully avoid both the burden of unwanted sexual intercourse and the burden of any of the threatened harms from which the statute seeks to protect her. (210)

In Westen's view, the resistance requirement in (3) is simply a logical corollary of the wrongful threat requirement in (2), in the following sense. Suppose the jurisdiction says that A's threat is wrongful (for the purposes of its rape statute) if and only if it is a threat of

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71. "Compulsion" doesn't work because Westen defines it narrowly as physical force that S is unable to prevent. In the passive victim scenario, this need not be the case.

But can Westen rely on a "soft" compulsion argument? Perhaps he can argue that legal consent is also lacking if S, while retaining some ability to prevent A from securing x, has less capacity to prevent x than the law entitles her to have. But this reformulation of the "compulsion" element seems arbitrary. The policy arguments in favor of "'No' means 'no'" or "Only 'yes' means 'yes'" need not rely on A overwhelming S's will, yet that is what any "compulsion" approach presupposes.

serious bodily injury or death. If S responds to a threat of death (2) by choosing to submit (1), when she could have chosen an evasion or form of resistance (3), what is critical is what harm she (believes that she) would have suffered if she had chosen resistance. If by resisting (3) she would have been met with serious bodily harm, then there is no duty to resist, for imposing such a duty would require her to suffer the very harm from which the rape statute protects her. But if by resisting she would only have suffered moderate or lesser bodily injury, then she has declined to choose an option that would have permitted her to avoid both unwanted sex (1) and the enumerated harm (2) from which the statute sought to protect her. Of course, one might object that a statute such as this imposes too onerous a duty to resist. But, according to Westen, this really amounts to an objection that the statute should not impose such a narrow definition of wrongful threat. So if a jurisdiction does not want to require a duty to resist if this would lead to even moderate injury, then the jurisdiction should also require, as its criterion of wrongful threat, that A not put S to the choice of intercourse and even moderate injury.

This argument has superficial appeal. If true, it would also dramatically change the way we view and argue about resistance requirements.[72] It would mean that "utmost-resistance" requirements are just as acceptable (or unacceptable) as the wrongful threat requirements that the jurisdiction imposes (212-14). It would also mean that "*no*-duty-to-resist" rules are just as defensible as the corresponding wrongful threat requirements (214-17). And it would demonstrate, on the one hand, that resistance requirements in a sense are *gratuitous*, for they need not be

72. Westen is also deliberately provocative in his description of the actual operation of the traditional "utmost-resistance" rule. He states that the rule did not really require utmost resistance: it only applied to those with capacity to resist, who did not think countermeasures futile, and who could use countermeasures without risking death or great bodily injury (212). Whether this is an accurate account of the doctrine, I leave to others who have studied the history more carefully.

specified independently of definitions of what count as wrongful threats; and on the other hand, that resistance requirements in a sense are *inevitable*, because any plausible definition of wrongful threat will only protect S against certain types of harm, and thus will in effect require a woman to "resist" if in doing so she can avoid that type of harm. For example, suppose it is a wrongful threat to induce acquiescence by any threat of physical harm, but not by a threat to take an inexpensive piece of property. If A wrongfully threatens to slap S if she does not have sex, and if she knows she could easily walk out the door to safety but also realizes that this would cause A never to return S's inexpensive ring, her submitting to sex instead would satisfy legal consent.

But the logical corollary argument is inadequate and in an important respect fallacious. Let me explain why, with the following four points.[73]

1. An initial issue is terminological: what should count as resistance? Should it include anything that S could do or say to prevent x (running away, screaming, pressing a car alarm, merely saying "no"), or only S's efforts, by physical confrontation, to prevent x (pushing A away, fighting back)? Westen defines resistance in the first, extremely broad way. This is problematic for some of the same reasons that defining "force" extremely broadly is problematic. Among other things, it means that his criticism of others' views of resistance is sometimes misplaced; while his criticism is apt if they are employing the broad view (and indeed, the phrase "verbal resistance"

73. I am also unpersuaded by Westen's criticism of the argument that resistance can at least give notice of non-consent to A (217-19). Even if one accepts his "corollary" view (that resistance risking harm up to a certain magnitude is required if a threat of harm of that corresponding magnitude is required), the notice argument has at least some weight. It is sometimes difficult for A to know why S submitted, or whether she honestly felt threatened by A; if she resists, these things are easier to know. The law would not be "contradicting itself" (cf. 218) in wanting especially clear proof of threats, or of S's honest belief that she has been threatened, or of A's realization that S so believes, though of course there are also very strong reasons not to elevate this slight evidentiary benefit to a legal requirement.

is sometimes employed in the rape debate), it is not apt if, as is sometimes the case, they are employing the narrower view.[74] Good pragmatic reasons also support the narrower interpretation. Whether a woman must say "no" or else be deemed to have factually consented is an important and controversial question. Because it is controversial, while the lack of a stringent duty to resist physically is not, it would make sense to restrict the term "resistance" to physical steps taken by the victim to ward off the man's advances.

2. The second point is this. The logical corollary argument is simply false: it reflects an understanding of the duty to resist that a jurisdiction might have very good reason to reject, and it fails to capture features of a duty to resist that a jurisdiction might have very good reason to find problematic. Specifically, a jurisdiction might not consider legally equivalent the situation in which S "resists" (in the broad sense) and thereby expects to suffer harm Y, and the situation in which S submits to sex in order to avoid the wrongful threat of a harm Z that is claimed to be equivalent to Y. One reason it might not consider the situations legally equivalent is because a meaningful comparison of harms Y and Z is often quite difficult. For Westen's very broad definitions of force and resistance create a serious incommensurability problem. Suppose it is wrongful force for A to threaten to give S a lower grade than she deserves, or to deny her graduation from high school, if she will not have sex with him. And suppose S knows she could "resist" and prevent sex by reporting A to the school board, or by slapping A as he initiates sexual activity. I have no idea whether the state's imposition of a duty on A not to obtain sex by wrongful "force" threatening these kinds of harms (lower grade, nongraduation) has as its corollary that S must take these preventive actions despite the harms S will thereby suffer (the burdens of having to report A, or of having to

74. A number of states refer to duties, or absence of duties, to "physically" resist. See 214-17.

physically strike A). Which harms are greater? Perhaps the rough idea is that S is required to employ forms of resistance that are less burdensome for her to undertake than the burden that she would suffer if A were to make good his wrongful threat; but the legislative definition of wrongful threats hardly clarifies what counts as a lesser burden.[75]

There is a second, more fundamental reason why a jurisdiction might choose not to impose on S a duty to resist if this would entail her suffering harm Y1, even in cases where Y1 *can* more easily be compared with the harm Y2 that A is forbidden from threatening to impose in order to induce her acquiescence. (Suppose a case in which Y2 is physical harm or violence threatened by A, and Y1 is physical harm or violence that S expects to suffer if she physically resists.) The reason is this: imposing a duty to resist, insofar as it demands affirmative action by S at a moment when she is under imminent violent threat, is requiring something quite extraordinary of a crime victim. Even a jurisdiction that requires a threat of a relatively high degree of violence in order for A's threat to be wrongful might also understandably choose not to require any affirmative conduct by S to resist the threat, or at least, no affirmative conduct by which she might expect to suffer any injury. (Presumably this is one of the reasons why rape reformers have tried to abolish the resistance requirement.[76])

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75. Or consider the facts of the famous case of State v. Rusk, 424 A.2d 720 (Md. 1981). In *Rusk*, a jury might have concluded that the victim was implicitly threatened with physical harm when Rusk grabbed her car keys and insisted on her coming up to his apartment. But Pat did have another option: to run away into the unfamiliar neighborhood at night. If she believed that fleeing would expose her to an equivalent risk of harm from an unknown stranger, does that count as legally equivalent to the threat of harm from Rusk? Alternatively, suppose she conceded that the risk of physical harm from fleeing was much less than the risk of such harm from staying with Rusk; rather, the main risk from fleeing was simply that she would be lost, fearful and disoriented in an unfamiliar place at night, and would have great difficulty getting home. Is this a lesser, equivalent, or greater burden than what she expects to suffer if she does not flee (and does not submit to sex)?

76. Another reason, to be sure, is undoubtedly a desire to reduce the requisite

Thus, suppose a jurisdiction provides that wrongful force means threats of physical injury. The jurisdiction might at the same time plausibly conclude that S need not engage in any form of physical resistance, even if she could avoid any physical injury to herself by shoving A and running away, or by stabbing A with a knife. Even a jurisdiction that limits "wrongful force" to threats of *serious* physical injury or death might conclude that requiring S to resist if she knows she could do so by suffering "only" less-than-serious injury would place too great an obligation on a victim—"too great" in terms of what can realistically be expected in such a stressful and extraordinary circumstance, and in terms of what can legitimately be expected of a person in order to avoid an otherwise coercive choice. (Indeed, in cases where she can protect herself only by causing serious injury to A, but where she does not expect to suffer any harm if she chooses to harm A, it would certainly be understandable if a jurisdiction decided both (1) to permit S to be merciful rather than stand on her right to self-defense, and also (2) not to treat the merciful choice as precluding a rape conviction.) Or, at the other end of the spectrum, suppose a jurisdiction defines wrongful force as any threat of aggressive physical contact. And suppose the following case: A threatens to push S onto a bed if she does not submit; S believes that slapping the man hard on the face is the only sure way to stop him; but she is also sure (given what she knows about his fearful response to such an act) that he will not then retaliate with violence. Why should she be required to resort to even a mild form of violence?

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level of violence that A must threaten in order for his threat to be wrongful, or a desire to eliminate a threat requirement from rape law altogether. To this extent, Westen's "corollary" approach is a valuable reminder of the possible (but not necessary) relationship between force and resistance requirements. Still, even a jurisdiction that abolishes the threat requirement might want to impose *aggravated* punishment on sexual assault accomplished by threat of serious violence, and it still should be an open question and not merely a question of logical relevance whether a duty to resist should also be required for conviction of the aggravated crime, even if S knows that by resisting she risks only less-than-serious violence.

In this and other cases, a jurisdiction might have good reasons for rejecting any duty to resist. And it might conclude that the evil of having to resist and thereby suffer (or even inflict) a particular harm is a qualitatively distinct type of harm or wrong from the evil of directly suffering an otherwise similar harm from A as a result of A making good his threat.[77]

An analogy is a robbery victim who could resist and thereby expect minor force (less than what the robber is threatening) in order to avert the harm. We obviously would not view the victim as consenting to the robbery, even in a minimal, factual sense, simply because he had this opportunity and failed to choose it; nor would a duty to resist in this way logically follow from a statutory requirement that the robbery be accompanied by a threat of greater-than-minor force.

Accordingly, even if we understand resistance broadly, as encompassing acts other than physical resistance against A's advances, the factual consent choice set should not be understood to encompass S's option of taking affirmative action to resist A. And this exclusion of resistance from the conditional preference choice set is consistent with Westen's general treatment of factual consent: just as he sensibly builds some minimal standards of competence and knowledge into factual consent, so he should build in some minimal constraints on the choice set

77. Indeed, the failure of the "logical corollary" argument also means that, in theory, a jurisdiction could choose the *converse* approach from the one we have been considering: a jurisdiction might decide to impose a *more* stringent duty to resist than the corresponding definition of wrongful threat entails. In cases of physical violence, to be sure, this is exceedingly unlikely. If aggravated rape requires A to threaten S with moderate or serious physical injury, it is difficult to see how the jurisdiction could plausibly justify requiring S to resist if this would cause her to risk moderate physical injury or worse. Still, such a jurisdiction would not be literally "contradicting itself," as Westen argues (219). For imagine a much weaker threat requirement: criminalizing the threat of any unwanted emotional harm, including the threat of social embarrassment. And suppose the state also requires S to actively resist by loudly proclaiming "no" even in a situation (such as proximity to the public) where this will cause S significant embarrassment, in order to ensure that A has notice of nonacquiescence or that the proof of S's nonacquiescence is clear. This might still be bad policy, but it would not be self-contradictory.

(at least, insofar as many jurisdictions would indeed recognize such constraints).

It is especially important to exclude S's option of affirmative action from the choice set when A's conduct involves threats other than violence, or involves persistence in the face of a clear "no." Otherwise, one is compelled to draw the awkward and implausible conclusion that when S persistently and vehemently says "no" to A's advances but ultimately submits, she has factually consented simply because she could have chosen another option that would be effective (such as striking A or screaming). Westen indeed draws that conclusion:

> If [S] . . . appears to realize that saying "no" will not change her partner's mind and to be consciously refraining from resorting to more emphatic forms of resistance at her disposal that might succeed, she . . . factually "consents" to sexual intercourse in mind as well as in expression, because she subjectively prefers sexual intercourse to the alternatives to which she believes she could resort, and she makes her preference manifest. (87)[78]

3. At the same time, if a jurisdiction decides as a matter of policy to impose a duty to resist, it can easily do so, by explicitly incorporating such a duty within the definition of legal consent. For example: "S shall be deemed

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78. To be sure, Westen's approach can still criminalize A's conduct in this scenario, but I believe that he must frame this as an instance of factual consent failing to satisfy either the jurisdiction's requirement of sufficient competence, or its requirement of sufficient freedom, for legal consent. Or we would need a separate exception to the effect that certain forms of resistance are not required, even if the overall factual consent/legal consent framework would otherwise treat the case as one of legal consent. Either solution seems ad hoc. Would it not be more perspicuous to exclude physical resistance in the first instance from the choice set for factual consent?

Westen does ameliorate the difficulty with his "logical corollary" approach to resistance in one important respect. He would say that S does not factually consent if in the face of a threat, and aware of an option to resist, she simply panics or is in an emotionally frozen state of mind; for she has not actually made a decision not to resist (219). Still, if she does actually decide that it is better, all things considered, not to resist, she will indeed be understood to have given factual consent.

to legally consent if she acquiesces to x, even in response to a wrongful threat, if she also (1) knows she could have prevented x by employing minor force or by employing verbal resistance and (2) knows that these methods are likely to be effective." And if the legislature means to adopt a duty to resist that is precisely coextensive with the definition of wrongful force, then it can so define element (1).[79] Among other things, this approach would have the benefit of highlighting the legislative decision to impose this special affirmative duty on a rape victim, rather than concealing the duty by articulating a general definition of wrongful force or threat and then simply assuming that the victim's duty to resist directly follows from that definition.

4. I have been considering cases in which A threatens S with physical violence, and S has some ability to resist or prevent such violence. But another important category of cases involves A actually using physical force to overpower S. In some cases, which Westen denominates "compulsion," A overpowers S completely. But how should we analyze cases in which A tries to overpower S, yet S knows that she has, or might have, the ability to avoid the harm? In this scenario, too, Westen's analysis is deficient. For in these cases, Westen must (and does) say that A factually consents to the harm, because she evidently prefers to submit to sex than to resist (229). And once again, in order to make sense of a jurisdiction's decision to criminalize such conduct, he must employ an ad hoc solution, such as characterizing S as lacking sufficient "competence" or "freedom."

79. Thus, if the legislature defines wrongful force for purposes of rape as a threat of serious bodily injury or death, then it could define (1) as any preventive means that do not expose the victim to a significant risk of serious bodily injury or death.

CONCLUSION

In concluding, I offer four suggestions or observations.

1. First, the book would have benefited from a more definitive set of conclusions, and a more detailed analysis of the criteria by which factual consent becomes legal consent.

As I concluded reading the book's complex and intricate arguments, I came away feeling that the critical focus was a bit too relentless. Not that it is easy to criticize; actually, Westen shows how difficult it is to articulate precisely what is wrong with the statutory provisions and academic arguments that he so thoughtfully and persuasively dissects. But it would have been immensely helpful if he had offered the reader a more specific model of how the problems of consent and sexual relationships should be analyzed. Perhaps in the future Westen could suggest model statutory language to address the most important issues that he analyzes here.[80] As suggested earlier, he might propose greater uniformity of usage, such as eliminating "consent" from "factual consent" and calling this "acquiescence" or something else instead.[81] Or, at least, he might suggest that legislators and courts explicitly use both the terms "factually consents" and "legally consents."[82]

Moreover, it would have been useful to spell out and analyze more fully some of the policies and principles that jurisdictions invoke in deciding which instances of factual consent qualify as legally valid consent. For example, Westen recognizes that legally valid consent requires, not just that S prefers x to the available alternatives, but that her choice of x is sufficiently "free." Saying "yes" to a stranger with a gun in order to avoid serious injury is hardly the same as saying "yes" to a partner in order to avoid his disappointment. But Westen says relatively little

80. Westen does offer a model statutory provision to simplify the treatment of imputed consent. See supra note 63.

81. Westen recognizes the option but does not pursue it (52).

82. Thus, Westen criticizes a Kansas rape statute for sometimes using the term "consent" factually and other times legally (339); but the statute's meaning would presumably be beyond doubt if it used the terms "factual" and "legal."

about how jurisdictions should analyze the difference or how they should identify the line between criminal and noncriminal behavior.[83]

To be sure, Westen is interested in providing a conceptual framework that jurisdictions with widely varying normative views would find useful. Still, it would have been beneficial to clarify why, for example, he endows "factual consent" with such minimal content and leaves so much of the controversial work to the freedom, knowledge, and competence conditions that convert factual into legal consent. It would also be helpful to understand why some issues of competence and knowledge are treated as part of factual consent, while others are part of legal consent.[84] (Perhaps this is an effort to reflect the ordinary meaning of "acquiescing" or "agreeing" to x, but I suspect it also derives from Westen's desire to invest factual consent with only a modicum of normative content.)

It would have been especially helpful if Westen had taken some of the most significant normative controversies about the proper scope of sexual assault law and explicitly stated how they should be framed. For example, although he addresses aspects of the "'No' means 'no'" and "Only 'yes'

83. For example, consider this opaque statement: "[Legal consent] does require a certain measure of freedom, namely, whatever freedom to reject sexual intercourse the society believes a woman must possess if her choice of sexual intercourse is to satisfy her legitimate interests . . ." (48).

84. Recall that some minimum conditions of competence and knowledge are part of factual consent. But why not build all such conditions in at the stage of legal consent, as he does with the condition of freedom? Alternatively, we could proceed in three rather than two steps:

1. Define factual consent very narrowly, excluding all conditions of competence, knowledge, and freedom.
2. Add all conditions of competence and knowledge required for legal consent.
3. Then add all conditions of freedom required for legal consent.

This approach would avoid the awkwardness of building an extremely minimal competence requirement into factual consent (so that, under Westen's analysis, even a three-year-old can factually consent) (see supra note 16). It would also render irrelevant the ultimately pointless distinction between fraud in the factum and in the inducement, which Westen rightly criticizes (197-99). We would not need to identify what type of "knowledge of x" is required for factual consent, and could instead focus on the genuine and ultimate issue, namely, what kinds of knowledge about x and the surrounding circumstances (including the risks and benefits of x) should be considered legally adequate for consent.

means 'yes'" approaches numerous times in the book, his analysis focuses on specific mistakes and fallacious arguments that legislators and commentators make in analyzing them, and not on how they *should* be conceptualized.

Westen skirts many of the hard questions by simply treating them as among the difficult normative questions that the jurisdiction must decide in converting factual consent into legal consent. Of course, in light of the conceptual nature of his project, it is hardly an objection that Westen declines to take a position on many of the most difficult normative questions here. But there is much more that could be said, of a conceptual nature, about the best way to understand the translation of factual consent into legal consent.

Perhaps Westen's hesitation stems from his belief that legal consent is "contestable" in ways that factual consent is not (330).[85] But the contrast seems overstated. He has shown that jurisdictions and commentators employ a great diversity of approaches to both factual consent and to legal consent. And if "contestable" means "cannot be rationally analyzed," that seems an inapt description of both factual consent and legal consent. Westen does articulate the range of considerations that are typically found relevant to legal consent.[86] I hope that he, or other scholars, will in the future subject these to more sustained analysis.

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85. Westen further claims that factual consent is constant and invariable, while legal consent adds variable elements (327). He seems to believe that "factual consent to x" means the same thing regardless of which x we are talking about; and regardless of the jurisdiction (328). But this, too, seems overstated. Westen acknowledges a variety of approaches to whether "indifference" counts as a form of factual consent, and about the requisite knowledge condition implicit in factual consent. And presumably a state's normative views about the proper scope of criminal liability could affect its definitions both of factual consent and of legal consent.

More generally, Westen seems to believe that the normative questions surrounding consent are less subject to analysis than are the conceptual questions (108). Yet again, the contrast seems overdrawn. After all, even the conceptual questions that arise in defining criteria of *factual* consent are questions we ask in order to improve the ultimate legal and normative analysis.

86. Westen mentions vulnerability to exploitation, the harm that A will cause S, the value of permitting self-regarding decisions, the social consequences and

2. The possibility of an ideal or model statutory approach raises a deeper question about Westen's project. There is some tension in the book between (1) providing a descriptive account of how ordinary people, and current sexual assault statutes, use various concepts related to consent (such as force, resistance, threat, compulsion, freedom, knowledge, and choice) and (2) providing a more idealized conceptualization of the normative phenomenon of consent to sexual relations, using terms entirely as terms of art, if necessary. We can see this tension in the basic progressive structure of factual and legal consent:

1. No factual consent.
2. Factual consent but not legal consent.
3. Legal consent = factual consent under adequate conditions of competence, knowledge, and freedom.

At times, Westen seems to suggest that the case for finding legally valid consent becomes progressively stronger as we move from step one to step two to step three (which fills in all the necessary conditions for "decriminalizing" what would otherwise be sexual assault).[87] At times, in other words, factual consent appears to have some presumptive normative weight, relative to cases in which factual consent is absent. But this claim is too strong. To be sure, cases in which a conscious victim is physically overpowered and cannot prevent that outcome might ordinarily be considered a more serious infringement of a woman's autonomy than cases in which she can make some choice, no matter how constrained. But in many instances of (1), where A acts without any factual consent, A is much less culpable or commits a much lesser wrong than in many instances of (2), where A does act with

effectiveness of criminalization, alternative ways to regulate A's conduct, and the seriousness of the criminal penalty (121).

87. See, e.g., 52 (Canada's usage of factual consent is "a healthy reminder of the normative significance of factual atttitudinal 'consent'"); 49 (contrasting a case in which a victim is overpowered despite her resistance with a case in which a victim is forced to acquiesce).

factual consent. Intercourse secured by threat of death with a woman who reluctantly gives factual consent can certainly be understood as a worse wrong than intercourse with a sleeping woman.

It appears, then, that Westen's framework is not a series of increasingly weighty normative presumptions of valid consent so much as a pragmatic instrument for clarifying concepts and reorganizing the structure of analysis. And throughout the book, Westen offers numerous examples of ways in which his general framework, and its particular subcategories, would indeed avoid serious confusion. Still, there remains some tension between the descriptive enterprise of identifying the ordinary language or legislatively intended meaning of terms such as consent, force, compulsion, and resistance, and the more prescriptive and idealized enterprise of developing concepts that perfectly suit a range of normative objectives.

3. In this review, I have suggested a number of specific problems with Westen's analysis, most importantly the following:

- The terminology of factual "consent" creates significant confusion, which Westen understates.
- The category of factual consent in which S is "indifferent" to whether x occurs is somewhat problematic, and involves only a weak sense of choice.
- Indecision might legitimately count as a fourth category of factual consent.
- The choice set over which factual consent ranges should not include options of affirmative action that the victim S could choose. Otherwise, we will be presupposing a controversially stringent duty to resist.
- The category of factual "expressive" consent should be divided into two separate categories, factual *subjectively expressed* consent and factual *observed* consent.

- The "expressive" consent category is too crude, because it does not permit a jurisdiction to choose a mens rea other than negligence with respect to S's attitudinal consent.
- More generally, although a jurisdiction might indeed wish to characterize "expressive" consent as pertaining to mens rea, it also might have reason to characterize "expressive" consent (or some variant of "expressive" consent) as constitutive of the actus reus.
- Westen's framework cannot readily explain two significant contemporary approaches to non-consent—the "'No' means 'no'" and the "Only 'yes' means 'yes'" approaches—because it cannot easily articulate and model a jurisdiction's decision to treat a "no" or the lack of a "yes" as insufficient for legal consent.
- The claim that retrospective consent essentially dissolves the harm of sexual assault is unpersuasive. For it is an open and normatively contestable question whether we should always give priority to what S today views as having been in her best interests over what she viewed as in her interests in the past.
- The so-called "fictions" of constructive, informed, and hypothetical consent often do not deserve the label. For although these categories do not involve persons who consented to x in Westen's prescriptive sense, they frequently involve scenarios in which S does consent in a significant sense, either to a social activity that includes x, or to the risk of x; or they involve a subject who would have consented but did not have the capacity to do so. These forms of consent at the very least bear a family resemblance to Westen's core category of prescriptive consent.
- Constructive consent to x involves S agreeing to a package in which x is only one component; but prescriptive consent also often involves merely agreeing to a package in a similar sense.

- Informed consent to a risk of x can be defined in precisely parallel fashion to prescriptive consent to x itself (incorporating the same criteria of factual and legal consent, suitably modified).
- Westen's definitions of force and resistance, while elegant, are procrustean: he presupposes that "force" is just a term of art for all unlawful pressures that induce S's acquiescence, and that "resistance" is essentially a term of art for any option available to S by which she could avoid both x and A's threat. These very broad definitions are disconnected from the history of the law of sexual assault and from the normative controversies that these terms continue to provoke.
- The argument that a jurisdiction's wrongful force requirement entails, as a logical corollary, a duty to resist is fallacious. A jurisdiction might have good reason to prohibit wrongful threats only of a certain type or degree of harm, but also good reason not to impose an affirmative duty on a victim of an immediate violent threat to resist even if she could thereby avoid suffering the same type or degree of harm.

4. *The Logic of Consent* is aptly named. This is a book about logic, about concepts. Its point is analytical clarity, not normative persuasion. The framework that Westen offers is extraordinarily helpful in understanding consent to sexual crimes. It should also prove highly useful in examining other legal doctrines involving consent. Some of these, Westen discusses only in passing (for example, the right to refuse medical treatment, and informed consent in the sense of a duty to disclose risks and benefits of S's consenting to a procedure or physical contact). And the analysis of doctrines and concepts outside of criminal law—including assumption of risk in tort law, consent in contract law, and perhaps consent in political theory—should also benefit from his sophisticated framework.[88]

88. Westen touches on the latter at 285.

Let me end with a caution to prospective readers. This is a challenging book. The conceptual analysis is sometimes abstract, and the architecture of the argument is elaborate. Moreover, in an effort to be both meticulous and thorough, Westen writes in a style that is sometimes dryly methodical, even mechanical. (I wish he had more frequently used shorthand phrases rather than replicating criteria each time he reinvoked them.)

But the depth, subtlety, and originality of the analysis will richly reward the patient reader. Legal philosophers, legal academics, judges, and legislators alike will profit from this splendid book. And if the lessons that Westen teaches are taken to heart in revising criminal law legislation and doctrine, then ordinary citizens will benefit as well. Conceptual precision can avoid confusion and facilitate the accurate expression of underlying principles. Enormous normative and factual disagreements will persist, of course. But we are certainly better off if we know precisely what we are disagreeing about.

BOOK REVIEW

Beyond the War on Crime: Personhood, Punishment, and the State

VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS. By Markus Dirk Dubber. New York and London, New York University Press, 2002. Pp. xii, 412. $50 cloth; $24 (paper).

Reviewed by Sharon Cowan†

INTRODUCTION

Victims in the War on Crime is a study of recent forays in the war on crime, asking the question, as the title would suggest, who are the real victims in this war on crime? It is a lengthy and detailed engagement with some of the questions that have been posed by criminal law and criminal justice theorists in recent years, relating to the increasing drive to criminalize and punish.[1] For Dubber, the war on crime is a war waged by the state, against those who are deemed by the state to pose a risk of harm to the community, where the concerns and desires of victims are taken into account only insofar as they accord with the state's preferred course of action. In this sense, the state's

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1. For a critical summary of the criminological literature on the increasing trend towards punitiveness, see Roger Matthews, The Myth of Punitiveness, 9 Theoretical Criminology 175 (2005). See also Douglas N. Husak, The Nature and Justifiability of Nonconsummate Offences, 37 Ariz. L. Rev. 151, 152 n.5 (1995) (citing Sanford Kadish as offering the original conception of over-criminalization as being a "crisis" in criminal justice).

recent battles in the war on crime have been fought on two fronts: one, by simultaneously expanding the substantive criminal law (in the form of possession and other related inchoate offenses such as endangerment) and relaxing the rules which constrain the policing of criminal law, particularly the gathering and use of evidence; and two, through the harnessing of the (negative) energy of the Victims' Rights Movement in order to bolster the state's claims that increased punitiveness is necessary and legitimate. The book is in two parts and divides along these lines, the first half concentrating on the criminalization and policing of possession, and the second part focusing on the role of the Victims' Rights Movement in recent crime strategies, as well as attempting to develop a more comprehensive theory of victims' (and offenders') rights based on the notion of "personhood."

This review essay sets out to demonstrate both the potential and the limitations of Dubber's powerful and persuasive thesis. Many of the individual chapters are long and some detailed consideration is given to the material therein. This is followed by an analysis which focuses on three specific themes within the book: the power of the state; the concepts of personhood, autonomy, and harm; and the application of the idea of the war on crime. Here some conclusions are drawn about the way in which the book is helpful in providing a starting point for many contemporary debates within criminal justice studies. In addition the essay assesses some of the key claims of the book in order to provide a platform for developing, and challenging, some of Dubber's ideas about the nature and function of the criminal law, arguing that more work needs to be done particularly in thinking through the project of "personhood." Finally some comments are offered regarding the style and structure of the book. The essay concludes that the story Dubber tells is a compelling one, but one which at times requires a more nuanced approach to the complexities of the politics of criminal justice, and to the conceptual framework of a theory of criminal law.

I. THE STORY OF THE WAR ON CRIME

A. *Part One: The War on Victimless Crime*

The basis of Dubber's thesis in part one, as sketched out in chapter one, is as follows. He claims that the war on crime is in essence *preventive*—aiming to control risks of harm before not just the harm but also the risks of harm have materialized. This risk management strategy is operationalized mainly through the introduction of new offenses, but is also linked to the extension of the discretion of those gatekeepers (primarily the police) who serve to bring risky people within the jurisdiction of the criminal process. The practical impact of a policy of targeting risks in this way is an increase in incapacitative methods of crime control—i.e., longer, consecutive, and "aggravated" prison sentences. In addition, he argues, the war on crime is *communitarian* in the Durkheimian sense that the rejection of "deviant" individuals promotes community safety and unity and *authoritarian* in the sense that it is the powerful state that takes responsibility for dealing with crime and preventing crime through risk management.

The community safety point is important, and although his notion of deviancy is a little underdeveloped and his reference to the vast criminological literature on deviancy and labelling could be expanded (24), Dubber makes a convincing argument about the importance within communities of the relationship between crime and the fear of crime. The middle classes, he states, are not most likely to be victims of crime but are most likely to express a fear of crime, thus providing them with reasons to support the move to eliminate the fear or threat of harm as early as possible. This is related to a further claim, developed through reference to the early-twentieth-century work of Francis Sayre, that society has moved in the last century from a conception of criminality as based on individual guilt to one based on "social danger" (28).

In chapter two, Dubber provides more detail on the way in which possession offenses function in the U.S.

Possession is said to be the weapon of choice in the war on crime, and consequently a more critical understanding of its operation is crucial. Criticism is levelled at both the rules of substantive criminal law, as well as the ways in which the rules are implemented in practice. Initially there is a powerful (though as we shall see, perhaps inflated) critique of possession laws as substantive criminal offenses. The critique refers to firstly the tendency of possession laws to punish behavior which is not in itself harmful and is too remote from the harm it is thought will result from possession, and secondly for the broad way in which the offenses are drawn by the executive, so that mere presence of an object or substance gives rise to a presumption of possession regardless of knowledge of presence. Dubber also rehearses the ways in which possession contravenes traditional principles and requirements of criminal law—that there is no harm in possession per se, that there is no "act" as such, that there is generally no mens rea, and that defenses commonly do not apply. Possession offenses, he concludes, are sui generis (82-91).

Dubber goes on to suggest, connecting the substantive concerns with concerns about the process of criminal justice, that the real problem is the "control function" of possession (84), i.e., its relationship with crime control policies and discretion. This can be observed from a range of practices. Possession operates both as an adjunct to existing wide police discretion, and as a problematically broad tool for stopping, searching, and criminalizing the "risky" where that frequently translates as young urban black men. Moreoever, the system of plea bargaining functions as a convenient way of incapacitating people faster and without the trouble of a criminal trial. People are treated in the same way as other dangerous or noxious objects (such as dogs or guns)—all are hazardous risks and therefore the state is entitled to intervene to extinguish the risks (40-42). But while the laws appear to apply to all equally, and some middle class whites do find themselves caught in the network of possession laws, the practice of policing possession weighs disproportionately upon the

already marginalized and disadvantaged—in particular along racial lines (92-97).

Possession is only one way of policing the dangerous, alongside police surveillance and stop and search, pre-trial detention, and so forth (45). But possession offenses are an important tool because, like the vagrancy laws which were used frequently by police until constitutional challenges in the 1960s (78), they allow the police to target specific populations, and also to sweep in large numbers of potential offenders in a kind of "fishing" exercise.[2] This is achievable because of a gradual erosion of the constraints on stop and search rules (for example, officers only need reasonable suspicion—or indeed no reason at all if it is a routine roadblock check for all cars—in order to pull someone over). Thus, alongside federal sentencing guidelines, hefty sentences for possession (which are longer than they were twenty-five years ago (50)), imaginative prosecution practices of "stacking" charges, and the aggravating factor that possession adds to other offenses (for example, gun possession can enhance a sentence given for another offense, and as such is not subject to the same proof requirements as an actual charge of possession (71-72, 120)), possession offenses are a convenient and central tool of the war on crime. This war is, in effect, a battle to incapacitate as many dangerous people as possible. It is in this respect that felons are never ex-felons, because ex-felons who are caught with guns, for example, are always automatically subject to criminal sanctions (73, 85).

This part of the book provides a comprehensive account of the law and its implementation, and the constitutional challenges that have been raised regarding possession. The extensive lists of cases and rules will be of great interest to U.S. criminal or evidence lawyers. It is also an important critique of the law in this area. Some further explanation would have been useful for the non-U.S. reader, however. For example, Dubber makes

2. The nature of the relationship between vagrancy and possession laws is teased out at 92-97.

reference on more than one occasion to the fact that in some states, simple possession of contraband can lead to a mandatory life sentence, without explaining how this can be so (e.g., 67). What would be interesting to the non-U.S. criminal law specialist would be a fuller explanation of the circumstances in which mere possession of an object could lead to a mandatory life sentence.

Chapter three focuses on how possession offenses function as a form of "nuisance control." Here the discussion begins with the "victimless" nature of possession offenses, where Dubber argues that seeing possession offenses as victimless crimes obscures the fact that the state behaves as though the state itself were the victim of such offenses—even if only in terms of disobedience of its laws (see also 118-20). This view—that the state perceives itself to be the ultimate victim of crime—is a theme that Dubber revisits throughout the book. The authoritarian state sets itself up as representing community interests and as such an offense which threatens or harms the community, threatens or harms the state. Public or social concerns are thus conflated with state interests (116) and real victims are a cover for the state acting for its own benefit (125). Following the "Pound-Sayre" model, he claims that the elaborate system of criminal justice and its focus on victims and offenders is only a "cover" for the state's self-protective strategies (125). By setting the risk/harm equation up in this way, the state then has the broad-based justification needed to police possession. The state is the "paradigmatic victim" of criminal law (123).

With regard to chapter three, although Dubber does not explicitly himself make the connection, in places his analysis comes close to Packer's "crime control" model of criminal justice.[3] This model emphasizes the efficiency of

3. Herbert Packer, writing in the U.S. in the 1960s, developed two models to explain how criminal justice systems work—the crime control model and the due process model. As with all models or ideal types, they are not pure descriptions and cannot capture the criminal justice process in all its complexity, but they provide a framework for making sense of criminal justice in practice. See Herbert L. Packer, The Limits of the Criminal Sanction (1968).

the criminal justice system in controlling crime. Efficiency is measured in terms of speed of the process and final resolution of cases, which involves securing convictions. The overall aim is to prosecute and punish guilty offenders, protect society, and maintain social stability. Packer described this as a "conveyer belt" approach to justice, as criminal justice agents pass the case along through the process to a successful conclusion—i.e., conviction.[4] The model also illustrates the significant faith that is often put in police and prosecutors to screen out the innocent (or in Dubber's terms, the non-dangerous) and bring only the guilty to justice through conviction.[5] In this sense Dubber's position is persuasive. However the text here is stylistically deceptive: he writes as though he is simply explaining the truth of criminal justice rather than providing a model for understanding the complex processes of criminal justice. This is rather problematic and relates to an issue to be explored later, namely a lack of critical attention to the complexities and contradictions inherent in criminal justice techniques of power and control.

Chapter three (135-44) also examines the introduction of the Model Penal Code and the part it has played in the escalation of criminalization of certain behaviors, especially regarding its role in defining "threats of threats" of harm (136); identifying those who are dangerous or display potential criminal dispositions, as legitimate targets for crime control (135-37); and the provision of bureaucratic sentencing guidelines which constrain judicial discretion (128-29). He notes the history of the Model Penal Code's rejection of strict liability in criminal proceedings and the Code's application of strict liability only to "violations," i.e., civil offenses. However he also observes the Code's

4. Id. at 159.

5. Roach, who has built on Packer's ideas, claims that contemporary policies that support the crime control model are part of more general move towards the criminalization of politics. See Kent Roach, Four Models of the Criminal Process, 89 J. Crim. L. & Criminology 671 (1999). Caplow and Simon call this "governing through crime." Theodore Caplow & Jonathan Simon, Understanding Prison Policy and Population Trends, 26 Crim. & Just. 63, 78 (Michael H. Tonry & Joan Petersilia eds., 1999), cited in Matthews, supra note 1, at 177.

susceptibility to reinterpretation by states that have extended the strict liability aspect to "violations" that result in a term of imprisonment—i.e., reintroducing strict liability for administrative offenses which give rise to custodial penalties (133-35). He makes a clear and convincing argument (reminiscent of claims made in chapter two) as to how presence of an object can be deemed possession, which can in turn be read as an attempt, even without any conduct on the part of the defendant (139-40). Dubber further identifies the jury as having potentially contradictory roles—on the one hand the jury is "fundamentally inconsistent with the Model Code's (and by implication the state's) general bureaucratic approach" (131), but on the other hand, the jury can become an "insider community" who empathize strongly with the victim (because they themselves are potential or actual victims) and therefore are allies of the state in the project to incapacitate the dangerous offender. The point becomes overstated however when he concludes that "[a]s a result, [the jury] merely reinforces the *communal hatred* captured by the state's accusation, labeling, and eventual disposal of the outside threat to the community of victims" (131, emphasis added).[6]

The argument is sustained in the following pages in relation to Dubber's critique of juries (131-33) where he turns to the example of the Nazi People's Courts to justify his scepticism towards juries. It is difficult to disagree with the suggestion that should the People's Court provide the model for a contemporary criminal trial, we would want to abandon juries completely. While it is true to say, as he does, that juries can facilitate and prop up rather than challenge state oppressive practices, there are many rather more complex arguments against (and in favor of) jury trials which need explication, and a voluminous body of critical literature on the pros and cons of the jury trial to attend to, if the issue is to be given proper consideration.

6. Much later in the book he refers to the jury as a kind of "focus group"—an interesting idea which could have been explored further (208).

As such the treatment of the subject is rather brief. This is an example of a problem, discussed in more detail below, regarding the abstraction of an issue from its place within a wider body of critical scholarship. More generally, Dubber's meticulous attention to the text and development of the Model Penal Code, and the principles on which it is based, is central to his argument and is well executed. However this section could perhaps have been more usefully introduced in an earlier part of the book since it may help us to understand the plethora of rules and cases on possession which are related in detail in chapter two.

B. Part Two: Vindicating Victims Rights

The second part of the book examines the role of victims in the criminal justice process and the way in which the Victims' Rights Movement (VRM) has utilized a certain characterization of victimhood in order to politically mobilize. His main thesis is that the most important aspect of both victim- and offenderhood is the individual person, or what he calls *personhood*, and that seeing both victims and offenders first and foremost as persons challenges many of the contemporary discourses on crime, such as the victim-offender dichotomy, as well as the criminal justice process itself. To describe someone in the first instance in terms of victim- or offenderhood rather than in terms of their personhood negates their autonomy; rather we must acknowledge that "victim" and "offender" are temporary labels that attach through the criminal justice process rather than distinct categories of persons. Adversarial processes tend to exacerbate the conflict between victims' and offenders' rights (210). Victims and offenders have rights, not as victims and offenders, but as persons, since "[r]ights are aspects of personhood" (154). The aim of the criminal law is to restore the autonomy of victims and respect the autonomy of offenders, i.e., respect the personhood of all participants in the criminal justice process. The second half of the book then is a discussion of what it would mean to "treat victims like persons" (155),

including an analysis of the politics of the contemporary VRM. The underlying thesis is that the law of victimhood (exemplified by compensation statutes) and the law of offenderhood (contained in systems of punishment) are two apparently different discourses, but which actually describe the same event from two different points of view—the victim's and the offender's. In order to create a criminal law based on personhood we must find a way of bringing these two perspectives together, not by conflating them, but by making them complementary.

Chapter four recounts the ways in which the criminal justice system has developed in the last couple of decades to take more account of the victims of crime. The shift towards victims is demonstrated by the inclusion of victims (or relatives of victims, sometimes termed "indirect victims") in parts of the punishment process (such as watching executions, or feeding into parole eligibility decisions). It is also visible in other practices such as the adoption by some states in the U.S. of a victims' bill of rights and other instruments intended to give victims a voice in the criminal process such as victim impact statements, as well as the growth of a very active and vocal VRM. However, the VRM is for the most part an expression of middle-class white communities' fears about crime, which make only certain kinds of crime visible (177-78). The VRM, Dubber argues, is closely connected to the war on crime, in that it has portrayed the paradigmatic victim as being the helpless subject of a crime of interpersonal violence who needs the state's help (175-84). Ironically, then, to be the most deserving of state intervention, the victim would have to be dead, thus making it difficult to see what the victim's rights could be in this situation (185-88), and making a nonsense of the inclusion of "victim impact statements" in a homicide case (207). Casting the debate in this way, with such high stakes, encourages public empathy and identification with a "helpless" victim (180-84), and this is necessary to mobilize the VRM and to ensure moral judgement of the offender. It also justifies punitive state intervention (to help the helpless). The

VRM's focus on these particular victims taps into public fears about safety from violent crime (anyone of us could be a victim of violence at any time), thus allowing the most visceral response to violent offenders—as an expression of fear and hatred—to be legitimized. Restorative justice as an alternative form of disposal to incarceration has not really been embraced in mainstream VRM politics, says Dubber (167).[7]

Both the state and the VRM then are involved in a process of construction of both victimhood and of appropriate—i.e., emotional—responses to victimization. Emotions are not to be discounted, says Dubber, and the VRM is right to centralize empathy (197-98), but we should have an emotional response to both victimization and to punishment, i.e., to victim and to offender (159). An emotional response solely to the victimization experience has nothing to do with the proper function of the criminal law—that is, moral judgement (207). We must also find a way for the state to incorporate emotions appropriately within the criminal justice process. Otherwise such emotions are channelled as hatred towards the offender (207-08). The VRM must be disentangled from the state's efforts in the war on crime, in order for proper consideration of the personhood of victims *and* offenders to be given. While identifying with victims is important, so too is identifying with offenders (199).

Chapter five, "Vindicating Victims," examines the law relating to victim compensation and some of the available definitions of victim for the purposes of that law. There are some compelling passages here, for example the comparison between being able to speak about a victim at a funeral and the input of victims' families at capital sentencing hearing (214-15). Here is where Dubber gives flesh to the bones of his argument made repeatedly in the

7. This may not be the case to the same extent out with the U.S. context. For example, in the UK the Victims' Rights Movement has recently been cautiously optimistic about the potential benefits to some victims of restorative justice. See Martin Wright, The Court As Last Resort: Victim-Sensitive, Community-Based Responses to Crime, 42 Brit. J. Criminology 654 (2002).

first half of the book, that the state sees itself as the ultimate victim of crime. The tardiness of the development of this argument is one reason for the reader to inquire as to whether the second half of the book, or material therein, might have been more suitably placed up front, foreshadowing the issues for discussion of possession and the war on crime. However, chapter five offers persuasive arguments about the purposes for which the category victim is defined, explaining that "victim" for the purpose of compensation (which is paid by the state) is interpreted narrowly, while for the purposes of restitution (which is paid by the offender) "victim" is more broadly defined to include even the state itself. In addition he directly compares similar concepts that are used in different senses in victim-based accounts as opposed to offender-based accounts of criminal law and makes some notable points, for example regarding harm. To count for the purposes of punishment (i.e., offender-focused accounts of criminal law), harm does not have to be actual but can be attempted, whereas for the purposes of compensating victims, many states require that harm must actually be completed rather than merely attempted. As Dubber rightly concludes, "the inclusion of threatened harm only in the punishment provision says less about the difference between punishment and compensation than about the contested nature of threatened harm both in the law of punishment and of compensation" (242).

Chapter six, the final chapter, is lengthy, and provides more detail about the criteria on which victim compensation schemes are based, as well as a more narrow focus on the comparison between schemes of compensation and systems of punishment. Throughout the chapter Dubber compares the treatment of an offense from the perspective of victims' rights/compensation law with the treatment of an offense from the criminal justice perspective, i.e., the law of punishment. This chapter flows well and includes more detail on some of the ideas introduced earlier in the book, including his central notion of "personhood." It is by far the most theoretically engaged

chapter. It also provides detailed arguments (which are referred to early in the book) relating to how and under what circumstances the state can define itself as the victim of crime (e.g., for the purposes of restitution or compensation). Arguably, again, this chapter, or some of the material in it, could have been brought forward in the book, in order to explain the concepts used and the claims made throughout the book, and to clear ground for the detailed arguments on possession and the politics of victims' rights.

Overall, the project of the book—to offer us an analysis of recent state interventions in crime and criminal justice, and to build from this a theory about how victims and offenders should be treated in the criminal justice system—is a worthwhile one. Dubber presents us with a strong critique of contemporary criminal justice strategies of crime control, and emphasizes the importance of centralizing the humanity ("personhood") of both victims and offenders within the criminal process. In so doing he makes some powerful assertions which require close attention. The remainder of this essay undertakes that task.

III. BEYOND THE WAR ON CRIME: PERSONHOOD, PUNISHMENT AND THE STATE

There is much in Dubber's book that is worth detailed consideration, and this essay cannot do justice to Dubber's ideas in their entirety. Here I will reflect on three ideas that are central to the book. First, Dubber's conception of the state and its role in the war on crime; secondly, the concepts of personhood, harm, and autonomy; and thirdly, the war on crime itself. These particular areas have been chosen because they have the potential to enhance existing debates on crime and criminal justice, and because in their exposition they are open to contestation. The essay concludes with some thoughts on the style and structure of the book.

A. The (Decontextualised) State

One of the conceptual difficulties with the book is Dubber's continual reference to the "state," without placing the state into a contextual discussion of who or what that might be—either by way of a theoretical analysis of the operation of power, or in practical terms, through reference to particular criminal justice agencies, or particular political regimes or presidencies. In relation to the first point, the lack of theorizing on the power of the state, Dubber's notion of the state seems to be similar to that of a sovereign (even though he explicitly shakes off America's historical legal connection with the sovereign-based law of eighteenth-century England), in that the state is seen as all encompassing and all powerful, where power works hierarchically—"top-down." He says, for example:

> In the war on crime, offenders and victims alike are *irrelevant nuisances, grains of sand* in the *great machine of state risk management.*
>
> The true victim in the war on crime is not a person, not even "the community," but simply the state itself. Surrounded by *pesky nuisances* in the form of hordes of persons, be they offenders or victims, *it maintains its authority and enforces that obedience which is due its commands.* (26, emphases added)

Because this is part of the introductory chapter, it might appear that this is simply a powerful opening statement that will be explored and supported later in the book. But similarly overstated propositions are common throughout the book yet are never unpacked. For example, Dubber makes broad claims about "the general tendency of modern criminal administration to bend, if not abandon, principles of criminal law" (125). Further, at the end of chapter four, conflating the state with prosecution practices, he writes:

> Both defendants and victims lose in a game that is played by the state for the purpose of *hiding its awesome power*

> *over defendants and victims alike*.... It is the state prosecutor who becomes *intoxicated with his own power* and uses every weapon at his disposal to *annihilate the defendant* and his proxy, the defense attorney. The wishes of the victim are relevant only insofar as they confirm the prosecutor's judgement. (201-02, emphases added)

Such bold statements as these are not given practical or theoretical grounding. This makes one sceptical about the scope of Dubber's argument, even where there is a persuasive claim at its core. The theoretical neglect of the intricacies of power implies an abstract *decontextualised* body—the state—which is all powerful and which must be obeyed. Much has been said about the nature of power that contradicts Dubber's portrayal. The most obvious example of critical work in this area is that of Michel Foucault. Foucault's conception of power is that power is exercised through relationships rather than held and controlled by individuals, flows throughout society rather than being imposed from top to bottom, and is productive rather than repressive.[8] Power has no "invincible unity" but is multi-dimensional and unstable.[9] It is about changing relationships rather than static conditions/relations.[10] Therefore, power is inherent within all social relations:

> Power is everywhere; not because it embraces everything, but because it comes from everywhere.... [P]ower is not an institution, and not a structure; neither is it a certain strength we are endowed with; *it is the name that one attributes to a complex strategical situation in a particular society*.[11]

In short, Dubber's notion of the state, of power, and of the relationships between states and subjects, are each presented uncritically and without reference to the large

8. For further discussion in a feminist context, see Jana Sawicki, Disciplining Foucault: Feminism, Power and the Body (1991).

9. Michel Foucault, The History of Sexuality 93 (Robert Hurley trans., 1978).

10. Id. at 99.

11. Id. at 93 (emphasis added).

body of literature, philosophical, political, sociological and legal, that problematizes these concepts. Admittedly, as Stuart Green in his review of Dubber's book points out, Dubber does not aim to provide a "full-scale foundational theory of criminal law and the state,"[12] but some engagement with theoretical work on the complex nature of state power seems necessary.

In terms of the practical questions about the power of the state, we might at this point conceivably wonder, who is this state behind the war on crime? Is it faceless bureaucrats? Specific politicians with ideological axes to grind? Crime fighting police officers who are trying to tackle the problem at street level? Reactionary judges? Who is the faceless "modern criminal administration" that flouts principles of criminal law (125)? And why now? There is no satisfactory answer to this "who is the state?" question, because Dubber does not engage with it. He does attempt briefly to historicize the war on crime by tracing proactive and concerted "punitive" responses to problems of crime back to Nixon (and beyond), and by linking present incapacitative practices to previous rehabilitative ones (124), but we are still left in a vacuum, full of references to a contemporary war that seems to have no leader. Dubber expends a considerable amount of energy relaying the number of provisions, judgments, practices, and institutions that support the war on crime, including the Supreme Court (67). While this accounting exercise is important and politically engaging, it demonstrates a particular trend in criminal justice/criminological literature to document examples of punitiveness,[13] but to neglect the equally if not more important question of how to talk about the state, and the war on crime, whilst recognizing competing trends within the enormously complex machine

12. Stuart P. Green, Victims' Rights and the Limits of Criminal Law, 14 Crim. L. Forum 335, 340 (2003).

13. See Richard Jones, Populist Punitiveness and the Politics of Criminal Justice, seminar at Faculty of Law, University of Sydney (March 2004) (on file with author).

that is criminal justice.[14] Each agency has its own separate function, remit, and goals. Different parts of the criminal justice system will have different occupational cultures, working practices, organizational aims, and will conform to different patterns at different times depending also on, for example, government policy, budget and resource constraints, and so on. To talk about the state or the war on crime without recognizing these issues weakens Dubber's arguments significantly.

The decontextualization of the state from both theories of power and the complexities of its practical operation is connected to a more general neglect of context. While the book is manifestly political in its persuasive critique of the parameters and application of criminal law by the state and its agents, it is strangely depoliticized in its lack of attention to the context of surrounding contemporary sociopolitical conditions. This problem arises throughout the book—for example at the end of chapter three where Dubber briefly engages with a hugely complex historical process of shifts in criminal justice policy between rehabilitatitive, incapacitatitive, and retributive ideals:

> A shift from a presumption of corrigibility to one of incorrigibility produced a concomitant shift in official response from rehabilitation to incapacitation. Eventually, extreme affliction sanctions became the norm, correctional measures the exception. Prisons were transformed from correctional institutions run by penologists into warehouses supervised by inventory managers." (145-46)

This decontextualizes, dehistoricizes and mechanizes a particularly complex network of political processes. This would be sufficient were it a summary of a preceding (or forthcoming) argument, but as an entire treatment of the issues concerned it is not. Where he does provide some discussion of historical context, for example in relation to the story in chapter three (of how what Dubber sees as

14. Cf. Matthews, supra note 1, at 183, who has described approaches similarly lacking in critical analysis a "crude form of mechanical functionalism . . . ."

punitive and draconian laws on possession have developed), it is enormously useful. Here he explains that drug laws have come about through a combination of policing Chinese immigrants and the threat of opium at the end of the nineteenth century. This, argues Dubber, is the beginning of the policing of threats and risks through possession offenses, and it is linked to the regulation and policing of the immigrant "other" as well as the poor (115). While it seems a little strange to be discussing the history of the present system a third of the way into the book (it seems to me for example that chapters two and three could have been usefully reversed), the discussion does provide interesting reading as well as the much needed wider historical and sociopolitical context that is missing from some of the rest of the book.[15]

B. Personhood, Autonomy, and Harm

1. Personhood

Dubber's thesis in the book rests on the concept of *personhood*, which he says forms the basis of a proper theory of criminal justice that respects all actors within the criminal process. Part of the general problem here is Dubber's failure to fully reflect on the assumptions and principles which surround and ground the concept of personhood. It is impossible to know what he means by the term, because there is no discussion (or reference to other discussion) of how best to characterize personhood. He suggests that personhood is the capacity for autonomy (199)—but this raises the further question of what is meant by autonomy (discussed below). The concept of personhood is referred to thoughout the book, and the fullest discussion we have of the term is in chapter six, i.e., in the final chapter of the book. Here he discusses the relationship between personhood and humanity (258-60). Evidently

15. He does not extend the analysis to the history of criminalization of other drugs other than to say, "Eventually, the instrument of police through possession spread from opium to other dangerous drugs . . ." (114).

non-humans are not persons, he says, but it is not adequate either to reduce the category of persons to humans. In fact humanity is necessary but not sufficient for personhood, at least in the context of being an offender; only a person who, with capacity, commits an act/omission can be guilty of an offense. So for the purposes of offenderhood, "[o]nly persons, defined as human beings endowed with the basic capacity for autonomy, can act" (258). This appears to lead us again back to autonomy. But we must agree, according to his theory, on a definition of persons that will accommodate both victims and offenders. And so he turns to other examples, this time statutory definitions of homicide where "person" corresponds with "human being" (i.e., not the unborn). Reducing these victim- and offender-based definitions to their common denominator, he comes to the conclusion that "we are left with the following simple definition of the person, as victim and as offender: a human being" (259). Almost immediately Dubber rightly rejects this as a sufficient definition, but this is as far as he goes. He acknowledges that the relationship between personhood and humanity is complicated (260) but does not attempt to further explain what characteristics are required for personhood. This is clearly an area that requires further conceptual analysis, particularly if the concept of personhood is the foundation of his theory of criminal law.

During his attempt to build a theory of criminal justice intervention based on personhood, Dubber raises the particular question of the use of race as an individual characteristic of victimhood. Here there is in my view a fundamental problem with his reasoning. His position is that individual characteristics such as race distract from a focus on personhood. So for example, he describes as "most troubling" the evocation of empathy for a particular victim on the basis of a racial connection between the observer (public) and victim. Shared race, he says, is not relevant to the moral judgement of an offender. Only personhood (rather than race) of the victim is relevant to the criminal process of judgement of criminal liability. Victims have to be recognized by the criminal justice system through the

general category of persons rather than in their particularity as victims. He states: "Racial characteristics, however, are irrelevant to personhood" (193). He makes this claim because he sees the VRM/state-driven evocation of empathy described above as an attempt to reduce personhood to race. While it seems clear that "personhood" can never be reducible to one characteristic, it seems to me equally clear that race cannot be discounted. It cannot be true to say that race is irrelevant to personhood—such a position implies that one is born a "person," then takes on other characteristics such as race, gender, sexuality, etc., as one develops and matures. This implies that a person is a blank sheet awaiting life's script (sex, gender, race) to be written in later on. It seems more plausible to argue that "personhood" becomes *visible*, takes on significance *through*, cultural and social characteristics such as race and gender. As Judith Butler has argued in relation to sex/gender, there is no "body as mute, prior to culture, awaiting signification . . . ."[16]

In other words, subjects, *persons*, are produced through discursive categories such as race. The problem here may be one of expression or interpretation of the text, but in claiming that "[t]o be a member of one race or another has as little effect on one's status as a person as where one happens to be born or where one happens to live (or have lived) at a particular moment in time, what language one speaks, how tall one is, or what clothes one wears," (193) Dubber seems to suggest that personhood is an abstract concept disconnected from all those social elements he relates above. It is one thing to say that personhood or dignity should be recognized regardless of race, or that race *should* not affect one's designation as a person who is due respect. But it does not follow that race is not a distinguishing feature of personhood. It is true that victims deserve rights because persons deserve rights. But to suggest that race is not a feature of personhood might have the consequence that

16. Judith Butler, Gender Trouble: Feminism and the Subversion of Identity 147 (1990).

everyone is treated equally as "a person" regardless of characteristics such as race, characteristics which distinguish the kind of person that they are. In other words, failing to recognize differences in personhood can result in policies of formal rather than substantive equality, policies which have been long criticized by feminists amongst others. Dealing with violations of autonomy through the criminal justice system might be said to properly require treating different kinds of violations differently, and violations might be substantively different depending on factors such as race or age. Such differences need not be taken into account merely at the sentencing stage but could be built into substantive criminal law.[17] Specific harms should arguably have specific (criminal) labels. There is no doubt that we must take care that problematic stereotypes which have already played a part in marginalizing individuals and communities, including racial stereotypes, are not built into the criminal justice system.[18] But this does not mean that we can discount such factors as irrelevant for all purposes in the criminal justice system. In saying that "personhood" and the seriousness of the offense are sufficient for developing a theory of victimhood (194), Dubber loses sight of the fact that factors such as race are bound up both with personhood and with the impact or seriousness of the offense.

This difficulty is clearest in his descriptions (160-73) of some of the places in criminal law where the victim has a role to play, and here Dubber includes offenses that are targeted at particular victims—e.g., hate crimes (162-63). Dubber suggests that hate crimes are an example of the

17. For instance, the French Penal Code (FPC) allows for certain characteristics of the victim to form the basis of a specific offense (and to dictate the sentence rather than leaving it to the discretion of the sentencer). See, e.g., Code Pénal [C. Pén.] art. 222-14 (Fr.), available at http://195.83.177.9/code/liste.phtml?lang=uk&c=33 (English translation) (last visited Feb. 14, 2006) (it is a criminal offense to perpetrate "habitual acts of violence" upon a child of fifteen years or a person whose vulnerability due to their age, illness, infirmity, physical or psychological weakness, or pregnancy, is obvious or known to the offender).

18. See here the literature on the problems of importing racial and cultural factors into the reasonableness requirement within the provocation defense, for example, Victor Tadros, Criminal Responsibility ch. 13 (2005).

tendency in American criminal law to focus on specific categories of victim as requiring special protection. This approach in criminal law, he says, contradicts his thesis that both victims and offenders should be dealt with by the criminal process as *persons*, rather than according to particular characteristics they might have. The way in which the passage on hate crimes is written implies that Dubber thinks that such offenses should not form part of the criminal law, though he does not overtly say so. He is particularly uncomfortable with hate crimes when the offense operates to criminalize as a hate crime, an act by an offender who mistakenly believes that the victim belongs to a specific (protected) category (a category based on, e.g., sexuality or race). It is not clear what purpose this short section on hate crimes serves in the book as full arguments as to the relevant issues are not rehearsed. At the very least such an important and sensitive issue requires further attention, including some reference to the heated and lengthy debates over the purpose and legitimacy of hate crime legislation.[19]

He returns to this idea towards the end of the chapter (198-201), in claiming that in criminal law certain grounds of identification between the general public and the victim (such as race, gender) are morally insignificant in the same way that they are insignificant in discrimination law. This appears to be an unsustainable comparison. Discrimination law prohibits unfair treatment based on, for example, gender. But that does not mean that gender is insignificant, as the debates on formal versus substantive equality show.[20] In discrimination law, the legal *response*

19. In the UK context, see, e.g., Maleiha Malik, "Racist Crime": Racially Aggravated Offences in the Crime and Disorder Act 1998 Part II, 62 Mod. L. Rev. 409 (1999). In the U.S. context, see, e.g., Heidi M. Hurd, Why Liberals Should Hate "Hate Crime Legislation," 20 Law & Phil. 215 (2001). For a recent argument on the benefits of looking beyond the criminal law in dealing with hate crimes (in the German context), see Rainer Strobl et al., Preventing Hate Crimes: Experiences from Two East-German Towns, 45 Brit. J. Criminology 634 (2005).

20. See for instance, Gillian Calder, A Pregnant Pause: Federalism, Equality and the Maternity and Parental Leave Debate in Canada, 14 Feminist Legal Stud. (forthcoming 2006).

requires that we examine the treatment of the victim. As such we must see the victim in her specificity, taking such characteristics as race and gender into account.[21] The same approach could be advocated, as suggested above, in relation to the response of the criminal law. There, although we might want to avoid essentializing victimhood, or particular characteristics such as race, seeing a victim in her own particular specific social position surely is a justifiable aim of the criminal process. It is overly simplistic to say that race cannot be relevant in any sense in distributing criminal justice. At least we should engage with the places in criminal law and criminal process where erasing race (i.e., formal equality) might in itself be open to a charge of (indirect) racism.

2. Autonomy

In relation to autonomy, Dubber suggests that the state can only legitimately intervene in response to crime if the victim wishes the state to intervene to redress the violation of autonomy. This is consistent with his thesis in the first part of the book regarding the victimless nature of possession offenses as posing a problem for criminal law, but it is a problematic assertion. Dubber goes on to later say that a victim is not always the best judge of when state intervention is necessary, and gives the example of a victim of domestic violence who does not want to press charges

21. For example, Nicola Lacey calls for discrimination rights in the UK to be based on the disadvantage suffered rather than membership of a group such as "women." The focus then becomes the particular effect of different treatment on that person rather than the fact of different treatment itself. Those in the "group" claiming rights need not have anything in common other than the fact of a resulting shared disadvantage, not even the characteristic in question (such as race); one need not prove membership of an identity-based group as the instance of discrimination based on perceived membership is sufficient. This conception allows us to take into account the *impact* of discriminatory treatment on a person given their own particular position in society without essentializing the characteristic on which the discrimination is based (the essentialization of victimhood being one of Dubber's fears). See Nicola Lacey, From Individual to Group?, in Discrimination: The Limits of Law 99 (Bob Hepple & Erika M. Szyszczak eds., 1992).

(195). However, he does nothing to resolve the tension inherent in simultaneously claiming that the state can only intervene to protect a victim's autonomy, and yet also denying that autonomy by claiming that the state can intervene even when the victim does not desire it—at once affirming and denying an individual's autonomy. Nor does he deal with other problematic cases, such as injuries consensually inflicted through sadomasochistic practices; theft of an item which the "victim" did not know that she owned; requesting to be killed—or more extreme, agreeing for a portion of one's flesh to be eaten and then to be killed.[22] How does his understanding of autonomy accommodate these examples? He states that victims' decisions about whether or not to proceed against offenders should be reviewed but does not state on what basis or how (196).

He further suggests that the prosecutor decides whether to prosecute based on whether she thinks that interference with the victim's autonomy needs redress (196) (despite the fact that he earlier argues that prosecutors, as elected officials with wide powers of discretion, are soldiers in the war on crime who make decisions primarily in relation to the perceived need to incapacitate the dangerous). However, the main difficulty is that there are two somewhat different expressions of the argument (195): first, "A victim whose *sense of autonomy* is not affected by the experience of a crime, who laughs off the offender's clumsy attempt to treat her as a non-person, is in no need of state assistance in the form of a legal response, in the form of either punishment or compensation"; second, "Unless there is harm to *a person's autonomy*, there's no need to fix it" (emphasis added). Arguably there is a difference between a victim whose "sense" of autonomy is affected and a victim whose actual autonomy (or perhaps more accurately, capacity for/right to autonomy) has been harmed. As Gardner and Shute have argued in the context

22. I am referring here to the notorious case of Armin Meiwes, a German cannibal who was convicted of murder in 2004. See Manslaughter Verdict for Cannibal, BBC, Jan. 30, 2004, http://news.bbc.co.uk/1/hi/world/europe/3443293.stm.

of rape, the defendant may violate the victim's right to autonomy even if she was not aware of the violation as such—for example if she is unconscious when raped and never subsequently finds out.[23] Violation of the right to autonomy does not require that the victim has a *sense* of that violation. Otherwise it would appear that being murdered in one's sleep does not involve a violation of one's autonomy.[24] Further, Gardner and Shute argue that even where there is no feeling of violation there is still a criminal wrong, and this wrong does not depend on the victim's idea of what is done to her.[25] For them, it is this sheer instrumentalization of a person that amounts tc a "denial of personhood."[26]

Dubber's use of the term autonomy does not include reference to critiques of the notion of autonomy and questions about its relation to the concept of personhood. In the context of sexual autonomy, for example, Nicola Lacey has argued that the liberal notion of autonomy problematically allows no space for the expression of affective and corporeal aspects of sexual harm—in other words autonomy is usually linked to notions of free will, and of choice and consent. This underplays the role that bodily integrity plays in sexual autonomy. Autonomy is important, but currently autonomy "dominates at the expense of the development of a positive conception of what kinds of sexual relationships matter to personhood."[27] A further question arises as to whether in order for any formal right to autonomy to have effect, the context of choices and the substantive elements of the right have to also be present—i.e., what does a right to autonomy mean in practice? Reconstructing autonomy in positive terms would mean acknowledging its relationship with the

23. See John Gardner & Steven Shute, The Wrongness of Rape, in Oxford Essays on Jurisprudence 193 (Jeremy Horder ed., 2000).

24. I am grateful to Victor Tadros for this example.

25. See Gardner & Shute, supra note 23.

26. Id. at 205.

27. See Nicola Lacey, Unspeakable Subjects: Feminist Essays in Legal and Social Theory 117 (1998).

capacity to realize "life plans" as much as with formal choice and the negative freedom not to have rights interfered with.[28] However, Lacey takes the view that even if we adopt a positive model of autonomy and freedom, the concept of autonomy is too closely bound to its historical foundation in the abstract choosing subject and the consequent concealment of the body. For this reason she would favor the phrase sexual integrity rather than sexual autonomy.[29]

As stated earlier, the main problem is the lack of attention to a fuller exposition of the concept of autonomy. Although he states that "Crime is the assault by one person upon the autonomy of another" (218) (itself a narrow conception of crime, as argued below), autonomy is never defined, although a (rather confusing) discussion about what Dubber perceives as a distinction between "vindicating" and "restoring" the victim's autonomy ensues. Here he states that the criminal justice system vindicates autonomy rather than restores it; to suggest that it restores autonomy implies that the offender has *damaged* the victim's autonomy, thus conceding too much ground to the offender (204). The distinction is not explored in any detail and he goes on to contradict this position in relation to homicide victims, whose autonomy he admits has been destroyed. The distinction therefore seems not to stand up to scrutiny, but it would make more sense if we knew how he is defining autonomy. He later states that "[t]he punishment of negligent crimes threatens to violate, rather than vindicate, victims' rights insofar as it obscures the central function of the criminal process: the reaffirmation of the victim's autonomy as a person" (229). Of course this is again consistent with the argument in part one of the

28. Id. at 119.

29. Likewise Jennifer Nedelsky has argued for a concept of "embodied autonomy." See, e.g., Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts, and Possibilities, 1 Yale J.L. & Feminism 7 (1989). There is also a wealth of literature on the concept of "relational" autonomy and on valuing dependency. See, e.g., Martha Fineman, The Autonomy Myth (2003); Marilyn Friedman, Autonomy, Gender, Politics (2003).

book that crimes of strict liability, victimless crimes, and constructive crimes all pose problems for the requirements of traditional substantive criminal law—so does a criminal standard of liability based on negligence. But quite how, for example, punishing a company for criminal negligence in a homicide case *violates* a victim's autonomy is not clear, and the question of why an offender cannot be said to negligently interfere with a victim's autonomy is not explored.

3. Harm

A further central, but underdeveloped, concept in Dubber's book is that of harm. In relation to the arguments in the first half of the book, one is provoked to ask the following questions: What is wrong with the criminalization of the possession of guns or drugs? Are they not harms against which the state is justified in legislating? Are possession laws per se problematic, or is it the way they are currently formulated and implemented? Is the real problem the inherent discretion within the policing of possession? Dubber's arguments would lead us to conclude that he does not think that the criminal law should concern itself with those who carry illegal guns or substances, and that we should abandon or at least question criminalizing possession of both drugs and guns (he does not in principle distinguish in his critique of possession laws between drugs and guns). However, he does not explicitly advocate decriminalization. Moreover he does not explain the basis for his belief that such possession should not properly be a matter for the criminal law. Are such offenses harmful, wrongful, both, or neither? Is harm the best peg on which to hang such offenses? Questions of harm are not directly addressed.[30] At a general level we are left wondering what principles might govern decisions about what behavior to criminalize. More

30. For a recent and excellent effort to distinguish between harms and wrongs in criminal law, see R.A. Duff, Harms and Wrongs, 5 Buff. Crim. L. Rev. 13 (2001).

particularly one might ask whether there are important differences when considering the decriminalization of drugs as opposed to guns.[31] Explicit attention has been given to both these issues by other writers, but Dubber does not attend to them. Doug Husak has suggested that in order to expand the use of the criminal sanction it is necessary to provide principled arguments for the move. The same is also true of the need to support a proposal to constrain or remove substantive criminal offenses. As Husak states, "A detailed account of the specific instances of legislation that should be rejected as incompatible with a liberal theory of law requires at least two supplementary theories: first, a theory of moral rights, and second, a theory of wrongful conduct."[32] How then are we to support Dubber's argument that the expansion of the criminal law as regards possession is misdirected (and indeed that we should narrow the concept of crime itself) if we do not know the principled basis on which he makes this claim (other than a very broadly interpreted liberal aim of desiring less state intervention in our lives)?[33]

Here Dubber's account is part of a more general problematic tendency, referred to above, to divorce an issue from a broad and sophisticated literature which considers it. This is also apparent in relation to hate crimes, as described earlier, and again in a later discussion of whether or not corporations or other entities can count as "persons" for the purposes of the criminal law. In chapter five Dubber states that corporations can only suffer economic loss, not physical harm, and therefore cannot be a victim requiring the protection of the criminal law. Equally, as an "apersonal" entity, a company cannot inflict physical harm and therefore cannot be guilty of a criminal

31. That there may be different arguments justifying the criminalization of drugs as opposed to the criminalization of weapons such as guns, is clearly set out by Doug Husak. See Douglas N. Husak, Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction, 23 Law & Phil. 437 (2004).

32. See Husak, supra note 1, at 157.

33. Husak amongst others has written extensively on what these principles of (over)criminalisation might be. See, e.g., Husak, supra note 1; Douglas N. Husak, Legalize This!: The Case for Decriminalizing Drugs (2002).

offense (216-20). However, he makes these statements without any reference whatsoever to the burgeoning field of corporate liability studies.[34] The arguments, both conceptual and practical, for and against criminalizing corporations, are many and complex. In the light of that literature, Dubber's claims appear somewhat under-defended. The reason he does give for taking the anti-criminalization view refers again to his concept of personhood. Companies, for example, do not have autonomy and therefore should have nothing to do with state punishment (218). They can cause victimization and loss but this is not criminal victimization and so is not the business of the criminal law. Persons, not acts, cause (and suffer) criminal victimization (223). Negligent homicides caused by companies (or individuals for that matter) are "not crimes in the true sense of the word" (228), hence "their victims are not victims of crimes" (229). So for him, companies do not have the kind of personhood that either requires vindication by the criminal law or that can inflict harm on persons. However, the relationship between his notion of personhood and the harm that criminal law is concerned with needs to be teased out in more detail and supported by reference to the existing theories and arguments about corporate criminal liability.

The application of his anti-criminalization perspective would lead to the conclusion that offenders should not be criminally liable for offenses such as embezzlement or fraud against a company. Even more worrying, it would suggest that serious harms committed by corporations (not just corporate homicides but also large scale polluting practices such as those performed by Union Carbide in Bhopal) are somehow not as significant or deserving of severe punishment as less serious harms committed by individuals. And Dubber states his position without supporting evidence or reference to existing debates—other

34. The literature is literally vast, but see, e.g., C.M.V. Clarkson, Kicking Corporate Bodies and Damning Their Souls, 59 Mod. L. Rev. 557 (1996); Unmasking the Crimes of the Powerful: Scrutinizing States and Corporations (Steve Tombs & Dave Whyte eds., 2003).

than his dismissal of the pro-corporate-criminalization stance as being part of the over-criminalization zeal and the "rush to punish" (218-19). Conflating the punitive "war on crime" with debates on how to address the very real social (and arguably criminal) harms perpetrated by companies and other "apersonal" entities is a fundamental error. Even if we accept Dubber's contention that there is such a war on crime, arguments for criminalizing companies are not simply driven by incapactitative urges but are based on principles of responsibility for harm caused. While he is right in saying that the current system of corporate criminal liability tends to disproportionately impact upon small companies and businesses (219), this is not by itself a sufficient reason to reject the principle of corporate criminal liability and responsibility altogether.[35]

C. The War on Crime and the War on Terror

Dubber's thesis has some interesting applications outside of the remit of possession, victims' rights, and the war on crime. Particularly, Dubber's themes have particular resonance in relation to the "war on terror."[36] Since September 11, 2001, there has been an expansion of the criminal law in relation to terrorist offenses, notably in the U.S. and the UK, an expansion which, from his arguments, would clearly be problematic for Dubber. There are many parallels between Dubber's argument about the war on crime and the present approach to legislating against threats of terrorism taken by the U.S. and UK governments. In the UK, for example, there have recently been lengthy and heated debates over plans to extend

35. General concerns about a narrowing of the concept of crime were also raised by Stuart Green in his review of Dubber's book. See Green, supra note 12.

36. Upendra Baxi, amongst others, would distinguish between the "war on terror" and the "war of terror" engaged in by western governments. Baxi has termed the war on terror the "new political theology." See Upendra Baxi, Siting Truth, Justice and Rights in the Two Terror Wars, Keynote Speech at Translating Terror: Globalisation and the New Planetary Wars, a joint conference of the Centre for Translation and Comparative Cultural Studies, and the Centre for the Study of Globalisation and Regionalisation, Warwick University (Nov. 12, 2005).

police powers to detain terrorist suspects for ninety days without charge.[37] In the end the government's proposals were defeated by a healthy majority,[38] but in terms of an extension to the possible detention period, the Bill as it stands still proposes a maximum of twenty-eight days. Internment, detention without charge, was an ultimately unsuccessful feature of the English government's attempt to police Irish Republican uprisings.[39] A similar critique of internment is made in contemporary debates in the ongoing war on terror, regarding the extension of police powers of detention.[40]

Dubber's concerns are noteworthy in this context; his critical examination of the policing of possession offenses emphasizes the way in which discourses of threat and risk have been invoked by the state to justify intervention (in the form of the criminal law) at increasingly earlier stages in causal chains of conduct, without the traditional criminal law requirement for mens rea, in the name of social welfare (20, 28). This analysis informs current debates over the criminalization of a range of behaviors that appear to suggest a terrorist threat to security. Likewise his suggestion that one of the ways in which the state extends the arm of the criminal law is to identify, or even profile (66) certain categories of individuals (or individuals within certain "high crime" areas (52)) as

37. See Terrorism Bill, 2005, § 23(5). The grounds on which a terrorist suspect's detention may be reviewed and extended in the UK are set out in Terrorism Act, 2001, § 23, sched. 8.

38. See Patrick Wintour, After Eight Years in Power Tony Blair Hears a New Word: Defeat, Guardian, Nov. 10, 2005, at 1.

39. See Secretary of State for Northern Ireland, Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland, 1975, Cmnd. 5847. Internment was initially proposed in the wake of the inception of Northern Ireland as a separate state, under the Civil Authorities (Special Powers) Act, 1922, 12 & 13 Geo. 5, c. 5, (N. Ir.).

40. See A. Sivanandan, Why Muslims Reject British Values, Observer, Oct. 16, 2005, at 30; Michael Meacher, Blair Can't Govern Alone. He Must Learn to Listen—Or Fail, Guardian, Nov. 17, 2005, at 32. For a comparison of the UK government's approach to dealing with the IRA with current responses to terrorism, see Ben Brandon, Terrorism, Human Rights and the Rule of Law: 120 Years of the UK's Legal Response to Terrorism, 2004 Crim. L. Rev. 981.

showing a dangerous disposition towards crime. The presumption here is that such individuals pose a sufficient risk to justify intervention in the form of surveillance, targeting, arrest, interrogation, and eventually charging and prosecution. The process of intervention, and indeed the assessment of dangerousness, is dependent on the discretion of police officers "on the beat" (22). Similar conclusions can be drawn from a study of the terms of the terrorism debate; beliefs, both popular and propounded by governments, about the impending threat of terrorism, have been employed in order to rationalize the increasingly hysterical response to perceived risks, in the form of what some would describe as draconian legislation in the UK. Strategies of early intervention in potentially risky behavior (such as attending certain political meetings) or indeed the focused policing of specific populations perceived as posing a particular risk (such as Muslims), have both been the subject of damning criticism by those worried about the parameters of the war on terror.[41] Dubber is correct in identifying these practices as worrying in the war on crime, and such concerns apply equally in the war on terror. The similarity between discourses of crime control and discourses of risks/threats of terrorism is uncanny. For example, risk in both arenas is seen as harm in itself rather than merely a possibility of harm. State intervention is justified in both cases, even where "the actual manifestation of harm remains unpredictable and uncertain."[42] Both crime generally and terrorism in particular have been used to generate public fear about risk, which is in turn used justify a highly intrusive amount of surveillance (by the state, and of each other), and state intervention at earlier points in the causal chain

41. See Adam Tomkins, Legislating against Terror: The Anti-Terrorism, Crime and Security Act 2001, 2002 Pub. L. 205. See also House of Lords and House of Commons Joint Committee on Human Rights, Review of Counter-Terrorism Powers, 2003-4, H.L. 158/H.C. 713, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/158/158.pdf (last visited Feb. 8, 2006).

42. See Gabe Mythen & Sandra Walkate, Criminology and Terrorism: Which Thesis? Risk Society or Governmentality?, Brit. J. Criminology, Advance Access, July 28, 2005, http://bjc.oxfordjournals.org/cgi/rapidpdf/azi074v1, at 3.

of behavior. The Durkheimian argument used by Dubber to describe the communitarian function of crime control practices—the rejection of "deviant" individuals in order to promote community safety—is also relevant here. The only difference is that both the terror threat and the anti-terror measures extend far beyond the domestic criminal law context, confounding conventional geographical boundaries as well as those relating to criminal liability. In fact one might argue, as Gabe Mythen and Sandra Walklate have done, that it is the preexisting crime control policies that have made the process of extending anti-terrorist measures relatively easy—they are simply an extension of existing penal policies.[43] Dubber's work does give us a starting point to analyze the phenomenon that is the "war on crime," and understanding the operation of the war on crime will in turn inform our analysis of contemporary discourses on the war on terror.

IV. STYLE AND STRUCTURE

Finally there are some stylistic issues to draw to the attention of potential readers. Overall the book is very lengthy; the first half, on the criminalization of possession offenses, is around 150 pages and the second half, on victims' rights, almost 200 pages long. The book is extremely well written in the sense that the story of the book is easy to follow, but the reading experience is not as fluid as it could be, due to the style in which the book is written. The book combines arguments from previously published material in the form of journal articles (one on policing possession and the other on victims in the criminal justice system). The initial impression is that the two articles have been expanded beyond their natural scope and length to provide a basis for the book, or at least that some further work needed to be done to integrate the two. This impression is not challenged by an enduring feature of the book—the repetitious manner in which Dubber makes

43. Id. at 4, 11.

his claims. His story about the proliferation and expansion of criminal offenses is a powerful one, and one which needs telling, but there is a frustrating amount of reiteration of ideas, phrases, and conclusions. This is true for example of the text relating to his claim that possession offenses are crimes against the state, and that both victims and offenders can be nuisances—inconveniences which clog up the system of dealing swiftly and efficiently with risks (i.e., dangerous people) (98-100, 189, 213). This is not only an issue of method but also of structure. The extent of the repetition in chapter two may have been mediated had chapters two and three been reversed, for example. The second half of the book flows more easily than the first, and when the discussion there connects to claims made earlier in the book, Dubber refers us to those claims rather than repeat the same arguments again, lessening the repetitive feel of the first half. In addition, some of the substantive arguments and theoretical concepts referred to in the first half are explained in more detail in the second half. This strengthens the feeling, indicated earlier, that the structure of the book could perhaps have been reversed, or at least edited so that explanatory material in the second half precedes its use in the first.

Dubber tends also towards a certain hyperbolic and overstated style of writing, which almost reads like conspiracy theory. At the end of chapter three, for example, he suggests that the Model Penal Code in its present form obscures the more explicit aims of previous drafts of the Code—i.e., previous drafts unequivocally relied on the protection of interests of the society and public welfare to justify intervention, whereas the current proposed Code does not refer to these utilitarian concerns but is based on the protection of individuals. His analysis of this shift is not that the interests of society have been neglected by the current Model Penal Code but that the Code text is deliberately disingenuous (142-43). The state wants us to believe that the autonomy and individual rights of victims and potential victims are prioritized by the Code while in fact the Code is a central part of the state's project to

protect itself. This kind of overinflated claim makes it difficult to accept what is at the heart of his contention and a sustainable point—that texts such as the Model Penal Code are subject to fluctuating political forces during the drafting process. Likewise towards the end of chapter four, he states:

> Generally speaking, victims are an inconvenience to the state. They demand attention and compromise the efficiency of the criminal disposal process. Helpless victims, by contrast, pose no such challenge. They are eager for state assistance and easily manipulable. *As a result, they constitute a valuable source of legitimacy for the state's pursuit of its self-aggrandizement.* (189, emphasis added)

That the aims of the VRM and of the state's war on crime overlap has already been stated, and the point behind the above statement is thus defensible, but the terms in which he makes a claim tend on occasion to distract from its credibility.

CONCLUSION

Overall the book provides a passionate and powerful contribution to criminal law and justice studies, charting the course of contemporary over-criminalization by way of an examination of both the operation of possession offenses, and the way in which discourses of victimhood have legitimized state intervention. In addition there is an attempt to offer a theory, that of personhood, which should found the basis of criminal law, applying to both victims and offenders, and which would offer respect, dignity, and the right to autonomy to all actors within the criminal justice process. The way in which Dubber expresses his enthusiasm sometimes distracts from the argument, but the book forms an important part of the broader field of critical studies in criminal law and criminal justice. Further work needs to be done to unpack some of the central concepts of the book, most crucially personhood, and more attention needs to be given to existing critical

scholarship on notions of the state, harm, and autonomy. And there are some issues of style and structure which require consideration. However, Dubber's book not only plays a role in provoking a healthy critique of the practices of criminalization, but also helps us to understand more generally the problematic nature of the expansion of criminal justice intervention into many areas of contemporary life. This is especially true in the present political climate, where, as Beck has said, "the borders that divide domestic from international, the police from the military, crime from war and war from peace—are overthrown."[44]

44. See Ulrich Beck, Terror and Solidarity, in Re-ordering the World: The Long-Term Implications of 11 September 112, 115 (Mark Leonard ed., 2002).

BOOK REVIEW

The Three Dimensions of Freedom, Crime, and Punishment

PERSON, SUBJEKT, BÜRGER. By Michael Pawlik. Berlin, Duncker & Humblot, 2004. Pp. 124. EUR 49.80/SFR 86.00 (paper).

Reviewed by Hanno F. Kaiser†

Ever since the protection of individual freedom replaced justice as the primary criterion for the legitimacy of government, criminal punishment, as one of the most drastic exercises of governmental authority, has been held against that standard, too. As a result, any diminution of freedom through punishment must at the same time be justifiable as a realization of freedom. So long as the loss of the criminal's freedom is traded off against gains in the protection of everyone else's freedom, consequentionalist accounts provide an appealing strategy of vicarious justification. But once we require that for complete justification freedom must not only be realized for everyone else but also in the person of the criminal, a more sophisticated and inclusive strategy is required.

Michael Pawlik, professor of criminal law and philosophy of law at the University of Regensburg, Germany, takes up the challenge of disentangling the paradox of punishment and freedom in his latest book *Person, Subjekt, Bürger* (Person, Subject, Citizen),[1] in which he presents a highly original retributive theory of punishment. Pawlik's theory is rooted in the legal philosophy of Hegel and Fichte, whose concepts of

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1. Michael Pawlik, Person, Subjekt, Bürger: Zur Legitimation von Strafe (2004). All translations are mine; internal citations have been omitted.

recognition and of the subject he recasts in a framework of communication theory, inspired by the works of Günther Jakobs[2] and Niklas Luhmann.[3] By applying his theory to questions of criminal law doctrine such as self-defense, defense of others, provocation, and inchoate crimes, Pawlik succeeds not only in providing a plausible solution to the problem of vicarious justification, but also in bridging the gap between theory and practice.

This article begins with (I) a sketch of the overall design of Pawlik's theory, followed by (II) a discussion of three defining characteristics of his argument, and (III-IV) a critical examination of two of Pawlik's central claims, one relating to the connection of censure and hard treatment and the other to his rejection of consequentionalism.

I. THE THREE DIMENSIONS OF FREEDOM, CRIME, AND PUNISHMENT

In a state of freedom, individuals enjoy certain rights that protect them against arbitrary interference by others and by the government. Such rights are guaranteed and, if need be, enforced by the state. At its most basic level, the law protects the individual as a *person*. Persons are defined by their potential. They have not yet committed themselves to any particular way of life and are thus not yet confined to any particular identity. In that sense they are existentially free. That open, abstract, not-yet-defined, "you can be anything you want to be" state depends on the availability of *options*, that is, on the largely unencumbered potential for action (76-77). The law protects the potential of the individual as a *person*, for example, through property rights and the freedom of contract. Once a person makes certain choices about him- or herself and begins to move along a path of establishing a distinct biographical identity,

2. See, e.g., Günther Jakobs, Norm, Person, Gesellschaft: Vorüberlegungen zu einer Rechtsphilosophie (1997).

3. See, e.g., Niklas Luhmann, Law As a Social System (Klaus A. Ziegert trans., 2004). Niklas Luhmann, Social Systems (John Bednarz, Jr. and Dirk Baecker trans., 1995).

he or she morphs, over time, from a person into a *subject* (77-78).[4] While the freedom of the person is about potentiality, the freedom of the subject is about actuality.

> Using Hegel's terms, one could say: The freedom of the subject is *more concrete* than the freedom of the person. More concisely: The subject is the truth of the person. (78)

The law protects a subject's actuality by providing additional safeguards, such as due process, civil rights, freedom of speech, etc., against arbitrary interference with the manifestations of the subject's choices. Both as a person and as a subject, the individual is a beneficiary of the legal order, as the law protects both options and choices. However, that state of freedom cannot be maintained if everyone merely chooses to exercise his or her rights as a person and as a subject. Maintaining the state of freedom requires *active participation* in securing the continued existence of its necessary conditions. That factual requirement renders plausible a normative duty to contribute to the "project of freedom through law" (85), which is a duty of the individual as a *citizen*. Pawlik calls this civic obligation a *duty of loyalty*,[5] the central requirement of which is to "maintain a state of generally secured lawfulness" (83), that is, to obey the law, to render minimal assistance to others in emergencies,[6] and to pay taxes. The state uses tax revenues to provide internal and external security, as well as a minimum level of general

4. Note that individuals are never *solely* persons or *entirely* subjects. Rather, they are persons in some respects and subjects in others, a mix that will likely be unique for each individual.

5. Note that acting *from* duty is not required; only actions *according to* duty are (84). See also Immanuel Kant, The Metaphysics of Morals 6:219 (Mary Gregor ed. & trans., 1996) (1797). ("That lawgiving which makes an action a duty and also makes this duty the incentive is *ethical*. But that lawgiving which does not include the incentive of duty in the law and so admits an incentive other than the idea of duty itself is *juridical*.").

6. A general duty of minimal assistance is a requirement of German but not of U.S. criminal law. See Strafgesetzbuch [StGB] [German Penal Code] Nov. 13, 1998, Bundesgesetzblatt, Teil I [BGBl.] 3322, § 323c, translation available at http://www.iuscomp.org/gla/statutes/StGB.htm#323c (last visited August 1, 2005).

welfare, so that most everyone will be able to enjoy the options that a state of freedom provides (83). Social freedom is a state of legal rights *and* duties.

The criminal violates the rights of others as persons and as subjects; in addition, he or she flouts the civic duty of loyalty. Corresponding to the three dimensions of freedom, there are three dimensions of the criminal wrong. The *wrong of the person* lies in the "culpable interference with the legally protected freedom of action of another" (76), that is, in diminishing the victim's potential for action, for example, by stealing his or her money. Diminution of options by transferring wealth, however, is only one aspect of the wrong committed by the thief. The *wrong of the subject* lies in treating the victim solely as a means to an end (78). Theft implies that the victim's goals (here, keeping his or her wallet) are subordinate to and thus less deserving of respect than the criminal's goals (here, taking the money). The wrong of the subject thus "cuts deeper into the claim for recognition of the victim than a (mere) personal wrong: a wrong of the subject is (also) *culpable expression of disrespect for the victim's plan of life*" (78).[7]

The *wrong of the citizen*, finally, is of a qualitatively different nature. On a personal and subjective level, crime is an interpersonal affair. The wrong lies in the arbitrary diminution of the victim's (personal) freedom of action and in the disrespect for the victim's (subjective) moral standing. In contrast, the failure to contribute to the common project of freedom through law is a transcendental wrong. It undermines the necessary conditions of everyone's personal and subjective freedom. It is thus an affair between the criminal and his or her entire community.

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7. For a similar view of the interpersonal aspect of the criminal wrong, see Jean Hampton, Correcting Harms versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659, 1677 (1992) ("A person behaves wrongfully in a way that effects a moral injury to another when she treats that person in a way that is precluded by that person's value, and/or by representing him as worth far less than his actual value; or, in other words, when the meaning of her action is such that she *diminishes* him, and by doing so, represents herself as elevated with respect him, thereby according herself a value that she does not have.").

> By denying proper recognition to [the victim as] a subject, [the perpetrator as a citizen] also breaches the duty of loyalty owed to other citizens .... The specific plus of the wrong of the citizen lies in the violation of the *law as law*, understood as the *existence of freedom*. (86-87)

In a nutshell:

> One and the same criminal act, the culpable violation of a duty, may be discussed on different planes of interpretation: as unjustified diminution of someone's potential to act, as disregard for someone else's plan of life, and finally as a breach of the civic duty to contribute to the maintenance of a common state of freedom. (75-76)

Legitimate punishment is a reaction to all three dimensions of the criminal wrong, and as such it is the restoration of the three underlying dimensions of freedom. The wrongs of the person and of the subject require interpersonal compensation for material damages and for injury to the victim's status as a moral agent (88). Conceivably, those wrongs could be dealt with by a torts system. But responding to the wrong of the citizen requires something different that goes beyond interpersonal compensation.

> With the breach of the primary obligation of active loyalty, an implied secondary obligation arises: The criminal must accept that the inseparability of the nexus between enjoying one's freedom and performing one's duty of loyalty will now be affirmed at his expense. Such affirmation is put into effect by taking away certain freedoms from the criminal in response to his breach of duty. (90-91)

Punishment proper thus makes a "necessary contribution to the restoration of the legal order as a state of freedom, which was attacked by the criminal" (76).

Enduring punishment is the convicted criminal's unique contribution to maintaining a state of freedom, owed to the community as a whole and enforced by the state as the community's agent. Punishment proper thus

restores a state of freedom: the money is returned to the victim (person), his or her entitlement to equal respect is reaffirmed (subject), and the criminal is made to honor his or her duties as a member of society (citizen).

II. THE PROJECT OF FREEDOM THROUGH LAW

For Pawlik, freedom is necessarily freedom through law. Law is defined in terms of freedom and (the reality of) freedom is defined as a state of law.[8] The individuals in Pawlik's theory are always and already part of a community. Pawlik does not invoke a pre-social natural state and the corresponding Hobbesean concept of negative freedom. In Pawlik's world, freedom—including freedom of the person—is social freedom. This starting point allows Pawlik to plausibly make three related claims, which give his theory its distinctive design: (i) only freedom-affirming laws are valid; (ii) the criminal wrong lies in the subversion of freedom, not in gaining an unfair advantage; and (iii) the criminal is and remains part of society, which places significant limitations on the range of permissible punishments.

For Pawlik, the basic criteria for the legitimacy of punishment and of societal order are the same.

> The state and its laws derive legitimacy from enabling freedom. . . . Punishment as a specific exercise of the power of the state must pass muster under the test for the legitimacy of the state itself—the test of freedom. In other words, one has to show that punishment makes a necessary contribution to the task of safeguarding the freedom of the people, that it gives "reality" to that freedom, as Hegel put it. The state of affairs that punishment intends to restore must therefore not be described in the abstract as a state of justice, rather it must be portrayed as a state of lawful distribution of freedom. (56-57)

8. Georg Wilhelm Friedrich Hegel, Hegel's Philosophy of Right 29 (T.M. Knox trans., 1967) (1821). ("An existent of any sort embodying the free will, this is what right is. Right therefore is by definition freedom as Idea.").

Freedom is defined in terms of interpersonal and institutional recognition; we voluntarily concede everyone else a position identical to that from which such recognition originates, and we require the maintenance of the necessary conditions of such recognition (69).[9] From a legislator's point of view, Pawlik's account is both limiting and enabling. It is limiting, because there is no legitimate punishment in an unfree state, and even in a free state, criminal punishment must not be used as a purely preventive measure; no "duty of loyalty" is owed to a law that fails to promote freedom.[10] It is enabling, because punishment may be imposed on those who subvert the conditions of personal and subjective freedom, i.e., those who refuse to participate in the project of freedom through law.

The very theory of recognition that places limitations on the validity of the criminal laws also allows Pawlik to clearly identify the specific property of the criminal wrong as a *failure to contribute*, which is a form of transcendental free riding. Importantly, what's offensive about the free ride is *not* that the free rider gets an unfair advantage (which others, given the opportunity, would also like to enjoy), but rather that he or she undermines the conditions of freedom enjoyed by the criminal and others alike without which a state of freedom cannot be maintained. Because punishment for failing to perform one's duty of loyalty affirms the nexus between the state of freedom and each individual's participation in maintaining its conditions, the criminal's loss of freedom (as perceived by others) now represents his or her contribution to the common project, which resonates with the metaphor of punishment as "paying one's dues."

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9. For an analysis of interpersonal and institutional recognition in Hegel's philosophy of law, see Hanno F. Kaiser, Widerspruch und Harte Behandlung 98-111 (1999); Robert R. Williams, Recognition: Fichte and Hegel on the Other (1992).

10. For example, within Pawlik's theory, criminal prohibitions against consensual sodomy or criminal laws permitting the indefinite detention of suspected terrorists would be invalid.

Another requirement for justifiable punishment is that the criminal must not be expelled from society into a natural state. "Punishment acknowledges the persistence of the criminal's role as a citizen: He will not be excused from his responsibility for society" (95). This requirement of institutional recognition as the flip side of the individual's inability to unilaterally renounce the bounds of society stands in the way of "enemy jurisprudence," which is a troubling consequence of most contractual and purely interpersonal theories of recognition.[11] Within the realm of prima facie justifiable punishments, Pawlik's three-tiered account of the criminal wrong also provides useful criteria to answer the question *how much* punishment is permissible. The extent of permissible punishment is determined by the material damage (absent in the event of an attempt), the significance of the disregard displayed for someone else's moral standing (more in cases of manslaughter than of theft), and, finally, the "extent of disloyalty vis-à-vis the project of freedom through law" (92). The latter permits consideration of provocation (the victim impermissibly pushes the limits of the criminal's loyalty) and of voluntary attempts of the criminal to mitigate the effects of his or her crime (marginalizing the breach of duty as an isolated event).

III. CENSURE, HARD TREATMENT, AND THE FAILURE OF CONSEQUENTIONALISM

Two areas in which Pawlik's theory of punishment requires further elaboration are (i) the justification of hard treatment as a necessary part of punishment, and (ii) the reasons for dismissing consequentionalist accounts.

First, the connection between censure and hard treatment has been a persistent problem for virtually all retributive accounts. Most theories fall into one of three categories: (a) hard treatment as a conventional symbol for

11. The excessive punishments meted out in the "war on drugs" or the near-permanent exclusion of sex offenders and other undesirables from society come to mind.

censure;[12] (b) hard treatment as the embodiment of censure;[13] and (c) hard treatment as prudential supplement.[14] Pawlik rejects (a) because hard treatment as a conventional symbol for censure fails to capture the notion that "[t]he object of recognition (and its denial) are not norms but relations of real (and thus materialized) freedom" (68). At a later point he seems to embrace (b) when he writes that

> [t]he surer a society is of itself, the more crime is perceived as a "fragile and isolated" occurrence, the milder punishments may be. This leaves a broad range for social and cultural evolution. However, the punitive sanction must always be somewhat drastic, because only in conjunction will norm-affirmation [i.e., censure] and "hard treatment" amount to a normatively adequate response to the type of violation of recognition, which has been identified as the wrong of the citizen. The name of that answer is: *punishment*. (91)

It is important to note that Pawlik does not turn the notion of freedom into an ideal entity. His normative theory is communicative throughout, not ontological. But it appears that Pawlik's theory of *meaning* is not unqualifiedly nominalist, as the true expression of a concept seemingly requires some form of real-world manifestation; blowing a kiss means something different

12. See, e.g., Joel Feinberg, Doing and Deserving 100 (1970) ("To say that the very physical treatment itself expresses condemnation is to say simply that certain forms of hard treatment have become the conventional symbols of public reprobation.").

13. See, e.g., Anthony Skillen, How to Say Things with Walls, 55 Phil. 509, 517 (1980) ("Feinberg vastly underrates the natural appropriateness, the non-arbitrariness, of certain forms of hard treatment to be the expression or communication of moralistic and punitive attitudes. Such practices *embody* punitive hostility, they do not merely 'symbolize' it.").

14. See, e.g., Uma Narayan, Appropriate Responses and Preventive Benefits: Justifying Censure and Hard Treatment in Legal Punishment, 13 Oxford J.Legal Stud. 166, 181 (1993) (noting that hard treatment "can function so as to provide these moral agents with *additional prudential incentives* for not breaking these laws, given the facts of human frailty and proneness to temptation"). See also Andrew von Hirsch, Censure and Sanctions (1993).

than kissing someone, censuring a criminal means something different than locking him or her up for two years. The implications of combining a communicative theory of crime and censure with a theory of meaning that is at least in part non-nominalist require further exploration.[15]

Second, Pawlik's rejection of consequentionalism is of particular interest. Like many retributivists, Pawlik backs into his position by finding fault with consequentionalist accounts. The core of his criticism of negative general and special prevention is the problem of vicarious justification.[16]

> As long as [the proponents of negative general prevention] make their case from within a framework of rational self-interest, which is attractive as it does not require much in terms of assumptions, they must limit their argument to the interests of all (criminally tempted) members of society *with the exception of the convicted criminal himself.* The punishment of the criminal is a demonstration for those other members of society that crime doesn't pay. No longer is there communication *with* the criminal but rather *through* him. He is used . . . "like discarded rags to make a scarecrow." The criminal is thus no longer treated . . . as a member of society with equal rights. In that fashion, one cannot justify *legal punishment*, but merely an act of *exclusion*. . . . [Therefore,] [t]he concept of deterrence adds nothing to the justification of punishment. (25-26, 29)

Pawlik does not require actual consent by the criminal as a condition of legitimacy; he merely requires that such consent be conceptually possible. Thus, a theory of the subject pursuant to which the criminal *cannot will* to receive (massive) hard treatment is deficient, as it fails to address the criminal as a moral agent. This criticism is entirely valid if lodged against naturalistic accounts of the

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15. One possible framework for such exploration has been suggested by Charles Taylor, Hegel 11-29 (1975). Taylor contrasts the nominalist approach to meaning with an anthropological and linguistic theory of self-expressive conduct.

16. See also Kaiser, supra note 9, at 37-39. Pawlik correctly identifies theories of positive general prevention as explanatory, rather than justificatory in nature (39-43).

subject as a trivial machine, as found, for example, in Hobbes's *De Homine* and *De Cive*, and in crude variants of utilitarianism that only take into account bodily states of pleasure and pain.[17] But those accounts are little more than straw men in today's sophisticated and methodologically conscious discourse of consequentionalism and behavioral economics. An actor's set of preferences is not confined to bodily pleasures or to the avoidance of physical harm, even though such states will certainly be part of most actors' preference sets. Few consequentionalists would therefore deny the individual's faculty for noninstrumental moral reasoning. Most would agree that the convicted criminal should remain a moral agent with the capacity to find moral or spiritual redemption, that he or she should, conceptually, remain a member of a family, a citizen, and a (potential) participant in the political discourse with rights and obligations. The prison is a normative legal space, not a trial of strength in a natural state. The point is that even if criminal punishment is conceptualized in a purely instrumental fashion, normative identities remain available to the convicted criminal that allow him- or herself to understand the *meaning* of the hard treatment. Thus, the convicted criminal is not *solely* used as a scarecrow. This is not to say that Pawlik's criticism of pervasive consequentionalism is methodologically mistaken, quite the contrary. With respect to certain outsiders such as sex offenders and suspected terrorists, Pawlik's criticism is right on target; it also serves as a powerful check against disproportional (yet conceivably effective) punishments. But as a categorical rejection of preventive theories of punishment and their underlying consequentionalism, it falls short, as consequentionalism is

17. See, e.g., Thomas Hobbes, On the Citizen ch. 1, para. 7 (Richard Tuck & Michael Silverthorne eds. & trans., 1998) (1641) ("Amid so many dangers therefore from men's natural cupidity, that threaten every man every day, we cannot be blamed for looking out for ourselves; we cannot will to do otherwise. For each man is drawn to desire that which is Good for him and to Avoid what is bad for him and most of all the greatest of natural evils, which is death; this happens by a real necessity of nature as powerful as that by which a stone falls downward.").

not conceptually confined to explanation. Pawlik's claim that "[t]he concept of deterrence adds *nothing* to the justification of punishment" is too strong (29, emphasis added).

Pawlik's rejection of instrumental theories of punishment is a consequence of his even further-reaching assumption that mere instrumental interaction is insufficient to sustain a society. With respect to the individual, he claims that "[t]he pathos of detachment fails as a general mode of existence" (77). In other words, abstract potentiality and the corresponding freedom of action is a deficient mode of being. With respect to society,

> a legal order to which individuals relate in a purely instrumental manner is highly unstable, as it remains tied to a framework of stimulus and response with its "interrelations of fleeting perceptions and external constellations." Within that framework, performing one's legal duties is contingent upon whether such performance will make the individual better off. (35)

Consequently, negative duties of non-interference are insufficient, and active participation in the "project of freedom through law" is required.

Pawlik presents his assumptions in almost anecdotal form without further elaboration. Upon reflection, however, it is not necessarily intuitive that "the pathos of detachment" is unsuitable as a general way of life and that instrumental interaction is, in fact, unstable. An instrumental theory of the law and the state does not imply an entirely instrumental social universe. It merely states that *some* social systems may indeed operate with instrumental models of the individual and of society. That alone neither amounts to a *general* way of life, nor does it, without more, rob such systems of legitimacy.[18] Similarly, it

18. In fact, one might argue that, in a multicultural, multiethnic, and highly differentiated society, it is neither possible nor desirable to have a legislator identify a set of common purposes beyond a certain minimum level of physical safety. Depending on the degree of societal differentiation, the commonality of such purposes is bound to be restricted to the shared preferences of the largest

is questionable whether instrumental interaction is in fact quite as unstable as Pawlik assumes it is. The market, as the paradigm of decentralized, instrumental exchange, may well be sufficient as the kernel of a modern, albeit minimal, civic society.[19] Concerns about the stability of purely instrumental relationships have played a prominent role in Hobbes' concept of the state of nature as a zero-sum game. But that model is flawed, because in a situation of scarcity and competition, the emergence of a property system and the mutual realization of comparative advantage through trade and functional differentiation is at least as likely as a "war of every man, against every man."[20] It is thus not a foregone conclusion that the *legal* system should bear a special responsibility for organizing and actively maintaining social cohesion; it is conceivable that social cohesion stems primarily from extralegal practices and basic value orientations[21] and that the role of the legal system and the state need not go beyond protecting basic individual liberties.

IV. SUMMARY

Pawlik's slender volume of 124 pages contains an impressive collection of original thought, at the center of which stands the highly practical three-pronged concept of the criminal wrong. The fundamental normative question that Pawlik raises is whether and to what extent a free society is defined by institutional detachment from common goals or by affirmatively embracing and thus requiring participation in the maintenance of common goals *specific*

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and/or most influential minority.

19. See, e.g., Robert Nozick, Anarchy, State, and Utopia (1974). For a radical version of the argument that *all* traditional functions of government can better be performed through private arrangements, see David D. Friedman, The Machinery of Freedom (2d ed. 1989).

20. Thomas Hobbes, Leviathan ch. 13, para. 8 (1996) (1651).

21. See, e.g., Robert Ingelhart & Wayne E. Baker, Modernization, Cultural Change, and the Persistence of Traditional Values, 65 Am. Soc. Rev. 23 (2000); Dan M. Kahan & Donald Braman, More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions, 151 U. Pa. L. Rev. 1291 (2003).

to a free society.[22] Pawlik opts for the latter by introducing a normative concept of freedom based on both interpersonal and institutional recognition as a candidate for that common goal. Pawlik's contribution significantly advances the integration of punishment theory into a broader framework of subject theory and political philosophy. Such integration is all the more valuable, given that the theory of recognition, as a foundation for legal and political philosophy, has not always received the attention that it deserves. Pawlik's communicative, non-ontological reading of Hegel, in particular, should be of interest not only to specialists in punishment theory but also to a broader audience of legal and political philosophers.

22. In other words, the question is whether *difference* or *unity* should be at the center of political philosophy.