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**WAS THE FROG PRINCE SEXUALLY
MOLESTED?:
A REVIEW OF PETER WESTEN'S
*THE LOGIC OF CONSENT***

*Heidi M. Hurd**

THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT. By *Peter Westen*. Burlington: Ashgate Publishing Co. 2004. Pp. vii, 383. \$104.95.

Peter Westen's *The Logic of Consent*¹ is nothing short of a tour de force. In the tradition of the very best and most significant contributions to legal theory, Professor Westen demonstrates that we do not know what we think we know about a capacity that on a daily basis turns trespasses into dinner parties, brutal batteries into football games, rape into lovemaking, and the commercial appropriation of name and likeness into biography.² While we all employ claims of consent in everyday moral gossip to absolve some and withhold sympathy from others, and while courts of law across the nation commonly predicate legal rights and responsibilities on findings of consent or its absence, Professor Westen convincingly proves that (1) we do not share, either individually or institutionally, a common concept of consent; (2) a number of the competing conceptions of consent that are regularly employed (sometimes simultaneously by the same person or court) are either, in themselves, conceptually incoherent, or are frequently combined in ways that produce conceptual confusion; and (3) our failure to sort out our conceptual confusions results in gross injustices and inequities as we punish the innocent and acquit the guilty.

Frankly speaking, when one agrees to review a book one privately hopes for two things: that the book will not offer so many points of disagreement as to make one's review feel like a remedial exercise (giving rise to the "so many confusions, so little time" response); and

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1. Peter Westen is the Frank G. Millard Professor of Law, University of Michigan.

2. For my own crack at this thorny concept, see Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121 (1996).

that it will offer enough points of disagreement to provide one with grounds for serious debate with the author. If I have one disappointment with Professor Westen's marvelous book, it is that I can find too little with which to disagree! And this is a book of sufficient philosophical daring to deserve more feisty debate than I find myself able to muster.

Professor Westen's enterprise is to elucidate the distinctly separate empirical and normative components of legally-effective consent and to demonstrate how confusions of these components have resulted in morally unjustified legal judgments. Consider Professor Westen's opening example of twenty-five-year-old Elizabeth Wilson, who awoke in the middle of a September night in 1992 to find that a total stranger, Joel Valdez, had broken into her Texas apartment and was advancing on her with a knife. She leapt from her bed and fled to the bathroom, but Valdez broke down the door and demanded that she pull down his pants. Fearing both that she would be stabbed if she resisted, and that she would contract AIDS if he forced her into the unprotected intercourse that he made clear was his purpose, Wilson agreed to submit to sexual intercourse if Valdez put on a condom. He did so, and then subjected her to intercourse for an hour before she was able to escape from his clutches and flee naked to the aid of a neighbor. Without explanation, the grand jury refused to indict Valdez for rape, though an unnamed participant later stated that several members of the grand jury believed that the apparent bargain Wilson struck with Valdez constituted consent on her part.³

As Professor Westen suggests, such a finding is only plausibly explained if one assumes that the grand jury confused factual consent with legal consent, mistaking true acquiescence by Wilson (that is, an all-things-considered choice to submit to intercourse with Valdez), with that amalgam of conditions that are individually necessary and only jointly sufficient for a genuine justification on the part of Valdez (that is, subjective acquiescence by Wilson under circumstances in which her rational capacities were fully intact, she was armed with adequate information, and she was sufficiently free to have meaningfully chosen otherwise) (pp. 2, 9-10). Only a finding of legal consent could properly have absolved Valdez of blame and rightly insulated him from legal consequences, and inasmuch as it seems clear that Wilson's choice — albeit an autonomous and fully informed one — was hardly made under circumstances of adequate freedom, the grand jury could not have fairly said that her factual consent satisfied the requirements of legal consent.

3. Pp. 1-2; Ross E. Milloy, *Furor Over a Decision Not to Indict in a Rape Case*, N.Y. TIMES, Oct. 25, 1992, at 30; *No Bill in Rape Case Prompts Outrage; Suspect Wore a Condom at Woman's Request*, HOUS. CHRON., Oct. 10 1992, at 30.

The Wilson case nicely motivates one of the principal themes that runs through Professor Westen's sophisticated analysis of consent — the claim that juries and judges often confuse a finding of a complainant's "factual consent" (which, at its core, constitutes a state of subjective acquiescence to what would be a rights violation in the absence of such acquiescence, and which is generally a necessary, though not sufficient, means of according another a justification for action) with her "legal consent" (which varies in its requirements from one jurisdiction to the next, but which requires sufficient knowledge, rational capacity, and freedom as to make the defendant's behavior toward the complainant justified, and hence, not a rights violation). Part I of his book is dedicated to an analysis of what he terms "factual consent." Part II is then devoted to analyzing the further conditions that must be present before factual consent will provide another with a legal justification for a *prima facie* rights violation. Part III concludes the book by revisiting decisions and doctrines previously discussed in the text so as to summarize ways in which courts have perpetrated and perpetuated doctrinal confusions by conflating concepts of factual consent with concepts of legal consent. Because Part III largely summarizes the principal themes that animate Parts I and II, I shall focus my energies here on the first two parts of his book.

In Chapter One, Professor Westen articulates the conditions of what he calls "attitudinal consent," which as he says is "central to all conceptions of consent," both factual and legal (p. 51). When the law concerns itself with an offense to which consent is a defense, it recognizes that subjective acquiescence has the capacity (under the right conditions) to eliminate the wrongdoing addressed by the offense. In words from my past, rather than in Professor Westen's words, subjective acquiescence has the potential to be "morally magical" — it can transform a wrong into a right when it constitutes an autonomous exercise of will that conveys a permission on another that he would not otherwise have.⁴ Inasmuch as an autonomous willing or choice is a subjective mental state, so consent must consist of a subjective mental state if its normative power is to derive from its instantiation of autonomy.

As Professor Westen maintains, mental states of choosing can take several alternative forms, any one of which will suffice to constitute factual attitudinal consent (p. 53).

[I]t is enough that a person possess an unconditional desire for *x*. It is also enough that a person possess a decided preference for *x* under the circumstances — that is, a desire for *x*, all things considered. It can also be enough that a person be so indifferent to *x* as to be willing to leave it

4. Hurd, *supra* note 2, at 124-25.

to others as to whether x occurs. (p. 53)

As Professor Westen spends time making clear, one cannot satisfy these requirements without an appreciation of the nature and quality of x and without the capacity to assess one's desires and the ability of x to satisfy them. Thus, a woman who acquiesces to penetration believing herself to be having a gynecological examination does not consent to sexual intercourse.⁵

But Professor Westen powerfully maintains in his opening chapter that "a person can subjectively choose x as that which she desires for herself under the circumstances even if she has no control over whether x occurs, and even if she would not choose x but for the circumstances in which she finds herself" (p. 53). And crucially, when a person does subjectively choose x as that which she desires for herself under the circumstances, all things considered, she factually consents to it (even if she does not legally consent to it). Thus, when Wilson submitted to sexual intercourse with Valdez as a means of preventing him from stabbing her, Professor Westen maintains that she factually consented to intercourse, because she subjectively chose it over what she believed to be the alternatives, and the fact that she could not have prevented him from having intercourse with her does not make her choice to engage in it something less than factual attitudinal consent.

Professor Westen takes pains to remind his readers throughout his chapters on factual consent that a finding of factual consent does not exhaust the question of whether there was legal consent, for while factual attitudinal consent is a core requirement for legal consent, it is not sufficient for legal consent, and hence, we need not fear that in saying that Wilson factually consented to intercourse we are simultaneously saying that she was not raped. Still, I want to take issue with the defining claim that Professor Westen introduces in Chapter One that a woman who knowingly and in full possession of her rational capacities acquiesces to intercourse at gunpoint gives anything that should be thought of as "consent." *I want to suggest, instead, that coerced consent is no consent at all.*

Professor Westen defends the conceptual integrity of the notion of factual consent by arguing that it alone captures the difference between the woman who fights to the bitter end to defend against forced penetration and the woman who acquiesces to it because she holds her bodily integrity less dear than something else — e.g., her life, her property, the lives of loved ones, etc. And while there may be no

5. Pp. 39, 41; *see also* *McNair v. Nevada*, 825 P.2d 571 (Nev. 1992) (concerning a woman who consented to a gynecological examination, but who later discovered that she had been subjected to intercourse); *New York v. Hough*, 607 N.Y.S.2d 884 (N.Y. Dist. Ct. 1994) (concerning a woman who consented to intercourse with a man who turned out to be the identical twin of her boyfriend, to whom she thought she had given consent).

moral difference between one who achieves intercourse through force and one who achieves it through threats, Professor Westen insists that we have reason to want to preserve the conceptual distinction between the mental states of these victims, and hence, to admit that the one who was overpowered gave no consent, while the one who struck a deal with the devil, did so consensually (albeit not with sufficient freedom to provide a legal justification to her aggressor) (pp. 48-49).

But what reason can Professor Westen give for wanting to preserve the conceptual distinction between the mental states of these victims? Nothing turns on the distinction between these two kinds of victims. Perhaps in days gone by, when the value of a woman's virtue was elevated above the value of her life, the choice to preserve life at the cost of virtue had significant moral ramifications: the woman who succumbed at knife point could be deemed of lesser moral fiber than the woman who fought to the death to protect her honor. But in this day and age we properly draw no moral distinction between one who risks death to protect her bodily integrity and one who sacrifices her bodily integrity as a means of saving her life. So what value derives from treating coerced acquiescence as a species of consent? I can think of none that is not anachronistic.

I would suggest, instead, that we ought to reserve the concept of consent for instances in which a person's acquiescence alters the *moral* rights and obligations of another, rendering what would otherwise be morally wrong a matter of moral right. Thus, a woman who acquiesces at knife point in no sense accords her assailant a moral right to subject her to sexual intercourse, and hence, she does nothing that ought to be thought of as giving consent.

Now if one reserves the concept of consent for instances in which persons alter the moral rights and duties of others, Professor Westen may still have grounds for suggesting that the law ought sometimes to require more than does morality, and, indeed, that it ought sometimes to part ways with morality altogether. He might argue that jurisdictions plausibly distinguish legal consent from moral consent, for they are wary about allowing defendants to claim consent as a defense to legally prohibited conduct without requiring them to meet elevated evidentiary standards and, perhaps, elevated standards of freedom and rationality on the part of their complainants. Or, inversely, jurisdictions might legitimately acquit defendants who have in fact invaded others' interests without their moral consent in circumstances in which such defendants had good grounds to believe that they had secured such consent.

Thus, for example, one can imagine a man subjecting a woman to intercourse under circumstances in which she was willing and eager, but in which he did not have adequate objective proof of her mental state. We might say that he did her no moral wrong, given that she, in

fact, subjectively willed that they have intercourse, but that he should be thought guilty of a legal wrong, for he was consciously aware of a substantial and unjustifiable risk that she was not, in fact, choosing his actions for herself. Thus, some courts and theorists might insist that he should be held liable for reckless rape on the basis that her consent did not satisfy necessary evidentiary standards for affording him a legal defense. Professor Westen might thus argue that even if I am right in thinking that the relevant distinction is not between factual consent and legal consent, but between moral consent and legal consent, his essential claim that the law's understanding of consent is uniquely complex as compared to other relevant conceptions of consent survives.

But I would argue, on the contrary, that a defendant who has sexual intercourse with a woman who subjectively welcomes it but who does nothing objective to manifest her desire, should at most be guilty of attempted reckless rape.⁶ For while he was aware of the possibility that she was not consenting, and so was culpable, the fact that she was gladly choosing intercourse with him defeats the claim that she was raped. I would thus suggest that the law is conceptually confused when it torques the concept of consent in order to hold a culpable defendant liable for something that was not, in fact, contrary to the wants of another (assuming that other has the requisite knowledge and capacity to know and execute her wants autonomously). It should instead use attempt liability for this purpose, for the doctrines of attempt liability were crafted precisely to allow for the punishment of culpable persons who get lucky and in fact do no wrong. And this is to say that the law has no good reason to part company with morality in order fairly to deal with defendants who have taken liberties with others in the absence of clear evidence of consent.

Conversely, recall the case of *O'Brien v. Cunard Steamship Co.*,⁷ in which a woman joined a line of newly-arrived immigrants who were receiving smallpox vaccinations. When she held out her arm she did not appreciate that she was going to receive an injection, and hence, did not choose the doctor's conduct for herself. But the doctor, having no reasonable basis for believing the immunization to be nonconsensual, might properly be legally acquitted for what constituted a true violation of her moral rights, given the absence on

6. In venturing this claim, I am aware of the dispute over whether it is not a contradiction in terms to suggest that one can attempt crimes of recklessness. After all, inasmuch as attempt liability requires proof of specific intent, it would seem inconsistent with mere recklessness. I do not take an attempted reckless offense to be an oxymoron, however; for conceptually, one can have as one's conscious object the doing of an action under circumstances material to its criminality about which one is consciously aware.

7. 28 N.E. 266 (Mass. 1891).

her part of any choice to suffer such a contact. Many would say of him that while he committed a prima facie battery, he had reasonable grounds for believing his contact consensual, and thus, he ought to be thought to have acted with legal justification.⁸ Professor Westen might thus argue that just as the previous case demonstrates how the law might plausibly withhold the defense of consent under circumstances in which the complainant eagerly received the defendant's advances, this case suggests that the law might plausibly accord a defendant the defense of consent under circumstances in which the complainant did not, in fact, choose his conduct for herself (and would have resisted it if she had better understood its nature).

In fact, I would say that the physician in this case was merely excused, rather than justified. I would reserve justifications for instances in which no wrongs are done, leaving excuses to exonerate persons from wrongs that were not culpably caused.⁹ This position has the virtue of preserving justifications for circumstances in which we applaud defendants' choices and would recommend their repetition if we could turn back the clock. In a case in which we take a defendant to have made the best choice possible given the information reasonably available to him, but in which we come to appreciate that it was the wrong choice, we best capture the judgment that history should not be repeated by granting him an excuse, but not a justification. Once again, then, I would suggest that to the extent that the law parts ways with morality, it does so by virtue of confusing its own categories. Rather than invoking the concept of justification to achieve the exoneration of someone who nonculpably committed a nonconsensual rights-violation, the law ought to employ the language of excuse, thus leaving in tact the fundamental principle that prima facie rights violations committed without consent are wrongful.

All this is to say that Professor Westen's core distinction between factual consent and legal consent is, in my view, off the mark. For the

8. See, e.g., MODEL PENAL CODE § 3.04(1) (Proposed Official Draft 1962) (holding that use of force is justified if an actor merely believes it to be immediately necessary); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.01 (2d ed. 1986) (recounting that at common law, conduct is justified if an actor reasonably mistakes the existence of justifying circumstances). In addition to capturing the jurisprudence of justification in a number of jurisdictions, this "epistemic theory" has some very impressive academic champions. See, e.g., Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61 (1984); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

9. See Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1557-62, 1565-72 (1999). While a minority position, this view certainly has some worthy friends. See, e.g., GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 10.1 (1978); PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 122 (1984); George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982).

distinction between those who provide factual consent but not legal consent (the woman who acquiesces at knife point) and those who do not provide even factual consent (the woman who fights back until physically overwhelmed) is a distinction without a difference. The distinction that might make a difference (though I have argued against even this) is the distinction between those whose consent provides a moral defense but not a full legal defense and those whose conduct (I do not say consent) is sufficient for a legal defense. For this distinction would squarely raise the question of whether the law ought to punish people who have done nothing morally wrongful; and acquit others who have invaded moral rights without permission.

Professor Westen would surely respond by pointing out that the confusions perpetrated by juries and judges take their inspiration from a confusion of his distinction, not a confusion of my distinction. As his opening recounting of the case of Elizabeth Wilson attests, the grand jury seemed to assume that Ms. Wilson's acquiescence to intercourse with Joel Valdez rendered such intercourse consensual for purposes of rape law. Professor Westen would likely insist that the jury mistook the relevance of acquiescence. It is not that they found her acquiescence morally relevant, and then failed to appreciate that the law sometimes does not mirror morality. They simply seemed to think that acquiescence, by itself, settled the legal (and implicitly the moral) question.

It may be that our disagreement is, in the end, largely semantic; and that is how I took it when I first read through Professor Westen's thoughtful and searching book. It may be that what he calls "factual consent" I would call "acquiescence." Forced acquiescence is certainly acquiescence, and perhaps it does no harm to call acquiescence "factual consent" so long as one fully understands that acquiescence (or factual consent) takes one a very short distance towards determining whether someone has transferred to another a moral or legal right. Given how persuasive Professor Westen is, however, in establishing that juries and judges standardly confuse factual consent with legal consent, I would much prefer to alter our discourse so as never to use the term "consent" in circumstances in which it does not connote that one has, in fact, given another a right to do what was formerly wrong. Inasmuch as the confusions that Professor Westen is at pains to unpack owe so much of their inspiration to over-use of the term "consent," I would seek to limit its application to instances in which it at least does moral work (if not legal work), and hence, I would say that persons who submit to others' conduct under circumstances of ignorance, irrationality, or coercion do not consent to that conduct; they merely acquiesce to it and that is, in itself, of no moral or legal consequence.

In Chapter Two, Professor Westen takes up what he thinks of as a second, alternative conception of factual consent that rivals the notion

developed in Chapter One to the effect that consent is factually given when one subjectively chooses another's conduct for herself. This alternative conception is advanced by those who claim that one does not factually consent unless and until one *manifests* one's subjective acquiescence to another's behavior in ways that are overt and observable. As David Archard puts it: "Consent is an act rather than a state of mind. Consent is something I do rather than think or feel."¹⁰ Thus, a woman who is willing and eager for another's touch does not consent to it unless she manifests her desire through action. One who wakes to loving kisses has not consented to them, even if they are welcome. To put it bluntly, Sleeping Beauty, Snow White, the Little Mermaid, and the Frog Prince were all sexually molested! For while their lives were returned to them by others who were willing to kiss them despite their rather remarkable disabilities, their disabilities made them unable to render those kisses consensual.

One might understand what I will call "the expressivist's position" if, in fact, expressions of consent constituted what John Searle called "declarations" — utterances the very uttering of which makes them true or brings about a state of affairs.¹¹ To say "I do" before an ordained minister at the front of a chapel in the course of a marriage ceremony is to marry, regardless of one's intentions or sentiments about the matter. To say "you're out" as an umpire in a baseball game is to put a player out, regardless of one's beliefs concerning the merits of the call. To say "I resign" is to relinquish one's position, regardless of whether one intends to be playing a prank or delivering a threat.

If by saying "I consent" (or an illocutionary equivalent) one necessarily makes whatever follows on the part of another a consensual deed, regardless of one's beliefs or sentiments concerning the conduct, then we might understand why some, like Archard, might insist that consent is an act, not a mental state. But there are two things to say in response to those who take expressions of consent to be declarations, one of which Professor Westen nicely captures, the other of which is worth making clear. First, as Professor Westen argues, "When *S*'s utterance of 'yes' operates in law to constitute legal consent, it is not *despite* what it represents about *S*'s mental state, but *because* of what it represents about her mental state — which is why it

10. P. 66 (quoting DAVID ARCHARD, *SEXUAL CONSENT* 4 (1998)); see also Joan McGregor, *Force, Consent and the Reasonable Woman*, in IN HARM'S WAY 231, 242 (Jules L. Coleman & Allen E. Buchanan eds., 1994) (claiming that "[c]onsent is performative, it is something that an agent does"); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2181 (1995) (arguing that consent in the sexual context should mirror "every other context-affirmative permission clearly signalled by words or conduct"); Emily Sherwin, *Infelicitous Sex*, 2 LEGAL THEORY 209, 217 (1996).

11. JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* 1-8, 12-20 (1979).

is commonly and rightly observed, “Yes does not always mean yes” (p. 91). Second, even if one were to persist in maintaining that expressions of consent are declarations the saying of which makes consensual the deeds to which they apply, one would not have established that all instances of consent are expressive. For even if the expression of consent is *sufficient* for there to be consent, it may not be *necessary* for there to be consent. That we *can* make another’s deeds consensual simply by saying that they are does not mean that we cannot make them consensual in other ways; for example, by subjectively choosing them for ourselves without external manifestation. Thus, it ultimately does not help the expressivist’s case very much to sign onto the claim that expressions of consent are declarations — unless and until he can convincingly defend the claim that consent is not consent unless it is expressed. Let us further explore these two objections to the expressivist’s understanding of consent.

It would seem that one who declares consent to be an act rather than a mental state has two related problems to solve on pain of his thesis being manifestly false: not all “yes’s” would seem to be “yes’s,” and not all “no’s” would seem to be “no’s.” A person suffering from Tourette’s Syndrome might be heard to exclaim “yes” in response to another when her utterance was wholly involuntary. A speaker just learning English might misremember the word “no,” inverting its spelling in her head and crying out “on, on” rather than “no, no.” An immigrant woman might believe that in holding out her arm in an immunization line-up she is going to get a stamp, not an injection. On pain of absurdity, expressivists would have to admit that while these cases all reflect acts of apparent acquiescence, their status is merely apparent. One might want to forgive those who relied upon such acts if they had no reason to know that such acts were involuntary or motivated by error in the ways I have described, but as I argued above, crediting them with innocent mistakes ought not to be confused with finding them in the right.

While it seems obvious that expressions of “yes” do not function as declarations that necessarily make others’ deeds consensual, Professor Westen’s second chapter reveals that many expressivists would embrace an asymmetrical theory of factual expressive consent. They would argue that while a “yes” may not be sufficient for consent, it is nevertheless at least necessary. But I join Professor Westen in thinking that there are clear cases in which consent is present even though there has been no manifestation of it, and more strongly, even though a clear “no” has been registered. To insist that consent is an act is to insist that those who cannot act cannot consent. But does one really want to maintain that mute quadriplegics lack not only the powers of speech and locomotion but also the moral power to alter others’ rights and obligations by the exercise of their will? The only substantial power they possess is the power of will, and it would be cruel indeed to

declare that they cannot make others' touchings consensual simply by welcoming them.¹² Once again, of course, we might want to blame the person who proceeds in the absence of any manifestation of consent by one who is incapable of such a manifestation, but we ought not to confuse our blame of one who substitutes hope (or indifference) for knowledge with our understanding of when a prima facie rights violation has, in fact, been licensed by a rights holder.

Some (now weak) expressivists might concede the argument so far, and so might agree that "yes" is neither necessary nor sufficient for consent. But, like Susan Estrich, they might continue to insist that at the very least "'no' means no."¹³ Estrich is not silly about this: she well appreciates, for example, that women sometimes say "no" during moments of intimacy when they fervently hope that it will be ignored. But she firmly believes that the law ought to treat a "no" as a declaration that makes the conduct to which it applies nonconsensual, regardless of the beliefs and desires of the parties involved. Like the umpire who makes it so by declaring a player to have committed a foul, so a woman renders her partner's actions nonconsensual by delivering up a "no," even if she, like the unwitting umpire, was not intending to bring the game to a halt.

Estrich may be right that the law ought always to treat an expressed "no" as if it were a "no" in heart and mind. Evidentiary concerns and the desire to use the law to impress upon persons the importance of securing ex ante consent to what are prima facie rights violations might be sufficient to justify the law in laying down a per se rule that accords a "no" the status of a declaration that, by itself, renders another's persistence nonconsensual. But such arguments appear to be misplaced in this chapter, for they concern what the law ought to build into the notion of legal consent, rather than what constitutes Professor Westen's more primitive notion of factual consent. Inasmuch as Professor Westen himself is anxious to remind theorists of the need to divorce legal consent from factual consent, it is puzzling that he treats Estrich's theory as a theory of factual consent, for given how often a "no" is uttered by one who is willing, it is a very poor theory of factual consent, and hence, if given its best interpretation, it ought to be dealt with as a theory of legal consent.

More generally, there is only one interpretation that can cure the embarrassment to expressivism posed by cases that make clear that persons can both satisfy its actus reus requirement without being a willing recipient of another's overtures and fail to satisfy that

12. The fallacy, as Westen nicely puts it, "is the assumption that if conduct is involuntary in the sense of being unpreventable, it must also be involuntary in the sense of being unwelcomed." P. 228.

13. Susan Estrich, *Rape*, 95 *YALE L.J.* 1087 (1986).

requirement while welcoming another's conduct. It must be that expressivists are advancing, not an empirical (or in Professor Westen's terms, a factual) account of consent, but a normative theory about how the law *ought* to define consent. They might plausibly believe, in my lexicon, that only overt acts transfer rights and alter responsibilities, and they thus might rightly reserve the term "consent" for such morally magical events in the world. Motivated by the worry that culpable defendants will be acquitted and nonculpable defendants will be convicted if consent is deemed a subjective state, they urge upon the law a definition that both exonerates those who reasonably rely upon what is ordinary evidence of consent and holds liable those who are indifferent to the lack of such evidence (even when they get lucky and do not offend another's wishes).

But as Professor Westen himself recognizes later in the book, "defining consent as a mental state does not allow defendants . . . to escape punishment altogether. . . . at least in jurisdictions that also possess attempt statutes" (p. 161). Once again, we need not build into the concept of consent all that is necessary to inculcate the guilty and exculpate the innocent; for we have doctrines of attempt and doctrines of excuse that are up to these tasks. The only thing that expressivists might complain of, then, is that we do not punish attempts the same as completions; but that is a general complaint with the jurisprudence of attempt liability that ought to be advanced in its own right, and not in the disguise of a discrete thesis about the justification of consent.

Given Professor Westen's own complaints with the expressivist's theory of consent (and he has several other complaints beyond those he shares with me, including very persuasive ones about how the expressivist fixes the interpretive community that defines whether a given action expresses consent), it is quite surprising that he dignifies the theory of "factual expressive consent" as a genuine alternative to the theory of "factual attitudinal consent" advanced in the first chapter as "the core conception" of consent. While I appreciate that Professor Westen is anxious to give a conceptual analysis of understandings of consent in fact embraced by the law and leading theorists, and while he certainly advances good authority in support of his empirical claim that "factual expressive consent" enjoys substantial doctrinal and scholarly support, I would have thought that the best means of providing conceptual clarity would have been to show the theory to be confused at its core, rather than to pick at the confusions at its perimeter. As it stands, Professor Westen pays the expressivist's theory the compliment of characterizing it as a rival to the subjectivist's attitudinal theory; analyzes both theories separately; plainly reveals and defends his conviction that the former is, as he describes it, "the core conception of consent;" finds fault with the latter conception; and then ultimately refuses to declare those who advance an expressive theory of factual consent to be confused, thus

committing himself to juggling both notions of factual consent throughout the entire book as though the dispute between their contenders is resistant to reasoned resolution.

In my humble view, Professor Westen should have had the courage of his intuitions and should have gone the distance to establish that those who inject an expressive requirement into the most primitive conception of consent do so because they believe that our understanding of consent must be constructed to answer the sorts of concerns that might rightly make legal consent different from, and more onerous than, mere acquiescence. But inasmuch as Professor Westen's project is to demonstrate how our understanding of factual consent need not (and implicitly, should not) capture all that legal consent must capture, I would have thought that he would declare as confused any concept of factual consent that smuggles in the concerns reserved for legal consent which is the subject matter of Part Two.

In Part Two of his book, Professor Westen turns to the various conceptions of consent employed by the law in defining the rights and duties that will be protected and enforced by recourse to the powers of the state. According to Professor Westen, "[l]egal conceptions of consent . . . fall into two subsets that I shall call 'prescriptive' and 'imputed'" (p. 6). Prescriptive consent is factual consent that is sufficiently competent, informed, and free to justify another in committing a *prima facie* legal wrong. There are thus, in Professor Westen's view, two possible sorts of prescriptive consent, answering to the two sorts of factual consent that he unpacks in Part One of the text: "prescriptive attitudinal consent," which "consists of an attitude of factual acquiescence by *S* under conditions of a certain kind — namely, such conditions of competence, knowledge, freedom, and motivation to acquiesce as are deemed necessary to change *S*'s legal relationship to *A*" (p. 7); and "prescriptive expressive consent," which consists of "an empirical expression of acquiescence by *S* in the context of such apparent competence, knowledge, freedom, and motivation to acquiesce as are deemed necessary to give the expression legal effect" (p. 7).

In contrast to prescriptive consent, Professor Westen points out that the various kinds of "imputed consent" do not incorporate claims of factual consent: consent is imputed precisely when and because none has been granted in fact. As he taxonomizes them, there are three sorts of imputed consent. First, under what he calls "constructive consent," a person's consent to *x* is constructively construed as consent to *y*, when *y* is, as an objective matter, a means to or an incident of *x* (regardless of whether the person understood it as such). Thus, to use his example, when an amateur hockey player consents to enter the rink, he constructively consents to being cross-checked, despite the fact that it constitutes a major foul under the rules and despite the fact

that he may have never contemplated its possibility, for it is generally known that such a rule violation is a common occurrence within the game. Second, when one subjectively appreciates and assumes a risk, one gives “informed consent” to the materialization of the risk. Thus, a woman who breaks a leg while skiing can be thought to have given informed consent to the injury, for she voluntarily encountered the risk while fully informed and subjectively aware of the consequences that would ensue from its materialization. Finally, when one *would have given* prescriptive consent to x if one were competent to do so, the law takes one to have “hypothetically consented” to x . Thus, the law will take an unconscious accident victim to have hypothetically consented to a blood transfusion if doctors reasonably believed that she would have prescriptively consented to it had she been conscious and able to assess her situation, so as to give factual consent to the procedure under circumstances in which the law would afford her doctors’ a full justification.

Professor Westen’s treatment of the species and genera of legal consent is doctrinally rich, analytically rigorous, and philosophically engaging. For page after page he works through the detailed conceptual and normative claims that have to be defended before these conceptions of consent can be thought coherent and consistent, drawing on fascinating cases to supply intuition-priming examples. Because I simply cannot do justice to this remarkably rich exploration here, I am forced to do what I did with Part One and pick a single sampling from the intellectual feast that comprises the great middle part of his book.

Consider, then, Professor Westen’s discussion of “informed consent.” As Professor Westen describes it, “[t]he fiction is that because persons prescriptively acquiesce to *risks* of x , they also prescriptively acquiesce to x *itself*” (p. 283). To use his example, a woman who prefers the small *risk* of blindness to the alternative of continuing to have impaired vision will be thought to have given informed consent to her laser surgeon’s blinding of her, when the risk materializes despite due care on the part of the surgeon (p. 281). The virtue of this fiction, says Professor Westen, is that it “signal[s] what assumption-of-risk rules possess in common with rules of prescriptive consent” (p. 284). As he elaborates:

Both rules enhance S ’s autonomy to submit to conduct on A ’s part by immunizing A from criminal liability for harm, x , that A inflicts upon S in the course of his conduct: rules of prescriptive consent enhance S ’s autonomy to choose conduct that involves a certainty of harm x , while assumption-of-risk rules enhance S ’s autonomy to choose conduct that involves a mere *risk* of x without immunizing A from liability for x in the event the latter ensues, framing S ’s assumption of risk of x as a fiction of consent to x expresses the sense in which by legally choosing to engage in conduct involving a risk of x , S also legally chooses x . (p. 284)

I would suggest that while the assumption of a risk has “moral magic” that makes it a cousin to consent, there are significant dissimilarities between the two concepts, and a host of conceptual and normative problems attendant upon the one (assumption of risk) that do not beset the other (consent). Inasmuch as the concept of assumption of risk (or informed consent) is one of the least developed in Professor Westen’s text, and inasmuch as it glosses over significant and interesting questions to declare assumption of risk a species of (legally imputed) consent, let me lay out the differences between the concepts that have moral and legal implications.

There appear two distinct ways in which a person’s moral agency can be used to alter the morality of another person’s actions. First, it can function to fully transform the morality of another’s conduct — to make an action right when it would otherwise be wrong. For example, consent turns an assault into a handshake, a trespass into a barbeque, and a kidnapping into a Sunday drive. Second, a person can exercise moral agency in a manner that generates a permission that allows another to do a wrong act. Such a permission does not morally transform a wrong act into a right act, but it grants another a right to do wrong. It conveys a “stained permission,” for the act done remains, in some sense, wrong, and hence, morally stained, but the permission defeats any rights on the part of others that the actor not do the wrong act. Consider, for example, a woman who prefers to avoid motherhood by having successive abortions, rather than by using birth control. Suppose that her doctor has repeatedly tried to induce her to abandon this strategy, but, in the face of her refusal to do so, he has continued to perform abortions whenever she finds herself pregnant. Even the most committed pro-choice advocates can condemn the woman’s choice to substitute abortion for birth control, for they can judge her wrong to prefer her own freedom from trivial inconveniences to the genuine interests that can be attributed to fetuses. Nevertheless, if such pro-choice advocates are right in thinking that the liberty interests possessed by such a woman outweigh the interests of the fetuses she seeks to abort, then they must admit that her consent to the abortions makes her doctor’s successive procedures morally permissible.¹⁴

Many courts have reasoned that the assumption of a risk is either fully morally transformative, making morally justified what would otherwise be unjustified; or is itself blameworthy, and so a species of an altogether different defense in law — e.g., contributory negligence — and not morally transformative in the least. Thus, for example, in

14. For an extensive discussion of how wrongs can be right (in the sense of permitted) while still being wrongs, see Heidi M. Hurd, *Duties Beyond the Call of Duty*, 6 ANN. REV. OF LAW & ETHICS 3 (1998); Heidi M. Hurd, *Liberty in Law*, 21 LAW & PHIL. 385 (2002).

Meistrich v. Casino Arena Attractions, Inc.,¹⁵ the court declared that the doctrine of assumption of risk cannot be thought to be an autonomous defense in torts. As the court argued, a plaintiff's assumption of a risk inevitably entails either that the defendant was in no manner negligent in imposing the risk (making it impossible for the plaintiff even to make out the prima facie case for negligence because of an inability to prove a breach of duty on the defendant's part), or entails that the plaintiff was herself negligent in assuming what was, ex hypothesi, a negligently imposed risk. The court described the first understanding as "primary assumption of risk" and the second as "secondary assumption of risk," and argued that there remains no conceptual room for a doctrine that exonerates a *negligent* defendant from blame without relying on *negligence* on the plaintiff's part.

I think that this is wrong. It seems to me that it is possible for persons to non-negligently assume risks negligently imposed by others, and when they do so, they give others stained permissions to do what it is, ex hypothesi, wrong to do. That it is possible to non-negligently assume a negligently imposed risk follows from the thesis that the reasonableness or unreasonableness of an action turns on the costs and benefits of that action as judged from the epistemic vantage point of the actor. Thus, to use the facts of *Meistrich* in illustration, it may have been negligent of the ice rink owner to maintain ice that was too hard for ordinary skaters, but it may have been non-negligent of the plaintiff to have skated on the ice, given the costs to him of forgoing his practice. Under such circumstances, his willingness to encounter the increased risks of particularly hard ice did not make having such ice non-negligent; and it did not make him negligent in skating on it; but it did convey a stained permission to the rink owner that foreclosed any further right on his part to complain about the ice, or the consequences of the fall that inevitably transpired.

By capturing how assumption of risk can plausibly alter the rights and obligations of others without collapsing into contributory negligence I have sought to vindicate Professor Westen's intuition that assumption of risk is at least akin to, if not a species of, consent. Given that fictions are just that, I am not a fan of their use, and I would thus have resisted the temptation to characterize assumption of risk as "imputed consent," for it is not that the law pretends that assumption of risk is a form of consent; it is that assumption of risk has its own moral power — a power akin to, but not the same as, consent (namely the power to generate stained permissions) — and the law simply mirrors morality when it recognizes it as a legal defense.

But while assumption of risk is an analogue to consent in its ability to alter others' rights and duties, it is a nettlesome concept that

15. 155 A.2d 90 (N.J. 1959).

persistently defies attempts to specify its conditions. As Professor Westen recognizes and discusses only briefly, the conditions under which persons will be thought to assume risks of others' wrongs are contested. "First, an imputation of consent by *S* rests upon a normative judgment that the risk of which *S* is conscious is a risk that persons are justified in taking" (p. 283). Some risks are deemed too risky to assume in light of their social (dis-) utility. "[N]o jurisdiction allows persons to assume the risks of serious bodily injury involved in street fighting because no jurisdiction sees any social value in street brawls. On the other hand, every jurisdiction sees enough social value in competitive boxing . . . to allow persons to assume the risk of assault" (p. 283; footnotes omitted). Second, determinations of informed consent "rest upon normative judgments as to the amount of information that *S* must possess about a risk if *S*'s decision to face the risk is to constitute a defense to *A* in the event the risk materializes (p. 283). Thus, as Professor Westen argues, medical patients who are contemplating life-threatening surgery are likely to be entitled to more detailed information about the risks of death than persons exposed to HIV through sexual intercourse. And, third, Professor Westen might have added that just as one cannot assume a risk without having an informed appreciation of its significance, so one's assumption of a risk must be sufficiently free to make it "one's own." Thus, while the doctrine of assumption of risk was a child of the Industrial Revolution, coined as a means of protecting employers from suits by employees who had gravitated to the cities to take up often dangerous tasks in relatively unprotected settings, it came to be criticized in that doctrinal arena precisely because it was understood that employees could not meaningfully simply leave their jobs every time they identified an unreasonable risk.

Now fixing the conditions of the legitimacy of a risk, the adequacy of information concerning that risk, and the voluntariness with which someone confronts a risk are thorny matters. One might think them no more thorny than those that beset claims of consent, but there are substantial differences. Consider the woman who wears a low cut tight red dress to a notoriously rough bar on a Friday night. Does she assume the risk of rape, and so give her rapist a stained permission to subject her to forced intercourse? After all, wearing what one wants where one wants would seem of considerable social value. And we can imagine that her knowledge of the risk is perfect: she understands precisely the peril she courts. And nothing about her decision to spend a Friday night at that bar is in any way coerced or less than fully voluntary. So it would seem that she assumes the risk of rape. But surely we do not want to suggest that in wearing deliberately provocative clothing to a bar, a woman transfers away her right to bodily integrity. The same problem rears its head in countless settings.

One who drives to the grocery store late on New Year's Eve to buy snacks clearly does something that is *prima facie* socially legitimate; fully appreciates the very substantial risk of being hit by a drunk driver; and encounters that risk entirely voluntarily. Do we want to say that such a person conveys a stained permission to a drunk driver to collide with him? In the same vein, can we stomach the conclusion that a runner who heads through Central Park at dusk is voluntarily and knowingly assuming the risk of being mugged in a manner that gives his assailant a legitimate defense?

As all of these examples demonstrate, there is a substantial difference between the scope of a consent defense and the scope of an assumption of risk defense, and unless and until we can sort out why women who dress provocatively do not assume the risk of rape while hockey players who enter an amateur game assume the risk of being cross-checked, we will not be in a position to specify when and why the law ought to impute consent or otherwise transfer losses to persons who assume the risk of others' wrongdoing. Inasmuch as the criteria for informed consent discussed by Professor Westen do not do the work to sort between hockey players and skiers on one hand and provocatively dressed women and joggers in Central Park on the other, we cannot be confident that informed consent is a conceptually coherent and normatively defensible defense, and we thus cannot be confident that it should be counted as a moral or doctrinal cousin of consent.

That Professor Westen leaves for later work both conceptual vagaries and normative doubts is of small matter, given the extraordinary depth and breadth of the analysis he provides. Professor Westen's book is a sumptuous read, its pages brimming with lively cases, colorful examples, and crisp analytic moves that reveal entrenched doctrinal confusions. One finishes it with a sense of breathlessness, as though one has finally come to a halt after the professional analogue of an arduous hike through tremendously interesting terrain. I recommend this hike to all who enjoy rigorous intellectual workouts in areas fraught with conceptual obstacles and rich in normative and doctrinal significance.