THE CONCEPTUAL STRUCTURE OF CONSENT IN CRIMINAL LAW

KENNETH W. SIMONS

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The Conceptual Structure of Consent in Criminal Law

Book review of

Peter Westen, The Logic of Consent:
The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct
(Ashgate 2004)

by

Kenneth W. Simons

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I. 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

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¹ Professor of Law, The Honorable Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law. © 2005. All rights reserved. I thank Larry Alexander and Doug Husak for helpful comments.

unconstitutional conditions, waiver and forfeiture, and duress 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 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

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References:


controversial claim that both “force” requirements and “resistance” requirements are essentially gratuitous. A conclusion follows.

II. Brief exegesis of the framework

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

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<th>FC</th>
<th>Factual consent</th>
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<td>FAC</td>
<td>Factual attitudinal consent</td>
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<td></td>
<td>(unconditional preference, conditional preference among available alternatives, or &quot;indifference&quot;)</td>
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<td>FEC</td>
<td>Factual expressive consent</td>
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<td>(A’s interpretive community understands S’s words and conduct to satisfy FAC)</td>
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5 In a recent article, “Some Common Confusions About Consent in Rape Cases,” 2 Ohio St. J. Crim. L. 333 (2004), Westen restates some central themes from his book. 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.
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 (FC) to sexual relations with A if she chooses that option as what she most prefers under the circumstances. Thus, FC 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 FC 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 stems from a threat of serious violence if she fails to submit. Needless to say, FC is not a sufficient condition of legally valid consent (LC) 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 FC is sufficient for LC.

The concept of prescriptive consent identifies those instances of FC (whether FAC or FEC) that do constitute legally binding consent (LC). For example, a 14-year old girl who eagerly engages in sex with an adult gives both FAC and FEC, 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

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<th>Imputed consent</th>
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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 (which, 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 FAC or FEC), 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.)

III. 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

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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 form which she wishes she were free (233).
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.

In the book, 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. Wyoming, a case in which the defense lawyer successfully confused the jury by falsely implying that 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’” (p. 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, to the extent that the “perfectly sensible” meaning has such an enormous potential for confusion. “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

7 735 P. 2d 440 (1987), discussed at pp. 310-312.
8 Id. at 742-743.
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”).
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 “voluntary” act, although of course it will 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, FC 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). Westen also argues, against several commentators, that FC does not and should not depend on a subjective attitude in which S 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 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 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.

10 The language “conscious preference” is more apt than the language of “desire” that Westen sometimes employs here; for S might choose intercourse with great reluctance, and thus with none of the positive affect implicit in “desire.” Moreover, 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, finally, 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).)
“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.  

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; 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 to delegate the decision to another. A jurisdiction might well decide to count such indifference as FC 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 FC, while indifference might or might not (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 the 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

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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 contradictory in the slightest 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.)
“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 FC 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 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” 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

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13 See State in Interest of M.T.S., 609 A.2d 1266 (1992). See also Wis. Stat. §940.225, recognizing as third-degree sexual assault nonconsensual intercourse, and defining consent as “words or actions by a person ... indicating a freely given agreement to have sexual intercourse.” Of course, other reasons for the MTS view include 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
conduct that is insufficiently culpable and effectuating a notion of autonomy that is overly paternalistic. But Westen’s framework should be 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). 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 factual 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, 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 nonliability 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 nonculpable, a jurisdiction 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.

A refined and contextual approach is much more plausible than the absolute view that indifference is never legally sufficient for legal consent. So even in a jurisdiction that ordinarily requires one of the two core types of FC, 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 FC should be required, while in later encounters, indifference suffices. Or perhaps a core type of FC 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.
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 nonconsent? 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 factual attitudinal consent, Westen identifies the minimal cognitive and volitional content of S’s preference for x that he believes is required for FAC.\textsuperscript{16} Let me briefly comment 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 FAC. 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

\textsuperscript{16} Westen identifies the minimum \textbf{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 identify might vitiate factual consent.

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 \textbf{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.
paralysis). Both should both be understood as factually consenting despite their inability to prevent the kiss (44).

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 factual attitudinal consent concerns the range of the relevant choice set over which we evaluate S’s 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 p. 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 seem much more straightforward to deny at the outset that the 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 factual 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, FEC is properly defined by reference to what A’s interpretive community (essentially, a reasonable person in A’s shoes17) 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 FAC and FEC. In the first, California 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, New York v. Bink, the victim, a prison inmate who had been previously 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 FEC but not FAC: 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 FAC but

17 For some reason, Westen avoids the more familiar “reasonable person” language, but his notion appears to be substantially equivalent.
18 176 Cal. App. 3d 1134 (1985), discussed at 139-140.
20 In a footnote, Westen makes the interesting argument that we would have FAC, and not merely FEC, in Burnham if the victim, in order to avoid her husband’s threats, had to actually succeed in having sex
not FEC: 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, FEC is derivative of FAC, insofar as what must be "expressed" in some manner is any of the species of FAC that the jurisdiction recognizes (unconditional preference, conditional preference, and perhaps "indifference"). Second, FAC defines the actus reus of rape, while FEC is best understood as defining the mens rea. Thus, in Burnham, since S was not subjectively willing and did not give FAC, the actus reus of rape is satisfied; but since she did not express that unwillingness by the words or conduct the jurisdiction requires under FEC, 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. However, Westen points out that Bink might be guilty of attempted rape (161-162).

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 FAC 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 nonconsent)? Note that if they are only liable for attempted rape, that also seems to be true of the husband—an implausible result.

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 sex was secured.

A more straightforward case than Bink of FAC but no FEC, in which FAC is much more clearly also sufficient for LC, 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 group of sadomasochists who welcome his threats of violence (p. =).)
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 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 (156-157). In other words, whether Bink should be punished less because of the fortuity, from his perspective, that his victim consented (in the sense of FAC), is answered affirmatively if one accepts the moral luck principle and if FAC eliminates the social harm of rape. But if only FEC, not FAC, 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 FEC precisely in terms of FAC. But the second conclusion, understanding FAC as vitiating actus reus and FEC as vitiating mens rea, is not nearly so obvious. For it depends both on a definition of FEC 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 FAC 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 FAC (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. And a jurisdiction might have reason to recognize either or both components as a conception of factual consent. Thus, I would replace FEC with the following two categories of factual consent:

- **FSEC:** Factual subjectively expressed consent (where S employs words or conduct by which she intends to communicate her FAC)

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22 Burnham is a clear case of such an intention.

It might be appropriate to expand this definition to employing words or conduct by which S intends to communicate her FAC, or that she expects others to understand as FAC (even if she does not so intend them). I don’t pursue this complication.
FOC: Factual observed consent (where an observer—either A, or A’s “intermediate community,” or a reasonable person in A’s shoes—understands S’s words and conduct to satisfy FAC)\textsuperscript{23}

At least in some circumstances, a jurisdiction might choose to require (before it will find legal consent) the outward expression of FSEC, rather than FAC, in order to assure that acquiescence reflects a relatively firm, rather than fleeting or changeable, state of mind.\textsuperscript{24} The very act of 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 FOC—that an observer (perhaps a reasonable observer) recognize that S factually consents—either because law-makers 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. (FOC is what Westen calls FEC, 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 put FSEC 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

\textsuperscript{23} Indeed, a comprehensive approach would include a fourth category as well. The actus reus of rape could be defined either by lack of FAC or by lack of FSEC. (It is even possible to define it as lack of FOC, though this is the least plausible alternative.) Correspondingly, FOC could be subdividing into two corresponding categories: where the observer understands S’s words and conduct to satisfy FAC (Westen’s FEC fits here), and where he understands them to satisfy FSEC. But I will spare the reader further servings of alphabetic soup.

\textsuperscript{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 FC helps protect against unfair punishment in such circumstances.

Perhaps Westen is correct about the proper understanding of FAC, 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 value of recognizing FSEC as another category of factual consent.
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.)

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 FSEC 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 nonconsent 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 FSEC category than by Westen’s FAC and FEC 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 (FAC) and whether a reasonable person would have

25 Westen provides a nice analysis of the confused approach of some 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 require that the victim’s fearful response be one that a reasonable person in her situation would also 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 submitting only for that reason (320-321).
interacted her as having conveyed subjective willingness (FEC, which I treat as a subcategory of FOC). 26

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 instances 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

On Westen’s account, it is much more difficult to model this approach and all of its plausible variants than under my suggested approach. 29 Suppose, for example, that the jurisdiction want 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 FSEC) will count as legal consent. Then it would make sense to define the actus reus of rape as sexual intercourse absent affirmative FSEC. 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)

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.


28 See Schulhofer, 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 FSEC approach (70). But this seems incorrect: New Jersey law (as interpreted in MTS) appears to employ this approach, and the same might be true of other states’ explicit requirements of “freely-given” consent. See, e.g., Wisc. Crim. Code §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.”).

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
But it is difficult to see how Westen can express these different mens rea variations within his model, for he largely neglects the FSEC category, and he defines FEC too simply as posing only the question whether A was reasonable or unreasonable (i.e., negligent) as to FAC.  

Accordingly, his general point, that FAC pertains to actus reus while FEC 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 FSEC, not lack of FAC), and what counts as adequate mens rea. Some jurisdictions believe that the optimal policy (a) gives some, 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.

31 Westen’s careful definition of FEC and of the relevant perspective of the observer is a composite: it includes 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 FEC (as he defines it) offers a less precise measure of an actor’s guilty mind than the combination of FAC 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 (149-152, 161-163).

But the difference between lack of FEC and lack of FAC, 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. 2 Ohio St. J. Crim. L. 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.
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.  

Of course, if the absence of FSE or of some other type of communication is taken to define the social harm of a crime, then the question whether S satisfied the subjective standards of FAC 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 consent to rape or other crimes. 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 FAC 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 indicate 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 past sexual history.

To be sure, Westen might use the reasonable person (or interpretive community) rubric to capture the idea of FSEC. Perhaps it is just not reasonable for A to think S has given FAC unless he observes that S has tried to express FAC by word or conduct; inferring FAC from silence is just “unreasonable.” But I seriously doubt that this is in all cases the

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

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.”)
correct understanding of what a “reasonable” interpreter would infer. Moreover, this 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 FAC, 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, a jurisdiction that wishes to criminalize this conduct (without regard to whether A honestly and reasonably believes that FAC is present) would say that legally valid consent to sexual assault requires FSEC, which is lacking here, and which A will usually know is lacking; while a jurisdiction that does not wish automatically to criminalize such conduct would say that, while legal consent requires only FAC, in this scenario A would often have a defense of lack of mens rea as to S’s lack of FAC. But 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 FAC or FEC, but instead must take the form of a very specific type of FEC, verbal affirmative permission (77).

Although I agree with most of what Westen says here, I am unpersuaded by his attempt to treat the Antioch policy as an instance of FAC 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 the similarly 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 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 to a later section discussion of his most controversial claims about the (in)significance of force and resistance requirements.

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\(^{35}\) Of course, if some version of FSEC 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?”).
Addressing the “freedom” condition, Westen offers a useful analysis of different possible conceptions of “wrongful threats.” Because factual consent is only a 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 wish to 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,”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 phrase very narrowly indeed.38 Also, the term “compulsion” usually connotes the use of physical force in order to overcome S, contrary to her desires; while Westen also wishes to use the term in

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 a worsening in her situation; 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 practice.

37 This is Wertheimer’s proposal, which Westen rejects (182). See Alan Wertheimer, Coercion 217-221 (Princeton 1987).

38 In another respect, however, Westen uses “force” extremely broadly, as any form of pressure on S’s choice, as we shall see.
cases when S invites or desires A’s acts of “compulsion.” (A more accurate phrase might be “overwhelming physical force.”) 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.

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 physically 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 welcome the compulsion.

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” (187B). And he provides an excellent analysis of the well-known case, Boro v. Superior Court. 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

39 See 2 Ohio State J. Crim. L. at 350, using this phrase.

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 (Regina v. Morgan, [1976] App.Cas. 182, discussed at p.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 FC, this might or might not be LC. But with compulsion, Westen seems to say, if this is one of the unusual cases in which S gives FC, this will always be LC, too (unless her knowledge or competence is insufficient).==

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

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 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 PEC, 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. The latter category includes the classic story of 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 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.

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 a bit 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.

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 impairments.
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 not implausible; 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 understandably 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 a prior 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 nonconsent (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). Westen points out that mens rea requirements protect A here, but he concedes that from S’s perspective, retrospective nonconsent “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 reflect 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 compare well to that of his twenty year old predecessor, but not the judgment of a ninety year old relative to his fifty year old counterpart.

Westen points out that jurisdictions tend almost always to deny giving effect to retrospective consent, for a number of plausible reasons (257). But perhaps the

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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, 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; while in the other cases, 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
substantive 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. \(^{48}\)

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, S changes her mind about whether she has experienced harm, transform vitiated harm into legally recognized harm and back again, without limit.

\(^{48}\) 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.

\(^{49}\) 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).
Westen discovers an explicit Delaware criminal statute that so provides. 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 was 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 does not 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" (278-279). 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 sacrifices," including 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, S consents to the package, but not 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 to y, she consents to x despite its being negatively linked with y (e.g., S consents to sex so that A will not break up with her), even though S would often much prefer if they were unlinked.

Moreover, in a surprisingly wide range of cases, sexual contacts are better understood as instances of constructive consent rather than 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

50 “Any person who enters the presence of other people consents to the normal physical contacts incident to such presence.” 11Del. Code §451 (1999), note on p. 322.
intimate gesture moments later, that, too, will most likely fall within constructive consent\textsuperscript{51}; but the same is not true 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 might 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 unconditional 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 long-time 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 LC, we might need to rely on constructive consent (or at least retrospective consent).\textsuperscript{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 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 (275-276). 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,

\textsuperscript{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).

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

\textsuperscript{53} See Simons, Reflections on Assumption of Risk, supra note 11=, at , 498-503.
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. 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 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 in order to secure the benefits of the surgery, then S does not prescriptively consent. 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).

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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).
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 PC is that “informed” consent need not be invoked as frequently as one might have imagined.

Specifically, Westen indicates that PC 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 PC (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 PC 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 a particular type of 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 consent 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

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\(^{55}\) Notice how sensitive the PC 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.
not often involve S acquiescing to a mere risk that (undesired) sex will occur, 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.

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

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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 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 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 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.

=OR is there an intermediate case in which prescrip. consent would not be recognized but ass. of risk would be recognized???
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.)

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 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 FSEC, 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.\textsuperscript{58} But the nature of the analysis is not fundamentally different in the two contexts.

\textsuperscript{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,
Notice that 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.  

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.

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

Westen discusses my own account of assumption of risk in a footnote (n. 43, pp. 299-300). On that account, S assumes a risk in tort law just in case 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 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
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 PC 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:

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 fashion to the definition and analysis of prescriptive consent.\(^6^0\)

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, Reflections, supra note 11=, at 500.

On the other hand, it might also be true, as Westen suggests, that the criteria for barring tort recovery for assumption of risk properly differ from the criteria for precluding criminal liability on the basis of assumption of risk. 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 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.

\(^6^0\) 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.
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 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 version 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

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).

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 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

IV. The controversial claims

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

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 nonconsent than the current approach, under which courts often create fictions of nonconsent 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 nonconsent, 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.
(1) A force requirement is largely coextensive with a simple nonconsent requirement. Accordingly, force is essentially a gratuitous concept, and the controversy 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 nonconsent requirements, and therefore are not problematic; at least, they are no more problematic than the force and nonconsent 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 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

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65 See Pa. Stat. §3101 (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 note 36= supra, that term could be used, when appropriate.
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 nonconsent, he says, “rests on false conceptual premises” (208), for either “force” or “nonconsent” can easily incorporate the jurisdiction’s view of when pressures on subjective acquiescence are wrongful. 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). Rather, Westen 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 nonconsent requirement, what pressures to acquiesce are illegitimate.

Westen is correct to underscore that in many cases, force and nonconsent 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 “nonconsent” requirement has actually meant a substantive change from requiring that pressure be due to 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 does 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 “nonconsent” requirement.

Westen mentions two exceptional cases, where he points out that “nonconsent” 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 her 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 nonconsent 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).

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 difference between the approaches is rhetorical, not substantive, and that it is “normative confusion” to think otherwise (3).
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 nonacquiescence. 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 nonacquiescence, 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 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. But this often is not an apt description of the situation and of S’s state of mind when she says “no” yet 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 with respect to her conduct of 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, consists of wrongful pressure to acquiesce to the physical contact of sexual intercourse, not the physical act of sexual intercourse itself” (229). But cf. MTS, supra note 13= (controversially holding that
Interestingly enough, at the very end of the book, Westen objects to the use of "force" to describe instances of nonconsent 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 (346). "It would be simpler and more perspicuous to start and finish with legal consent as the controlling standard." 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 it 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 has a possibly 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 consent, or that she is the subject of "compulsion"—are dubious on their face.)

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.

the statutory “force” requirement is satisfied by the physical contact intrinsic to the act of intercourse itself).

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 LC 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 NMN or OYMY need not rely on A overwhelming S’s will, yet that it is what any “compulsion” approach presupposes.
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) just in case it is a threat of 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 that the rape statute protects her from. 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) that the statute sought to protect her from. 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. It would mean that “utmost-resistance” requirements are just as acceptable (or unacceptable) as the wrongful threat requirements that the jurisdiction imposes (212-214). It would also mean that “no-duty-to-

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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.
“resist” rules are just as defensible as the corresponding wrongful threat requirements (214-217). And it would demonstrate, on the one hand, that resistance requirements in a sense are gratuitous, for they need not be 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” is sometimes employed in the rape debate), it is not apt if, as is sometimes the case, they are employing the narrower view.74 I also believe that there are good pragmatic reasons for adopting 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.

73 I am also unpersuaded by Westen’s criticism of the argument that resistance can at least give notice of nonconsent to A (217-219). 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 D; if she resists, these things are easier to know. There is no logical “contradiction” (cf. 218F) 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.

74 A number of states refer to duties, or absence of duties, to “physically” resist. See pp. 214-217.
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 that it is often difficult meaningfully to compare the harms. 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 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.\textsuperscript{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 Y\textsubscript{1}, even in cases where Y\textsubscript{1} can more easily be compared with the harm Y\textsubscript{2} that A is forbidden from threatening to impose in order to induce her acquiescence. (Suppose a case in which Y\textsubscript{2} is physical harm or violence threatened by A, and Y\textsubscript{1} 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

\textsuperscript{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 the keys from her 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)?
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)

Thus, suppose a jurisdiction provides that wrongful force is limited to threats of
physical injury. The jurisdiction might also 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 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
extreme, 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?

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

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

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
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 (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).

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.

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
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 adding such a duty to the definition of factual consent. For example: “S shall be deemed 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). 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.”

V. Conclusion

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.

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.
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.\(^60\) 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 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

\(^60\) Westen does offer a model statutory provision to simplify the treatment of imputed consent. See note 61= supra.

\(^81\) 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 more explicit terminology.

\(^83\) 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).
others are part of legal consent.\footnote{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 note 16 above). It would also render irrelevant the ultimately pointless distinction between fraud in the factum and in the inducement, which Westen rightly criticizes (197-199). 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.} 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’ 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 FC into LC. 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 FC into LC.

Perhaps Westen’s hesitation stems from his belief that LC is “contestable” in ways that FC is not.\footnote{See 330. Westen further claims that FC is constant and invariable, while LC adds variable elements (327). He seems to believe that “FC 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 FC, and about the requisite} But the contrast seems overstated. He has shown that jurisdictions and
commentators employ a great diversity of approaches to both FC and to LC. And if “contestable” means “cannot be rationally analyzed,” that seems an inapt description of both FC and LC. Westen does articulate the range of considerations that are typically found relevant to LC.\footnote{Westen mentions vulnerability to exploitation, the harm that A will cause S, the value of permitting self-regarding decisions, the social consequences and effectiveness of criminalization, alternative ways to regulate A's conduct, and the seriousness of the criminal penalty (121).} I hope that he, or other scholars, will in the future subject these to more sustained analysis.

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 FC.
2. FC but not LC.
3. LC = FC under adequate conditions of competence, knowledge and freedom.

At times, Westen seems to suggest that the case against criminalization becomes stronger as we move from step one to step two, while step three fills in all the necessary conditions for "decriminalizing" what would otherwise be sexual assault.\footnote{See e.g. 52 (Canada's usage of FC is "a healthy reminder of the normative significance of factual attitudinal 'consent'"); 49 (contrasting a case in which a victim is overpowered despite her resistance with a case in which a victim forced to acquiesce).} 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 knowledge condition implicit in FC. And presumably a state's normative views about the proper scope of criminal liability could affect its definitions both of FC and of LC.

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.
which she can make some choice, no matter how constrained. But in many instances of #1, where A acts without any FC, A is much less culpable or commits a much lesser wrong than in many instances of #2, where A does act with FC. Intercourse secured by threat of death with a woman who reluctantly gives FC 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 nonconsent 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 (FEC) should be divided into two separate categories, factual subjectively expressed consent and factual observed consent.
- The FEC category is too crude, because it does not permit a jurisdiction to choose a mens rea other than negligence with respect to S’s factual attitudinal consent (FAC).
- More generally, although a jurisdiction might indeed wish to characterize FEC as pertaining to mens rea, it also might have reason to characterize FEC (or some variant of FEC) as constitutive of the actus reus.
- Westen’s framework cannot readily explain two significant contemporary approaches to nonconsent—the “‘No’ means ‘no’” and the “Only ‘yes’ means ‘yes’”
approaches—because it cannot explain why a jurisdiction might choose to treat the conduct and mental state of S in these situations as not amounting to 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 to be so characterized. 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).

- His 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 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

Let me end with a caution to prospective readers. This is a challenging book. The conceptual analysis is sometimes abstract, and the architectonic 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.

⁸⁸ Westen touches on the latter at p. 285.