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Currents: Feminist Key Concepts and Controversies

The Move to Affirmative Consent

> Politically, I call it rape whenever a woman has sex and feels violated.
> —Catharine MacKinnon (1987, 82)

In a vigorous new trend supported by many feminists, affirmative consent requirements are appearing in campus sexual conduct codes and in a parallel campaign for reform of state-based criminal law. As of this writing, California and New York have passed legislation requiring colleges and universities to adopt an affirmative consent standard in their sexual assault policies.[1] A number of state legislators in other states have proposed bills with similar language.[2] Additionally, many public and private colleges and universities around the country have adopted an affirmative consent standard in their sexual assault policies.[3] And adding an affirmative consent requirement to the Model Penal Code was recently hotly debated within the American Law Institute (ALI), a body that generates model laws that are highly influential with state legislators and have strong feminist support (Anderson 2016). The proposal appears to have been defeated (Richardson 2016), though at the time of this writing the debate is not fully concluded. Whatever happens in the ALI, the campaign for affirmative consent will now move to the state legislatures.

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[1] Cal. Educ. Code § 67386 (2015); N.Y. Educ. Law § 6441 (2015).

[2] See S. 636 (Conn. 2015); S. 387 (Haw. 2015); H.R. 667 (Md. 2014); H.R. 4903 (Mich. 2015); H.R. 1689 (Minn. 2015); S. 2478 (N.J. 2014); S. 474 (N.C. 2015).

[3] I am unaware of a reliable count of all campuses that have adopted affirmative consent requirements. But the trend is clear, and it appears in universities as well as colleges, in private as well as public institutions, and in Eastern, Western, Southern, and Midwestern institutions. See, e.g., "Student Code of Conduct: Gender-Based or Sexual Misconduct," University of Alaska; "Policy against Sexual Misconduct," Carleton College; "Information Regarding Sexual Misconduct, Relationship Violence and Stalking Cases," University of Connecticut; "Definitions, Sexual Respect," Dartmouth College; "Student Sexual Misconduct Policy and Procedures," Duke University.

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These provisions pivot on consent and are often praised for the improved sexual culture they will produce among those who comply, the increased leverage they will give women in sexual encounters ranging from unwanted solicitations to rape, and the social incentives they will generate for men to make sure women have provided consent before they initiate or continue sexual contact.

If we define big-L Liberalism as a broad orientation of the political order toward individual equality, if we define freedom as the highest political good, and if we define a commitment to the state as their guarantor (distinguishing Liberalism from feudalism, fascism, communism, and anarchism), the overarching aim of these reforms seems to be Liberal. They emphasize consent in order to promote individual freedom to decide the course of one's own sexual engagements and to help produce a world in which women enjoy freedom, in sex and otherwise, on an equal basis with men.

But are they little-l liberal also—that is, progressive, emancipatory, substantively opposed to a social-conservative ideal for social life? I am going to argue in this essay that they are not, that instead they are conservative. They show us that the branch of feminism that advocates for them has turned sharply and decisively to the right. This branch of feminism—which many feminists have dubbed dominance feminism—originated on the radical American left.[4] But in its prolonged engagement with the state as a, and even *the*, primary engine for women's emancipation, it has cooperated with male paternalist elites and moved rightward. I will argue here that the campaign for affirmative consent requirements is distinctively rightist and that it would be even more conservative than it is today if it were not making political compromises *to its left* with male paternalist elites.

And now we get to the single thing that has most distressed me, as a feminist and a lawyer, about the affirmative consent bandwagon. The norm itself sounds great. I myself would never want to have sex with an unconsenting person, and I don't want you do so either. I also don't ever want to have sex that I haven't consented to, and I hope that never happens to you either. But using *legal procedure* to decide these cases is about far more than just the desirability of the norm. It's also about the desirability of putting the weight of the state and of punishment behind that norm. We have to want to put the norm *into legal proceedings in the real world*.

[4] See, e.g., Abrams (1995), Crenshaw (2010–11), Gruber (2012), Harris (2013), and Mazingo (2014). "Dominance feminism" appears in many different forms, but these forms share the view that male domination and female subordination constitute a virtually or actually uninterrupted condition of women's existence, expressed in almost all or all phenomena of social life. I have also called it structuralist feminism because male domination and female subordination become the structure underlying all of social life. See Halley (2006, 42–79).

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As I will argue here, affirmative consent requirements—in part because of their origin in a carceral project that is overcommitted to social control through punishment in a way that seems to me to be social-conservative, not emancipatory—will do a lot more than distribute bargaining power to women operating in contexts of male domination and male privilege. They will foster a new, randomly applied moral order that will often be intensely repressive and sex-negative. They will enable people who enthusiastically participated in sex to deny it later and punish their partners. They will function as protective legislation that encourages weakness among those they protect. They will install traditional social norms of male responsibility and female helplessness. All of these will be the costs we pay for the benefits affirmative consent requirements deliver. This essay asks feminists to engage in a robust debate about whether all of this is what they want, and if it is not, whether it is worth it to get the upsides of the reform.

The long feminist march through the institutions

Consent, though central to the political lexicon of Liberalism and liberalism, has never been treasured in radical dominance feminist thought. In 1983, in the pages of this journal, Catharine A. MacKinnon distanced her avowedly radical feminism (MacKinnon 1983, 639) from any endorsement of consent as a guarantor of women's emancipation: "If sex is normally something men do to women, the issue is less whether there was force and more whether consent is a meaningful concept" (650). Feminist political and legal advocacy, drawing on MacKinnon and other radical feminist sources, has more recently reframed this query as a positive claim: women often—in some versions, always or almost always—consent to sex with men under pervasively coercive conditions of male domination that render their consent descriptively and morally meaningless.

For example, feminists working this line sought to ensure that the International Criminal Court for the Former Yugoslavia would eliminate the consent defense from the tribunal's definition of rape.[5] And when they carried this advocacy forward to the Rome Conference, where the treaty establishing the International Criminal Court was drawn up, they rejected the idea that rape in armed conflict was distinct from rape in "peacetime." In that setting, they used expressions like "so-called peace" to pour scorn on the idea that women were ever free from pervasively coercive circumstances that vitiated their consent to sex with men.[6] In cities and suburbs,

[5] See Green et al. (1994, 218) and Halley (2008, 86–91).

[6] Halley (2008–9, 62–64, 71, 74–5); see also MacKinnon (2006, 244–45).

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in schools and shopping malls all over the United States, women faced the same male domination that they do when living in the midst of a civil war or international invasion. Under that domination, they may give consent to sex, but that consent is bankrupt from the moment it is given. If they later retract it and declare that the sex was unwanted, they should be believed.

It is a key point here that MacKinnon has never argued that good sex between men and women is not possible or doesn't happen. Rather, she and others accepting her arguments argue that the real vision of emancipation is a world in which women have sex only when they *desire* or *want* it. To move us closer to such a world, law should impose sanctions on men who have sexual contact with women who didn't desire or want it.[7]

On their long march through the institutions, dominance feminists have made incremental progress toward this goal. A key achievement was securing a definition of a new civil rights violation, sexual harassment, in which the wrongful act is *unwanted* sexual conduct. The Supreme Court has said that, to be sexual harassment, the sexual conduct must be not only (1) unwanted but also (2) sufficiently severe or pervasive (3) to have a detrimental impact on the complainant's work or educational experience—and it must (4) be all these things in the eyes not simply of the complainant herself but of a reasonable person.[8] Over the last several years, however, under dominance feminist influence coming from the Department of Education Office for Civil Rights and from a dominance feminist–inspired Title IX activist movement, many new campus sexual harassment policies have loosened up these requirements, shedding "severity or pervasiveness," making unwantedness sufficient to show detrimental impact, and dropping the detrimental impact and reasonable person requirements. The trend of these incremental rule changes is to invite complaints based on subjective unwantedness alone. Dominance feminist advocacy claims Supreme Court authority for this trend in repeated—and distorted—claims that sexual harassment law promises women sanctions against men for sex that is nothing more than "unwelcome."[9]

[7] MacKinnon writes: "An equality standard . . . requires that sex be welcome. For the criminal law to change to this standard would require that sex be wanted for it not to be assaultive" (2005, 244).

[8] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21–22 (1993); *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75, 81 (1998); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 651 (1999). For a discussion of these cases, see Halley (2014), 3–6.

[9] Impact litigator and adjunct professor of sexual violence law at New England Law | Boston Wendy Murphy writes: "Sexual assault is by its nature 'severe,' and 'unwelcome' is subjective to the victim alone" (2015).

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The result has been a wave of new campus sexual harassment policies that make it far easier to hold accused men responsible for sex that was merely unwanted. Harvard University's policy, for instance, classifies sexual conduct as sexual harassment if a complainant did not request or invite it and "regarded" it as "undesirable or offensive."[10] As part of the rollout of Harvard's new policy in the summer of 2014, Mia Karvonides, the university's first Title IX officer and a member of the otherwise undisclosed committee that drafted the policy, told the *Harvard Gazette* how she intended to apply it: "The standard we've adopted is that of unwelcome conduct of a sexual nature. . . . In our policy, we talk about how you determine if it is unwelcomed conduct. There's more in the policy to elaborate, but essentially conduct is unwelcome if a person did not request or invite it and regarded the conduct as undesirable or offensive" (Karvonides 2014).[11] Karvonides explained to the *Gazette* that Harvard had decided not to require affirmative consent because no clear guidelines for defining it then existed.

Meanwhile, the law of rape (to generalize) criminalizes sexual penetration achieved by force or threat of force and without the victim's consent. Formally, the state must show both elements to get a jury to convict. Feminists have long objected to these onerous requirements, and they are achieving some influence in US law. No increasingly does mean no.[12] The victim's reasonable perception of threat has been held to suffice.[13] Force or threat of force have been held to vitiate any consent given.[14] But the dominance feminist agenda as she articulates it would go further: the force/threat-of-force requirement would be satisfied by the coercive circumstances of everyday life, and the nonconsent requirement would be replaced by unwelcomeness. "If force were defined to include inequalities of power, meaning social hierarchies, and consent were replaced with a welcome-

[10] See Harvard University Sexual and Gender-Based Harassment Policy, at http://titleix.harvard.edu/sexual-harassment-policy.

[11] Harvard has since backtracked from this extreme position, issuing frequently asked questions that restore the legal definition of sexual harassment, but the policy itself remains unamended.

[12] For example, Ill. Comp. Stat. 5/12-17 (2003) (establishing "No Means No" law); *United States v. Carr,* 18 M.J. 297, 302 (C.M.A. 1984) (disallowing reasonable mistake of consent defense when victim said "no"); *Commonwealth v. Lefkowitz*, 481 N.E.2d 227, 232 n.1 (Mass. App. 1985) (Brown, J., concurring) ("'No' must be understood to mean precisely that.").

[13] *Rusk v. State*, 424 A.2d 720 (Md. 1982). For an excellent investigation and analysis, see Suk (2013).

[14] For example, *People v. Roberts*, N.E.2d 1080, 1083 (Ill. App. Ct. 1989) ("Where the State proves defendant used force, it necessarily proves the victim did not consent.").

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ness standard, the law of rape would begin to approximate the reality of forced and unwanted sex" (MacKinnon 2005, 247). Rape would be demonstrated from a general finding of male social superiority, or a slightly more specific one of a given woman's group-based subordination to a given man's group-based dominance, and from the victim's subjective claim that the sex was unwelcome.

So far, feminist changes to rape law remain incremental: the overhaul proposed by MacKinnon is not on any real-world agenda that I know of. But a major effort is currently underway to move toward it in a body of law more immediately receptive to it: the law of sexual assault. Sexual assault (to generalize) is sexual contact achieved without consent. Unlike rape, it is not limited to intercourse (though it usually is limited to touching sexually significant parts of the body like the breasts, buttocks, or genitalia) and does not require the prosecutor to show force or threat of force. A debate about whether to include an affirmative consent requirement in the law of sexual assault recently took place in the ALI, which is undertaking a review of its Model Penal Code (MPC) provisions on sexual assault.

The ALI campaign for affirmative consent shows the progress of a radical feminist idea into mainstream thought and practice. Affirmative consent proponents were given the job of drafting the new model code on sexual offenses. They initially sought to criminalize sexual penetration and sexual contact achieved without "positive agreement, communicated by either words or actions, to engage in a specific [sexual] act."[15] Note that, here, affirmative consent is "an action, not a state of mind."[16] Each crime is a lesser offense than the same sexual connection achieved by force or after a positive refusal: penetration is a misdemeanor, and sexual contact made for a sexual purpose is a petty misdemeanor.[17] Sexual contact is extremely broadly defined, to include any bodily contact, not just contact with intimate body areas.[18] Both affirmative consent provisions provoked widespread controversy within the ALI.

In their commentary on both drafts, the drafters express their willingness to convict people of sexual crimes when the complaining witness was actually feeling passionate desire for precisely what happened precisely at the time of the conduct. Both times, the drafters admit that this is a down-

[15] "ALI Discussion Draft No. 2," Section 213.0(3), at 29. *Model Penal Code: Sexual Assault and Related Offenses* (April 28, 2015). On file with the author.

[16] "ALI Discussion Draft No. 2," Comment on Section 213, at 30.

[17] "ALI Discussion Draft No. 2," Section 213.2, at 44; "ALI Preliminary Draft No. 5," Section 213.2. *Model Penal Code: Sexual Assault and Related Offenses* (September 8, 2015); "ALI Discussion Draft No. 2," Section 213.6(3), at 116–17.

[18] "ALI Discussion Draft No. 2," Section 213.6(3), at 116–17.

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side, but they conclude that it is worth it. The second, less convoluted, version of this passage reads:

> Of course, a legal standard requiring the *expression* of agreement inevitably makes sexual penetration impermissible in situations where passionate desire is subjectively present but not overtly communicated. Yet the contrary standard inevitably has the opposite and far more dangerous effect of permitting sexual penetration when such intimacy is entirely *un*wanted. Section 213(2) reflects the judgment that the harms that arise under the latter standard present far greater reason for concern.[19]

This is an astonishing passage. Criminal unwantedness has arrived in the American legal mainstream. And its advocates admit that they are willing to endorse the conviction of people who initiated sexual penetration (and, in the earlier version, contact as innocuous as hand-holding) with passionately desirous partners who later charge sexual assault. If the police, prosecutor, judge, and jury conclude that the accuser did not express consent—an evidentiary and procedural possibility in almost any sexual encounter that is not witnessed or recorded—the ALI drafters think that the prosecution and conviction of people who had sex with other people who passionately wanted it are regrettable, perhaps, but worth it because that is the only way to extend criminal enforcement to sexual contacts that are unwanted.

Affirmative consent thus poses the possibility of a vast new criminalization. The drafters argue that this approach is justified even in the current climate of widespread political rejection of criminal enforcement to control microbehaviors like those of Eric Garner and Walter Scott.[20] In the area of sexual offenses, we cannot wait for law to follow society. Instead, society must come to the heel of law:

> Because criminal law is the site of the most afflictive sanctions that public authority can bring to bear on individuals, it necessarily must and will reflect prevailing social norms. But for the same reason, it must often be called upon to help shape those norms by commu-

[19] "ALI Preliminary Draft No. 5," Comment on Section 213.2(2), at 65; see also "ALI Discussion Draft No. 2," Comment on Section 213.2(2), at 53.

[20] Garner was choked to death by the New York City police after allegedly selling loose cigarettes. Scott was fatally short by the North Charleston, SC, police after driving with a nonfunctioning taillight. Both events became central to the rise of the Black Lives Matter movement.

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> nicating effectively the conditions under which commonplace or seemingly innocuous behavior can be unacceptably abusive or dangerous.[21]

Moreover, the leverage that women gain to convict men of sexual crimes *for sex the women passionately desired at the time* will license them to inflict serious harm when no possible benefit to American sexual culture can result. The randomness of these criminalizations will surely have effects, but not in the form of a more lucid and joyful sexual environment.

All of this brings me back to little-l liberalism. Dominance feminism made its appearance on the American stage as a distinctly *left* political incursion, far to the left of the little-l liberalism of the time. It rightly earned its common moniker, radical feminism. I am arguing that—in an alliance with paternalistic male reformers—it remains the driving ideology behind advocacy for affirmative consent requirements and for many related carceral projects. In the process, it has made compromises with big-L Liberalism, specifically the emphasis on consent. For dominance feminists, this emphasis is instrumental only. They attack it for not going far enough (MacKinnon 2005, 246; Murphy 2015). For them, affirmative consent is a problematic way station en route to the criminalization of unwanted sexual contact, a criminalization supported by a theory of pervasively coercive conditions.

Grounding women's emancipation, sexual and otherwise, on such a sweeping use of criminal punishment and civil incapacitation (e.g., expulsion from college with a transcript marking one as a sexual wrongdoer) has led feminist reformers to take several stances typically thought to be hallmarks of social conservatism. They are seeking social control through punitive and repressive deployments of state power. They are criminalizing as a first rather than a last resort to achieving social change. They are affirming indifference to the punishment of innocent conduct. They have moved well to the right of civil liberties–oriented liberalism in their advocacy for swift and sure punishment unimpeded by due process restraints. And, as I will show below, they have embraced the primacy of traditional gender roles for men and women in heterosexual relations. I think it's time to ask whether this strand of American dominance feminism has become unmoored from its left, radical anchor and has become—not merely accidentally or strategically but affirmatively—conservative.

[21] "ALI Discussion Draft No. 2," at 11; "ALI Preliminary Draft No. 5," at 15.

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Defining affirmative consent

Because it is a legal requirement for all public colleges and universities in one of the largest states in the United States, I am going to examine the California affirmative consent law to show in more detail how affirmative consent is likely to operate as an enforcement practice. This statute requires public colleges and universities to punish, as sexual assault, sexual conduct that is not affirmatively consented to. The offense it establishes is closer to simple unwantedness than sexual harassment because it lacks the limitations (severity or pervasiveness, detrimental impact, and reasonableness of all elements of the complaint) that the Supreme Court has placed on sexual harassment claims. It is easier to prove and harder to defend than rape because there is no force or threat-of-force requirement. And it is easier to prove and harder to defend than sexual assault in existing sexual assault statutes because consent must be affirmative.

I'm going to draw a distinction between two kinds of consent—positive consent versus constrained consent on the one hand, and performative consent on the other. In what follows, *positive consent* is the internal state of mind of agreeing to something because one positively and unambiguously wants it, while *constrained consent* is the internal state of mind of agreeing to something because one perceives it as better than the realistic alternatives. When I say "subjective consent" in these pages, I am referring to positive and constrained consent without distinguishing between them. By contrast with both types of subjective consent, *performative consent* is the semiotic communication of agreement to something.[22]

These distinctions enable us to inquire whether the California affirmative consent statute takes on board the radical feminist critique of consent, couched in the claim that much of the sex women have with men is consented to under coercive circumstances—subjectively consented to by women who nevertheless find the sex to be unwanted. And they enable us to distinguish sex that women did not desire from sex they bargained for in social negotiations offering limited options. MacKinnon elides this difference—"anyone who has sex without wanting to was compelled by something" (2006, 237)—but I will argue that it matters.

Think of the woman who agrees to have sexual intercourse because her assailant will otherwise attack her with a knife. This woman consents performatively to the sexual intercourse, and she constrainedly, subjectively consents, but she does not positively consent. Under traditional rape law,

[22] I am elaborating Mark Kelman's (2005) distinction between consent (subjective consent) and assent (here, performative consent).

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the knife is the force or threat of force, but because consent is a defense, there has been no rape. Under more recently adopted feminist-inspired rules, the threatened force vitiates the consent, and the intercourse was rape. *But in the law of sexual harassment and sexual assault, there is no force or threat-of-force requirement.* And as I have argued above, dominance feminists mean a lot more by coercive circumstances than the threat to maim or kill made by a man holding a knife. They mean the coercive circumstances of male domination, a pervasive cultural condition. Where there is no force or threat of force to render subjective consent morally problematic, should we supply in its place a general cultural condition of domination in which women operate all the time?

I think not. Consider two additional hypotheticals, which I will call the social compliance hypothesis and the moral ambivalence hypothesis.

Suppose a young woman goes to a fraternity party and sips carefully from her drink to avoid losing cognitive control. But toward the end of the evening, when the music is loudest and the dancing is most sexually explicit, a fraternity member urges her to follow him to a back room. She complies, because she thinks that is expected behavior; she has seen other couples do it, and she supposes it is the norm. He then starts fondling her body, and she allows it, because she thinks it will be extremely awkward to refuse to comply with what she understands is the expected behavior. He guides her into an act of fellatio, which she goes along with for the same reasons she left the dance floor and accepted the groping. The next day her friends tell her that she was sexually assaulted and raped, and she files a complaint.

The woman in the social compliance hypothesis does not positively consent or performatively consent, but she does constrainedly consent. The constraint was some combination of actual and imagined social conventions that the young woman did not want to flout. She faced a constrained choice: she accepted the sexual contacts initiated by the fraternity member because violating social conventions, disappointing the young man, and walking out of the party were the price she would have to pay to avoid his overtures, and they were, to her, at that time, not worth it.

Or suppose a young woman is intensely sexually attracted to a partner who is morally or socially ruled out for her. This prohibition could come from so many different sources that I can barely begin to suggest their variety: the partner is a woman, and she has never had sex with a woman and believes it is wrong; she is white and the partner is black, and she believes black men are sexually dangerous; she is married and the partner is not her spouse; she has a steady boyfriend and the partner is someone else; in her family and religion, she is supposed to be a virgin until she marries and she

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is not married yet. She and the partner are in a private setting, and they could have sex without anyone noticing. She is intensely turned on and also very aware that her desire is forbidden—indeed, the forbiddenness of the desire is becoming a renewed source of excitement. She has sex with the partner. The next day one of two things happens. She wakes up horrified at what she has done, and her denial takes the form of an emerging conviction that she was imposed upon by the forbidden sex partner; or she writes about the encounter in her diary, and it is discovered by a third person who is an enforcer of the prohibition and who demands that she deny the truth of the diary entry. She files a complaint, in good or bad faith, in order to shift the blame for her transgression onto the partner.

Did the woman in the moral ambivalence hypothesis give positive consent? It's hard to say. *She was ambivalent.* She may have given performative consent, but she will now deny it, in good faith or bad but perhaps very vehemently and convincingly.

Many permissible interpretations of the California affirmative consent statute will allow women to impose sanctions in cases based on the social compliance hypothesis and the moral ambivalence hypothesis. The question I am posing is: do we want to go there, really? The woman facing the knife and the woman in the social compliance hypothesis are identical under the assumptions that male domination is women's pervasively coercive circumstance, so that women who prefer unwanted sex to the alternatives are not making a choice among limited options but are in fact *coerced.* I think this conflation obscures significant descriptive and moral differences between the wrong done to the woman facing the knife and the suffering of the woman at the fraternity party. One way of encapsulating them quickly is to note that almost all feminists would want the former to decide precisely as she did—we want her to walk away uncut and alive, even if she has to be raped to do so—while many of us would want the young woman at the fraternity party to blurt out "Hell no, you jerk" and make a swift exit. The affirmative consent debate is about the legal incentives we want to create not only for men but also for women and nowhere more problematically than in its constrained-choice dimension. Do we want the law to say to future women tempted to "go along" in cases of mild social constraint: we will punish men as a retrospective substitute for your own exercise of robust choice about when to have sex of what kind with whom, hoping that the resulting deterrence will protect—not you, you are already harmed—but the next woman like you?

Feminists need to have a debate about whether they really want to answer yes to that question in the form of support for affirmative consent laws. At first glance, there is less need for debate about the moral ambiv-

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alence hypothesis: presented as a hypothesis, this scenario makes it hard to see the accused as anything but a victim of the accuser's failure to own up to the power of her sex drive and of her sexual norms and of the conflict between them. But in the real world, it is very hard to detect accusations grounded in moral ambivalence. I myself think I have seen many of them over the years of my work on sexual harassment. But I've often been faced with complainants so enthusiastic about their claims, and so convincing in stating them, that I've been alone in my sense that the wrong person was emerging as the victim. Feminists need to have a debate about these cases, and about whether they want to support affirmative consent laws that make it easier—whether through a positive consent requirement or a performative consent requirement—to hold men responsible for serious sexual misconduct when the animating wrong is based in difficult-to-detect moral ambivalence.

Now comes California, with a law saying that, among students on campuses, each party to sexual activity has to obtain the affirmative consent of all other parties—and that if they don't, they are going to be subject to discipline for sexual assault, domestic violence, dating violence, or stalking, depending on the circumstances.

It is not perfectly clear to me that this law grounds wrongdoing on sexual contact without subjective consent, but it surely moves the needle in that direction. The definitional paragraph reads: "'Affirmative consent' means the affirmative, conscious, and voluntary agreement to engage in sexual activity."[23] The words "conscious" and "voluntary" strongly suggest subjective agreement—not performative consent but subjective consent and maybe even positive subjective consent. It's not "desire," but it may be as close to that as the drafters could get within the language of consent.

The California definition has gaps and ambiguities, and I'm going to set out an interpretation of its language that attempts to fill and resolve them consistently with the statutory language. I'm aiming to establish the range of interpretations and enforcement practices that the California decision makers putting the statute into effect are likely to choose. I conclude that some enforcers may require positive consent: the statute permits them to, I argue, and some aspects of it encourage them to. If and when they do this, they will be going much further in the direction some feminists have promoted than the ALI proposals examined above, which, as we have seen, are indifferent to the presence of positive consent and require performative consent instead. As we have also seen, the ALI proposals thereby threaten

[23] Cal. Educ. Code, § 67386(a)(1).

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serious overinclusiveness; I hope to show here that the California statute does too.

The definitional paragraph goes on: "Lack of protest or resistance does not mean consent, nor does silence mean consent."[24] In the world set up by the statute, the default position, the assumption about everybody, is that we are not now consenting to sexual activity. Something positive, something *additional*, has to happen to change that—and that new, additional, positive thing is the consent. But which kind of consent—subjective or performative—serves to ratify the okayness of a sexual contact? And if subjective consent is needed, is constrained consent enough, or does it have to be positive?

The surrounding language helps us to see the interpretive choices here. The things that do not mean consent—lack of protest, lack of resistance, and silence—are all performances. They are visible, audible, apprehensible. None of them "mean" consent. This could be telling us that some *other* performance has to happen and it can *be* the consent, or that this other performance can "mean" it in the sense that it is sufficient *evidence* of the consent. Either way, in our vocabulary, performative consent would ratify the okayness of a challenged sexual act. A signal, even if given under constraint, would be enough. Or the word "mean" could be driving a wedge between sign and signified, so that the observed performance, whatever it is, merely *refers to* the inner state of mind of agreeing. On that reading, performative consent is not enough: the conduct is wrongful unless it was subjectively agreed to. We do not get guidance from the statutory language, in that case, as to whether subjective consent can be given under constraints or, more strictly, must have positively registered desire.

Furthermore, if subjective consent is required to ratify a challenged sex act, the statute gives us no help at all in determining whether it can be constrained or must be positive. Nor do we know whether, if constrained consent is enough to create liability, the constraint must be imposed by the alleged wrongdoer (he took away her keys) or can be environmental (she met him in a part of town that was unknown to her). Nor does the statute indicate whether the constraint, if it creates liability, must be forcelike (e.g., the alleged wrongdoer refused to provide the victim with a requested ride home) or a mere choice among limited alternatives (the victim preferred giving the blow job to engaging in an upsetting conversation). Each of these alternatives is conflated in the dominance feminist understanding. But enforcing affirmative consent in California's public universities will require

[24] Ibid.

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decision makers to unconflate them. And I think there is no feminist consensus that all the constrained consents I've just mentioned should give rise to liability.

To engage lawfully in sexual activity with another person, something further is needed: you have to *have* their consent. It is not enough that they consent: you have to *obtain* the consent: "It is the responsibility of each person involved in the sexual activity to ensure that he or she *has* the affirmative consent of the other or others to engage in the sexual activity."[25] Once again, it's not clear to me whether this is performative or subjective consent. You could say it's enough to obtain a clear signal of agreement, to observe in some way the *performance* of consent. But it could also mean that you have to have the other person's *internal state of mind of agreeing* to the sexual activity: either constrained or positive consent.

Note that the California statute does not require *express* consent, consent in words. Presumably consent can be given by conduct. But certain kinds of conduct do not convey consent. First, "affirmative consent must be ongoing throughout a sexual activity."[26] This formulation at least strongly implies that you cannot count on the sexual activity itself to be the manifestation of consent to it. You need something else. Moreover, "the existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent."[27] Even if a couple in a long-term relationship or marriage has had sex every Friday night after the movie, they both need something more than the relationship and its understandings. What that something more is, exactly, the statute does not say. But again, because consent to the sex this last time is what will be in question, participation in that sexual activity might not count as an admissible conveyance of consent. *In practice* you may need that verbal yes to defend such a case, and you may need even more: constrained or positive subjective consent.

The California definition of affirmative consent is therefore open to interpretation, and one plausible reading instructs that the woman who gives the guy the blow job because she finds the process of saying no to him highly aversive—who consents constrainedly and not positively, and whose only signal of consent is the blow job itself—has been sexually assaulted. And as we've seen, for some feminists, even if she said "yes" first, she would not be giving positive consent. If "yes means yes" is not a tautology, even "yes" is not enough.

[25] Ibid.; emphasis added.
[26] Ibid.
[27] Ibid.

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Operationalizing affirmative consent

The California statute provides some procedures that, when implemented, will guide the "law in action" of affirmative consent. These procedural provisions push the rule further in the direction of dominance-feminist desiderata.

Making the complainant's case

The statute provides that "the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence."[28] This means that the decision maker must be 50.00001 percent convinced of each element of the complaint for the accused to be held responsible. The complainant's allegations must be demonstrated: if they are not, the complaint fails. And presumably the complainant bears the burden of coming up with enough proof to push the factfinder to 50.00001 percent certainty that she is right about what happened and that it violated the sexual misconduct rule.

A little bit of background on burdens of proof.[29] These are legal devices to allocate to one party or the other the job of doing something during the proceedings. There are two kinds of burdens of proof. A burden of production allocates the job of coming up with the evidence of X element of the complaint, while a burden of persuasion on issue Y says to the party who bears it: "If, taking into account all the evidence from all sources, the decision maker is not convinced of Y, *you lose*." The fancier name for the burden of persuasion is the *risk of nonpersuasion*: the party who bears it on issue Y is the default loser on that issue if the record as a whole does not convince the factfinder.

We can make either party bear the risk of nonpersuasion. The California statute's preponderance requirement would be read by almost every lawyer trained in modern US law to put the burden of persuasion—the risk of nonpersuasion—on the complainant. She loses if the factfinder is not 50.00001 percent convinced that she suffered sexual misconduct at the hands of the accused.

The dominance feminist goal has long been to shift the risk of nonpersuasion to the accused. Under the coercive conditions of sex inequality, MacKinnon argues, "To counter a claim that sex was forced by inequality, a *defendant could (among other defenses) prove that the sex was wanted—affirmatively and freely wanted*—despite the inequality, and was not forced by the socially entrenched forms of power that distinguish the parties"

[28] Cal. Educ. Code, § 67386(a)(3).

[29] For a more complete explanation, see Hazard, Leubsdorf, and Basset (2011, 458–66).

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(2005, 247–48; emphasis added). She argues that affirmative consent should be an "affirmative defense"—the accused person's burden of proof (483, n. 37). This would literally be "guilty until proven innocent." It is a genuinely radical idea, repugnant to most if not all Liberal and liberal thought. And I think it is not a radical left idea: it envisions statist social control in a social-conservative way.

As we have seen, the California statute does not go that far. But two other dimensions of the statute move the needle so far in that direction that, in effect, it will authorize proceedings in which the decision maker effectively presumes guilt and requires the accused to disprove it.

The complainant's burden of persuasion is easier to bear if the case rests on subjective consent (either positive or constrained) than on performative consent. If performative consent decides the case, the accused can relevantly testify to what he perceived her to communicate to him. She can still deny that she made those communications, or testify that it would be unreasonable to conclude that her gestures or words could communicate consent. Technically, it would not matter that she did not intend to signal consent by speaking or acting as she did, but even so, if performative consent is enough, the testimony of the accused will have some kind of weight. On the other hand, if subjective consent is needed, the complainant will be talking about her own past state of mind. She is the world's single most authoritative voice on it. If the accused says that she communicated consent, her denial that she *meant it* cuts deeply into the value of his proof.

The respondent can attack the complainant's credibility, but most of the difficult cases that are swept in by the shift to affirmative consent won't involve *lying* complainants. For all the furor over that, in my experience the hard cases involve good-faith plaintiffs whose assertions we might or might not believe. This includes complainants who say *now* that they didn't consent *then* but whose memory was destroyed by the voluntary consumption of mind-altering substances at the time, or whose memories have morphed since then; complainants who have been convinced by friends, boyfriends, or parents that "what happened to you was assault" when they didn't feel that way at the time; complainants who were ambivalent at the time but have since become more negative about the episode, to the point where they are now convinced, sincerely, that they did not consent then; and complainants who feel angry or shameful feelings now that convince them that they could not have consented at the time, or that they should not have so they must not have. It is near anathema in feminist circles to say that these women should sometimes not be believed when they state that the sex was wrongful under the legal rules. Founding the claim on the lack of affirmative consent, and leaving the door open to construing the re-

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quired consent as subjective consent, simultaneously opens the door to holding those accused in these types of cases responsible for serious, possibly expellable, misconduct. And if affirmative consent, via the ALI MPC or otherwise, makes it into criminal law, it could open the door to conviction for sexual crimes.

Defending an accusation

The California statute does not set forth any defenses, but it does acknowledge an excuse founded in the accused's "belie[f] that the complainant consented to the sexual activity."[30] To a lawyer, a successful defense says that no wrong occurred; a successful excuse concedes that the wrong occurred but that the accused can be excused for committing it.

An excuse of belief that consent has been granted necessarily acknowledges that the accuser's performative consent matters: it will be the basis of the argument for an excuse. But this might be merely evidentiary. Sadly, I don't think this clarifies whether the affirmative consent that the accused must obtain is subjective or performative. The statute does not say.

The statute establishes the excuse negatively; it says what the excuse is not, not what it is. Here is the language: "It shall not be a valid excuse to an alleged lack of affirmative consent that the accused believed that the complainant consented to the sexual activity" in three circumstances: where the belief "arose from the [1] intoxication or [2] recklessness of the accused"; and [3] where "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented."[31]

First, if the accused had been drinking, his belief that his partner was consenting cannot excuse him. The statute does not clarify how much drinking blocks access to this excuse. It could be construed to require heavy drinking, drinking heavy enough to make the accused person's sincere be-

[30] Cal. Educ. Code, § 67386(a)(2).

[31] Ibid. The provision quoted above provides for an excuse from "an *alleged* lack of consent," suggesting that mere *allegation* of lack of affirmative consent shifts the burden of proof to the accused. If that's the purport of this language, the presumption of innocence has been abrogated. But I don't think it's plausible to read it that way. The statute requires the *complaint* to be substantiated to a preponderance, and, as I've said, US lawyers are trained to assume that this means that the *complainant* bears the burden of proof (the risk of nonpersuasion) on the central claim of wrongdoing. It remains entirely possible that *actual proceedings* will shift the burden of proof on affirmative consent to the accused. See *Mock v. University of Tennessee at Chattanooga* (Davidson County Chancery Court, TN, filed August 4, 2015) for proceedings that apparently did precisely that and were (pending possible appeal) held to violate the accused student's constitutional right to due process and an administrative law requirement that the burden of proof in student discipline cases rest with the university.

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lief that consent has been granted unworthy of excuse. We might withhold the excuse for several reasons: for instance, we could say that, by drinking, the accused made himself a social danger and deserves no clemency, or we could say that, by drinking, he impaired the very judgment he now invokes in his argument for the excuse. But the statute could also block access to the excuse when the accused had one beer over a two-hour period. He would be neither a social danger nor responsible for his own impaired judgment. The statute leaves the amount of drinking that blocks access to the excuse unspecified.

Second, if he was reckless, that too vitiates an excuse of belief. Recklessness is a concept from tort and criminal law, so lawyers have a sense of its "middle position" between negligence and intent on a scale of mental states about the creation of risk. Negligence is carelessness about the risks one is creating, recklessness is stronger indifference to them, and intent is a positive will to create them. But it's unclear to me whether campus administrators will track legal traditions or their own moral intuitions in applying this provision.

And third, even if he was not intoxicated or reckless, the accused does not have a valid excuse unless he took reasonable steps. The double negative makes this hard to follow, so I'll flip this provision into an affirmative sentence: if the accused can show he took reasonable steps, he can argue belief.[32] Most US-trained lawyers would assume that the accused bears the burden of persuasion (the risk of nonpersuasion) on the steps and on the excuse overall.

We would normally expect to see language requiring the *belief* to be reasonable. But that's not what the statute says. Instead, the accused has to show that he has taken reasonable *steps*. This is an objective, not subjective, element. And the steps have to be *reasonable*. If the campus official or officials deciding the case subscribe to the widespread conviction that sex is inherently irrational (something I believe myself sometimes), the steps will have to be nonsexual, nonerotic, and maybe even nonphysical. Requiring steps means that the accused can't just declare that he held the belief when he engaged in the challenged conduct, and appeal to the decision maker's sense of what sex is like and how people communicate about it to show it was reasonable; he has to talk about steps he took, actual *steps*, and persuade the decision maker that he took those steps and that *they* were reasonable.

[32] The negative formulation is important because it falls short of promising the excuse. Even if the accused can show nonintoxication, nonrecklessness, and reasonable steps, the excuse may be deemed a discretionary release from responsibility, not an entitlement.

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The assertion of reasonable steps on the part of the accused corresponds with the accuser's denial of affirmative consent: technically (though most actual procedures won't be very technical about this), in any case involving a nondrunk, nonreckless respondent, once she denies affirmative consent, he has to prove reasonable steps or he will be held responsible for a sexual assault. This is not a full move to "guilty until proven innocent," but it's a large step in that direction, and it may well turn out in enforcement that that is what it produces.

As we have seen, affirmative consent could well mean subjective or performative consent. Whichever, the accuser can win only if the decison maker is 50.00001 percent convinced that she did not provide affirmative consent. She can prove it through her own testimony and, if she has access to it, through the testimony of the accused and of witnesses. She can bring in documents like the text messages she and the accused sent each other or that she sent friends, but in many cases her say-so on this question will be the only thing approaching direct evidence. Only one person on the planet has direct "knowledge" of the state of mind of the complainant, and that is the complainant herself. Everybody else depends on her *performance* of it to *signify* it, and even there, she has superior authority because she can testify to her own intent.

As I've suggested, the complainant can, however, be mistaken or confused or conflicted about her state of mind, can change it, and can forget it. She can "be of two minds" at the time—that is to say, ambivalent—and put forth only one of them. She is not necessarily—except in dominance feminist frameworks—an always reliable witness to her past state of mind. Here is what the California statute tells me the proceedings will look like. The complainant can win on an assertion of her nonconsent, a subjective state of mind on which she is the world's foremost expert. The accused can deny the truth of that assertion, but he's up against tall odds unless her credibility falls apart. And what evidence will he ever have, really? If the whole purpose of the reform is to require not her performative but her subjective consent, evidence that she did a lot of sexual things that *look* like consent—that are signs of consent—can be reduced by an assertion of nonconsent to mere acts that mean nothing.

Of course the days of the impressionistic, slapdash hearing are over. The sexual encounter, all later discussion of it, all e-mails, text messages, love letters, phone logs—*everything*—will be gone over in minute detail. If the parties remember anything, the decision maker will have a vast trove of minifacts about the sexual encounter from which to infer her affirmative consent or its absence. But all of that is indirect evidence, and as I've said, the decision maker can't rely, even for "indicator[s] of consent," on the

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language or customs of the relationship. The statute is written to isolate the moment of the sexual contact and to make everything turn on it alone.

Unless the accused has concrete evidence of the accuser's performative consent (he will never have evidence of her subjective consent) or superior credibility, the accused's only good alternative is to claim that he believed she consented. But if he does that, he effectively has to be able to show that he took reasonable steps. Unlike hers, his proof is not about his own subjective state of mind but about objective steps. On whether he took them or not, there will virtually never be direct, real-time objective evidence.

Men as active and women as passive in sex; women as subjective and men as objective; women with feelings and men with reason; women with no role in shaping events in the world and men with all responsibility for them: have we ever heard those ideas before?

Conservative feminism

The California affirmative consent statute may look feminist on its face, but, as a guide for real-world procedures, it installs profoundly conservative gender values and visions. They are embedded deep in the affirmative consent requirement—a law reform project positively advanced by dominance feminist advocacy. I'm not suggesting that dominance feminists, in their ambivalent push for affirmative consent laws, have engaged in yet another collaboration with conservatives; rather, that they *are* conservatives in today's left/right politics. The emphasis on punishment as the premier means toward the premier end of social control; the resentment of civil liberties–based brakes on criminal punishment and severe civil sanctions like expulsion with a stigmatic transcript; the reassertion of dichotomous gender roles reminiscent of the gilded cage, including the encouragement of male responsibility and female passivity; the division of the world into a mere two sexes and the reduction of the dazzling array of human sexualities into a model of (heterosexual) male domination and female subordination—all of these are strong markers of conservative social values.

Let's add up the costs of following this conservative feminist trend. Drafters can follow the ALI proposal that I examine above, which requires performative consent, or the California statute, which permits decision makers to impose liability where constrained consent is shown, and to define constrained consent broadly or narrowly, or to go all the way to a positive consent requirement. There may be other ways to draw up an affirmative consent requirement, but these seem to be the main options that the movement has advocated so far. Each has benefits but comes with con-

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siderable costs in the form of overinclusiveness—that is, people punished who did nothing wrong.

Requiring performative consent focuses decision makers' attention on behavior that seems "objective," that gives the accused something concrete to testify about, and that corresponds with the real-life conditions that promoters seek to foster. But as we have seen, these benefits come at the cost of enabling people to punish their sex partners for engaging in sex that the complainants passionately desired at the time. The rule doesn't sort out cases in which the complainant is in good faith from those in which she is in bad faith. Given the huge range of sexual contacts happening every day in the United States that are not preceded by performative consent of the kind that can readily be proven months later, this exposes many, many people to randomly distributed punishment. These punishments will also be arbitrary if the purpose is to promote sex people participate in enthusiastically.

Defining constrained consent narrowly—for instance, limited to constraints deliberately imposed by the accused for the purposes of gaining social leverage on the complainant—includes the man who threatens a woman to extract her consent. This seems like a good idea: it includes the man I have hypothesized who threatens the woman with a knife or keeps her from leaving as she seeks to do so (though we can also punish these bad actors without an affirmative consent requirement). But defining constrained consent broadly includes most of social life—we all act under circumstantial constraints all of the time—and this rule has been authored by feminists seeking to install in law their idea of pervasive conditions of male domination. Some really nefarious exploitations will become punishable, but so will sexual interactions that are—even if you do believe that women live under pervasive conditions of male domination—entirely innocuous. Once again, the rule exposes many, many people to randomly distributed punishment. And it encourages its intended constituency, women, to relinquish rather than exercise the social powers they *do* have in sexual encounters with men. If the only constraint is that they find the social costs of saying no too high, or that they are ambivalent and can't decide what they really want, they can wait and decide later, in the form of an accusation. This is protective legislation, and it will have the classic and predictable social consequence of protective legislation: it will entrench the protected group in its weakness. Under feminist auspices, it brings back the gender mores of the gilded cage.

Meanwhile, a requirement of positive consent will deliver the boon many feminists are seeking: sex that women have that is dysphoric to them at the

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time will be punishable. This rule is entirely indifferent to the degree of wrongdoing by the accused: the best guys and the worst will be swept into the scope of punishment. Except to the extent that it gives the force of punishment to the will of individual accusers, its enforcement will be quite arbitrary. It introduces into sexual life an omnipresent *in terrorem* threat that unhappiness of almost any kind can result in sanctions.

Finally, all three rules, to the extent that they authorize randomly distributed punishment, are going to follow the course of other social discriminations: they will fall disproportionately on groups thought to be sexually dangerous. This will include black men, other men of color, men of lower social and economic class than their accusers, and men and women who don't conform to the gender expectations and norms of their accusers.

Is this our image of a healthy sexual culture? To me, it looks like sexual repression enforced by severe and randomly applied sanctions that are sometimes warranted but very often, case by case, profoundly unfair. And far from generating a new social consensus that we should all obtain clear consent before having sex with anyone, it will be controversial. Many feminists, and other progressives and liberals, will experience the system's unfair and sex-negative applications as delegitimating. Any moral capital that the punishment system still has with those feminists will be further squandered.

Affirmative consent requirements don't deserve their progressive reputation, and the many progressives and leftists (including those scholars and activists who have no indebtedness to the dominance framework) who support it should, I think, give their support a second thought.

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