



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

**Digital Commons @ Touro Law
Center**

Scholarly Works

Faculty Scholarship

2008

Copulemus in Pace: A Meditation on Rape, Affirmative Consent to Sex, and Sexual Autonomy

Dan Subotnik

Touro Law Center, dans@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Other Law Commons](#)

Recommended Citation

41 Akron L. Rev. 847 (2008).

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

***COPULEMUS IN PACE*:* A MEDITATION ON RAPE, AFFIRMATIVE CONSENT TO SEX, AND SEXUAL AUTONOMY**

*Dan Subotnik***

I asked him with my eyes to ask again yes and then
he asked me would I yes to say yes my mountain flower
and first I put my arms around him yes and drew him
down to me so he could feel my breasts all perfume
yes and his heart was going like mad and yes I said
yes I will Yes. (sic)

James Joyce¹

I. INTRODUCTION

Here is a rich irony to chew on: At a time when women's political, social, physical, and especially economic powers are at a 10,000-year high, a movement to regulate sexual intercourse in this country is growing, fueled by the notion that contemporary women can't say "no."

I am not making light of unwanted sex. Evidence of the physical and psychological damage to women that results therefrom is overwhelming. Neither am I suggesting that the test for a reform agenda is whether it makes historical sense. Such tests are never more than provisional; circumstances are always changing. With hard thinking, moreover, the body politic can get wiser over time. I have refrained

* "Let us copulate in peace" or, optatively, "May we copulate in peace." (Latin).

** Dan Subotnik is a professor at Touro Law School, Jacob D. Fuchsberg Law Center, and author of *TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA* (2005). The author thanks Kate Anderson, Cynthia Raskin Rocco, Roy Sturgeon, Leslie Wong, and, above all, his wife, and editor and counselor par excellence, Rose Rosengard Subotnik. He would also like to thank Malisheia Douglas, Katie Albrecht, and all the other *Akron Law Review* members who worked so hard on his article and the *Rape, Affirmative Consent, and Sexual Autonomy Symposium*. Finally, the author would like to thank Professor Jane Moriarty for organizing the symposium and his Dean, Lawrence Rafal, for generous summer support.

1. JAMES JOYCE, *ULYSSES* 768 (1914). The passage from which the epigraph was taken has come to be known as Molly Bloom's Soliloquy.

from ironing out the irony only to highlight the need for close scrutiny of the revolutionary regulatory measure in question here, affirmative consent.

What is affirmative consent? It is a rule of law proposed by a number of male and female academics that would criminalize sexual penetration not preceded by real and very clear consent; Molly Bloom's Soliloquy would normally satisfy the clear consent standard.² Affirmative consent is designed to apply to "date rape" cases, the focus of our discussion here, where the volitional elements may be murky.

Consider this story told by a young (black) woman not long ago: "I had sex with a guy I met at a bus stop. I didn't want to have sex with him, but I felt like I had to because I came up to his apartment. . . . I didn't want to have sexual intercourse with just anyone, but in certain situations I still had a hard time saying no."³ Affirmative consent could *conceivably* solve the problem.

Affirmative consent is premised not only on presumed power differentials in the very areas where women have actually gained power in recent decades but also on the idea of male sexual rapacity, which leads men either to ignore women's words and body language or to just torture them into evidence of consent. In legal terms, the proposed criminal law rule would shift the definition of rape away from one that is force-centered, the model used in most jurisdictions today, to one that is consent-based. Put this way, the proposal may seem totally unobjectionable. In fact, as readers may already intuit from their own experience, and as we shall see in detail later, affirmative consent would create a tangle of problems.

To illustrate, briefly at this point, such regulation of an aspect of our lives as intimate as copulation may well, given the varieties of sexual experience, constitute a civil rights violation. If anal sex can apparently be practiced free of special concern for whether the implied dominance of one and submissiveness of the other problematizes a true "meeting of the minds," why not the genital variety?

Consigning the affirmative consent decision to feminist writers (whether male or female) is especially risky. Rising up against patriarchal power can be intoxicating;⁴ it can distract even experienced

2. *See id.*

3. Siobhan Brooks, *A Blackgirl Taking Control of Her Sexuality*, in *SEX & SINGLE GIRLS: STRAIGHT AND QUEER WOMEN ON SEXUALITY* 310, 315 (Lee Damsky ed., 2000).

4. "[B]oundary crossing, from safe circle into wilderness . . . [i]s the willingness to spoil a good party and break an encompassing circle The transgression is dizzyingly intense, a reminder of what it is to be alive." PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 129-30 (1991).

academics from what many would say is good practice. Harvard's motto is "*Veritas*" not "*Mutatio*," but, writes professor Joan Williams, "[M]y goal is not to deliver the truth, but to inspire social change."⁵

Social change, to be sure, is not necessarily bad. But what if affirmative consent is not biologically or psychologically sound and, for that reason, women do not even desire it? Questioning the idea that increasing women's power will be desirable even if not founded on the "the truth," I ask: Can and should women — to say nothing of men — say "no" to affirmative consent?

I examine this question in two parts. Part I evaluates the sexual environment today from which affirmative consent has arisen. Part II deals specifically with affirmative consent.

A few preliminaries: I wrote a piece in 2007 titled "*Hands Off: Sex, Feminism, Affirmative Consent, and The Law of Foreplay*"⁶ which is the basis for many of my remarks here. Anticipating that the subject would be of wide interest because of the pervasiveness of sexual intercourse in fact and in representation in our culture — and because of the tediousness of so much other academic discussion — I decided to organize a panel of fellow academics interested in criminal law and feminism for a symposium at the annual Law and Society Conference held last July in Berlin. Professors Donald Dripps, Richard Klein, Jane Larson, Jane Moriarty, and I were the panelists.

As I see it, the defining moment of the conference — which serves as another frame for this Meditation — came from the juxtaposition of two dramatic images. Professor Jane Larson announced her support for affirmative consent by saying that she never again "wanted to see a woman lying back on the bed with tears running down her cheeks as someone had sex with her." To which I responded, having the Duke rape case and my 30-year-old son in mind, "and I never want to see a man's life devastated through a bad rap from some vindictive woman."

My almost reflexive riposte did not shelter me from the horror of Larson's imagery. Was mine, I could not help but think, just a brutish male reaction? Does affirmative consent come down to whether our concerns are with the man or the woman?

As I pondered the issue, my mind drifted to a young couple sprawled on a secluded beach after a day of hiking, swimming, and picnicking. He is a newly minted lawyer, she a legal secretary whom he

5. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 244 (2000).

6. See Dan Subotnik, "*Hands Off: Sex, Feminism, Affirmative Consent and the Law of Foreplay*," 16 SO. CAL. REV. L. & SOC. JUST. 249 (2007).

met at work. He tells her that he cannot keep his eyes off hers, and when she tells him that she wants to be admired for her character, he tells her that he loves her forthrightness. She tells him that she loves his sense of humor, and that she has never felt so comfortable with anyone, that, indeed, she feels he can read her mind. The air is hot, sticky, and pungent with sex as the man senses a hand brushing lightly against his thigh.

Does this story have any sexuo-legal meaning? Should the law treat the parties as if they had just met, say, on the New York subway? To cut to the chase, if the man pulls off the woman's bathing suit and enters her, without protest on her part, is it rape? Here was yet another frame for the issue at hand.

II. PART I

That men are generally more powerful than women politically, socially, physically, and economically is a theme you will be hearing a lot in this Symposium. There is no gainsaying this regrettable truth, and I will not waste your time or mine trying to do so. But that is hardly the end of the inquiry. For this truth leaves open to discussion whether those gaps extend to the purely sexual realm, whether the damage done to women from the lack of bargaining power is so great that the law should intercede, whether affirmative consent is desired by young women (as opposed to those who claim to advocate for them), and whether the implications of buying into theories of women's weakness are simply too problematic for women to live with. Overhanging these questions is the one implied at the outset: Why now? Why are reformers raising affirmative consent when the power gap between the sexes is at its narrowest?

My earlier article examines these questions, and I will try not to repeat myself too much in these pages; interested readers can go to the original. What I will do here is use the redoubtable, mainstream Robin West to focus the analysis. Although Professor West has not, as far as I know, explicitly endorsed affirmative consent, she provides the philosophical foundation for its evaluation.

For West, the woman "defines herself as a being who 'gives' sex so she will not become a being from whom sex is taken."⁷ What that means as a practical matter is that "if a man wants to have sex and his female

7. *Id.* at 253 (quoting Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 165 (2000)).

partner doesn't, they more often will than won't."⁸ West is not queasy about providing details. "If what we need to do to survive, materially and psychically, is have heterosexual penetration three to five times a week, then we'll do it, and . . . [w]e'll report as pleasure what we feel as pain."⁹

West goes on to explain why it is that sex can be so psychologically damaging. Rejecting the idea that rape should be treated as theft of services, she makes reference to her computer. When she sells or gives it away, "[i]n no case does part of myself go *with* the thing so traded."¹⁰ Rather, West says, she holds her "self" back in order to "bask in the glow of [her] beneficence or feel free of the burden of [her] now disposed excess baggage."¹¹

By contrast, she insists, when women "'have sex' or 'make love,' at least ideally, they do not hold [their] 'self' back in this way."¹² If and when they do, and "consciously separate the 'sex' [they] are giving, and hence [their] 'sexual self' from the self who will receive in exchange an equal or greater value — [they] tend to think of that sex as being to some degree injurious."¹³

Here, in short, are West's basic — and grim — themes: Men are the driving force in sex, and women, out of fear, will accommodate. When they do so, they will not only do injury to themselves but they will also delude themselves into thinking that the sex is pleasurable. Because it involves the "self," sexual relations should not be deemed a commercial exchange.

West's construction of sex is creative, if depressing, but is it sound? Is the real young woman today as put upon and even handicapped in the sexual marketplace as West makes her out to be? There is good evidence, happily, that she is far from effete and sexless, far from, in Billy Bigelow's words, the "skinny-lipped virgin with blood like water/ who'll give [her guy] a peck/ and call it a kiss/ and look in his eyes through a lorgnette."¹⁴

The (black) woman in the earlier story admits that she generally "did have control over" intercourse;¹⁵ this is where she could exercise

8. *Id.* (quoting ROBIN WEST, *CARING FOR JUSTICE* 110 (1997)).

9. *Id.* at 271 (quoting West, *supra* note 7, at 214).

10. *Id.* at 270-71 (quoting Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1451 (1993)).

11. *Id.*

12. *Id.* at 271 (quoting West, *supra* note 10, at 1451).

13. *Id.*

14. RICHARD RODGERS AND OSCAR HAMMERSTEIN III, *CAROUSEL* (1945).

15. See Brooks, *supra* note 3, at 310, 315.

power. “I’m a top, no doubt about it,” exults another writer in *Sex & Single Girls*, an anthology of young women’s writing.¹⁶ “I love seeing a man’s lips red with arousal,” she continues, “his eyes, his nostrils dilated with lust, and reminding him that there is no way in hell that he is going to get to f*** me.”¹⁷

If women can be successful gatekeepers under the most trying circumstances, and thrill to the process, why let the gates down. “Sex is my life,” reports another writer; “I know that sounds melodramatic, but really, if I could be sure I would never have any kind of sex again, I would take a quick header off the nearest tall building.”¹⁸

A dispassionate scholar must not assume that the fifty articulate and lusty women represented in *Sex & Single Girls* are representative of young women generally. Continuing the evaluation of the philosophical foundation of affirmative consent, then, I ask: is fear of rape as pervasive as West suggests? Happily again, the answer appears to be no. In *Sex & Single Girls* and Kathleen Bogle’s new study, *Hooking Up*, fear of rape plays no role in determining when women have sex.¹⁹ Data that I have gathered and present below also shows that fear of rape is not the bogeyman for women that it has been made out to be.

The idea that women delude themselves into thinking that they are actually enjoying sex when they actually hate it—the “false consciousness” problem—not only infantilizes women but also makes impossible a rational evaluation of affirmative consent. A conscientious and nonsexist male scholar is obliged to reject the argument.

We can now home in on West’s central argument that, because of the nature of women’s sexuality, sex should not be thought of as a commercial exchange. Here is the problem: If not like a commercial exchange, how should we view sex? As a gift? But West’s measure of sexual success or failure is whether the woman got back “equal or greater value.”²⁰ That, however, is precisely the test of a successful

16. Hanne Blank, *Confessions of an Unrepentant C***tease*, in *SEX & SINGLE GIRLS*, *supra* note 3, at 3.

17. *Id.* “[F]***ing for power’s sake is what I know best” writes another reporter in this anthology; “[s]imply put, I use sex to f*** with things.” Karleen Pendleton Jiménez, *Seductions of a Bordertown Boy*, in *SEX & SINGLE GIRLS*, *supra* note 3, at 87-88.

18. Karen Bullock-Jordan, *Eternal Novice*, in *SEX & SINGLE GIRLS*, *supra* note 3, at 232. “I’ve never been one of those oh-sex-is-okay-but-what’s-all-the-fuss-about kind of girls. More like the sex-sex-where-can-I-get-more-sex kind.” Lisa Miya-Jervis, *A Celibate Sexpot Ties the Knot*, in *SEX & SINGLE GIRLS*, *supra* note 3, at 280-81.

19. See generally KATHLEEN A. BOGLE, *HOOKING UP: SEX, DATING AND RELATIONSHIPS ON CAMPUS* (2008); *SEX & SINGLE GIRLS*, *supra* note 3.

20. Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1451 (1993).

commercial exchange. Although she might well deny it, the computer-sale metaphor highlights even more explicitly the centrality of sex-as-exchange for West.

I will not presume to contest West's assessment of her own hedonic sensibilities. I will, however, reject universalizing the idea that selling a computer is easier for women because they are not soulfully invested in their computers. Some women, I suggest — and maybe all women at some point in time — are likely more attached to their computers, as brain extensions, than to their sexual "integrity," and may, therefore, more easily surrender their sex. A personal computer, once gone, like a brain cell, is gone forever. A woman can, by contrast, have her sex and eat it too.

A theory of the body is not necessary, however, to cast doubt on the idea that a woman's perceived essence is in her genitals, that her sexual needs are materially different from a man's, and thus that the law need not concern itself with the disintegration of the self through depersonalized sex. Describing her one-night stands, Meg Daly writes, "[I spent] half the time thinking if I slept with the guy it would lead to a relationship, and the other half just acting from a *blind* and *urgent* need to be touched."²¹

As for the college-age set, consider the widespread practice of hooking up. While many women say that they hope a relationship emerges out of the hook-up, the hallmark of the practice is "no strings attached" sex.²² If the hope does not materialize, the result may come as a disappointment, and perhaps a reason to avoid hooking up in the future, but that is hardly a mutilation.

The still larger problem in West's analysis is implied by her use of the word "ideally." Yes, it may well be true that, as she suggests, sex is best when the "self" goes with the flow — for men as well as women, I would add. But we do not live in an ideal world. One of our essayists forces us to face this. According to contractarian theory, she complains, the law assumes that the "human agent has a free and unfettered remit for individual self-determination." That position is unsound, she charges, so the law needs to replace "the image of unfettered self-determination with a more realistic account of the constructed operation

21. Meg Daly, *The Allure of the One-Night Stand*, in *SEX & SINGLE GIRLS*, *supra* note 3, at 194-96 (emphasis added). "[O]ne-nighters are not usually about knowing or even caring about each other — they are predominantly about getting off." *Id.* at 199.

22. See BOGLE, *supra* note 19, at 40, 49.

of choice.”²³

The commentator is on the mark. Except in the most extraordinary cases, we do not experience our basic functions ideally. We do not, for example, eat, drink, and sleep ideally.²⁴ The very people who enrich our lives often make demands on us that keep us from living exactly as we like.²⁵ If we accept the proposition that one can give one’s “self” away, then there is no basis for thinking that copulation is different from, say, working. Questioning the idea that “the prostitute alienates her sexuality [by providing] sexual services to a client for a fee,” distinguished philosopher Martha Nussbaum asks, “Does the [opera] singer alienate her voice” by selling her service?²⁶

It would seem, then, that there is no alternative to going back to the world of exchange and weighing the quids and quos of sex. In this connection, philosopher Alan Wertheimer has examined the case where the woman does not experience the same purely sexual pleasure from sex as the man. Ignoring the issue of how one might measure such things, he writes, “little of moral interest turns on whether sex is . . . desired,” for its own sake, or not.²⁷ Is he right?

Consider a woman who would “Rather Eat Chocolate”²⁸ than have sex, who works as a receptionist and craves intellectual companionship with a man more than she dislikes sex. She meets a nerdy guy who has more than enough chocolate for his needs but has no one to be caressed by or to caress. Must the law trouble itself if these two unhappy souls come together? Here, it would seem, is a “commercial” arrangement at its best.

Of course, the woman may find sexual activity with a particular man or the idea of sex with men to be repulsive. The good news is that the power gap has narrowed considerably in recent decades. A woman today is much more likely to have the educational and financial resources to make it on her own.

23. See Vanessa Munro, *Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy*, 41 AKRON L. REV. 899 (2008).

24. If we did, of course, the activities wouldn’t be experienced as ideal any more, that is, as something to aspire to.

25. We are unlikely to get what we want from the law either. In the realm of law, writes Thomas Sowell, “[T]here are no ‘solutions’ . . . but only trade-offs . . .” THOMAS SOWELL, *THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY* 113 (1996).

26. Martha Nussbaum, *Whether From Reason or Prejudice: Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 714 (1998).

27. Subotnik, *supra* note 6, at 289 (quoting ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 158 (2003)).

28. See generally JOAN SEWELL, *I’D RATHER EAT CHOCOLATE: LEARNING TO LOVE MY LOW LIBIDO* (2007).

In the hook-up world of college students in particular, the argument that the woman has to give sex because she has to depend on the man for financial resources is an especially difficult one because each party is usually expected to pay his or her own way.²⁹ How can affirmative consent be justified when the sexual offer can be easily refused?

But now suppose that the woman is in a financially precarious position — and for a number of commentators this is her normal state. Is this where the law must intercede? Not, it would seem, according to our panelist Donald Dripps. The distribution of financial assets is unfair, he concedes, but so is the distribution of “erotic assets,”³⁰ and the law should not redistribute the one without redistributing the other.³¹

We can test this conclusion through the archetypal case of a blond, down-on-her-luck, 35-year-old divorcee. The implication of would-be regulators is that if Donald Trump comes courting she will be obliged by circumstance to say yes. But, again, is that so? The woman offers beauty, youth, energy. She is a testament to her mate’s vitality. If she rejects him, he looks like a fool. If not, she becomes his *trophy*. You have to earn trophies.

Yes, the woman may well eventually have to sleep with a man if she wants to possess him for herself. But as Wertheimer and others have argued — and only one commentator seems to have contested³² — a man may well have a moral right to condition a relationship with a woman on sex.³³ If affirmative consent enthusiasts think otherwise, they need to say so.

Far from strengthening the affirmative consent argument, it should be clear by now that male sexual hunger for women actually weakens it. Desperate people are normally in a weaker bargaining position and thus have to forfeit something of value.

Women have surely leveraged flesh as successfully as men have leveraged money in the real world. Would there even be a market for diamonds and furs absent men’s sexual hunger? The long-time editor-in-chief of *Cosmopolitan* magazine, Helen Gurley Brown (perhaps the

29. See BOGLE, *supra* note 19 at 170-71.

30. A folk expression common in Uruguay phrases this more poetically: “La chocha tiene más fuerza que un par de bueyes” (The female genitals are more powerful than a yoke of oxen).

31. Subotnik, *supra* note 6, at 284-85 (quoting Donald Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1786, 1790-91 (1992)).

32. Mary Jo Frug has suggested that a husband should not be able to divorce his wife on the grounds that she does not provide sex. See Mary Jo Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1066 (1992).

33. See WERTHEIMER, *supra* note 27, at 158..

reigning expert on unmarried sex and women's consumption patterns), has long been teaching women exactly how to extract the maximum from sexual intercourse: "If there's a man who might be up for having sex with you," she urges, "take him to Gucci."³⁴

That women have been able to exact some payoff for the sex they "give" does not necessarily mean that, on balance, they have not gotten the shaft. Indeed, there is evidence that women do not bargain as well as men in some settings.³⁵ Does a bargaining gap create a problem requiring the law's intervention? Are women so fettered by male power that they fail to recover the full "cost" of the sex they are giving up?

Laura Kipnis, at least, does not think so. "Pricey dinners, diamond rings," writes the Northwestern University professor of media studies, "... in what other system of exchange can you trade exclusive access to an orifice for a suburban split-level and a lifetime of monetary support?"³⁶ "Not such a bad deal," she concludes, "considering the backbreaking and alienated things that a lot of people end up doing for money."³⁷

The best answer to the question of women's vulnerability in the sexual marketplace, may, in the final analysis, be a simpler one. And that answer presents a major problem for affirmative consent enthusiasts: If, indeed, lacking male power, women are forced to glom onto any guy who shows interest, why did this tragic situation not come to light centuries, or even millennia ago when women, as we understand things now, had no power? Because it didn't serve the interests of men and women were not encouraged to write for most of that time?

Maybe. But why does Jane Austen give no hint of women's powerlessness? Although Elizabeth Bennett's family has little money, Mr. Collins has a sinecure and stands to inherit the property the Bennetts live on, and Elizabeth is getting older, Elizabeth rejects Collins's proposals of marriage not once, but twice.³⁸

That was then, to be sure; this is now. That is literature; this is real life. So consider a few narrowly-tailored questions: (a) If lower-class women are the most vulnerable to sexual duress, why do upper-class

34. Subotnik, *supra* note 6, at 286 n.263 (quoting Helen Gurley Brown, *Don't Give Up on Sex After 60*, NEWSWEEK, May 29, 2000, at 55).

35. See, e.g., LINDA BABCOCK & SARA LESCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE ix (2003).

36. Subotnik, *supra* note 6, at 287-88 (quoting LAURA KIPNIS, THE FEMALE THING: DIRT, SEX, ENVY, VULNERABILITY 123 (2006)).

37. *Id.* at 288 (quoting KIPNIS, *supra* note 36, at 123).

38. See generally JANE AUSTEN, PRIDE AND PREJUDICE (1813).

women have the most premarital sex today;³⁹ (b) Is there one unmarried male heterosexual reader out there who has not been rejected for both short- and long-term relationships with a woman; and just in case the same women have been doing all the rejecting in the latter case; (c) Are there female readers out there who have not said “no” to a man—recently?

III. PART II

Although by no means a majority movement in the legal academy, affirmative consent has attracted a number of eminent and strong supporters. Included in this group are law professors Michelle Anderson, Ian Ayres, Katharine Baker, Linda Hirshman, Jane Larson, Catharine MacKinnon, Ilene Seidman, Stephen Schulhofer, and Andrew Taslitz.⁴⁰

Besides preventing misunderstandings about intention, affirmative consent would, according to some of these sponsors, give the woman breathing space during a rush to coition. This would allow her not only to carefully consider whether she really wants to proceed, but also to negotiate a better deal for herself, which might include more sexual pleasure or perhaps a greater commitment from the man. Sounds like a commercial exchange again.

Affirmative consent comes in two basic forms: hard and soft. The former would require clear verbal consent by the woman while the latter would allow consent through action, as long as, again, the consent was clear. For some reformers, the consent would have to be obtained not only along the way, but also before penetration.⁴¹ Whatever the test, “[s]ilence and ambiguity would be construed against the intruder” and “only positive and clear agreement” to sex would count.⁴²

We should be able to agree that affirmative consent will not be of much use in eliminating unwanted sex. To the extent that the man holds the reins of power in the relationship, the effect of affirmative consent will be minimal. The same forces acting on the woman will induce her

39. SAMUEL JANUS, PHD & CYNTHIA JANUS, MD, *THE JANUS REPORT ON SEXUAL BEHAVIOR* 323 (1993) (“Upper-income women reported having the most premarital sexual experience, compared to low- and middle-income women . . .”).

40. Subotnik, *supra* note 6, at 257, 272-78.

41. *Id.* at 274 (quoting Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFF. U. L. REV. 467, 490 (2005)).

42. *Id.* at 261 (quoting LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 271 (1998)).

to consent affirmatively instead of silently. In that respect she is likely to feel even worse, having contributed to her own “victimization.”

That affirmative consent cannot be the end-all solution to unwanted sex, however, is not the only test of its usefulness. A major goal of affirmative consent, as we have seen, is to limit men’s ability to exploit ambiguity in sexual matters. This, however, seems not to be a significant problem. Most of the time, says the experienced female prosecutor Linda Fairstein, “the signals that the victim has given, whether verbally or physically, are very clear. There is little rape that is due to failure to communicate, in fact.”⁴³

And, arguably, a woman can normally say “no”—and resist. “I have never had a case,” says Fairstein, “in which the only expression of lack of consent was verbalization of the word ‘no,’ without any display of force or threats by the aggressor.”⁴⁴ In short, a woman can and will resist if at all possible.

If we are not going to allow Fairstein the last word on the subject, it may be very hard to satisfy critics that sex is preceded by true consent. Some of the panelists here will almost surely identify with Catharine MacKinnon. Since social and economic “inequalities are coercive conditions,” MacKinnon writes, force should be defined to “include inequalities of power.”⁴⁵ In particular, MacKinnon suggests that the law assume “that money is a form of force in sex.”⁴⁶ That, however, would mean that no number of Molly Bloom’s “yeses” could protect a sexually active Bill Gates from a charge of rape. Without concerning ourselves with Bill Gates’ needs, is that what women want for themselves? Are women so weak-kneed that they must invoke the law to keep Gates at bay?

Happily, most affirmative consent promoters have a less rigid standard for determining legal copulation. “A man can choose to progress slowly,” Taslitz advises, “getting to know her better.”⁴⁷ He can “directly ask [the woman] about her thoughts, feelings and desires.”⁴⁸ Michelle Anderson, the most published proponent of affirmative

43. *Id.* at 294 (quoting Linda Fairstein, *Panel Discussion: Men, Women and Rape*, 63 *FORDHAM L. REV.* 125, 171 (1994)).

44. *Id.* at 264 (quoting Fairstein, *supra* note 43, at 161).

45. *Id.* at 278 (quoting CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 247 (2005)).

46. *Id.* (quoting MACKINNON, *supra* note 45, at 248) (“The assumption that money provides or shows consent to sex would be replaced by the assumption that money is a form of force in sex.”).

47. *Id.* at 274 (quoting Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 *HARV. J.L. & GENDER* 381, 437 (2005)).

48. *Id.*

consent, proposes this test: “Did the person who initiated the sexual penetration negotiate with his partner and thereby come to an agreement that sexual penetration should occur?”⁴⁹ Did the negotiation “minimally require a request for information about another person’s desires and boundaries [?]”⁵⁰ In other words, did it express a “willingness to consider the other person’s inclination and humanity[?]”⁵¹

For Anderson, affirmative consent would ensure that the woman was not reacting to male aggressiveness with “peritraumatic disassociation,” that is, “frozen fright in response to sexual trauma.”⁵²

These are wonderful sentiments and, one could argue, should be incorporated into practice. But into the legal system? Would women want that? “[M]illions of women,” says Professor Catherine Wells, “do not seek. . . the kind of communicative sexual relations” that reformers are pushing for.⁵³

I can perhaps speak more authoritatively for these more-action, less-talk folks than Wells can. In an effort to determine how much agency Americans seek in their sexual activities, and skeptical of all the high theory on the subject, I formulated a questionnaire for distribution in a variety of Touro Law classes.⁵⁴ Respondents were made up of 143 women and 170 men.

The questions are based on a scenario in which, after several dates involving dinner and drinks, Sam and Vivian end up smooching on Vivian’s couch. I then presented a dozen alternate and rather graphic mini-scenes and asked whether Sam has either acted immorally or committed what students would want to see treated as a felony. I also asked women whether rape was a major concern in their lives. Here are some of the questions:

Question 3: After placing his hand on her genital area and meeting no resistance, Sam has placed his finger inside Vivian.

Question 4: After placing his finger inside Vivian and meeting no resistance, but receiving no express or physical evidence of consent, Sam proceeds to intercourse with Vivian.⁵⁵

49. *Id.* at 275 (quoting Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1423 (2005)).

50. *Id.*

51. *Id.*

52. *Id.* (quoting Anderson, *supra* note 49, at 1429, 1432).

53. *Id.* at 295 (quoting Catherine Pierce Wells, *Date Rape and the Law: Another Feminist View*, in *DATE RAPE* 41, 48 (Leslie Francis ed., 1996)).

54. *Id.* at 300-02.

55. *Id.* at 300.

In Question 3, 23% of women and 14% of men thought the action should be criminalized; 24% of women and 25% of men thought it was immoral.

In Question 4, 23% of women and 11% men thought the action should be criminalized; 39% of women and 25% of men thought it was immoral.

The threshold for majority criminal condemnation by men and women came in another question in which Vivian pushes Sam's hand away and Sam put his hand back in. But even there the majority for criminalization is a bare one for men and women (51% of women and 54% of men).

As for rape fear, only 6% of Touro women responded that rape is a constant concern; more said that they rarely or never think about being raped themselves (60%) than said that rape is a frequent or occasional concern (40%).⁵⁶

The lessons seem apparent — to me at least. Touro women are not afraid of “frozen fright in response to the sexual trauma” of a man taking liberties with their bodies.⁵⁷ Fear of rape does not discourage them from allowing a certain amount of aggressiveness on the part of the men they date, or likely, from wanting it. That women seem happy with the way things are would seem to deserve as much respect as any other of their desires. Women have been deprived of autonomy for far too long.

In short, affirmative consent enthusiasts seem to have ignored something fundamental. In her reading of the academic sex literature, says Harvard Law's Janet Halley, “I have not found *anyone* determined to produce a theory or politics of *women's heterosexual desire for masculinity in men*.”⁵⁸ Maybe, perhaps unlike those who advocate on their behalf, young women today actually *like* sex.

That the law students are not on the same page as affirmative consent proponents may be even more manifest in their answer to another question. Suppose after the circumstances of Question 4 above, I asked, Vivian does not resist but tells Sam that she is not ready for intercourse, and Sam proceeds to intercourse with Vivian, who again does not resist. In that scenario, only 60% of women would criminalize Sam's action.

We cannot be sure whether these responses would be different in other survey settings; law students generally are surely not representative

56. *Id.* at 304.

57. *Id.* at 275 (quoting Anderson, *supra* note 49, at 1432).

58. *Id.* at 271 (quoting JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 65 (2006) (emphasis in original)).

of the entire population. What we do know is how women today show their acquiescence to sexual relations. A study by two well-known psychologists several years ago investigated this matter for both men and women. Data were collected using the following alternatives: direct verbal, direct nonverbal, indirect verbal, indirect nonverbal, and no response.

None of the five categories captured a majority of the votes, but men and women respondents reported that “they most often showed their consent to sexual intercourse by making no response.”⁵⁹ What this means, the authors lamented, is that there are numerous partners of both sexes who are “letting their partner undress them, not stopping their partner from kissing or touching them, not saying no.”⁶⁰

Why didn’t the women in this group respond with more gusto to the sex that was offered? Analyzing this question may well help us home in on women’s thinking. In a study of why women sometimes say no when they mean yes, two women psychologists were told of “fear of appearing promiscuous,” “uncertainty of the partner’s feelings,” “[e]motional, religious or moral reasons,” “wanting men to beg” (the reader is asked to especially remember this one),⁶¹ “self-consciousness/embarrassment about the body,” and “desire to be the one in control.”⁶² Not responding affirmatively to a man’s sexual overtures, that is, playing the passive role, would allow the woman to accomplish all these purposes. Drinking, discussed later in this Symposium,⁶³ would allow women to dissociate from the act in another way: “It wasn’t me, it was the alcohol.”⁶⁴

But there is more to say because men also showed their consent by letting themselves be undressed. Feminists are right; sex is power. The other side of the sex coin, however, is that sex is also powerlessness.⁶⁵ If sex is about screwing, it is equally about “getting laid.”

59. *Id.* at 299.

60. *Id.* at 299 (quoting Susan E. Hickman & Charlene L. Muehlenhard, “By the Semi-Mystical Appearance of a Condom”: How Young Women and Men Communicate Sexual Consent in Heterosexual Situations, 36 J. SEX RES. 258, 271 (1999)). This is precisely how Lady (Constance) Chatterley manifests her consent. *Id.* at 262, 299.

61. See, e.g., Blank, *supra* note 16, at 3.

62. Subotnik, *supra* note 6, at 282-83 (quoting Charlene Muehlenhard & Lisa Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women’s Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872, 875-76 (1988)).

63. Sharon Cowan, *The Trouble with Drink: Intoxication, (In)capacity, and the Evaporation of Consent to Sex*, 41 AKRON L. REV. 899 (2008).

64. See BOGLE, *supra* note 19, at 63, 167-69.

65. “I willingly abdicate my power, grateful for the experience of emotional release through physical sensation. Silencing the chaos of my conscious mind,” writes an S/M devotee, “I allow my

Can anyone honestly disagree? Surely, no one will hold that taking one's own clothes off is more erotically charging than being undressed by a partner. If control were the touchstone in our sex lives, would we not self-actualize through masturbation? Indeed, if maintaining control were central to our sense of personal autonomy, would we not abjure orgasm?

The dynamics of our love lives are no different. What does "I love you" mean? Among other things, it means "I am thrilled to give myself entirely into your care."

That students in the study often fail to respond to sexual overtures by a "direct verbal" response may also be triggered by something else entirely, a desire to have sex that is purely biological. "Most of us," writes well-known author Cynthia Heimel, "would kiss the ankles of a man who lets his passion overtake him to the point where he forgets all the amenities. Call us weird, but we love that. Passion – that feeling that a man wants us so badly he can hardly breathe – is the ultimate aphrodisiac."⁶⁶

There are two more strikes against affirmative consent. No writer likes to admit that he is not telling readers anything that they do not already know. And yet, for my first argument's sake, I must concede the point.

In contemporary culture, when a man has a sexual interest in a woman, he asks her out for a drink. (It works in reverse, of course, as well.) Both parties understand what is going on — that he wants to bed her and that her acceptance of the offer is an indication that she is not averse to the idea, at least in principle. If all goes well that day, that week, that month, the parties will normally be providing increasing prospects of interest. At some point the man will invite the woman to his apartment for a nightcap. What the parties are not likely to do at any time is to set forth unambiguously what they have in mind.

Why? Our earlier discussion is relevant. A fuller answer would seem to require consciousness of the fact that much of the time we human beings live in a daze, and this is not because we are taking drugs, but because we don't like to face one aspect of life or another. This mental state is especially common where our creatureliness is concerned. The euphemisms for our excretory functions are too well known to need elaboration here. Our mortality is no easier to confront than our toilet

physical senses to take over and celebrate the ability to feel, this gift of sentience." Meg Weber, *Pleasing Alex*, in *SEX & SINGLE GIRLS*, *supra* note 3, at 35, 45.

66. Subotnik, *supra* note 6, at 294 (quoting CYNTHIA HEIMEL, *SEX TIPS FOR GIRLS* 81 (1983)).

activities. Slaughtering animals for food is yet another activity on which we prefer not to dwell.

Sex for many of us is similarly fraught with ambiguity and ambivalence. That it is perilous to force consciousness of intercourse on a particular partner cannot be clearer to sentient males: "If avoiding sex is vaguely a part of your complex set of desires," Professor William Ian Miller teaches, "there is probably no better way of accomplishing it than by coming on with 'Hey, wanna f***?'"⁶⁷

It is not only the man who risks not getting what he needs when engaging in frank talk. "[W]hen I put the words to it, when I say, 'I want you to f*** me, please . . .,' then I can't pretend that I just happened to fall into this bed, oops! . . . and that goes against everything I was ever taught."⁶⁸

Second, the case for affirmative consent proves too much. "I am woman / I am invincible / I am strong."⁶⁹ Helen Reddy's iconic ode to contemporary women has strengthened them. A growing number of women, now occupying the top tier in economic and political pyramids, are called on every day by employees, customers, and political colleagues to make decisions. It simply cannot be in women's interests to sabotage the credibility of this vanguard.

Here is the point that might well be understood by the women in the Touro survey. If the woman in the case above,⁷⁰ lacks the gumption to say "no" to a man for sex, on what basis can she be expected to say "no" to one who wants a job or a promotion, or who makes an offer to settle a case for far less than it is worth to her client? Or to a Congress full of men who want to, say, blow up the world or just deport wholesale millions of undocumented workers?

Which brings us to the final question here: Why the affirmative consent push now? It is clearly not, as suggested by reformers, that women are politically, socially, physically, and economically handicapped. Nor is there any evidence that men are acting more aggressively with women than ever.

The real answer seems so simple. The feminists' fulsome promises of equality in sexual expression notwithstanding,⁷¹ the cost of unzipping

67. WILLIAM IAN MILLER, *FAKING IT* 52 (2003).

68. Mary Anne Mohanraj, *Silence and the Word*, in *SEX AND SINGLE GIRLS*, *supra* note 3, at 294, 299.

69. HELEN REDDY, *I AM WOMAN* (Capitol Records 1972).

70. *See supra* Introduction.

71. *See* BOGLE, *supra* note 19, at 21-22. Among the noble goals of the sexual revolution, wrote Kate Millett, was ending "traditional sexual inhibitions and taboos" and initiating "a permissive single standard of sexual freedom." *SEXUAL REVOLUTION* xxvi (Jeffrey Escoffier ed.,

to women — whose sexual expression had been most constrained — has been high. The increased supply of sex has limited female options. “The reason [boys] can’t really understand why a girl says no,” a young interviewee explains, “is because so many girls say yes.”⁷²

The erosion of young women’s sexual power can be seen just as clearly in the increase in the marriage age⁷³ and in the drop in the marriage rate.⁷⁴ The irony here is no less striking than the irony of the most powerful women’s generation in history complaining of weakness.

That today’s woman may have to put out or be shut out is far from ideal.⁷⁵ What is to be done? Reformers cannot call for celibacy, or a return to the double standard, which they rightly and roundly condemned. All they can do is try to regulate the market through affirmative consent. But is that a fair response when young women themselves seem unpersuaded, when for 10,000 years they have enjoyed men begging for sex, and when the underlying problem is not men’s political and economic strengths but rather women’s weaknesses? It is not that women can’t say “no” but rather — not that there’s anything wrong with it — won’t.

2003) (quoting KATE MILLETT, *SEXUAL POLITICS* (1970)). Lee Damsky thanks Helen Gurley Brown, longtime editor of *Cosmopolitan* magazine, for giving “us permission to get laid.” Lee Damsky, *Introduction*, in *SEX & SINGLE GIRLS*, *supra* note 3, at xi-xii.

72. SHARON THOMPSON, *GOING ALL THE WAY* 19 (1995) (quoting “Tracy,” a teenage girl interviewed by the author).

73. Today’s all-time high American marriage age is 27 for men and 25 for women. See BOGLE, *supra* note 19, at 2. In 1960, the median age for first marriages was approximately 23 for men and 20 for women. *Id.* at 22.

74. In 1960, for example, 8.6% of women 25-34 in age had never married compared to 29.7% in 2000. U.S. Census Bureau, *Marital Status: 2000*, at 9 (October 2003). In 1996, 16.4% of women 35-44 had never married. U.S. Census Bureau, *2006 American Community Survey S1201*. The television show “Sex in the City” dramatizes the point. The four thirty-something women are looking for love, but often find only sex instead.

75. See BOGLE, *supra* note 19, at 71, 181-82.

[T]he sexual double standard . . . is still very much a part of the hookup scene. . . . Women want ‘romantic’ interaction with men, but there are many pitfalls for them in doing so. The catch is that a woman needs to hook up in order to find someone with whom to have a potential relationship, yet her very participation in hooking up can mean that she is not taken seriously as a potential girlfriend, is exploited for sex, and/or is labeled a slut.

Id. at 181.