The Semiotics of Consent and The American Law Institute's Reform of the Model Penal Code's Sexual Assault Provisions

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ABSTRACT

The concept of consent is ubiquitous in the West. It is the foundation of its construction of meaning for sovereignty (and political legitimacy), and for personal autonomy (and human dignity). Ubiquity, however, has come with a price. The making of a transposable meaning for consent that bridges political community and interpersonal relations has drawn sharply into focus the malleability of the concept, and its utility for masking a power of politics behind an orthodoxy of meaning that is both politically correct, and at the same time its own inversion. This short essay on the semiotics of "consent" considers the manifestation of the concept as object, as symbol, and as a cluster of political interpretation that itself contains within it the Janus-faced morality of political correctness. It takes as its starting and end point the idea that *free consent is the product of a process of management that reduces consent to the sum of status and authority over the thing assented.* The exploration is framed around the recent arguments in the American Law institute's Model Penal Code Project around the meaning of consent in sexual relations. The essay first situates the *problematique* of consent—as action and object that incarnates power relations and the boundaries of the taboo. It then illustrates the way that semiotic meaning making produces a political correctness that produces paradox by critically chronicling the meaning of consent respecting sexual intimacy in criminal law. It enhances sexual liberation by placing it within a cage of limitations that ultimately transfers the power over consent form the individual to the state. That produces a perversity, and the illusion of free will which appears now only to be exercised by or with leave of the state. That meaning making suggests the way that consent as an act, and as a state of being, is transposed to the broader context of political economic relations.

KEYWORDS:

Criminal Law, Consent, American Law Institute; Model Penal Code, Sexual Offenses, feminism, sexual assault, communication, sociology of law, text interpretation

1. The Problematique[1] of Consent as the Performance of Orthodoxy.

The concept of consent is ubiquitous in the West (Craven 2018, 106).[2] It is, in some respects, a metaphor for the core engagement of idealized social relations on which communal life is organized, of which the prison stands at the opposite end of the ideal (Foucault 1995). It is the foundation of its construction of meaning for sovereignty (and political legitimacy). Within liberal democratic political orders, it is not uncommon to invoke the phrase "consent of the governed" like an incantation the power of which holds together a political community.[3] It applies as well in the context of international law (Craven 2018, 135).[4] Consent is essential to the formation of private relationships as well. Aggregations of capital and labor operating as cooperatives and corporations are authenticated on theories of consent, on the politically correct consent to engage productive forces in specific ways (Hamermesh 2014). Here, the focus is on information rather than on constitution (Rodhouse & Vanclay 2016). Non-governmental organizations brings together individuals and others who consent to join for common purposes (Hearn 2007). Consent is at the center of the most intimate personal relations, and the essence of the exercise of personal autonomy (and human dignity).

Ubiquity, thus, comes with a price. The making of a transposable meaning for consent that bridges political community and interpersonal relations has drawn sharply into focus the malleability of the concept, and its utility for masking a power of politics behind an orthodoxy of meaning that is both politically correct, and at the same time its own inversion. The politically correct, of course, is understood both in its pejorative sense—as the sometimes ruthless control (through social, legal, political, and economic mechanics) by a collective vanguard intent on reshaping communal principles and practices (Marques 2009; Ely et al. 2006; Hofstede 2006)—and in its general sense as

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1 "Nous avons proposé une définition du mot problématique: 'Dilemme récurrent auquel sont confrontés les managers', permettant de réconcilier le sens de l'adjectif et du nom d'une part, et de faire apparaître la permanence des questions que se posent les managers." (Nikitin 2006, 96).

2 Consent to be understood as a fundamental legitimating condition (Craven 2018, 106).

3 *See, e.g.*, Locke (1689). For modern variations of popular consent and state theory, *see, e.g.*, Gregg (2013).

4 Vienna Convention organized around legitimation of the notion of consent to obligation as a foundation of international law; but Krisch (2014).

communal orthodoxy generally, one which permits freedom only within the quite tightly guarded boundaries of the possible.[5]

This is especially evident in the oxymoron concept of consent freely given. *Politically correct free consent is the product of a process of management that reduces consent to the sum of status and authority over the thing assented—and in both cases it is not for the individual to decide the limits and scope of either.* Consent may be freely given only when undertaken with the approval and under the guidance of an orthodox collective[6] or the protection of a community strong enough to offer some protection.[7] Some people and institutions are incapable of giving consent, under certain circumstances. Consent can be revoked. Consent can be bartered; it may be waived. Consent can be conditioned. Consent can be exercised on behalf of others. The consent of people long dead may bind the living. Consent to certain acts may transgress a taboo (e.g., consenting to being eaten by another). One consents to marriage and to acts of physical intimacy, for example. One can consent to acts of intimacy, say, with other species, but in most societies only at one's peril. And some acts of sexual intimacy, in form or kind, may not generate interest by the state, but may produce adverse social and religious consequences. Together these produce both the mechanics of social control of which the act-thing consent becomes the expression of political correctness.[8]

This short essay on the semiotics of "consent" considers the manifestation of the concept as object, as symbol, and as a cluster of political interpretation that itself contains within it the Janus-faced morality of political correctness. The exploration is framed around the recent controversies produced by efforts to transform the meaning of consent for purpose of sexual crimes in the American Law institute's (ALI) Model Penal Code Project.[9] This was a project

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5 The notion has been most honestly stated by both fascists and Leninists in the 20th century. It is bound up in the concept of discretion within the boundaries within which action is possible. Benito Mussolini: "Nothing outside of the state; all within the state; nothing against the state." quoted in Stewart (1928); Fidel Castro (1961), "Within the Revolution everything, outside the revolution, nothing".

6 It is in this context that consent evidences its semiotic quality as object (actin) which is the essence of a sign (a thing other than itself without referent), the meaning of which (validity, possibility, consequence etc.) is determined by application of the structures of organized society (as contract through the courts, for example, or as legally forbidden taboo through the application of the criminal law, or through social measures, for example in the 1950s the effect of divorce on social position). See, e.g., Kevelson (1990).

7 In the case of consent for intimate activities that might be available through informal organizations. See, e.g., John D'Emilio (1983). In the case of action in suppressed markets, for example that is provided by outlaw organizations. See Backer (2009), reviewing Westbrook (2007).

8 See, e.g., Duncan (1995). For an interesting consideration, see, Smith (1999).

9 For purposes of this essay the focus is on the work of transforming Article 213 of the Model Penal Code

deliberately aimed at changing the orthodoxy of sexual assault regulation to one more correct.[10] Central to that project of transformed orthodoxy was the definition of "consent." [11] The essay first situates the *problematique* of consent—as action and object that incarnates power relations and the boundaries of the taboo. It then illustrates the way that semiotic meaning making produces a political correctness that produces paradox by critically chronicling the meaning of consent respecting sexual intimacy in criminal law. It enhances sexual liberation by placing it within a cage of limitations that ultimately transfers the power over consent form the individual to the state. That cage is necessary where, as here, sexual entitlement—the crumbling of the old taboos built around the chaste woman and the centrality of marriage between men and women—makes incomprehensible the old structures within which consent was confined. Confinement is still necessary—sexual liberation was coupled with enhancement of notions of autonomy,[12] specifically of personal control of one's body, again interposed consent as an act (of liberation, of autonomy, and of choice and thus hierarchy), as that assent, and of its affirmance of a new societal ordering,[13] and a new language within which to embed action and object with meaning.[14] That meaning making suggests the way that consent as an act, and as a state of being, is transposed to the broader context of political economic relations.

(Sexual Offenses) definition of consent. The general revision project was approved by the ALI membership at its May 2012 meeting and work began thereafter by the reporters, Stephen J. Schulhofer and Erin Murphy, both of New York University Law School. See American Law Institute (2013, xv). The ALI is a nongovernmental organization composed of jurists, lawyers, and academics whose purpose is to seek to bring clarity to the law of the United States through restatements of the common law and the development of ideal types of statutory law (for example, the criminal or penal law). See https://ali.org .

10 "For some time experts have told us that this portion of the MPC needed to be rewritten to fit with contemporary knowledge and values." Lance Liebman, Foreword, American Law Institute (2013), p. ix (Mr. Liebman was the ALI Director). "As a predicate to discussing procedural and evidentiary reforms of sexual assault laws, it may be helpful to have a shared understanding of the nature of sexual assault complaints today. . . In almost every other respect [e.g., with respect to sexual assault on men], however, the conventional image is wrong." American Law Institute (2012, Background Memorandum, 1).

11 Consent was initially an issue generally with respect to specific acts, and as well with respect to the sexual history of the complainant, from which circumstantial evidence of consent might be implied. See, generally, Anderson (2002).

12 See, e.g., Young (2017) arguing for an embedded rather than an individualist autonomy.

13 See, McLean (2010, 40-69). In the context of sado-masochistic sexual practices, see Hanna (2001).

14 Cf., Grossfeld (2001) (displacing the normative language and sensibility of the lawyer for the quantitative language of the accountant as corporate governance moves from the centrality of contract to that of compliance).

2. The Signification of Consent in the Shadow of "Correct" Politics and Social Relations

The signification of consent may help unpack the complexities buried within this straightforward and simple word. Consent is both a verb and a noun in English. That is, the word, as sign, simultaneously signifies both acts or actions, as well as a condition or status in relation to such acts or action. It frames the context in which consent is given and the object of the consent. Consent, then, expresses an act defining relationships between people (or institutions).[15] At the same time consent is understood as the thing ("res") that is given, received or negotiated; that is, consent is the embodiment of the relationship itself that is defined by the act of giving consent.[16] In all these senses , consent derives from the Latin *consentire*, to agree (verb) and an accord (noun), literally a meeting of the minds. The Latin itself is a compound word derived from *com* (together) and *sentire* (to perceive, feel, experience or think, realize, see, or understand).

The word consent, in both its senses of act and object, began to be used in the English language around 1300, during the course of the century after the descendants of Vikings holding the Duchy of Normandy from the French king too the English crown from its Anglo-Saxon holders.[17] As a verb, its primary meaning is to signify agreement. However, not everyone can give consent. Consent is a power reserved by societal custom or law to those with the authority to give it. As such, consent was meant to suggest a power to agree or to assent, as well as the act of agreement itself. It followed that consent as a verb signified not merely the act of assent *but also the personal status of the person* (or institution) assenting, at least in relation to the person (or institution) to which assent was given. Consent *also signified a power over the thing about which consent was given*. That power could include a power over one's body, possessions, or rights, or control of others. One would not consent unless she was recognized as being invested with the right or power to assent—and to withhold assent. The object—an act of consent—was in this

[15] Institutions may give or withhold consent as freely as people in some context. They may also unreasonably give or withhold consent, the judgment about which has pre-occupied the courts. See, e.g., Weddle (1995).

[16] This is evident, for example, in the context of consent to student testing in the US. See, e.g., Freeman et al. (2006).

[17] The etymology of the word in the discussion that follows is taken from Etymology Online ("Consent").

sense also a declaration of status in relation to the person to which consent was given, and a power over the thing about which consent was related.

As a noun, consent referenced the cluster of obligation or responsibility that followed form the act of consent. In that respect, at least from the late13th century, the word referenced an agreement of sentiment or unity in opinion as an object justifying the consequences of the act producing this unity or agreement. It is in this sense that the noun consent signified a duty to comply—consent gave rise to a compliance obligation in the consenting party and a right to require performance or to seek damages or other reedy by the person to which consent had been given. Consent, then, carried with it the notion of obligation or responsibility to see the objective of consent consummated. It was the thing that served to acknowledge the power of the act to otherwise constrain the freedom of those giving consent to its terms. Most importantly, where consent as a verb also defined the extent of the authority of the consenting party, consent as a noun transformed that act into obligation, into the thing that must be undertaken, or the relationship that must be acknowledged *without adverse consequences to either party*. That was the key significs. One moves here from an agreement deeply embedded in societally constructed power relationships and status hierarchies to an acknowledgement of the power to undertake the action consented without interference. Consent, then, properly given served as a societal imprimatur, of its willingness to be complicit in the consent by permitting its enforcement through societal organs.

Notions of the "age of consent" nicely conflated these overtones of authority, obligation, and societal permission through the direct legalization of conditions necessary to be bound or bind without adverse consequences in the undertaking of intimate or sexual contact (see Epstein et al. 2000). Again, these fold into and connect with broader discourses of power—religious and political—through which consent can be understood as derivative delegations of (societal consent) to the exercise of personal consent (Sarkar 1993; Sweeny 2014). At the same time this reference to "age of consent" also reminds us that the Middle English origins of the term is also embedded with a moral element. That mora element is derived from the understanding of consent as an act of "yielding" or "yielding up" something to someone. Here one moves from an active to a passive and immoral sense of the term in the sense, for example, of consenting or "yielding" to temptation, to sinful (or unlawful) behavior. Here the word acknowledges the power to assent but at the same time suggesting the application of a superior (moral, political, or

societal) force to exact adverse consequences from that act and the resulting condition. Fornication and adultery were the traditional examples (Eskridge Jr. 1995). Here one encounters the Janus face of the morality of consent, one built into the signification of consent yet not of its object. Consent speaks to an empowering, of the vesting of a power in those entitled to consent over the matter that is its object. Yet it also constitutes its subject as the holder of a set of characteristics that a society has vesed with capacity to consent.

The semiotics of consent, then, is nicely drawn from its origins. It serves as an object and symbol around which meaning is constructed, even as such constructed meaning gives form to that object as act and thing. Consent, then, *signifies* action and simultaneously objectifies the act signified (an incarnation of meaning). At the same time, consent also signals the status of the parties (they may give and receive consent, their authority over the thing consented, and acknowledges an obligation represented by the consent, and the like), and in this way reconstitutes them as a function of that assenting power. The signification, then, embeds that object (now recognized as act and thing) within a complex ecology of relationships and webs of power/authority which themselves are also signified by the act of consent and the obligations that consent produces. Consent embodies within its meaning a powerful "network of power relations . . . forming a dense web that passes through apparatuses and institutions, without being exactly localized in them" (Foucault 1978, 96). The power to affect the meaning of any of these interlinked signs can change the social order; an idea especially relevant in the context of sexual assault.[18] To that end, consent requires a new language to fit the model of principles of social relations within which it is embedded, a social semiotics of the language (the significs) of (legitimate and forbidden) consent (van Leeuwen 2005, 91-171). These, as will become clearer in the section that follows, then revolve around language, but also of context, facial expressions, movement, interactions, dress, and other signs that together will be interpreted or re-interpreted as the performance of consent and as consent itself which is then acquires meaning when the community moves to impose consequences on the basis of the character of the consent. Politically correct consent produces reward or at least indifference, the other, punishment.

[18] "True primary prevention is population-based using environmental and system-level strategies, policies, and actions that prevent sexual violence from initially occurring." (American College Health Association 2018, 5).

The webs of relationships signified through consent were becoming increasingly unstable in the context of the regulation of prohibited and permitted sexual (or sexualized activity). Much of that instability was initially focused on youth—especially in the university, where sexual assault constituted a new frontier of managing cultural norms through law. That involved changes to the way that sexual assault was defined and disciplined within university grievance and disciplinary processes,[19] and enforcement.[20] And indeed, the Guidance[21] issued by the US Department of Education in 2012 in the wake of the Obama Administration's White House Task Force to Protect Students from Sexual Assault.

The criminalization of sexual assault has also become an issue of general concern, and of meaning making with the bite of state power. The issues raised go to the heart of two great trends in U.S jurisprudence. The first is the move toward the criminalization of behaviors that society, through the state, seeks to control. This is an ancient impulse, and one natural to the leadership of collectives. The second touches on the value of the use of the criminal law as an instrument of social and cultural change. This is also an ancient impulse but its manifestation in the early 21st century suggests its renewed utility as a center of coercive meaning making. A subsidiary issue that is related to the use of the criminal law as an agent for cultural change involves the way that customary rules of process fairness are bent to the greater policy goals. There are many who view criminalization and the use of law instrumentally, and especially the criminal law, as a valuable tool for societal progress. There are many who disagree. Consider the position of 16

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[19] U.S. Department of Education (n.d.) "The Obama administration is committed to putting an end to sexual violence—particularly on college campuses. That's why the President established the Task Force earlier this year with a mandate to strengthen federal enforcement efforts and provide schools with additional tools to combat sexual assault on their campuses. As part of that work, the Education Department released updated guidance earlier this week describing the responsibilities of colleges, universities and schools receiving federal funds to address sexual violence and other forms of sex discrimination under Title IX. The guidelines provide greater clarity about the requirements of the law around sexual violence—as requested by institutions and students."

[20] "The UC released new systemwide policies for the handling of sexual violence and harassment cases last year and adopted standards requiring consent to be unambiguous, voluntary, informed and revocable. 'A primary goal in our efforts at the University of California to prevent and respond to sexual violence and sexual assault has been to make sure law enforcement agencies are more fully engaged with us on this serious issue', Napolitano said." (Johnson 2016).

[21] U. S. Department of Education (2014), rescinded under the Trump Administration.

Penn Law faculty members wrote this open letter criticizing aspects of that policy, and of the federal government's actions.[22]

3. Consent in the Laboratory of Control: The American Law Institute Struggle to Reprogram the Principles of Authoritative Consent.

The ALI project to reconceive the criminal law of sexual assault commenced in 2012. The issue of the definition of consent appeared in 2014 after consideration of other issues.[23] Already by this time, the effort to reconsider this portion of American criminal law "in light of experience and changed values" was meeting with responses from the ALI's "Consultative Group participants who see these issues from different perspectives."[24] The issue arose first in the context of the performance of consent—that is of the signs that are unambiguous indicators of the action of consent in the context of rape.[25] The Reporters would have opted for affirmative consent, but "existing ambiguity of social norms in this regard" got in the way (ALI 2014, xix). Instead the focus turned to nonconsent—the meaning of an unambiguous 'no', at least in the "absence of subsequent indicia of positive agreement" (ALI 2014, xix).

> (3) "Consent" means a person's positive agreement, communicated by either words or actions, to engage in sexual intercourse or sexual contact.

[22] Open Letter From Members Of The Penn Law School Faculty (2015): "Although our comments and criticisms focus on universities' procedures for adjudicating sexual assault complaints, we recognize the far more important issue: how can universities help to change the culture and attitudes that lead to sexual assaults? Our first priority should be to reduce the frequency of assaults. After-the-fact disciplinary proceedings, while useful, cannot by themselves adequately protect our students. Universities must take more steps to deal with excessive use of alcohol and drugs, substances that all too often fuel the conditions that lead to contested sexual assault complaints" (p. 1).

[23] "In 2012, the Council approved a project to revise Article 213 of the Model Penal Code. The Reporters began by focusing on two subject-matter areas—issues of procedure and evidence; and the collateral consequences of conviction. Attention then turned to the issues of definition of substantive offenses and procedural and evidentiary issues." (ALI 2014, xv).

[24] Lance Liebman, Foreword, (ALI 2014, ix).

[25] "Section 213.4 endorses the position that an affirmative expression of consent, either by words or conduct, is always an appropriate prerequisite to sexual intercourse, and that the failure to obtain such consent should be punishable under Article 213." (ALI 2014, xviii).

> (4) "Nonconsent" means a person's refusal to consent to sexual intercourse or sexual contact, communicated by either words or actions; a verbally expressed refusal establishes nonconsent in the absence of subsequent words or actions indicating positive agreement. [ALI 2014, §213.0 (3) and (4), p. 1]

Changes to the notion of consent was bound up in two not necessarily coherent movement of societal norms. The first was to situate sexual assault as a species of crimes of force (and bound up in its general psychological, physical and emotional effects, rather than as a sui generis species of aberrational violence. The second, however, touched on the sexual liberation of (mostly) women but also men to more freely engage in a broader spectrum of intimate activities of their own choosing, a "liberation" that fundamentally undercut the traditional notions of consent for women grounded in notions of chastity.[26] For some feminists, though, this suggested consent as a sign for the joining of two distinct clusters of meaning making, one protective and the other enabling.[27] The Reporters concluded, "Overall, the evolution of reform toward a more consent-based conception of the offense has been unmistakable, not only in the United States but throughout the world," (ALI 2014, General Commentary, 13) which now serves as the marker of the difference between lawful and unlawful sexual contact. The original vision was to divide consent into two categories. The first—affirmative consent, required positive affirmance signaled in some societally understood manner (language, actions, etc.), and by a person with the capacity to undertake that consent (as that is defined for each offense). The second—nonconsent—applied in the context of refusals to consent; these circumstances (when does "no" mean "no!)[28] proved the more interesting. Commission of an offense

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[26] ALI (2014, General Commentary, 12), citing not merely the work of one of the Reporters but also the more germinal Comment, Harris (1976) ("Although the force element has traditionally furthered the policy of physical protection, as well as serving an evidentiary function, . . . freedom of sexual choice rather than physical protection is the primary value served by criminalization of rape.")

[27] See, Franke (2001, 181–182) noting that "feminists in other [non-legal] disciplines . . . approach questions of sexuality in both negative (freedom from) and positive (freedom to) terms."), cited by the ALI Reporters in ALI (2015c, General Commentary, 23, n. 30).

[28] The Reporters cited two approaches: "CAL. PENAL CODE § 261.6 (defining consent to require "positive cooperation"); Commonwealth v. Lefkowitz, 481 N.E.2d 227, 232 (Mass. App. 1985) (holding that "when a woman says 'no,' . . . any implication other than a manifestation of non-consent that might arise in a person's psyche is legally irrelevant, and thus no defense"), with N.Y. PENAL LAW § 130.05(2)(d) (defining lack of consent to require that "the victim clearly expressed that he or she did not consent .

in the presence of nonconsent was treated as an aggravating circumstance increasing the criminal penalty.

The semiotics of the active-passive binary suggests the way that consent loses its autonomy and becomes deeply embedded in power relations mediated by the state which acts on the basis of what it perceives (or desires) to represent an idealized model of societal relations—the essence of political correctness. Thus, for example, the initial position of the Reporters was that language trumped other signs ALI (2014, Satutory Commentary, 22). In the process they engaged in both an act of cultural reduction (e.g., sound as the primary means of communication), followed by action. A verbal nonconsent has special power—it may be revoked only by an act of positive consent, communicated by words or actions. The problem for the criminal law, then, shifts. It centers consent on its forms and history. Consent binds for an instant, and may be instantaneously revoked. Its manifestation as communication is the consent—that is consent becomes the communicative act—with the primary focus on verbal communication, followed by actions that might be interpreted as communicative in a shared sense.

The result produced some confusion—and especially respecting the legal consequences of signaling—that is the performance of consent (or nonconsenting) in politically (now legally) correct ways. That resulted in the production of a response memo from the Reporters who sought to both press their view of a new regime of politically (and legally) correct performance or communication of consent and to defend the construction of consent as a Janus figure of affirmative consent-non-consent.[29] The issues touched at the margins of communication which now appeared to serve as both the act of consent and as the consent itself.[30] The first touched on the borderlands of affirmative and non-consent: "Should the draft criminalize sexual intercourse, in the absence of physical force or specific coercive circumstances, when the defendant is subjectively aware of a risk that the complainant has not expressed consent to that intercourse through words or conduct" (ALI 2015a). In at least one

. . and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances" (emphasis added)); State v. Gangahar, 609 N.W.2d 690, 695 (Neb. App. 2000) (holding that "while [the victim] said 'no,' the statute allows Gangahar to argue that given all of her actions or inaction, 'no did not really mean no'")." ALI (2014, Statutory Commentary, 22, footnote 61).

[29] See, ALI (2015a, Reporters' Memo and Recommended Reading).

[30] These included what the Reporters called the (1) force and consent spectrum, (2) intoxication and consent; (3) minors and consent; and (4) tainted consent. (ALI 2015a).

circumstance the answer would be liability, in effect for failing to interpret societal sexual cues in accordance with the measure now imposed by the state ALI (2015a, Reporters' Memo and Recommended Reading).[31] The intoxication standard drew a line between incapacity to consent ("actor has reckless awareness of a risk that victim never gave a words- or-conduct "yes") and authoritative performance ["Yes by words or conduct (i.e., capacity to assent, even if in hindsight regrets it or judgment clouded by intoxication)"] (ALI 2015a, Reporters' Memo and Recommended Reading).[32]

The reaction was strongly expressed by the ALI members.[33] They resisted the transformative vision of the Reporters and criticized the tendency that draft expressed toward overbreadth and overcriminalization.[34] ALI members argued that the revision tilted too heavily on the side of overcriminalization and overincarceration. It suggested that an affirmative consent standard would imperil both parties even (especially) in otherwise innocent situations, and that, in that sense, it contributes to ripping rather than mending the social fabric respecting personal autonomy and sexual freedom.[35] The critics noted absurd results from the provisions describing threats that otherwise invalidate a coerced consent and noted as well that the statute made no effort to consider the potential disproportionate racial effect of the statutory scheme.[36]

The resistance to this approach produced somewhat dramatic changes to the vision of consent as a communicative act with its own hierarchy and

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[31] "CW did not push away D, but also did not embrace D, reciprocate D's advances, or otherwise act like CW willing (although never acted unwilling, either)" (ALI 2015a, Chart: Nonconsent Spectrum); compare no liability for "CW felt 'yes' but expressed 'no'" (ALI, 2015a, Reporters' Memo and Recommended Reading).

[32] Visual Statutory Scheme—Proposed Article 2013; Intercourse Liability Scheme.

[33] The reaction was technically to the language in ALI (2015b). Tentative Draft No. 1 was presented to the ALI membership in May 2014, but given the controversy around several of its provisions, there had been no time to consider the definitional provisions. Discussion Draft 5 brought forward the black letter of Tentative Draft No. 1 but with substantially expanded commentary. (ALI 2015b, xviii).

[34] Undersigned ALI Members and Advisers (2015) reproduced at Sexual Assault at the American Law Institute (2015).

[35] Undersigned ALI Members and Advisers (2015). "The draft states that it is difficult to distinguish "threats" from mere "offers" of a benefit to which the benefitted party is not entitled and, accordingly, the draft chooses to treat "offers" as the equivalent of "threats." (Id. at 77–80). Thus, an offer to vote in favor of your sex partner's preferred "American Idol" contestant is also a third degree felony if the complainant later asserts that the offer was the cause of the consent to sexual intercourse. The draft candidly admits that it "represents a largely new direction for legislation in this area." (Id. at 75).

[36] Undersigned ALI Members and Advisers (2015): "the criminal law has an unfortunate history of excessive punishment in the name of protecting women especially when issues of race are present". See Coker v. Georgia, 433 U.S. 584 (1977)" and noting the racist as well as sexist failings of US approaches to rape law).

resultant distribution of responsibilities and consequences. The changes, however, refined the notion of consent more precisely in ways that appeared to take a transactional approach to intimate acts leading up to penetration even as it abandoned the initial affirmative consent-nonconsent binary. Those changes were unveiled in September 2015, when the Reporters produced a substantially revised definition of consent:

> (3) "Consent"
> (a) "Consent" means a person's positive, freely given agreement to engage in a specific act of sexual penetration or sexual contact.
> (b) Consent is absent until such agreement is communicated by conduct, words, or both.
> (c) Consent can be revoked at any time by communicating unwillingness by conduct, words, or both. Any verbal expression of unwillingness suffices to establish the lack of consent, in the absence of subsequent words or actions indicating positive agreement.
> (d) Lack of physical or verbal resistance does not by itself constitute consent to sexual penetration.
> (e) Consent is not "freely given" when it is the product of force, restraint, threat, coercion, or exploitation under any of the circumstances described in this Article, or when it is the product of any force or restraint that inflicts serious bodily injury. (ALI 2015c, 1)

The changes from the initial draft preserved the fundamental premise of the original—that intimacy was centered on affirmative consent, but that action in the face of non-consent aggravated the violation.[37] The question, then, was on the definition of affirmation and the characteristics of non-consent. These followed the 2015 Memorandum described above (ALI 2015a). The semiotics of the changes were unavoidable: "In ordinary understanding, consent is something a person does, not something a person feels. Consent given reluctantly or with regret is still valid consent, absent impermissible coercion." (ALI 2015c, Statutory Commentary, 34). The Reporters acknowl-

[37] This was underlined by the Reporters in their Model Penal Code: Sexual Assault, Memorandum for Advisors and MCG (1 October 2016): "the Reporters presently expect to recommend defining consent as communicated willingness, so that the Code will penalize conduct as the misdemeanor offense of Penetration Without Consent when the totality of the other person's behavior communicates neither willingness nor unwillingness" (ALI 2015c, 2).

edged the contention around the question of affirmative consent rather than the absence of active opposition as the basis for determining the validity of consent, and opted for the affirmative consent standard. It rejected the criticism of this approach by suggesting that "the concept of conduct is not restricted to active bodily movement. It includes the totality of a person's behavior; silence and passivity are forms of conduct" (ALI 2015c).[38]

The difficulty, though, of course, was that the semiotics of the ALI's consent provision was post hoc—its meaning would be made after the fact and by the interpretive community of prosecutors, juries and judges. To that extent the definition developed a two level semiotic meaning making—the first in the concept of consent to be applied by the parties, and the second, that of those who judge the "correctness" of the interpretation ex ante but in post hoc proceedings (ALI 2015c, 35).[39] The consequence is clear—the definition serves as a means of shifting interpretive risk to the persons engaging in intimate conduct potentially covered by the statute. The risk here is of misalignment between interpretant at the time of the actions communicating consent and the making of meaning respecting that consent after the fact. Given the consequences, the effect should be for most (even risk neutral individuals) an incentive to avoid intimacy rather than to embrace it.[40] The Reporters noted: [T]he appropriate default position clearly is to err in the direction of protecting individuals against unwanted sexual imposition." (ALI 2015b, Substantive Material, 53). Even so, the Reporters remained suspicious that the incentive to avoid engagement had not gone far enough, that is not far enough to ensure the politically correct result.[41]

The Reporters now appeared more defensive—but also quite strong in their belief in their role as societal vanguards moving conceptions of con-

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[38] It thus rejected the criticism that the definition would require either an affirmative formal (written agreement or some recording of a verbal affirmation. (ALI 2015c).

[39] "The issue arises at two levels—first when acts of intimacy occur and subsequently, in the event of alleged abuse, when the legal process is called upon to determine culpability" (ALI 2015c, 35).

[40] "The point is simply to stress that in interpersonal conduct, willingness cannot be taken for granted, and that before sexual penetration occurs, the person initiating that act must look for affirmative indications that consent is present, exercising common sense and taking into account all the relevant circumstances." (ALI 2015c, 35).

[41] "Certain recurring fact patterns cause problems that require a legislative gloss; otherwise the statutory concept of consent could easily degenerate into a mere placeholder for divergent norms of sexual behavior or, even worse, an enabling mechanism for the wishful thinking of sexual aggressors"). (ALI 2015c, 35).

sent forward toward a correct politics enforced through law.[42] The position was awkward, balancing an acknowledgement that the state had no role in legislating ideal forms of sexual intimacy but did have a role in protecting people against undesired penetration (ALI 2015c, General Commentary, 15). Yet the refusal to move away from their earlier conception for mediating between the two remained awkward, especially in light of the earlier protests, and the clear lack of consensus among the ALI membership. The process involved an odd semiotic contest—a contest of storytelling, of competing idealizing fictions, hypotheticals and interpretations, hurled like missiles between factions intent on moving the constraining structures of consent in different directions.[43] Still, the process of meaning making can sometimes be violent—in the sense that it is coercively imposed by that faction with the power to impose its will on those who would not consent.[44] Through this, the Reporters held to their view that the language of the law, revolving around consent, must be changed to reflect the social realities around which the law ought to point, if not lead (ALI 2015c, 21-23).

Again, resistance to the form of the revisions to the provisions for consent required additional modification. These were circulated in Council Draft No. 5 dated December 15, 2015 (ALI 2015d). The Reporters appeared to retreat from their insistence on affirmative consent principles.[45] The definition was now drafted this way:

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[42] The language in the Commentary is worth quoting at some length: "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 communicating effectively the conditions under which commonplace or seemingly innocuous behavior can be unacceptably abusive or dangerous. Nearly all law-reform efforts addressed to the sexual offenses are met at some point by the objection that they go beyond social standards currently accepted by a good many law-abiding citizens. That protest was heard in response to the Institute's 1962 Model Code, and it has been raised on the occasion of most, perhaps all, subsequent state efforts to revise the law of rape" (ALI 2015c, General Commentary, 15).

[43] For a discussion in semiosis see Valsiner (2009).

[44] See, e.g., Coney, D. & Dickinson, G. (2010).

[45] They noted in their initial Reporters' Memorandum: "The treatment of consent and associated offenses in Preliminary Draft No. 5 provoked great controversy at the last Annual Meeting and at October's meeting of the Council. Many argued that the definition adopted an ideal of 'affirmative consent' at the expense of the largely tacit ways that people engage in sexual behavior in the real world. There was concern expressed that the definition covered behavior that was innocent, and that the criminal law should not dictate sexual mores in this evolving area. Taking into account both the breadth and depth of those concerns, this Council Draft presents a thoroughly reconsidered approach to the issue of consent. Given the contested state of current sexual mores and the risk of overbreadth in penal statutes, the revised Draft rejects these 'affirmative consent' formulations" (ALI 2015d, xi).

(3) "Consent"

(a) "Consent" means a person's agreement to engage in a specific act of sexual penetration or sexual contact, evidenced by words, conduct, or both, including both acts and omissions, as assessed under the totality of the circumstances; provided, however, that agreement does not constitute consent when it is the product of the force, fear, restraint, threat, coercion, or exploitation specifically prohibited by Section 213.1, Section 213.4, or Section 213.6 of this Article.

(b) Consent may be expressed or it may be inferred from the totality of a person's conduct. Neither verbal nor physical resistance is required to establish the absence of consent, but lack of physical or verbal resistance may be considered, together with all other circumstances, in determining whether a person has given consent.

(c) Consent can be revoked at any time prior to or during the act by communicating unwillingness through words, conduct, or both. A verbal expression of unwillingness suffices to establish the lack of consent, in the absence of subsequent words or conduct indicating positive agreement prior to the act in question. (ALI 2015d, 1)

In addition, the Reporters, understanding the crucial role of illustration in making the case for their opponents, also included illustrations intended to show the way the law would apply in idealized hypothetical cases (ALI 2015d, xii and Commentary, 4-7). Consent remains the principal concept used to distinguish lawful from unlawful conduct. Consent (in its quality of firstness) remains a signifier of both the act (permission or assent) and signification (legality). But the quality of consent changes, and in the changing speaks to the distribution of interpretive risk (*ex ante* and *post hoc*) and its negotiated quality (between ex ante and post hoc) is sharpened.[46] Consent, then, becomes significant not just for the parties, but the vehicle through which societally coercive institutions will use the bodies and experiences of those brought before it to help shape the meaning of sexual communications—judging it licit or illicit. The politically correct becomes both a gamble and a dynamic conversation between the lived

[46] "The Code tales into account the complexities of mutually desired sexual interaction and leaves room for the evolving character of sexual communication. The Code endorses the prevailing norm that requires each party to be alert to the wishes of the other. It likewise requires a trier of fact to take into account all the surrounding circumstances in reaching a contextually sensitive judgment" (ALI 2015d, Comment, 1-2).

experiences of those involved in the assent and those that thereafter judge its consequences. Consent is embedded in context—that is its meaning cannot be extracted from itself (the affirmation) but by the circumstances in which it occurs. Consent, then, becomes a function of a judgment of the meaning of the quality of the relationship (however long or brief) among the parties leading to the acts that might constitute affirmation or its negation. It is spoken in the language of risk ("disregards a substantial and unjustifiable risk that the other person has not given consent to such act") (ALI 2015d, §213.2, p. 4).

Continued dissatisfaction prompted the Reporters to produce another explanatory memorandum, this time "On the State of the Law of Consent" (ALI 2016b). The issue was the basis for counting states whose jurisprudence incorporated in some way the affirmative consent doctrine, either by defining consent in some manner related to affirmative consent or defining an element of liability for penetration as the absence of affirmative consent. The analysis exposed the difficulty of answering this question without interpretive leaps. "In sum, the variety of judgment calls necessary to tally "affirmative consent" can lead to legitimate disagreement about the way to categorize the 32 American jurisdictions that define consent" (ALI 2016b, 4). Meaning making becomes more elusive where the meaning depends on the way in which one approaches the evidence for its foundation. Exposure here undermined signification coherence and thus the power of the definition put forward by the Reporters, exposing it for its normative objectives. Along with the Memorandum can a slight revision to the proposed definition. That revision eliminated the "totality of the circumstances" language of §213.0(3)(a) and substituted "under the context of all the circumstances" (ALI 2016a).

By March 2016 yet another round of substantial revisions. Preliminary Draft No. 6 (ALI 2016c) acknowledged the movement from *affirmative consent* in the original draft to *contextual consent* presented in 2015. After further modification, what would become the bulk of the final form of the provisions for consent were presented to the ALI members as Tentative Draft No. 2 (15 April 2016) (ALI 2016d).

> (3) "Consent"
>
> (a) "Consent" means a person's behavior, including words and conduct—both action and inaction—that communicates the person's willingness to engage in a specific act of sexual penetration or sexual contact.

(b) Notwithstanding subsection (3)(a) of this Section, behavior does not constitute consent when it is the result of conduct specifically prohibited by Sections [reserved].
(c) Consent may be express, or it may be inferred from a person's behavior. Neither verbal nor physical resistance is required to establish the absence of consent; the person's behavior must be assessed in the context of all the circumstances to determine whether the person has consented.
(d) Consent may be revoked any time before or during the act of sexual penetration or sexual contact, by behavior communicating that the person is no longer willing. A clear verbal refusal—such as "No," "Stop," or "Don't"—suffices to establish the lack of consent. A clear verbal refusal also suffices to withdraw previously communicated willingness in the absence of subsequent behavior that communicates willingness before the sexual act occurs. (ALI 2016d, 1)

At the 2016 meeting of ALI, an additional modification was proposed and approved by the membership. As amended the ALI formally approved a final version of the definition of consent as §213.0(4) (ALI 2017, Reporters' Memorandum, xvii). In this form the definition appeared in Tentative Daft No. 3 (ALI 2017, 51). It underwent additional changes and renumbering, appearing in its current final form as §213.0(2)(d) in Tentative Draft No. 4 (18 August 2020), the provision reads in full as follows:

(d) "Consent"
(i) "Consent" for purposes of Article 213 means a person's willingness to engage in a specific act of sexual penetration or sexual contact.
(ii) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.
(iii) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining whether there was consent.
(iv) Notwithstanding subsection (2)(d)(ii) of this Section, consent is ineffective when given by a person incompetent to consent or under circumstances precluding the free exercise of consent, as provided in Sections 213.1, 213.2, 213.3, 213.4, 213.5, 213.7, 213.8, and 213.9.
(v) Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, or sexual contact. A clear verbal

> refusal—such as "No," "Stop," or "Don't"—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent given prior to the act of sexual penetration, oral sex, or sexual contact (ALI 2020, 14).

Contextual, dynamic consent now becomes the center of meaning for determining the character of consent as lawful or illicit. Consent becomes a sign, signifying by act the object's intent ("a person's consent is something that a person does that communicates what the person intends or feels, not that intention or feeling") (ALI 2020, Comment). Statutory meaning becomes the operative element (ALI 2020, 2-5). But that meaning within the definition of consent s then embedded within a broader framework in which the power to freely consent is deemed to be precluded. These include all of the provisions covered by sexual assault. Excluded are §213.6 (Sexual Assault in the Absence of Consent), and §213.10 (Affirmative Defense of Explicit Prior Permission). The effect, then, might be to relegate consent to a secondary issue—the primary issue being, in every case, whether the circumstances permitted the lawful exercise of consent. Or put another way, the structure of the consent definition reimposes the original affirmative consent requirements of the initial drafts but now through the back door of reducing the scope of the licit consent.[47]

It followed that even in its final form, the definition produced substantial criticism among the ALI membership. Much of the criticism, though, shifted from the definition of consent to the grading of offenses. The issue, however, was the same—the extent to which efforts to protect autonomy by shifting the risk to those who engage in defined acts, produce traps for the unwary and reduces sexual activity to strategic interplay of shifting responsibility.[48] More importantly, debate now shifted to the exception

[47] For example with respect to Offensive Sexual Contact (§213.7) "But what distinguishes culpable from nonculpable sexual 13 contact is not just that it lacks consent or occurred under impermissible circumstances, but also that the actor has an awareness of that lack of consent or those circumstances." [ALI 2020, 276 (Issues of vulnerability)].

[48] Memorandum to ALI Director, Deputy Director, Project Reporters, Council and Members (18 May 2017). "It is no longer possible to be surprised that outside reviewers have criticized this project and its drafts as 'a game of Whack-a-Mole' that reshuffles the old deck of ideas rather than propose new solutions to the problems that have been identified. "ALI critics of the sexual assault proposal could not be faulted for feeling as if they are in a game of Whack-a-Mole." (Cole 2016, 5)

provided in new §213.0(4)(d), which threatened to become the exception which made the rule. For example, the use of a "knowingly or recklessly" standard in the definition of forcible rape (§213.1).[49] The insertion of specific exceptions was also criticized for creating additional risk shifting that effectively discouraged intimate activity. For example, the provisions touching on sexual assault on vulnerable persons was criticized for substituting a "substantial risk" standard for a consent standard.[50] In the end, the protagonists and their opponents continue to battle over the understanding of licit and illicit sexual activity within a context in which the traditional structures within which those notions were given meaning—chastity and marriage (between a man and a woman)—and given way to principles of personal autonomy and sexual liberation (though still within broad limits of capacity based on age and mental condition and increasingly power relationships). Consent, in this context served as an instrument of this reorientation of societal taboos.

While at the level of the individual it retained its form and function as an act and a thig (permission) given, at the collective level it served as the polestar around which societal sexual order was crafted, and policed. Yet the battle over the political correctness of the choices evidenced the continuing dynamism in societal views of the acceptability of sex, and the sexualization of relations between humans which, like markets, can only be free when subject to substantial regulation at the margins. One moves here from autonomy and sexual liberation to vulnerability as the organizing principle of law and as the lens through which signs are signified.[51] And in the end

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[49] The issue revolved around whether the *mens rea* applied to the action of force or to the sexual act that followed. The difference was important as the consent element to the sexual act would be effectively eliminated by the act that would be deemed to constitute force. The example: "She says, 'I know that I screamed and slapped him and threatened to file for divorce and sole custody, but when we had sex that night, I thought we were having 'make-up' sex after the fight. It never occurred to me that he would say my behavior 'caused' him to have sex with me. Result under TD3: She is guilty of forcible rape because she 'knowingly' acted (slap) even though she did not know it would 'cause' sexual penetration." [American Law Institute (2017, April 6). Model Penal Code: Sexual Assault and Related Offenses (Tentative Draft No. 3), supra].

[50] Memorandum to ALI Director, Deputy Director, Project Reporters, Council and Members (9 October 2018):"First is that this provision creates criminal liability if the defendant "knows there is a substantial risk" that the other person is incapacitated. The offense is committed even if the other person in fact is not incapacitated because no element of the crime requires incapacity. If you know there is a "substantial risk" the other person has been drinking and might be "unable to communicate unwillingness," you are guilty even if the other person is not actually incapacitated".

[51] Cf. Fineman & Grear (2013) seeking to consider vulnerability in place of the autonomous liberal subject at the center of law and politics. This is a concept compatible with one of the Reporters' academic

the Reporters appear to have gotten what they wanted—the adoption oof an effective standard of affirmative consent, written into the law of sexual relations mediated by the state.

4. The Janus Face of Political Correctness in the Significs of Consent.

The long road from the initial draft of a definition for consent in 2012 to its final version in 2020 nicely illustrate the complexities the aggregations which incarnate not just a single faced God, but a God with two faces, and of two minds—each looking fixedly but in opposite directions, neither conscious of what the other sees, and each endlessly intent on pushing away from the other even where such an effort produces nothing. The ALI project reminds that society must be ordered, the way that humanity orders the world around it (Cf. Linnaeus 1964), including curiously humanity within it on the basis of sex,[52] and that in that ordering reveal the way that the abstract shapes the way that society sees the things and values the actions around it (see Foucault 1994).[53] In that context, political correctness implies the power to impose an orthodoxy, a way of seeing, and of believing in the truth of what is seen, on others. It is itself the label used to reveal the means by which individuals are embedded in a social system that rewards and punishes based on fidelity to a specific way of encountering (and responding) to the world. The ALI Project reminds us that at its heart, the search for a taxonomy of consent, and its application to the lied realities of societally embedded individuals is a political act, an act of coercion, and an expression of moral-political power to enforce of way of seeing things and bringing people closer toward an ideal based on a classification system that orders (sexual) activity along a spectrum of value.

In the name of the embrace of personal autonomy and sexual liberation the drafters of the definition of consent, within the broader context of pro-

resonates, though one speaks the language of vulnerability and the other the language of affirmative consent. See, Schulhofer (1998).

[52] For a delightful and profound discussion, see Steinbrügge (1995).

[53] Critically, here: "On what 'table', according to what grid of identities, similitudes, analogies, have we become accustomed to sort out so many different and similar things? . . . For it is not a question of linking consequences, but of grouping and isolating, of analyzing, of matching and pigeon-holing concrete contents; there is nothing more tentative, nothing more empirical. . . than the process of establishing an order among things." (Foucault 1994, xxi).

ducing an ecology of (illicit) sexual conduct regulation produced a scheme in which consent, in all of its definitional glory was submerged within a matrix of exclusions designed to advance the notion of vulnerability at the core of liberation. What sexual liberation produced, then, was the need for greater protection of the liberated from the failures of their own powers to effectively consent. The other road—to enhance the effectiveness of that power, and to permit is exercise, was never considered.[54] Put differently, sexual liberation was advanced by the definition of consent. But state paternalism was advanced (reducing the scope and effectiveness of consent in many contexts) by embracing notions of vulnerability and with it concepts that suggested substantial limits to the purity necessary to make a free and fully informed assent (Travis 2019). The vulnerable may consent, but like children and the incapacitates, that consent is necessarily (in the eyes of the state) illicit (Chamallas 1988).[55] Freedom, then, means acceptance of a fundamental notion that one is vulnerable, and vulnerability that one is never truly free but always embedded within the webs of power that may only be sorted and managed through the superior authority of the state. What was at issue, then, was the semiotics of the autonomous liberal person, expressed through action and embedded within a dynamic communal web of relationships over which those with the power to do so sought (as they have for centuries in the West) invoked the power of the state to direct.[56] It was to the politics of the ordering of that web that the battle over consent contributed.

Consent, then, defines the (small) space within which the individual is deemed free to exercise her liberation as a series of well constrained discretionary decisions. Yet, in the definition of the "correct" meaning of consent, the ALI, over the course of eight years of battles, also sought to define that (much larger) societal space in which consent was reserved not to the individual, but to the state. This represented not a revolution but rather, as the Reporters and the high officials noted at the outset of the project n 2012, a rearrangement of

[54] Cf. Camille Paglia; "The recent trend in feminism, notably in sexual harassment policy, has been to over rely on regulation and legislation rather than to promote personal responsibility. Women must not become wards and suppliants of authority figures. Freedom means rejecting dependency." (1988, xii).

[55] "Rules intended to foster sexual freedom for women cannot unreflectively judge the propriety of sex by the acquiescence of individual women. The risk is too great that acquiescence reflects inequality, not free choice." (Chamallas 1988, 862).

[56] From the perspective of vulnerability, see, e.g., Gilson (2013, 213).

that space reserved for the exercise of individual choice. It was not surprising, then, that over the course of eight years, consent became more sharply drawn as an object the meaning of which could only be constructed through the addition of appropriate modifiers. Consent could be "affirmative." At the opposite end of the spectrum was "nonconsent"—the absence of consent. In the middle existed a large range of consent, the character of which—as licit or illicit--was determined by the context in which it was given. The state was designated as the arbiter of those judgments (an office now long held by the sovereign, and will virtually unchallenged authority since religious and societal institutions in the West ceded formal control). Over the course of eight years, then, consent became the object of adjectives and modifiers. Its firstness exposed by the mechanics of rhetorical signification of consent as an object (and as the fundamental pure state of assent).

Consent, then, was transformed from an action into the ultimate objective representation (the sign) of liberation and of autonomy. It expressed a philosophy of sex (Marino 2014) that was manifested in an object (consent) that itself was manifested by an action (consent), the purity of which was the responsibility of the state to detect and protect—on the basis of its philosophy of sex. Consent, the ALI Reporters explained in 2012, must serve as the fundamental basis for ordering the law of sexual assault. It became both thing and the encapsulation of an ideal set of narratives of *pure* intimate relations among individuals;[57] not yet with non-humans for that appeared still a step too far.[58] There is irony here, of course. In some respects, one returns here to the ancient foundation of meaning making within which consent plays a subsidiary role—the social purpose of intimate contact. What separates the ALI Reporters from Aquinas (Milhaven 1977), or from Foucault (1990), is merely a moral-political stance grounded in peculiar values and an ideological adherence to a view of the "natural" (Mortimer-Sandilands, C. & Erickson 2010). And the natural in this case applies not merely to sex, but to the concept of consent as object (the assent), as a sign (the expression of the ideologies of autonomy, liberation and vulnerability manifested in the object), as a

[57] "The law of sex, however, can operate as a value generating force when those who create or are governed by it perceive in the law an underlying vision of appropriate sexual conduct" (Chamallas 1988, 777).

[58] This falls within a broader and ancient construction of the meaning of nature and the natural—again as a semiotic construction of signification drawn out of the extraction of meaning from things and action which are invested with significance. See, e g., Garlick (2009).

communication of meaning (here the nexus between the communication of consent and its receipt by another party, and thereafter the meaning given to that ritual of the delivery and receipt of consent adjudged by the community of meaning makers through law or societal consequential systems). This can be expressed as morals, religion, science, or societal expectation (see Backer 1993). But the irony in the case of the ALI's Reporters, is the insistence on cloaking what is the delegation of autonomy from the individual to the state in a discourse of liberation and autonomy now constrained by an overarching doctrine of vulnerability. This effectively cultivated a false illusion of free will (Nietzsche 1888/2016, 41-42.[59]

The eight years of struggle for the control of the meaning of consent, thus, evidenced a much more basic struggle for control of the moral-ideological basis through which intimate interactions could be judged, rewarded or condemned. It remains a struggle for the control, and the performance, of will. Affirmative consent, and the expansion (or contraction) of nonconsent, represented a moral political view based on the ideal of equals engaging in unambiguous communicative foreplay of a quantity and form sufficient to provide the bed on which their subsequent physical (and perhaps psychological) intimacy might be consummated. But contextual consent provided only a difference in form but not in function to that role. But the difference could be critical.[60] Each substantially affected the communal expectations, the meaning making rituals necessary to produce a licit intimacy that reaffirmed societal expectations. Contextual consent continued to embed determinations in the interpretation of acts against societal expectations. Affirmative consent was more abstract—it judged actions against its own ideals.

That in the end the political forces of affirmative consent appeared to win the day on the field of moral-ideological battle the control of the ideal might serve more as an aspirational ideal than the expression of communal practice. On that basis, the ALI project, as it expressly stated, acquired a Leninist tinge (Stalin 1953, esp. Ch. 8). That is, the Reporters constituted themselves the mouthpieces of a vanguard organization whose role was to use the levers of

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[59] "The doctrine of the will was invented principally for the purpose of punishment,—that is to say, with the intention of tracing guilt. The whole of ancient psychology, or the psychology of the will, is the outcome of the fact that its originators, who were the priests at the head of ancient communities, wanted to create for themselves a right to administer punishments" (Nietzsche 1888/2016, 42).

[60] Cf., Grello et al. (2006). Of great interest are the assumptions underlying the structuring of the analysis, assumptions that review a moral-political lens through which assessment may be undertaken.

power at their disposal to change (to better engineer) societal practices by controlling the ideals against which these would be measured and through which punishments and rewards would be applied. That is Western style Leninism practiced by an elite social, political, and moral leading force. And it is against this that the other, reactive factions within ALI reacted, and reacted strongly. The politically "correct" then, was a central element of the discussions. And it was this Western style Leninism, the forefront of which appear to be academics seeking implementation of their (published) vision for society and the political order, that was the subject of intense criticism by those who sought greater connection with (evolving) custos and traditions and offered the contextual consent principle (eventually undermined by the exceptions carved into its application in the normative sections of the Sexual Assault provisions.

The battles over control, then, were fought in the shadow of idealized narratives of societal expectations—of its evolving customs and traditions. These served as the baseline against which the ALI vanguard might push (forward—always forward—in the stye of Western discourse) and as the shield that might be used to effectively resist this forward thrusting. Here another element becomes decisive—the scientism (Stenmark 2001) that marks advanced Enlightenment society. In the case of the battle over the meaning of consent, however, that focus was on the social sciences. And thus, the ALI debates were marked by invocations of the techniques and sensibilities of social sciences—its ideologies of empirics (Hyslop-Margison & Naseem 2007), along with the constraints imposed by the assumptions and principles which structure the "scientific" approach of social science in their search for "truth" in data (see Backer 2018). The Reporters began the project with an appeal to data—carefully curated to serve their purpose—the customs and traditions of the nation had changed, reality was at variance with the idealized expectations embedded in legal rule, and the resulting dissonance required cure. The irony, of course, was that the modified idea they proffered was itself subject to the same criticism and on the same basis (De Haan 2013). The greater irony was the quite carefully narrow skepticism of scientism that appeared in the work of at least one of the Reporters.[61]

[61] See Murphy (2015). Yet there was no irony here. Indeed, the framework proposed fit in nicely with the approach adopted in the ALI approach to consent and its embedding within the substantive provisions of §213. It issue was misuse rather than use and thus a fight among experts over the semiotic meaning of truth of the absolutes that science might provide in shaping social meaning and judgment.

More importantly, perhaps, was the battle of the illustrations. These produced a critical space from which meaning could be extracted and insights generalized that was framed around two approaches to the construction of facts to support ideal—that is to the signification of narrative objects in the advancement of a specific construction of meaning. These two sorts of approaches to supporting "facts" suggest an interesting division in the way that reality was offered for the consumption of meaning. On the one hand, there was a substantial reliance on abstract truth from data. This was represented by the product of data driven aggregations of "little" or "discrete" truths into one larger "truth" that could then be folded back onto the universe of discrete truths. This was the realm of modeling, of what Foucault referred a generation ago as statistics[62] constructing a population from out of the aggregations of its offal—the data it left in the aftermath of its actions. On the other was the reliance on storytelling, now deeply embedded in the culture of lawmaking in the West, and its rebellion against the appearance (at least) of legal discourse (Massaro 1988; Baron & Epstein 1997). This is the realm of anecdote, but a strategic and essentializing collection of anecdotes that are meant to make (collective) meaning obvious. It elevates data out of abstraction and into context. It is based on the idea that stories reveal the essence of the truth within them, and that truth can be transposed (replicated) among classes of stories (Oderberg 2007; Ellis 2001). It is meant to produce the representation of the ideal type—the ideal person and the ideal situation in which actions occurs.[63] It works like data aggregation in that sense: that the essence of the story is the fact that when aggregated reveals collective truth (as meaning) that can then be folded back onto the population of truth makers.

Illustration was essential to the ALI project—both hiding and exposing the injection of meaning in terms such as consent (constrained by its modifiers), as well as managing away from its meaning (shrinking its scope) by the collection of illustrations within distinct (expanding and contracting scope) provisions. Storytelling was particularly effective in its use against the imposition of the affirmative consent standard advanced by the Reporters. But then the Reporters used storytelling as effectively

[62] Discussed in Mader (2007).

[63] American courts have a long history of constructing, and lawyers have a significant role in the construction of ideal types through which law is applied to particular litigants. It serves as a means of both stripping the individual of singularity and of imposing a meaning on her. See Backer (1996).

to rip large areas of activity from the realm of contextual consent back to functional affirmative consent regimes within the substantive provisions of sexual assault. And, indeed, the essence of the definition of consent (and especially the borderlands between consent and its modifiers in the substantive provisions of § 213) was deliberately constructed to invite judicial tweaking of the sort that the American legal system appears to have developed a substantial appetite, especially in the area of the regulation of sexual conduct (Backer 1998).

Lastly, the *problematique* would be incomplete without reference to a fundamental mechanics driving the system: risk. There are two levels of risk allocation and risk shifting that produces a consequential significs on the concept of consent as sign. Law serves as a risk router.[64] Sexual conduct regulation was structured as a risk-reward system framed through law. Traditionally the risk fell to the idealized chaste woman. That created certain incentives—virginity, chastity, and the avoidance of situations that might put her "in danger" of men who were not spouses or family members. Law was crafted to enforce the benefits of this risk framework. Consent can be understood, in this sense, as a sign of risk, to the benefit of patriarchy, and one easily adjusted to changes in the expression or parameters of patriarchy. This was well understood by the ALI Reporters. They did not object to the framework (which would have perhaps moved them more toward an autonomy liberty model grounded in the individual), but rather to the way in which risk was allocated (Schulhofer 1998). They effectively proposed an inversion.

> With their revised code, Schulhofer and Murphy recognize that at times, the expression of consent is ambiguous; one person may think there is a risk that consent was lacking, but choose to disregard that concern. They propose that the harm of the mistake fall on the person who proceeded in the face of uncertainty, rather than on the other person. "The hope is that the law will encourage people to clear up ambiguity," says Murphy, "instead of shielding those who take advantage of ambiguity." (NYU Law 2015)

[64] See, e.g., Fletcher (1972). He identifies two ideological viewpoints for embedding meaning in risk routing—a principle of reciprocity and one of utility. A third might also be posited—a principle of incentive. See, e.g., Garber (2000); Cooter (1988).

The risk shifting occurs at two levels. The first is at the level of individual choices. Those engaging in sexual activity are invited to be risk averse in the face of ambiguity. And yet the great irony is that this nudging towards a constant state of risk aversion is applied to an area of human conduct, sexual intimacy, much of which is grounded in ambiguity. The result takes society back from principles of sexual liberation to those of sexual confinement. Confinement is no longer within the boundaries of the state of marriage, but now within those of affirmative consent (as noun). In the absence of safe harbors, the risk of sex becomes significant and is held by those with the power to control ambiguity. The second is at the level of social choices. Those engaging in sexual intimacy effectively agree that the state may, at the instance of any party (or the state) have the nature of their sexual interactions reviewed for compliance with societal expectation by the courts. Here even a risk averse individual may find herself on the wrong side of consent if after the fact the court determines that her reading of societal cues, however conservative, did not meet societal expectations and standards. This double risk shifting—decisions made ex ante by the individuals and made for the individual post hoc by the courts (as societal organs) ensure enforcement of emerging societal taboos (now grounded in notions of vulnerability) and reinforce value systems, through exercises in the art of informed discretionary decision making infused by ordering ideology (see Backer 1998). The risk, though, is the continuing replication of (now inverted) structures of gender hierarchies and stereotyping (Klein 1996), compounded by the reductionism inherent in strategically utilized statistics.

And its semiotics? Consent becomes the vessel through which the social value of personal choices are developed and the metaphor through which risk is signaled. Consent has now become engorged with significance. It signifies action—an assent, but one bound up in a complex web of modifiers each bearing on the relation of those who act with the authority of the action. It signifies a thing—the four corners of the permission, of the assent, itself. But it signifies more than that; it signifies an acceptance of the structures of risk associated with the reception of consent from another to whom ownership of both action and thing has been ceded. whose "ownership" has been ceded to another. That reception is then adjudged both by the actors and society for its legitimacy, for the authority to make it, and for the identity between the consent and the actions that follow. These significations then point to the construction of meaning of which the meaning of consent is merely an

affirmation—of the extent of individual autonomy, of the judging of context, on the authority of storytelling, on the value of statistics in ordering a reality used to apply and mold generalized meaning onto individual activity, and on the character and taste of society for acts of (sexual) intimacy.

5. Conclusion.

One can conclude, then, by a return to the fundamental *problematique* posed by consent—and consent especially in the context of intimate relations—or that is to say in the manifestation of state power to divide intimate relations into the realms of the licit and the illicit (as it has since the formation of society). One deals here not with the abstract issue of giving meaning its due to words. But words themselves, as especially consent in the context of sexual intimacy, opens the interpretive doorway to the process of making ideal social relations. Social order requires orthodoxy—it requires the politically correct—and a ruthlessness in its application. When a specific world view loses its authority over a population, vanguards appoint themselves (as the ALI is of a habit of doing since its formation, and from a political perspective rightly so given the societal realities of our political-moral system) champions of reframing that orthodoxy. That is what the ALI Reporters attempted here. And they will drag the rest of society along with them to the extent they retain a large enough (and influential enough) well placed vanguard of like-minded elites to make this possible. But orthodoxy is selective—and it carries with it its own seeds of resistance. The ALI Reporters have offered American society (social) vulnerability and the state (again) as *parens patriae*. Against that another political correctness appears at the margins—rejected for the moment but still potent—that of individual autonomy and liberation.

These conflicts were played out in the conflict over the role and meaning of consent in the context of the criminal regulation of sexual assault (as well as in the understanding of those terms). This short essay used the framework of semiotics, of legal meaning making, as a structure for extracting the complexities and stakes involved in the simple exercise of finding consensus on the meaning of consent. It took as its starting and end point the idea that *free consent is the product of a process of management that reduces consent to the sum of status and authority over the thing assented.* It situated that analysis in concepts of taboo, and of the objectification and signification of

terms that both embody and abstract the realities of societal practices and predilections—to the extent those could also be mined. The ALI's eight year project to develop a new law of sexual assault grounded in notions (highly contested) of consent provided the basis for this exploration. It then illustrated the way that semiotic meaning making produces a political correctness that produces paradox by critically chronicling the meaning of consent respecting sexual intimacy in criminal law. It enhances sexual liberation by placing it within a cage of limitations that ultimately transfers the power over consent from the individual to the state. That meaning making suggested the way that consent as an act, and as a state of being, is transposed to the broader context of political economic relations.

> Law, then, does not merely make the world within which it exists; it does more. To make the world requires two distinct forms of action. The first, and the usual subject of lawyers, is to fill the world with substance. . . The second, sometimes the object of lawyers, and central to the tasks of judges and legislators. . . is the task of making and protecting the boundaries of this world law makes. (Broekman & Backer 2013, vii)

The ALI has reset the machinery of meaning making; it will be for others to observe (and to contribute each in their own ways) to the inevitable collisions of this impost on of meaning to those built one action at a time by the individuals who exist disaggregated from the process of aggregated meaning making that process both the certainty of law and its uncertain application and embedding in the lives of the individuals touched by it.

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