

## Complications of Consent

Capstone Conference, October 8, 2016

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When Leonore wrote to me about this panel, she asked us to be personal in our remarks, as well as academic, and this I can do, because when it comes to sex, our personal *and generational* experiences play a powerful role in how we view the current issues. Look—I'm so old that when I started college, PMS hadn't been invented. Because this conference celebrates our history, and admonishes us to learn from our history, I want to begin by looking back before looking ahead.

In my life as a feminist social psychologist, I've watched the swing of many pendulums within our movement: from women seeking sexual liberation to seeking sexual protection, from breaking down barriers to erecting them, from rightful political activism to self-righteous zealotry; from political identity to identity politics. If you live long enough, you see that everything comes around again. For example, in the 1980s and 1990s, with the public alarm about rape and incest, many feminists fell prey to the daycare sexual abuse panic and the recovered-memory epidemic. BELIEVE THE WOMEN, we were told, even if the women claimed they had been raped every day for 16 years but repressed the memory, even if they claimed they had been abducted by satanists who killed and ate babies. Gloria Steinem paid for the search for what proved to be nonexistent torture tunnels under the McMartin preschool, and Ms. magazine put BELIEVE IT on its cover about what proved to be nonexistent Satanic Ritual Abuse cults. I was not above this hysteria. When the McMartin family's trial ended with a hung jury, I wrote an op-ed for the LA Times, which was titled "Do Children Lie? Not about this." I sacrificed skepticism in the service of outrage, believing the foolish mantra "where there's smoke, there's fire." No; usually, there's only smoke. Later, of course, thanks to the tireless work of psychological

scientists, we learned that of course children “lie”—rather, confabulate, tell untruths—when pressured by righteous inquisitors who won’t take “nothing happened” for an answer/

Now we are faced with another allegedly new epidemic—sexual assault on college campuses. Once again, we struggle to separate evidence from the emotional contagion and panic that afflict all discussions involving sexuality. Misogyny, sexual coercion, and violence are real problems, but they are neither new nor newly epidemic; and what do we think is new about the phenomenon of “slut shaming”? Scarlet Letter, anyone?

In this talk, I will focus on the upwards of 85% of reports of assault that occur between people who know each other, for whom the intersection between consensual and nonconsensual sex is often not marked with colored lights and traffic signals that say stop! go! yield! No wonder so many collisions occur there. What is *happening* in that intersection?

People answer that question through the lenses of evidence, age, and experience. Consider the two first-year students at Occidental college, ages 17 and 18, who had sex while both were very drunk. The 17-year-old visited her classmate’s dorm room, took off her shirt and made out with the guy. Then she left and, after texting him to make sure he had a condom, returned. Her friends tried several times to take her to her room, but she kept texting him and going back. The next day, she said she couldn’t remember what happened, including whether or not they had had intercourse. A week later, encouraged by a professor in Occidental’s Sexual Assault Coalition, she filed a “sexual misconduct” complaint with university officials. The D. A.’s office declined to file charges, concluding that both parties were “willing participants exercising bad judgment.” Occidental agreed, noting that the young woman “engaged in conduct and made statements that would indicate she consented to sexual intercourse,” but, the college added, “she did not have the capacity to appreciate the nature and quality of the act” because she

was too drunk. As for the young man, the report added, he was too drunk to recognize that she was too drunk to consent. He was expelled. She was not.

Is this a story of rape, sexual misconduct, sexual assault, or sexual inexperience? Is that ruling fair? Sandy Banks, an African American columnist for the LA Times, wrote: “This problem occurs because of the combustible mix of sex and alcohol when two young people—both drunk and amorous—have sex that neither completely remembers, both belatedly regret, and each sees through a different lens the morning after. In my day, we called that a lesson; you might cry privately, commiserate with friends, and then life goes on. Today, we call that a crime; lives unravel, lawyers intervene, and years of therapy ensue. Making sexual stupidity a capital offense ... doesn’t educate men or rescue women; it just turns naive and awkward college students into perpetrators and victims.”

Sandy Banks and I are in the same generation, and I couldn’t agree with her more, but we’re the old guard, and we know it. Still, as we hand over the baton in the relay of feminism, I want to raise some concerns about bandwagons—those machines that tend to steamroller along suppressing nuance, complexity, uncertainty, and dissent. And, frankly, I smell the sulphur of another moral panic in the making, those whirlwind bursts of hysteria often generated by issues involving the sexuality of women and children. In a moral panic, a legitimate fear is generated (kidnapped children; rape; incest; pedophiles); its prevalence becomes exaggerated; institutions organize to “fight” the problem; “experts” are hired; courts are flooded. Along with the sharks that may be captured and punished, countless more minnows are usually sacrificed to placate the furious and worried public.

Three contentious feminist debates—none of them new—underlie our responses to stories like the one of the young Occidental couple, and our approaches toward solutions.

**1. Defining our terms.** Thanks to the work of feminists who succeeded in expanding the legal definition, rape now means forcible penetration of any body orifice with any object, against a person's will—even a wife's will—and when that person is unconscious. But what is “assault”? When the Justice Department announced, based on two dated samples that even their lead investigator said were not statistically representative, that “19% of women on college campuses are victims of rape or sexual assault,” they got that number by starting with the 2-3% of students who reported rape—nonconsensual sexual intercourse—and then adding any unwanted activities as “forced kissing,” “fondling,” and “rubbing up against you in a sexual way, even if it is over your clothes.” I realize that we can all sink in the mire of the “what are the real numbers” argument, complicated as those data are, the way questions affect answers, sampling problems, and so on. But what we *can* ask is this: Do we want to consider those behaviors as serious as rape? Some will say yes, because the goal should be to reduce any form of unwanted and unpleasant sexual contact. Some will say no, because we then conflate annoying, unpleasant experiences with traumatic ones. Leonore once observed that the problem with the label “female sexual dysfunction” is that it includes everything and therefore means nothing, like treating colds and cancer as equally serious examples of “disease.” What, then, is gained, what is lost, by expanding the definition of sexual assault to mean any unwanted overture? In a case at my own alma mater, Brandeis university concluded that an accused male student had committed “sexual violence” by kissing his sleeping lover and by gazing at his genitals when they showered together. A federal judge ruled that the investigator's reasoning was absurd.

**2. Identity issues.** What is gained, what is lost, by encouraging an identity label (“I am a rape victim”) rather than an experience label (“I am a woman who was raped”)? We now have decades of research on the negative psychological consequences of the former, because when trauma becomes part of a person's identity, it is more likely to suppress a sense of mastery over

adversity and impedes the ability to cope and recover. Is that psychological cost worth the political gains of mobilizing activism? Do we want to encourage young women to define all unpleasant sexual experiences as *traumatic*, with lifelong repercussions? Attributions have powerful consequences, so we can ask: what are the benefits and harms when only one kind of attribution is acceptable for a young woman to make—as Sandy Banks said, when see it as a crime, not a lesson? The anger-generating attribution that “he did this to me” is the energy of activism and protest; that’s its benefit. And when it is clear that he *did* do that to her, as in the cases of men who rape unconscious women, anger is certainly a healthier response than denial or self-blame. But anger is also easier to live with, as Sandy Banks noted, than embarrassment caused by the attribution “god, what an idiot I was”—which at least has the benefit of forcing us to learn from our idiot mistakes.

3. **Empowerment vs. protection.** What is gained, what is lost, by changing the feminist goal from sexual “empowerment” to sexual “protection”? That particular revolving wheel of history is screeching around yet again. The women in my age cohort who had consensual affairs with our professors or bosses—and we were neither rare nor radical—do not think our lives were ruined; on the contrary, we thought we learned a lot; we felt free and powerful; and we had fun, besides. (Some of my friends married their professors.) We noisily protested the intrusion of the university and its prudish efforts to regulate our sex lives (“dorm room doors must be open at all times if a male is in the room!”). Today’s college women want protection and regulation, and layers of administrators are being hired to provide it. But at what cost?

So, with those three issues as background, consider the responses to the familiar situation when each of two parties in an assault allegation tries to describe “what happened” the next day, week, or year: we often get two accounts that are miles apart. Some feminists argue that victims don’t lie, because the consequences of making a false rape allegation are horrific, and perpetra-

tors have every reason to lie, to protect themselves from jail or expulsion. As one blogger wrote: Believe the survivors, “even if they remember almost nothing. Believe them, even if their story sounds implausible to you.” Where have we heard that mindless exhortation to “believe it!” before? Now as then, I do not think that unquestioning belief serves the cause of feminism, sexual emancipation, science, or justice.

And this is why. The extensive research on memory, attribution, and self-justification shows that there is an alternative to assuming that “one of them is lying”: each partner honestly believes he or she is telling the truth—yet one or both may be wrong. A *lie* is an intentional falsehood; but a person doesn’t have to be lying to be mistaken. One or both can be misremembering and confabulating. And one or both can be self-justifying, unable to accept evidence of the harm or cruelty that he or she caused the other. The result can lead to what social psychologist Deborah Davis calls “honest false testimony” about sexual consent. Davis, with her colleagues Guillermo Villalobos, Elizabeth Loftus, and Richard Leo, have reviewed the enormous research literature documenting three pathways to “honest false testimony”: miscommunication, alcohol, and memory. The findings in this area have major implications for sex education, for legal cases, for therapy, and for research.

The first is miscommunication. “No means no” has outlived its usefulness, given how difficult it is for many women to say clearly and directly, and how difficult it is for many men to hear and accept. Studies repeatedly find that NO can mean no, but also “maybe,” “No for now, but ask again in a little while,” “I want to, but I don’t want to be a slut.” In one survey of high school students that Davis cites, almost 100% of the males and females agreed that the man should stop his sexual advances as soon as the woman says no. But nearly half of those same students, of both sexes, also believed that when a woman says no she doesn’t always mean it. In

study after study, a third to half of females report that they first respond to a sexual overture with a *token* no. Why wouldn't they, in a culture that has made "slut shaming" a subject of study?

In addition, as everyone here knows, many people communicate sexual intentions—including intentions *not* to have sex—*indirectly and ambiguously*, through flirting, hints, body language, eye contact, "testing the waters," and mind reading. People rarely say directly what they mean, and they often don't mean what they say. They may not know what they mean. They find it difficult to say what they don't want because they don't want to hurt the other person's feelings. They may think they want intercourse and then change their minds. They may think they *don't* want intercourse and change their minds.

The result of ignorance, indecisiveness, and inexperience is what Debbie Davis calls the "dance of ambiguity," which protects both parties and the relationship. It's important to understand what is *gained* by indirection and ambiguity: each party's ego is protected; each can try to subtly reject the *offer* without rejecting the *suitor*. But as a result, the same action can be seen as a sign of consent OR of resistance. What if someone undresses? Or gets a condom? Or nods in agreement? In each of those scenarios, a Washington Post-Kaiser Family Foundation poll found, at least 40 percent of current and recent college students said the action established consent for more sexual activity. And at least 40 percent said it did not. The dance of ambiguity protects egos and allows both parties to change their minds; but it also causes misunderstanding: She really thinks he should have known to stop, and he really thinks she consented.

The second pathway to honest false testimony is alcohol, which facilitates having sex, increases miscommunication about sex, impairs the cognitive interpretation of the other person's behavior, and blurs sexual negotiations. "Alcohol myopia" refers to a narrowing of attention, which in turn impairs every aspect of memory—from encoding details of the experience as it is happening to transferring information from short-term to long-term memory. Men who are drunk

are less likely to interpret nonconsent messages accurately, and women who are drunk convey less emphatic signs of refusal. Further, Davis's research finds that many people regard voluntary intoxication itself as an indicator of consent—except for themselves. Thus most young women, like most men, think voluntary drunkenness is a sign of consent *when other women do it*. Not when they do.

The third pathway to honest false testimony is through the normal errors of memory, some of which reside in the individual, others caused by post-event social influence. In many accuser-accused debates, each side is reporting a story that can be contaminated by all the factors that can distort any other memory, especially if they were not attending to certain details at the time, because of inebriation or distraction. Memory tends to be for the gist of what happened, rather than the exact details. Thus, the victim may report such gist summaries as “it was clear I didn't want to” whereas the accused may report his own gist summary as “she obviously wanted it” or “she didn't do anything to tell me to stop.” Because memory is always being reconstructed and susceptible to suggestion, and because we distort or rewrite memories to conform to our current views of ourselves, people can think they “remember” saying things that they only thought about saying at the time. The accuser might falsely remember saying things that she thought about (but did not say) to stop the situation, because she sees herself as an assertive person who would stand up for herself. The accused might falsely remember doing things to verify the woman's consent that he did not do, because he sees himself as a decent guy who would never rape a woman. She's not necessarily lying; she's misremembering. He's not necessarily lying; he's self-justifying.

One of the oldest feminist goals on the planet is how to turn the “dance of ambiguity” and coercion into a dance of intimacy and pleasure. Obviously I welcome efforts to teach students how to communicate clearly about consent. But I worry about the workshop/consultant machine



that is up and running with highly paid, self-proclaimed “experts,” many of whom lack the skills—let alone data—on how to implement “yes means yes” effectively. And haven’t we veterans of the New View campaign learned about conflicts of interest? Many of the administrators and consultants hired to deal with sexual assault on campus have good motives, but they are also motivated to protect their jobs, which means looking for more and more evidence that the problem is ubiquitous and insidious—hence dignifying the preposterous claim that gazing at your lover’s genitals in the shower is an act of sexual violence.

In their programs and guidelines, will they explain that there is a developmental learning curve in sexuality as in anything else, which means keeping a place for “maybe” or “I’m not sure yet” or plain bad judgment? How can we possibly expect 17-year-olds to be clear about consent, when they have no idea what they are consenting to, what activities they enjoy or dislike, with whom, when so many can’t even name their genitals correctly? Everyone agrees that both participants should be “conscious” when they consent, but would anyone like to draw a clear line between a mild buzz, intoxication, an ecstasy high, inebriation, and all other possible states of consciousness on the way to passing out? What penalties should be implemented for those who violate these ideal guidelines, and how long do we want the statute of limitations to run—that is, do we have any room to consider that most young men who behave in sexually stupid and even coercive ways eventually grow up?

Old, old questions in new forms. But as we look for ways of promoting sexual pleasure and reducing sexual cruelty, let’s remember the past’s most crucial, repeated lesson: There are always unintended, negative consequences in every well-meaning effort to institutionalize and codify sexual behavior and punish anyone who deviates from whatever norm the self-proclaimed experts set for us.

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# The Social Psychology of Consent: Yes, No, Maybe Later . . .

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One Woman's Story





1. Expanding definitions of sexual assault
2. Identity label vs. experience label  
Accountability and attributions: anger vs. shame or regret
3. Empowerment vs. protection

## What do women often do when they want sex?

DO NOTHING TO RESIST.

React positively to advances.

Directly state interest.

Hint.

Undress.

Talk about sexual or other intimate topics.

Get a condom.

Drink or take drugs.

Neck, caress, touch, kiss ...

## What do women often do when they do NOT want sex?

DO NOTHING TO RESIST.

Step back a few inches in response to advances.

Hint.

Undress.

Talk about sexual or other intimate topics.

Get a condom.

Drink or take drugs.

Neck, caress, touch, kiss ...



## When women are inebriated or drunk . . .

- They wait longer to resist.
- They communicate resistance less clearly and emphatically.
- They think their attempts to say no are clearer than they really are.
- Their ability to accurately interpret the other's behavior is impaired.

## When men are inebriated or drunk . . .

- They misinterpret nonconsent messages to mean yes.
- They “overperceive” sexual intentions in women.
- They are slower to recognize when their attempts at sex should stop.
- Their ability to interpret the other's behavior is impaired.



# Sources of Memory Distortion

- *Self-generated* changes in memories occur because of
  - Efforts to understand what happened.
  - Active reimagining of original event.
  - Reinterpretations of one's own or the other's actions.
  - The need to make memories consistent with one's self-image.
  - The need to preserve self-esteem and reduce shame or regret.
- *Other-generated* changes in memories occur because of social influence of friends, assault counselors, interviewers, etc.
- Alcohol impairs encoding of event, consolidation of memory, and transfer from short-term to long-term memory.

IT'S ON US CAMPAIGN

— Ψ —

# SEX & CONSENT

## WHAT IS CONSENT?

Consent is an agreement, expressed through affirmative, voluntary words or actions, and mutually understandable to all parties involved, to engage in a specific sexual act at a specific time.

Consent is an agreement between you and your partner to willingly engage in sexual activity.

- Consent can be withdrawn at any time.
- It cannot be coerced or compelled by force, threat, deception or intimidation.
- And, it cannot be given by someone who is asleep, unconscious, or unable to understand the facts, nature, extent, or implications of the situation due to drugs, alcohol, or a mental disability.

**If you are engaging in sexual activity without consent, you are committing sexual assault.**

## WHAT IS SEXUAL ASSAULT?

A sexual assault is committed when:

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>• An individual subjects another person to <b>sexual penetration without the consent</b> of the person and/or by force.</li> </ul> | <ul style="list-style-type: none"> <li>• An individual <b>touches the intimate area of another person</b> (i.e., genitals, breasts, buttocks) or intentionally touches another person with any of these body parts, for the purpose of sexual arousal or gratification of either party, <b>without the consent of the other person, and/or by force.</b></li> </ul> |
|---|---|

## HOW DO I GET CONSENT?

The only way to get consent is to ask for it, and to keep asking for it throughout sexual activity. Make sure your partner is engaged and wants to go further. You could say:

- Do you want to have sex with me?
- Can I touch you?
- Is this ok?

## BUT WHAT IF?

NO. There are no "but what if's" about consent. You either have consent or you don't. **If you don't have consent or you are not sure, STOP.** Sex without consent is assault.

Indiana University does not tolerate acts of sexual violence or misconduct. If you have experienced sexual misconduct, help is available.

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