

Rapid #: -23035154

CROSS REF ID: **50915699960002122**

LENDER: **CSL (University of Southern California) :: Other Libraries**

BORROWER: **GZM (Univ. of Wisconsin, Madison) :: Memorial Library**

TYPE: Book Chapter

BOOK TITLE: The ethics of consent : theory and practice

USER BOOK TITLE: The ethics of consent : theory and practice

CHAPTER TITLE: Chapter 1, "The Nature of Consent"

BOOK AUTHOR:

EDITION:

VOLUME:

PUBLISHER:

YEAR: 2010

PAGES:

ISBN: 9780195335149

LCCN:

OCLC #: 312625462

Processed by RapidX: 8/29/2024 11:25:51 AM

This material may be protected by copyright law (Title 17 U.S. Code)

The Nature of Consent*

John Kleinig

Introduction

Although consent has always had a role in moral and social discourse, that role has greatly expanded since the Renaissance and in particular with the development of liberal democratic societies.

In a post-Renaissance world, mature human relations (both individual and collective) are frequently assumed to be governed by a conception of personal flourishing whose realization is furthered through the recognition of various constraints on interpersonal behavior. Most critical have been those prohibiting people from acting toward each other in ways that are foreseeably detrimental to their interests—especially those that are central to the pursuit of what they conceive to be their good. Also, given the social nature of our development and the conditions for our continued flourishing, there are expectations that we contribute to the formation and maintenance of a social environment that will sustain our flourishing. Violations of such expectations are often characterized as violations of rights—a legally based discourse that identifies considerations worthy of coercive guarantees and whose breach is said to warrant a punitive response.

* I am grateful to Nick Evans and the editors for comments on an earlier draft of this chapter.

Against this background, consent plays an important moral role. In the contexts in which it is appropriately given, it may—and usually does—transform the normative expectations that hold between people and groups, whether directly or through various institutional arrangements. Where called for, consent can sometimes function like a proprietary gate that one opens to allow another's access, access that would be impermissible absent the act of voluntarily opening the gate. Thus, I may consent to another's sexual advance, use of my car, performance of an operative procedure, or dissemination of information concerning myself. Or, sometimes, consent can function like a normative rope whereby one binds oneself to another. Thus, I may consent to another's offer of marriage or request that I give a lecture or join a committee. In each case, whether the consent is viewed as opening a gate or as binding oneself, an act or outcome that would not be permissible absent the consent is given a normative sanction. Whether that sanction is sufficient to justify what is done is a further question, though there is usually a presumption that, in circumstances in which consent is normatively required and given, an important ground for complaint has been removed.

What is the nature of consent that enables it to work its "moral magic"?¹ And how much magic can it work? Although I will say something about both questions, my main purpose will be to engage with some of the complexities encountered by attempts to respond to the former. At first blush, that question might seem to divide into two: What is the nature of consent? and What gives consent its normative force? The two issues are, however, integrally related. Consent is not a neutral act that is then separately justified as having normative force, but is normative through and through even though it also has a descriptive content. To say that *A* consented to φ is not to report some evaluatively neutral doing, such as *A*'s saying "yes," which is then to be followed by further discussion about the significance of saying "yes." Instead, it is intended to convey that whatever it was that *A* did to consent (including, perhaps, saying "yes"), it also possessed a certain normative force.

Some of the foregoing assertions are provocative and need to be addressed. At this point I offer a couple of preliminary explanations, though more substantial issues will be dealt with later. What I am concerned with articulating here is not everything that might be graced with the label of "consent" but with a core moral notion—that is, with genuine or, as it is sometimes referred to in more institutionalized circles, valid consent. Although consent figures quite importantly in certain formalized contexts—especially the law—it draws its strength in those contexts from the sense that I have characterized as morally transformative. Although I will refer to and draw upon such institutionalized renderings of consent, my concern

here will be to illuminate its status as a transformative moral notion.² Moreover, as well as its more formalized renderings, the core notion of consent is surrounded by a penumbra of secondary meanings. For example, the suitor who seeks the “consent” of the woman’s father is nowadays more likely to be seeking the father’s approval (of the planned marriage) than his consent, because daughters are no longer (as they should never have been) considered as property.³ And a consent decree is an arrangement whereby an organization that faces legal proceedings likely to lead to sanctions against it agrees to initiate certain reforms in exchange for their suspension. In addition to such secondary meanings, consent has also acquired various parasitical variants—such as imputed, tacit, future, implied, constructive, and hypothetical consent—some of which I discuss in the course of this chapter. The transformative power of consent is such that its moral authority is eagerly sought, sometimes in circumstances that do not warrant it.

The Grammar of Consent

So, then, what conditions need to be obtained if we are to be justified in saying “*A* consented to φ ”? First, we should note that “*A* consented to φ ” is incomplete as it stands. Consent is a three-place transaction in which consent to do something— φ —is always given to another party or agent, to whom we will refer as *B*. So, “*A* consented (to *B*) to φ .” Although some accounts of consent countenance the idea that *A* might engage in an internal act of consenting, as though consent might simply express a certain kind of inner resolve or approval, I reject such an account. I argue for the view that consent is centrally and most appropriately a communicative act that serves to alter the moral relations in which *A* and *B* stand—and that for the moral relations to have been altered for *B*, a communicative act must have occurred.⁴ But let us first give some brief consideration to each of the place holders in the transaction. What needs to be true of *A*, *B*, and φ , if it is to be justifiably said that “*A* consented (to *B*) to φ ”? I will then discuss the substance of consent before turning to a number of remaining problems that need to be addressed.

(I) *A*

For *A* to consent, *A* must be an agent who has reached a certain level of maturity. (I explore that later in more detail.) Rocks and trees cannot consent; nor can infants. May dogs consent? I think not, even though they may willingly go along with some initiative of *B* (“Walk?”) or show themselves to be enthusiastic participants in some activity (fetching balls). A dog’s

engagement in what is presented to it is not intended to alter the moral relations between the dog and *B*—in particular, to give *B* a permission he would not otherwise have or to obligate itself in some way. Those inclined to take issue with this almost certainly personalize dogs in ways that would tend to reinforce my initial claim about agency.

Nevertheless, consent is not limited to individual agents or persons, even if they constitute the paradigmatic subjects of consent. Consent may be given by “collective persons,” whether as members of a particular class (such as the shareholders of a company) or as a collective unity (such as an orchestra). When a majority (or some relevant number) of shareholders signifies its agreement with the terms of a takeover offer, it consents to the takeover.⁵ When an orchestra or band consents to perform in a certain location or to perform a particular piece of music, it does so as a collective unit, which may or may not reflect the preference of each individual member. In addition, we sometimes speak of corporations or organizations as quasi-persons capable of consenting to whatever options may be included in φ . Although some collective subjects of consent can be said to consent only by virtue of a set of preexisting institutional arrangements, they illustrate the general point that the subjects of consent need not be singular.

(2) *B*

As with *A*, the (implicit) *B* to whom *A* gives consent must also be a person, group of persons, or quasi-person—an agent of some kind who (most often) initiates the process of inquiry to which *A*’s consent is sought in response. *B* seeks from *A* either *A*’s permission to do something or *A*’s agreement to do something—something to which *B* had no moral right or entitlement.

Must consent always be in response to another’s initiative? Suppose *A*, desirous of sexual intimacy with *B*, approaches *B*. *B* is agreeable and sexual intercourse takes place. Should a question later be raised whether *A* consented to the sexual contact, we would probably answer in the affirmative, though it would be more accurate—and we would be more likely—to respond by saying: “*B* did not merely consent; *B* initiated the contact.” The sequence is more complex in cases in which a course of action has discrete parts. Suppose *A* makes an appointment with a physician with a view to getting cosmetic surgery. Even though *A* initiated the process, *A* will be asked to sign a consent form. This is because a decision to have the surgery is not presumed to be made until after a consultation in which the physician presents the terms under which he will perform the surgery, terms to which *A* consents, thus authorizing the physician to go forward.

Does anything hang on the initiation-response question? It may sometimes do so. A legal case will illustrate. If a 25-year-old man proposes sexual contact with a 13-year-old girl, and she consents to it, the fact that she has not reached the legal "age of consent" means that her consent will not do much to mitigate his offense.⁶ If, however, she initiates the sexual contact and he consents to it, he is likely to fare better with the law (and probably morally) even though she has not reached the (legal) age of consent. In each case it is most likely that he will be found guilty of statutory rape (unless he had reason to believe she was considerably older). Nevertheless, her initiative offers a plausible ground for mitigating the penalty. He will be seen as opportunistic rather than predatory.

(3) φ

φ usually encompasses a course of action, one for whose pursuit *A*'s authorization, permission, or agreement is required. The course of action may be one that *B* wishes to pursue—for example, performing a medical procedure on *A* or on someone for whom *A* has responsibility, entry to or use of *A*'s property or property for which *A* has some responsibility, and so on. But the course of action may also be one that *B* wishes *A* to take, and which *B* has no right to expect of *A* absent *A*'s consent. It may be for *A* to agree to give a lecture or attend a rally or visit someone. But if *A* is already under some obligation to do something, *A*'s consent is not additionally required (though *A*'s approval may be thought desirable). In cases in which *B* wishes *A* to take some course of action, *A*'s consent obligates *A* to *B*.

Although consent alters the moral relations between *A* and *B*, the permissions granted or obligations created need not be of overriding or morally determinative importance. Indeed, *A* may consent to (do) things that it would be wrong for *B* or *A* to do. The prostitute who consents to paid intercourse will alter the moral relations between herself and *B* such that what *B* does will not constitute rape. It might, nevertheless, be argued that it is wrong for *A* to sell her body in this way (though whether, if that is the case, she should be prevented from doing so is another matter).

Consider, too, the case in which a woman consents to have intercourse with her therapist. He has not pressured her; indeed, she has become attracted to him and is welcoming of the proposition. Her consent has altered their relations to the extent that what they engage in does not constitute sexual assault. Yet we might still want to argue that the therapist has acted wrongly because he has corrupted the professional relationship he was obligated to maintain. True, there may be cases and cases. But the point is that the moral

engagement in what is presented to it is not intended to alter the moral relations between the dog and *B*—in particular, to give *B* a permission he would not otherwise have or to obligate itself in some way. Those inclined to take issue with this almost certainly personalize dogs in ways that would tend to reinforce my initial claim about agency.

Nevertheless, consent is not limited to individual agents or persons, even if they constitute the paradigmatic subjects of consent. Consent may be given by “collective persons,” whether as members of a particular class (such as the shareholders of a company) or as a collective unity (such as an orchestra). When a majority (or some relevant number) of shareholders signifies its agreement with the terms of a takeover offer, it consents to the takeover.⁵ When an orchestra or band consents to perform in a certain location or to perform a particular piece of music, it does so as a collective unit, which may or may not reflect the preference of each individual member. In addition, we sometimes speak of corporations or organizations as quasi-persons capable of consenting to whatever options may be included in φ . Although some collective subjects of consent can be said to consent only by virtue of a set of preexisting institutional arrangements, they illustrate the general point that the subjects of consent need not be singular.

(2) *B*

As with *A*, the (implicit) *B* to whom *A* gives consent must also be a person, group of persons, or quasi-person—an agent of some kind who (most often) initiates the process of inquiry to which *A*’s consent is sought in response. *B* seeks from *A* either *A*’s permission to do something or *A*’s agreement to do something—something to which *B* had no moral right or entitlement.

Must consent always be in response to another’s initiative? Suppose *A*, desirous of sexual intimacy with *B*, approaches *B*. *B* is agreeable and sexual intercourse takes place. Should a question later be raised whether *A* consented to the sexual contact, we would probably answer in the affirmative, though it would be more accurate—and we would be more likely—to respond by saying: “*B* did not merely consent; *B* initiated the contact.” The sequence is more complex in cases in which a course of action has discrete parts. Suppose *A* makes an appointment with a physician with a view to getting cosmetic surgery. Even though *A* initiated the process, *A* will be asked to sign a consent form. This is because a decision to have the surgery is not presumed to be made until after a consultation in which the physician presents the terms under which he will perform the surgery, terms to which *A* consents, thus authorizing the physician to go forward.

Does anything hang on the initiation-response question? It may sometimes do so. A legal case will illustrate. If a 25-year-old man proposes sexual contact with a 13-year-old girl, and she consents to it, the fact that she has not reached the legal "age of consent" means that her consent will not do much to mitigate his offense.⁶ If, however, she initiates the sexual contact and he consents to it, he is likely to fare better with the law (and probably morally) even though she has not reached the (legal) age of consent. In each case it is most likely that he will be found guilty of statutory rape (unless he had reason to believe she was considerably older). Nevertheless, her initiative offers a plausible ground for mitigating the penalty. He will be seen as opportunistic rather than predatory.

(3) φ

φ usually encompasses a course of action, one for whose pursuit *A*'s authorization, permission, or agreement is required. The course of action may be one that *B* wishes to pursue—for example, performing a medical procedure on *A* or on someone for whom *A* has responsibility, entry to or use of *A*'s property or property for which *A* has some responsibility, and so on. But the course of action may also be one that *B* wishes *A* to take, and which *B* has no right to expect of *A* absent *A*'s consent. It may be for *A* to agree to give a lecture or attend a rally or visit someone. But if *A* is already under some obligation to do something, *A*'s consent is not additionally required (though *A*'s approval may be thought desirable). In cases in which *B* wishes *A* to take some course of action, *A*'s consent obligates *A* to *B*.

Although consent alters the moral relations between *A* and *B*, the permissions granted or obligations created need not be of overriding or morally determinative importance. Indeed, *A* may consent to (do) things that it would be wrong for *B* or *A* to do. The prostitute who consents to paid intercourse will alter the moral relations between herself and *B* such that what *B* does will not constitute rape. It might, nevertheless, be argued that it is wrong for *A* to sell her body in this way (though whether, if that is the case, she should be prevented from doing so is another matter).

Consider, too, the case in which a woman consents to have intercourse with her therapist. He has not pressured her; indeed, she has become attracted to him and is welcoming of the proposition. Her consent has altered their relations to the extent that what they engage in does not constitute sexual assault. Yet we might still want to argue that the therapist has acted wrongly because he has corrupted the professional relationship he was obligated to maintain. True, there may be cases and cases. But the point is that the moral

transformation brought about by consent may not be complete in the sense of making that which would have been a sexual assault into something morally acceptable. As a person, the patient had the moral authority to consent to sexual intercourse; as a professional in a professional relationship, the therapist had no moral authority to seek it.⁷

But what if *B* asks *A* to act as a hitman and *A* consents? Does this represent a case in which consent does not alter the moral relations between *A* and *B*, because *B* asks for something that he has no authority to give? Perhaps. It is not that *A* fails to consent, but that his consent mistakenly or illegitimately presumes that *B* is in a moral position to authorize what he requests. If the conversation has been monitored by police, *A* will not be able to claim that he failed to consent because *B* had no right to authorize what *A* was asked to do. If that appears to contradict the account of consent given so far, the point may be rephrased as follows. Given what *A* took to be the normative order governing gang behavior, *B* was authorized to arrange for a hit and, in terms of that normative order, *A* consented to do what *B* was authorized to request. He therefore transformed relations so far as that order was concerned. But within the larger frame of morally acceptable relations, the normative order represented by the gang had no traction.

Keeping in mind the complication just noted, to be the object of consent φ must identify some course of action to which the consented-to party would otherwise have no moral right. Or, more accurately, it must appear as though *B* has no right to φ without *A*'s consent. If I consent to *B*'s request that he borrow my car, it is implied that, without consent, *B*'s using the car would constitute an unauthorized taking—indeed, a theft. Presuming that *B* is an eligible person, the consent constitutes a moral authorization to use the car.⁸

As we noted earlier, however, we sometimes perpetuate rituals of consent even though no authorization is necessary. Thus, a man who wishes to marry a particular woman may visit the woman's father to seek his "consent" to the arrangement, even though we no longer see daughters as the property of their fathers. What the man is really seeking in this ritualized act of consent getting is the approval of the father to the arrangement. Approval—or at least approval of—is not consent. Moreover, in cases in which consent is not morally required, *A*'s disapproval of *B*'s φ -ing will not constitute a refusal to consent. Furthermore, one may not approve of an arrangement to which one nevertheless consents. That no doubt occurs when fathers consent to their minor daughters getting tattoos, even though they consider their daughters beholden to the vagaries of fashion.

The action (φ) to which consent is given may be conclusive or continuous. If φ is a vote to be taken, then, once one's vote has been made, one

cannot (usually) retract whatever it is that one has consented to. Even if voting is still in progress, one's pulling the lever or depositing a slip in the ballot box places one at a point of no return. One may regret the consent one has given, but that is another matter. That which signifies or expresses consent takes a form that does not allow for retraction. But in the case of a prolonged course of action, it may often be possible to withdraw one's consent. A person who consents to a medical procedure or therapeutic regimen may, after a time (though perhaps not any time), withdraw his or her consent. The person may have signed a consent form, but the form is likely to include a provision for withdrawal. A person who consents to sexual intimacy may withdraw that consent along the way, at least up to the point of intercourse, and maybe even beyond penetration. I may withdraw my consent to give a lecture at any point up to my giving it, though in this latter case, an obligation is created that, in the event of a withdrawal, requires at least an apology. In all cases, the initial act of consent will usually reflect an ongoing commitment.

Withdrawal is more problematic in some cases than in others. Though a withdrawal of consent may be technically possible, it may also have significant costs associated with it. Consent creates reliance and those who have obtained our consent may be seriously disadvantaged if consent is subsequently withdrawn. A late withdrawal of consent to giving a lecture may sometimes reasonably result in liability for the costs associated with setting it up. In the case of medical consent, however, patient autonomy is usually considered so important that withdrawal of consent during a procedure or a course of treatment is not only honored but also protected against reprisals.

The Ontology of Consent

Having said something about the parties to and object of consent, I turn now to the act of consenting. There is considerable disagreement about what constitutes the core of consent, and some of my earlier remarks will have been provocative precisely because they take a position on an issue that is hotly contested. It is time to make good on those claims. How, exactly, are we to conceive of consent? Does it consist primarily in a state of mind—in what Peter Westen speaks of as “a state of mind of acquiescence . . . a felt willingness to agree with—or to choose—what another person seeks or proposes”⁹ or in what Hurd refers to as “an act of will—a subjective mental state akin to other morally and legally significant *mens rea*”?¹⁰ Or is it constituted by a performative act or the

conventional signification of agreement to some request or proposal? Or may it instead be some combination of these? Representatives of each of these possibilities may be found, though it is quite common in legal contexts to characterize the core of consent as a subjective mental state.

The position that I articulate and defend here is that there is always an expressive dimension to consent—that consent must be signified—and that only if consent takes the form of a communicative act can the moral relations between *A* and *B* be transformed. Absent such communication, *B* has no business doing that for which *A*'s consent is needed even if *A* condones or would acquiesce to it. Consent is a social act in which *A* conveys something to *B*—something that, once communicated (and with my earlier caveats acknowledged), now gives *B* a moral right or entitlement that *B* previously lacked.

First, however, I offer some observations on subjective mental state accounts. These accounts range widely (and sometimes in a confused manner) from those in which consent is thought of as “being of a like mind with another” to those in which it involves merely a “willingness that others do as they request”—a tolerance of their wishes. Westen appears to run them together. To illustrate the core “factual attitudinal” meaning of consent, he appeals to the case of a child who, while pretending to be asleep, “secretly consents” when her grandmother leans over and kisses her.¹¹ But does what the child feels constitute consent, even of a secret kind? Are we merely denied knowledge of the child's consent or is her consent lacking? We need not deny that the child has “a welcoming state of mind.” But many actions in which others engage us may create a welcoming state of mind without it being said that consent was involved. In the present case there is no way of distinguishing approval (of) from consent. But approving of and consenting are quite distinct, even if our consent to something is often contingent on our approval of it. The relevant kind of approval in the case of consent is not approving in the sense of approving of, as is the case when the little girl approves of what her grandmother is doing, but it is approval in the sense in which some authorization is given to the other to do as she seeks. In the case in question we need not deny that the child has consented or that this does not constitute an unconsented-to touching on the grandmother's part. But, if so, this is because we see past consent persisting into the present and not because it is now given.¹² As Westen construes it here, consent—a feeling of approval—is not morally transformative. It has been gutted of its moral significance. Were, for example, the child later to reveal that all the while she was secretly loathing her grandmother's kiss, what transpired would not

ipso facto have constituted an unconsented-to touching. The grandmother was not to know that it would be unwelcome on this occasion, and might reasonably claim that an affectionate kiss of the kind she gave could have been expected to be welcome, given the relation that was presumed to exist between her and the child.

Let me be clear. I do not wish to argue that states of mind are irrelevant to consent, only that consent is not constituted primarily by a state of mind. There must surely be a certain willingness on *A*'s part if *A* is to be said to have consented to *B*'s φ -ing. What is critical is that *A* communicates with *B* such that *B* knows that *A* has authorized *B* to φ . Consent requires signification—not in the sense that a state of mind is reported but in the sense that a right or entitlement is created or permission given or obligation assumed. Consent is not about agreeing with but to, and the latter, as a morally transformative act, requires signification. Likewise, the withdrawal of consent is not simply a matter of changing one's mind but of communicating to another that a permission once given is now being withdrawn. Unless that communication occurs, the (presumption of) consent remains.¹³

Signification

Let me say more about signification. Because, as I have been arguing, consent is a communicative act requiring, for consent to occur, that *A* signifies it to *B*, a good deal of attention is often paid to the issue of its form or *morphe*. The form taken by the act of consent may vary considerably, though it will commonly be constituted by some gesture, word, or other recordable behavior that conventionally and contextually expresses it. Precisely because consent is a *communicative* act, there must be a convention whereby consent given is recognized as such. Moreover, because we have developed different conventions for different contexts, its conventional expression must be contextualized. Raising one's hand or shouting "yes" may express one's consent at a rally, but it will not do when election time comes round and a voting ballot paper must be filled out. Context will also allow for consent to be signified by a negative act—such as the act of remaining silent when called upon to indicate if one has any objections to a proposal. Presuming that one has heard the call and been able to make known any objection one has, one's silence may be a legitimate expression of consent.

Nevertheless, because ambiguity is often possible with more truncated forms of signification, it may be important that for some matters the

conventions of signification (as well, of course, as the preparations for seeking consent) are more complex. Silence, for example, can sometimes indicate abstention, acquiescence,¹⁴ and lack of interest as well as consent, and it may be risky to interpret it as consent. And words such as "yes" may fail to indicate the scope of one's consent.

I have already made it clear that in focusing on the critical importance of signification—an importance that arises from the fact that consent is a communicative act—I do not thereby want to argue the extreme position that consent is simply a matter of engaging in signifying behavior. For one might do what would ordinarily be taken to signify consent without actually consenting. This occurs when a person is coerced into agreeing to something. We may more appropriately speak of this person as assenting than as consenting. Because consent transforms the moral relations that exist between persons, the signification must be voluntary. Assent that is given under duress does not have the moral force of consent. When Joel Valdez broke into Elizabeth Wilson's apartment and sought to rape her at knife point, she agreed to submit if he wore a condom. He had sex with her for an hour until she was able to flee to a neighbor's apartment. But a Texas grand jury decided that her agreement to have sex if Valdez wore a condom constituted consent to intercourse and therefore that she was not sexually assaulted.¹⁵ Given that Wilson negotiated her agreement under the threat of serious injury, her assent did not possess the moral force of consent. Coerced responses need not be strategically bereft, and evidence of physical resistance is no prerequisite of refusal to consent.

There may be cases in which, without a deeper understanding of the circumstances, one may be misled regarding consent. Suppose a CCTV camera picks up an encounter in which a man approaches a woman in a stairwell, grabs her, puts a knife to her neck, and then has sex with her. Our inclination would be to say that the sexual intercourse was nonconsensual and that she was raped. But we might well revise that judgment if we later learn that the "attack" was staged as part of a pornographic movie. There was only an appearance of duress; the sex was consensual.¹⁶

Sexual relations have proven particularly treacherous so far as signification is concerned. Not only are social conventions somewhat confused, confusing, and still often permeated by sexist prejudices, but the processual or continuing character of sexual relations allows for misunderstandings with regard to what is consented to as well as with regard to changes or withdrawals of permission.¹⁷ The ambiguities and consequences of mistake have sometimes led to extreme requirements for consensual sex, even between those who may know each other quite well.¹⁸

Consent and Responsibility

In speaking of consent as a communicative act I have made it clear that I do not wish to deprive it of an inner dimension. All I have attempted to argue is that it is not exclusively or primarily a state of mind. As an act that morally transforms a situation, it must satisfy certain conditions—in particular, those for constituting it responsible behavior. If *A* cannot be held responsible for what gives the appearance of consent, then consent has not been given. So-called coerced consent is better characterized as assent: It does not authorize *B* to φ or alternatively obligate *A* to φ . Nor does it follow from what I am claiming that *A* may not irresponsibly consent, for one may be held responsible for one's irresponsible conduct.

If consent is to be a communicative act for which responsibility is presupposed, it must be the act of an agent who is competent to consent; it must be voluntary, in the sense of being free from coercion; it must be based on understanding, in the sense that it is appropriately informed; and it must be intentional.

The Competence Condition

As I pointed out earlier, young children lack the cognitive development to consent. They are not conceptually or emotionally equipped to provide the authorization or commitment for many of the situations that would ordinarily require their consent. As they develop, no doubt, they will acquire an increasing capacity for making determinations with regard to such matters. Until that time, though, we usually consider that parents or others who can be expected to have their best interests in view will provide the authorization—consent—that is needed. Nevertheless, we should not presume that the capacity to consent will occur all at once. The level of competence required to join a scout club is very different from that required to buy a house or accept an offer of marriage. As children become cognitively (and otherwise) capable of making certain kinds of decisions concerning interests over which they should have moral jurisdiction, the authority to consent should pass to them from their guardians. In cases in which there are serious learning disabilities, the capacity to give consent, at least with regard to those matters about which we are most inclined to demand consent, may never be reached.

But even if competence in the sense of a certain level of cognitive development has been reached, it may be subverted in other ways. Intoxication impairs one's ability to consent, though the impairment may be a matter of degree. Sometimes we hold people responsible for what they do

under the influence of alcohol (or other drugs), and consider them to have acted irresponsibly rather than nonresponsibly, particularly if, prior to their impairment, they had reason to foresee what might occur.

Insanity and other forms of mental illness may also impair the capacity to consent to the point that what appears to be consent no longer transforms relations with others. Although there is no straight line from “mental illness” to “incapacity to consent,” certain kinds and degrees of mental illness may undermine the various requisites of consent.

Cases of acute or chronic pain can also impair consent. We do not usually hold people responsible for what they agree to under torture because the pain of torture so consumes their consciousness that they can usually focus on little beyond what can be done to alleviate it. In certain circumstances the experience of intense pain may present others with something of a dilemma. If a person who is suffering unrelievable pain seeks to be put out of her misery, should we see that as a responsible request or as impelled by the pain?¹⁹ There may not be any simple answer to such a question, and others might need to make a judgment about the likelihood of a change in the person’s situation or whether, even if pain has overcome the person’s capacity for rational thought, it would be in that person’s interests to respond affirmatively to the request.

In other cases in which a person may have lost the capacity to consent to matters that would ordinarily require consent, decisions might be made not on the basis of what are deemed to be the person’s best interests, but on the basis of what that person might have been expected to consent to, given what is known about her. This substituted judgment standard presumes that we know enough about the person to draw reasonable inferences about what that person would have consented to.

In cases in which the consent that *A* gives to *φ* concerns the affairs of another (call that other *C*) who would ordinarily be expected to give or withhold consent, we need to offer an argument for transferring the authority that would ordinarily belong to *C* to *A*. The expectation would be that the moral guardian would know enough about *C* either to make appropriate judgments about what *C* could have been expected to consent to (given her settled desires, values, and life plans) or, in the absence of that, what would be in *C*’s best interests (something which, in the absence of better knowledge, *C* could be presumed to consent to having secured for her).

The Voluntariness Condition

If *A* is coerced into doing what ordinarily signifies consent—be it the raised hand or the uttered “yes”—he does not act voluntarily and what he does does

not constitute consent. Some might argue that in such cases consent is given but, because it is coerced, it is not valid. But invalid consent no more counts as consent than an invalid vote counts as a vote. It has form but no substance. It is, I believe, more accurate to say that although *A* gave his assent, this did not amount to consent.

Lack of voluntariness may have a variety of sources—most dramatically from the knife to the throat but more subtly from the felt threat of social ostracism. Responsibility-defeating or responsibility-diminishing coercion takes many forms, and there is some dispute as to appropriate boundaries for its varied manifestations. It is generally agreed, for example, that assent given as a result of physical threats is coercive, but there is more debate about the coerciveness of moral and social pressures (say, social opprobrium and peer pressure); and even more contentious is the inclusion of certain “inner” forces (say, compulsions that affect what one agrees to). Furthermore, does coercion refer to threats that affect what one wills or may it include acts that make the will irrelevant? It is probably not necessary that we seek to resolve such questions here; what is important is the bearing that certain forces may have on the voluntariness of what we agree to and therefore on our responsibility for what would otherwise be taken to signify consent.²⁰

Sometimes it may be very difficult to determine whether supposed acts of consent are voluntary and therefore genuine. Do prisoners who “volunteer” to participate in clinical trials give their consent, or do their circumstances subvert the voluntariness of their agreement or—not much less problematic for public policy purposes—mask it? It has often been argued that the inmates of total institutions, especially in cases in which improved conditions (material or social) may flow from participation and in which risks may be involved in participation, have their voluntariness for such decision making compromised or, if not compromised, that, given their situation, we are in no position to know whether their decision to participate would rise above an appropriate threshold of voluntariness. Plea bargains have also posed a problem for some writers. On the surface, the option of pleading guilty to a lesser charge in exchange for trial on other and more serious charges may not appear coercive. But if the penalties faced at trial are considerably greater than those offered through the plea agreement, even an innocent defendant may feel pressured to plead guilty.²¹

Although there is a tradition of thinking that coercion requires threats, there is some reason to think that, in appropriate circumstances, even offers may be coercive. They may be coercive either because a refusal of the offer is associated with some threat (what are sometimes referred to as “thoffers”²²) or, alternatively, because the baseline circumstances in which the offer is made

are humanly unacceptable. If a factory owner takes advantage of economic conditions to advertise a subsistence wage for heavy work, we may see the offer as genuine but coercive.²³

Ensuring the voluntariness of agreements is one of the conditions that enables acts of consent to constitute a responsible transformation of the moral landscape for those who are party to it.

The Knowledge Condition

The responsibility that undergirds the moral force of consent also requires that the act of signifying consent be a knowledgeable one. That is, for consent to have its force unqualified, it should be informed. “Unqualified” may mean a number of things. It may be uninformed and irresponsible (but valid) or it may be ill-informed or misinformed and by virtue of that either fail as consent or have its moral force qualified in some way.

Some people may choose to consent irresponsibly by refusing to inform themselves about the circumstances under which they are giving their consent. *A* may consent to enter into a business partnership with *B* without looking carefully at its financial prospects. Even though risk may be part of any such arrangement, the assumption of risk ought to be informed. One might be equally uninformed—and irresponsible—when voting for a political candidate. As long as one is eligible to vote and one’s vote is voluntary, it may not matter (so far as the genuineness or the validity of the vote is concerned) if one’s vote is ill-informed.²⁴ Those who vote irresponsibly may have themselves to blame for its outcome.

In medical contexts, however, there is usually some effort made to ensure that consent is not ill-informed. Institutionally, that now usually requires the signing of a consent form under certain conditions. Thus, for example, if consent to a medical procedure is to be regarded as valid, it needs to be described in adequate detail and in a language that is familiar to the patient; the costs and risks associated with the procedure need to be made clear and alternatives to the proposed procedure (where available) need to be noted, along with some indication of the prognosis. Although a morally adequate consent may require less or more than the formalities usually involved in medical consent, the point is that if an onus is to be shifted or obligation is to be assumed, the person whose consent is given ought to understand the nature and ramifications of what he is doing.

Deceptive knowledge failures may affect consent in more than one way. An old—albeit problematic—legal distinction between “fraud in the *factum*” and “fraud in the inducement” suggests how misinformation may sometimes

negate consent but at other times not do so yet nevertheless provide the consenters with a significant cause for complaint.²⁵ An illustration often provided goes as follows: (1) *A* consents to a gynecological examination by *B*, who, she believes, inserts a vaginal speculum; in fact, he inserts his penis. (2) *A* consents to intercourse with her doctor *B* after he has deceptively induced her to believe that it will be therapeutically beneficial. On the traditional account, *A*'s consent in (1) is negated by *B*'s deception, and *B* is guilty of sexual assault. In (2), however, no sexual assault occurs, only a form of fraud. The reason usually given is that whereas the fraud in (1) goes to the very "fact" of what was done, in (2) it concerns only a "collateral matter." After all, in (2) *A* did consent to intercourse, albeit falsely believing it to be therapeutic, whereas in (1) *A* did not. But what might appear to be a clear-cut distinction between two types of fraud in (1) and (2) gets muddled once we introduce other cases. What if (3) *A* consents to intercourse with *B*, falsely believing that the man who (in the dark) has slipped into bed beside her is her husband? Has she been sexually assaulted or defrauded? Or, suppose (4) *A* consents to (her first) intercourse with *B* having been deceptively induced to believe that the papers she recently signed were marriage documents. Was *A* sexually assaulted or merely defrauded? What these and other cases tend to show is that underlying our judgments about the moral effect of misinformation are normative considerations concerning the seriousness of the deception. In cases (3) and (4), unlike case (2), there was consent to intercourse, although there was not—and it is assumed there would not have been—consent to extramarital intercourse. Even in cases similar to (2) distinctions might be drawn. Were it the case that (5) *A*, a prostitute, consented to intercourse with *B* after he deceptively led her to believe that he would pay, we might view it as simple economic fraud rather than as a sexual offense.

Leaving aside the varied ways in which the laws of different jurisdictions might view such cases, they indicate how normatively charged are our judgments concerning the impact of knowledge deficits. Moreover, given those varied ways, we should not assume that such normative undergirding will be uncontroversial. It may reflect cultural and other prejudices that stand in need of re-evaluation.

The Intention Condition

When *A* consents to φ , *A* consents to φ under a certain description. If *A* consents to *B*'s using his car and (without *A*'s knowing it) *B* uses the car to carry out a bank robbery, it would ordinarily be misleading to say that *A* consented to *B*'s use of the getaway vehicle.²⁶ Consent is relatively

determinate, and even though *A* did not explicitly exclude the possibility of its use as a getaway vehicle, some conventional expectations can usually be assumed to inform such acts of consent. In certain circumstances, it will be important to specify fairly precisely what is consented to. If *A* consents to engage in sexual intercourse with *B*, *A* does not thereby consent to (risk) contracting the STD with which *B* knows herself to be infected. *A* may be foolish not to inquire or take some prophylactic precaution, and *B* may be irresponsible in not informing *A*. But if *A* is aware that *B* is infected but nevertheless proceeds to have sex without a condom, we might want to argue that *A* voluntarily assumed the risk of contracting the STD. But this would still not amount to consenting to infection with the STD unless *A* stated that it was his intention to contract the STD. What we might say in such a case is that *A* consented to risk contracting an STD.

Though not incoherent, a so-called *carte blanche* consent would ordinarily be seen as either conventionally constrained or as irresponsible. "Whatever you wish," in response to a request that requires permission, is ordinarily bounded by the set of mutual understandings that is implicit in the relationship existing between *A* and *B*. Even so, a person who consents so generally may have to bear some moral responsibility for the risk that is implicit in giving such free rein to another.

Contact sports pose something of a challenge to what their participants consent to. It can be asserted with some confidence that those who play such sports professionally consent to certain risks inherent in the nature of the sport, and that injuries caused do not constitute either assaults or tortious harms. But what if the injury is caused as the result of deliberate breach of the rules of the game—such as the ice hockey player who slashes at an opponent's head with his stick? Here I would suggest that courts—in the United States, at least, though not so much in Canada—have compromised the moral force of consent for reasons that are not morally sustainable.²⁷ It does not seem reasonable to hold that those who have consented to participate in the game have consented to the risks associated with deliberate breaches of the rules—though here, as elsewhere, there will be cases and cases.

Political consent, insofar as it can be agreed to have been given, can be particularly treacherous. Except in referenda, which are often—though not necessarily—stated in fairly precise terms, the usual context for political consent—voting for a party or person—is necessarily open-ended, and we may find our consent abused. The party that we voted for because it promised not to raise taxes may decide, once in power, to raise taxes. Our consent is not easily withdrawn, given the institutional structures in place to give it effect, though we may wish to argue that the moral ramifications of our consent have

been forfeited. Often, given the unsatisfactoriness of waiting for a next election, our best hope may be to protest the decision and seek to garner enough public support to lead to its revocation. In any case, our consent can be reconsidered and judged misguided or abused.

Political consent and voting are complex in other ways. When I vote for *C* in an election, it will not usually be said that I did not consent to *D*'s election should *C* lose to *D*. Those who vote are ordinarily taken to have consented not simply to some particular person's election but to the outcome of the electoral process. That is what they intend. What we consent to is a particular decisional process (usually adopted in circumstances in which unanimity is unlikely) in which the outcome binds those who participate in it. There may be rare situations in which *A* takes the view that if *C* does not win he will not recognize *D*. But such a person will then have the burden of explaining why he participated in a particular process designed to resolve the issue of representation. Why not boycott the election altogether if only one candidate is deemed acceptable? The question is not rhetorical; nevertheless, the onus will be on *A* to make good his claim that participation did not amount to his consenting to the outcome (and hence to *D*'s election in the event of *D* getting the most votes). In certain cases, that onus can surely be met. It will, nevertheless, be for *A* to meet it.²⁸

This raises a further question with regard to those who do not participate in the electoral process. Presuming that participation is freely available to them, that they know of it and of what is at stake, can their failure to vote be taken as consenting to its outcome? I think not. At best it amounts to acquiescence, and with acquiescence, as with condonation, there may be some responsibility for the outcome. But this does not amount to consent, as is recognized by those who bemoan low participation rates and worry about the extent to which actual political outcomes can truly be said to manifest the "consent of the governed."

The issue of intention also comes into play in discussions about so-called tacit consent. Famously—or notoriously—Locke claimed:

[E]very man, that hath any possessions, or enjoyment, of any part of the dominions of any government, doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it; whether this his possession be of land, to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on the highway; and in effect, it reaches as far as the very being of any one within the territories of that government.²⁹

If some overpsychologize consent, others fail to recognize the extent to which consent as a communicative act must be intended to convey to *B* a permission or entitlement. Tacit consent of the kind that Locke defends resolves consent into a signifying act that has been detached from that which it is intended to signify. There is no reason to think that the person who travels freely on the highway consents to the laws of the government within whose jurisdiction the highway is located. Perhaps such a person, in exchange for the ability to travel freely on the highway, ought to consent to such laws. But having good reason to consent is not to consent. And perhaps a person who enjoys the benefit of free passage has a duty to obey the laws of a jurisdiction that enables this to be so. But such a duty arises out of other considerations, not because consent to them has been given.

It is not that the idea of tacit consent is incoherent. It is coherent, but it is narrowly bounded by intention. When a person makes no response to the question "Any objections?" when it is asked in relation to a proposal that is to be voted on and we have every reason to think that she heard the question and was capable of responding to it, then her silence can be taken as tacit (as distinguished from express) consent to the proposal. But here the conventions regarding signification are clearly understood. Of course, to remove all possible ambiguity, the person conducting the vote may call for ayes and nays or hands. But often that will not be necessary.

What about deceptively intended consent? If *A* consents to *B*'s request for permission to enter premises and then calls the police to report an intruder, can he deny that he consented because he intended revenge? I think such cases reinforce the view that consent is a communicative act, not simply a state of mind. *B* did receive *A*'s consent. Had the proceedings been taped or had *A* given permission in his handwriting, then, barring some exotic set of circumstances, *A* consented to *B*'s entering the premises. A somewhat more complicated case would be one in which an undercover narcotics detective "consents" to be part of a drug trade, but then turns the other participants in. Does he simply pretend to consent or is the consent genuine? What we might say here is that in relation to the norms operative within the drug ring the detective consented to participate, but that in relation to the larger structure of societal expectations he did not consent and so cannot be held to be *particeps criminis*. Nevertheless, the fact that consent is genuine at some level in such cases can create a problem for police, for it can amount to breaking the law to enforce it.

Limits to Consent's Moral Magic

The moral magic of consent will not work if, as we earlier saw, the normative order against whose background it was given is morally bankrupt. The mafia hitman who consents to do a job has no moral authorization to go ahead with it, even though the rules of the organization now permit it. True, if the hitman eliminates someone without first receiving authorization to do so, he may have to contend with the normative order that operates within the criminal organization. But insofar as that organization has no moral standing, any moral magic will only be simulated.

More contentious are situations in which *A*'s consent is to what will be reasonably believed to harm *A* or otherwise be to *A*'s detriment. An ancient legal maxim, *volenti non fit injuria*, though sometimes given close to full rein in civil cases, has often been limited when it comes to criminal law. If *A* consents to *B*'s beating or killing him, the law has frequently refused to recognize its transformative power. Practical policy reasons might of course be advanced for this: There may be reason to doubt the genuineness of consent to self-harm, and it may be difficult to sort out those cases in which the consent is genuine from those in which it is not. But cases in which the consent is both genuine and known to be so no doubt exist, and yet criminal law and sometimes moral judgment resist the transformative power of that consent.

In the case of criminal law at least, it may sometimes be argued—albeit controversially—that people have social responsibilities that would be breached were they permitted to consent to self-harming behavior (some variant on the old idea that the king has a right to the aid and assistance of his subjects³⁰), or that whatever right individuals may have to harm themselves, they have no overriding right to have others act as their agents in such matters, and that they and the other party have even less right to consent when the harmful course of action is at the initiative of someone other than the person who is harmed. In other words, whatever we say about *A* voluntarily and intentionally harming himself, it is more problematic if *B* agrees to *A*'s request that *B* harm him, and even more problematic for *B* if *A* consents to *B*'s request that *B* harm him.

This is not the place to explore these arguments in detail.³¹ They indicate, however, that consent's moral magic may have some limitations—limitations that, even if particularly controversial when embedded in law, may sometimes function more plausibly in a purely moral setting. Whether or not the law should forbid consensual cannibalism or self-enslavement, there is something morally problematic both about seeking to have another consent to

self-harming behavior and about using one's powers of consent to permit harm to be done to oneself. Our reservations may ultimately go back to the view that the value of consent is rooted in a conception of the social conditions under which humans may best flourish, conditions that will ordinarily support the magical power that consent is able to display. When consent functions otherwise, it seems to have uprooted itself from that which sustains it.

Notes

1. Heidi M. Hurd, "The Moral Magic of Consent," *Legal Theory* 2 (1996): 121–46. I do not, however, want to make Hurd's distinction between consent as "morally transformative" and as "giving stained permission." The focus of my account is what consent achieves by way of the relations between *A* and the person to whom *A* gives consent and not the moral quality of the acts to which permission is given. I say more about this later.
2. What we might argue, in view of the gap between legal and moral consent, is that legal consent is open to criticism to the extent that it fails to mirror moral consent. Such criticism need not be decisive, however, because law has social purposes that pure morality does not. In particular, law is designed to provide societal-wide guidance and closure, and to satisfy its public functions it must sometimes draw brighter lines than morally nuanced assessments would suggest.
3. That we are still inclined to speak of "consent" in such cases may have more to do with lingering conventions concerning the payment for wedding festivities and of course the fact that weddings usually remain extended-family occasions. Even if consent is not needed—either morally or legally—it may be good form to act as though it is. There may also be situations in which *B* may be legally entitled to φ , but not consider himself morally justified in φ -ing without *A*'s consent (as, for example, in the days when marriage was thought to constitute consent to sex whenever the husband desired it).
4. Does that mean that the communication has to have been with *B*? I think so—though there may be problematic cases in which, say, a letter of consent has been signed but not delivered. Even there, though, I would be inclined to argue that until notified, it would be presumptuous of *B* to φ .
5. Individually, the shareholders may consent to their votes being used in a count. Collectively, they consent to the terms of a takeover.
6. The "age of consent" represents a legal determination that prior to reaching a certain age a person cannot—for legal purposes—be said to have consented to some course of action (say, sexual intercourse, a medical procedure, or

- contractual arrangement) even if the person has done what would ordinarily have been taken as giving consent. The theory behind such determinations—and what links them to consent as a natural moral notion—is that prior to the nominated age of consent the person could not be, or could not be taken to be, capable of grasping the nature of φ with the sophistication necessary to enable the act of consenting to be one for which A should be held responsible.
7. For a more extensive discussion of consent in such contexts, see Alan Wertheimer, “Sexual Exploitation in Psychotherapy,” in *Exploitation* (Princeton, NJ: Princeton University Press, 1996), ch. 6.
 8. However, it would be a moral authorization only in the sense that B could not claim that A had stolen the car or used it without permission. There may be other countervailing factors that make it improper for A to use it— A is too young, unlicensed, disqualified from driving, etc. Although these are essentially formal or legal disqualifiers, we generally presume that they track morally relevant considerations, such as the ability to drive a car safely.
 9. Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Aldershot: Ashgate, 2003), 5.
 10. Hurd, “The Moral Magic of Consent,” 121.
 11. Westen, *The Logic of Consent*, 4.
 12. Grammatical confusion is easy: “ A approves of B ’s doing φ ” is to be distinguished from “ A approves B ’s doing φ ,” as is “ A agrees with B ’s doing φ ” from “ A agrees to B ’s doing φ .”
 13. The point may, however, be rendered moot, if B brings it about that A is no longer able to communicate any withdrawal.
 14. Does acquiescence constitute a form of consent? I am inclined to say that it depends. Where consent is called for and refusal to consent is easily signified, then acquiescence might reasonably be taken to constitute consent. But in cases in which it may be costly to refuse consent, acquiescence may not always be taken to signify consent.
 15. The case is discussed in Westen, *The Logic of Consent*, 1–2.
 16. I assume of course that there were not other features of the situation (for example, participation in the making of the pornographic movie) that were coercive.
 17. For two good discussions of the subtleties of consent in sexual contexts, see Stephen J. Schulhofer, *Unwanted Sex* (Cambridge, MA: Harvard University Press, 1998); and Alan Wertheimer, *Consent to Sexual Relations* (Cambridge, UK: Cambridge University Press, 2003).
 18. A great deal of controversy surrounded a sexual consent policy developed in the 1990s at Antioch College, accessible at <http://www.mit.edu/activities/safe/data/other/antioch-code>.

19. Of course, this is also a case—the more usual one—in which *A* takes the initiative, though we could structure it so that *A* could consent to *B*'s request whether *A* would like to be put out of her misery.
20. For a valuable discussion of the subtleties of coercion, see Alan Wertheimer, *Coercion* (Princeton, NJ: Princeton University Press, 1987).
21. See Candace McCoy, "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform," *Criminal Law Quarterly* 50 (2005): 67–107.
22. See Hillel Steiner, "Individual Liberty," *Proceedings of the Aristotelian Society* 75 (1974–75): 39.
23. Some are unwilling to go as far as this, seeing such offers as unconscionable or exploitative and therefore grossly unfair rather than as coercive. For a longer discussion of the intricacies, see Wertheimer, *Consent to Sexual Relations*, 171–77.
24. Voting, indeed, is so often corrupted from without as well as within that political consent theorists have some difficulty in claiming that political legitimacy is a function of the "consent of the governed."
25. Rollin M. Perkins, *Criminal Law*, 2nd ed. (Mincola, NY: Foundation Press, 1969), 964–66.
26. This is not necessarily to relieve *A* of all culpability. If *A* consents to lend *B* his firearm, it might be reasonable to expect *A* to inquire what *B* wants it for.
27. The gladiatorial aspects of some contact sports are an important part of their popular appeal. But that makes them no more acceptable than were public executions. On Canadian developments, see Diane V. White, "Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts," *Duke Law Journal* 6 (1986): 1030–54.
28. Consider the situation in which a person, though committed to the idea of a binding vote, believes that the actual electoral process has been so gerrymandered and corrupted by political tactics that the outcome of a voting process is at best a distorted representation of the considered judgment of those who have participated in it. The gap between the ideal and real may leave a person with reasonable doubts about whether an outcome represents the consent of the governed.
29. *Second Treatise Of Civil Government*, ch. 8, § 119.
30. This doctrine can be traced back to Aristotle, who argues that the person who harms himself commits an injustice, because he violates *public* law forbidding such action. See *Nicomachean Ethics*, V, ix. 6. The critical question of course is whether there should be such law.
31. For a valuable discussion, see Vera Bergelson, "The Right to Be Hurt: Testing the Boundaries of Consent," *George Washington Law Review* 75 (2007): 165–236.