

# **On Consent: Its Necessity and Its Domain**

By Morgan Davies

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## Introduction

Most of the normative constraints and liberties we have are not up to any particular person. For example, given the current U.S. legal system, it is not up to anyone's decision whether I have the legal liberty to tie my left shoe before my right, nor is it up to anyone whether I face a moral constraint against harming animals. But interestingly, every person does have the ability to alter some of the normative permissions and prohibitions others have. For example, if I don't do anything to alter the law regarding your entering my house, then your doing so would be an illegal trespass. And if I don't do anything to alter the moral world, your holding my face and kissing me would be an immoral assault. Yet I have the power to change the legal world so that you may legally enter my house, and to change the moral world so that you may morally hold my face and kiss me. My decisions and actions regarding whether you may enter my house and whether you may kiss me make a significant difference to the normative landscape. It is deeply important that we have these standing protections – that, without my approval, you ought not enter my house and that you ought not kiss me – and yet it is equally wonderful that I can approve of these actions and, in doing so, alter what legally and morally you can do. Our lives would be wretched without these standing normative protections, but our lives would be significantly less fulfilling if we could not alter them.

What does it mean for an action of ours to have a normative constraint or a normative liberty? It is easy to understand how my being handcuffed physically constrains the actions I can do. Normative constraints — such as moral, legal, or etiquette constraints — unlike physical constraints, do not limit what you can do, but they do limit what you should do. Sometimes the laws of the country of which you are a part, or the laws of morality itself, dictate what actions are legally, or morally, available to you. Normative

constraints don't make an action physically unavailable to us, but they can make that action, say, morally, legally, or politely unavailable to us. Like how we can be physically constrained against doing a particular action, we can also be normatively constrained against doing an action. What I wish to investigate in this dissertation is the change in the moral world when, say, I freely, capably, and enthusiastically tell you that I would love for you to hold my face and kiss me. In part as a matter of ordinary terminology and in part as a matter of stipulation, it is my "consent" that alters the normative world in these cases where I permit the action.

But what is the exact normative change involved when one consents? Does consent always alter the normative status of the relevant action? And how does a person consent – need they only adopt a particular mental state to bring about the normative changes, or is some form of communication always required? I will turn to these three questions in Chapter 1. In Chapter 2, I will dive into a recent debate on whether or not consent is necessary for sex to be morally benign. And in Chapter 3, I will examine a puzzle about the domain of consent that is related to some issues raised in Chapter 2 – in particular, whether there is a unified moral phenomenon of consent that applies both when we agree to others' actions and when we agree to do an action for them.

Chapter 1 first focuses on developing an account of the moral difference consent makes. A common view, which I argue against, treats consent primarily as a waiver of a claim-right: where one previously held a claim against another's  $\phi$ -ing, valid consent waives that claim, and so the other's correlative directed duty is removed, at least temporarily. That model captures most cases, but it struggles with cases in which valid consent coexists with residual directed duties. While it is tempting to think that consent makes it so that the

consenter removes the duty the agent owes to the consenter not to do the action, this isn't right – a person can consent to an action and yet another might still owe it to the consent-giver not to do that action (perhaps because of the grave harm it would cause to the consenter).

The account developed here, inspired by Liberto (2022), emphasizes making an action compatible with one's authority rather than waiving one's claim against that action. Individuals have moral authority over a wide array of actions, which is to say that the occurrence of those actions ought to be at least partially up to that individual. One way in which an action ought to be, at least partially, up to a person is that others ought to consult that person about whether the action is allowed – call this “allowing authority.” On this view, consent consists in making an action be in accordance with one's allowing authority. This authority-centered picture promises a finer-grained explanation of the moral status of an action and of why coercion, deception, or incapacity invalidate consent – namely, because the act was not left up to the right person in the right way.

Chapter 1 also, though to a lesser degree, discusses how consent is rendered and how this account differs from Liberto's (2022) view. While Liberto (2022) rejects hybrid accounts where consent requires some communication and a particular mental state, I argue against her reasoning in this area. And so, this chapter provides an, albeit modest, defense of hybrid accounts of consent's rendering.

Chapter 2 turns from the fundamental metaphysics of consent to discussing a more application-based case. There has been an increasing number of arguments for the thesis that consent is not necessary for sex to be morally benign. I reject this thesis; I believe that consent is necessary for sex to be morally benign, but it is important to clarify that the

proponents of these arguments do not think that violating sexual autonomy can ever be morally benign. Instead, these proponents argue that consent presupposes a feature that is absent in ideal sexual encounters—such as reluctance, not being an active participant, or acting at another’s behest. From these presuppositions not being met in ideal sexual encounters, my opponents conclude that morally benign sex can occur without consent. If this were correct, consent’s footprint in sexual ethics would be far smaller than many have assumed, and central legal and moral practices would require rethinking. But I argue that each of the three presuppositions proposed is either highly implausible or is met in ideal cases of sex.

For example, Ichikawa argues that in order for one to consent to  $\phi$ , someone else must be trying to get one to  $\phi$  (2020, p. 11), but in good cases of sex no one is trying to get another to do anything – it need not be that one person is trying to get another to have sex with them; the action can be mutually engaged and wanted. And so, Ichikawa concludes that morally permissible sex need not involve consent. But to say that “for one to consent to  $\phi$ , someone else must be trying to get one to  $\phi$ ” implies that you only ever consent to do actions at another’s behest, which would entail that one does not consent to actions performed by other people. But that is absurd, as the most canonical cases of consent (e.g., my consenting to you entering my house, my consenting to a medical procedure, etc.) involve consenting to actions done by someone other than the potential consent-giver. There are some ways of understanding Ichikawa’s “behest presupposition” in a more plausible way but, on those understandings, the behest presupposition will be met in cases of ideal sex.

Chapter 2 thus defends the moral necessity of consent by critically examining several proposed presuppositions of consent—what I call the Unwanted Presupposition, the Passive



Presupposition, and the Behest Presupposition—and arguing that none of them undermines consent’s central role in sexual ethics.

Chapter 3 addresses a puzzle about consent’s domain: which things are such that it is even meaningful to say that a person consents or does not consent to them. Clearly, some facts and actions are consent-inapplicable – my consent has nothing to do with whether some apples are red, and I do not have the ability to morally allow or forbid a stranger from scratching their own arm. By contrast, other actions – such as your entering my house – paradigmatically fall within my domain of consent. The chapter focuses on a special and philosophically neglected class of cases in this grey area: actions one does in virtue of the will of another, such as watching a friend’s cat at their request or agreeing to give a friend a massage. Ordinary language and some philosophical discussions suggest that at least some of these requested actions are consent-applicable. Yet, many theories treat consent as a permission-granting power that is directed only at others’ actions, apparently excluding one’s own requested actions from the domain of consent.

I formulate this tension as an antinomy: roughly, between the thought that there is a unified phenomenon of consent present both when we agree to others’ actions and when we agree to do an action for them, and the thought that consent is always a form of permission-granting that cannot coherently apply to one’s own actions. One tempting resolution disambiguates “consent” into two different moral phenomena—for example, treating “consent to do  $\phi$ ” as promising, and reserving “consent to  $\phi$ ” for the permission-granting power over others’ actions. I argue that such disambiguation is unsatisfactory. It fails to explain the deep structural similarities between the two classes of cases (including how they respond to coercion, deception, and incapacity).

The chapter instead defends a unified, permission-granting picture by rejecting the claim that consent to do a requested action cannot involve permission-granting. When I “consent to do  $\phi$ ” at another’s request, I do not morally permit myself to  $\phi$ , nor do I promise to  $\phi$ . Instead, I grant the requester permission to use my agency to do  $\phi$ . On this view, both “consent to  $\phi$ ” and “consent to do  $\phi$ ” involve the same moral phenomenon: in the former, I authorize another’s act upon me or what is mine; in the latter, I authorize another to employ my agency in performing an act for them. I suggest that this way of understanding consent to requested actions not only resolves the domain puzzle but also illuminates topics in labor ethics and other areas where the permissible use of another’s agency is at stake.

Taken together, these chapters aim to clarify what changes when consent is given, whether consent is morally required in various scenarios, and to which kinds of actions and arrangements the concept of consent meaningfully applies. The overarching picture preserves consent’s protective function while refining its metaphysics, defending its necessity for morally permissible sex, and extending and systematizing its domain to include both actions done to a person and at a person’s behest. In doing so, the dissertation treats consent as a unified permission-granting normative power that structures our moral and legal landscape, not only in familiar domains such as sexual and medical ethics, but also in the terrain of labor, authority, and interpersonal agency.

# **Chapter 1**

## A Theory of Permissive Consent

This chapter puts forward a theory of permissive consent, the moral phenomenon that “turns a trespass into a dinner party; a battery into a handshake; ...an invasion of privacy into an intimate moment”<sup>1</sup> (Hurd 1996, p. 123). In what follows, I develop an “authority-fitting” account of permissive consent that builds on and refines ideas from Liberto’s *Green Light Ethics*. I take from Liberto the central insight that consent is best understood as a way to change what counts as compatible with a person’s authority over matters that ought to be under their control. But, as will be discussed, my view differs from Liberto’s in some crucial ways.

## §1 Introduction

While the term “consent” may pick out multiple phenomena,<sup>2</sup> the sense of “consent” I am theorizing about involves the normative power that, for instance, makes it permissible for a friend to come over to my house when I invite them over for tea. I changed the moral and legal world, allowing my friend to enter my home even though they could not do so legally or morally before. Consent, in the sense used here, occurs only when an agent successfully uses their ability to change the normative landscape, and so, only happens when this permission-granting normative change is successfully realized. I believe that the successful use of our ability to change the normative landscape in a permission-granting way is appropriately called “consent”, but I also think that, regardless of what we call this phenomenon, it is of great moral and legal importance. And so, even if it were inapt to call

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<sup>1</sup> I’ve omitted Hurd’s “a theft into a gift” because, like Liberto (2022, Ch. 2, §1), I think this example involves a different moral power, which is unfortunately often not distinguished. Both moral powers affect what actions are or are not permissible, but the moral power involved in differentiating gifts and thefts also alters what agents have authority over, whereas the moral power involved in differentiating a trespass and a dinner party does not alter what agents have authority over but instead just what actions are compatible with the consenter’s authority.

<sup>2</sup> See Westen (2004) for a discussion on different potential meanings of the word “consent”.

this phenomenon “consent”, I will use this term in this chapter to theorize about this normative phenomenon.

While we can change both the legal and the moral landscape in this permission-creating way, my primary concern is with the successful use of a moral power that changes some *moral* facts about the world. And so, unless otherwise specified, I will use “consent” as interchangeable with “moral consent”, whereby an agent intentionally generates a moral permission for another agent. Occasionally, it is illustrative to discuss legal consent when one intentionally grants a legal permission, and in such cases, I will indicate that I am referring to legal consent.

To further clarify what I am, and am not, theorizing about, according to Westen (2004), there is an alternative sense of “consent”, which can apply even without a moral transformation; for example, one might say, “Alice told Bob that if Bob didn’t let Alice into Bob’s house she would cause him serious harm, and so, Bob reluctantly consented to her entering his house”. However, if we use “consent” to refer to the moral phenomenon that I am theorizing about, the previous quote would be false. Bob did not consent to Alice entering his house, as no genuine normative transformation took place – it was still the case that Alice should not enter Bob’s house. Bob may have verbally communicated that Alice could enter, but this utterance did not constitute Bob consenting to Alice entering his house. I am trying to theorize about what is sometimes called “valid consent,” and so, on my way of using “consent,” “invalid consent” is no more a type of consent than a toy duck is a type of duck.

I will give one more illustrative example of the moral phenomenon that I aim to theorize about, particularly since doing so also provides a clarification for later. On this understanding of “consent”, despite how some may write, the debate between the “Attitudinal

View” (e.g., Hurd, Alexander, Ferzan, and – arguably – Anderson)<sup>3</sup> and the “Performative View” (e.g., Dougherty, Owens, and Wertheimer)<sup>4</sup> should not be understood as a debate about what sort of thing consent *is* — whether a mental state, a speech act, or some combination — but rather as a debate about what actions or states are necessary and sufficient for someone to consent. In this framing of the debate, advocates of the Attitudinal View believe that there is a particular mental state or act that, by itself, is sufficient to permit another’s action to be morally permitted (though this mental state or act alone is not sufficient to remove the other agent’s potential blameworthiness). In contrast, advocates of the Performative View believe that some outward communication or signaling is also<sup>5</sup> required to change the moral landscape.

So far, my aim has not been to resolve, or even take a stance on, any particularly deep or controversial questions about the nature of consent. Instead, I hope to have clearly delineated the moral phenomenon of consent in discussion before theorizing about it. Our ability to intentionally change the moral world and make an action newly permissible for another agent is equally intriguing and significant. It is the use of this ability that I refer to as

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<sup>3</sup> Hurd (1996), Alexander (1996, 2014), Alexander, Hurd, and Westen (2016), Ferzan (2016) and Anderson (2022)

<sup>4</sup> Dougherty (2015, 2019, and 2021), Owens (2011), and Wertheimer (2003).

<sup>5</sup> Most authors who accept the Performative View also believe that there is a particular mental state or act which is necessary for the moral shift to occur but argue that this mental state or act isn’t independently sufficient for this shift to occur.

“consent,” and my goal for this chapter is to discuss precisely what moral change occurs when one consents.<sup>6</sup> And how an agent brings about this moral change<sup>7</sup>.

## **§2 Normative Power, What Not**

A natural first pass for describing the moral change of consent is to say that consent makes an otherwise impermissible action permissible. This description fits many ordinary cases involving consent. Say John is a neighbor of mine that I’ve only occasionally interacted with. One morning, while sitting on my porch, I saw him walking down our street. At that moment, if John were to say, “Sounds good!” and walk into my house, not only would I be confused and alarmed, but he would be doing something morally impermissible. However, if I say, “Would you like to come in for a cup of tea?” and he says, “Sounds good!” and walks into my house, that is morally permissible. In inviting him over for a cup of tea, I make a course of action that was previously impermissible for John morally permissible – it is through consent that I alter the moral landscape. It is how the moral landscape is changed that we are currently investigating. Could it be that the moral change of consent is the change of an action from impermissible to permissible?

Unfortunately, this first attempt to capture the moral change of consent will not work because one can consent to an impermissible action that nevertheless remains impermissible. To see a case in which intuitively I consent to an action which is impermissible both before and after my consent, say that after inviting John in for tea, we have a lovely time, and – even though I know that he is in a monogamous relationship – I tell him that I would love for him

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<sup>6</sup> See Liberto’s 2022, Chapter 3, “Question of Dynamics”.

<sup>7</sup> See Liberto’s 2022, Chapter 5 “Ontological Question”.

to kiss me if he would like to. Assuming I am a rationally capable adult not under any duress or deception, and I sincerely meant what I said, I have consented to John kissing me. Before consenting, John kissing me was morally impermissible, but even after consenting, John kissing me is morally impermissible (since he is in a monogamous relationship with someone else). Thus, it seems that the moral change of consent does not fundamentally transform an impermissible action into a permissible one, even if, at times, consent may have this overall effect.

There are at least two ways in which one could try to defend the view that consent alters the moral world by making an impermissible action permissible in light of the problem above. First, we could say that in the case considered (and similar cases), consent does not make any morally significant difference. In other words, consent, when it has any effect on the moral world, affects the moral world by making an impermissible action permissible. But consent does not always alter the moral world. Or, second, we could say that the cases considered (and similar such cases) don't involve consent – akin to what I would want to say in cases where there might be some communication of agreement that resulted from coercion or deception. But both of these paths fail.

When I, of sound mind, with sufficient information about the action (e.g., that John is married, that him kissing me will not pass on some contagious illness, etc.), and free of coercion, communicated to John that he may kiss me – I consent to him kissing me and I do in fact alter the moral world even if I don't make him kissing me all things considered morally permissible. In particular, I do change the moral status of the action as it relates to me. Before I told John that he may kiss me, John kissing me would wrong me – he should not do the action because of my standing as a moral being. After I told John he may kiss me, John's



kissing me does not wrong me – it is not because of my moral worth that he should not do so, but instead because of moral considerations relating to his partner. This more individualized change to the moral world seems exactly the right avenue to pursue how consent alters the moral landscape.

## **§2.1 The Right-Waiving Account of Consent**

The idea that consent alters the moral status of an action in relation to the consenter<sup>8</sup> leads us to much more popular and intuitive views about how consent alters the moral world. The most influential of such views comes from the work of Wesley Hohfeld (1917) and subsequent developments of his work. Hohfeld's account gives us a complete description of the normative relations between individuals – what actions people are entitled to have others do or not do, how one can alter what actions others owe one to do or not do, and so on. To do so, he distinguishes correlated pairs of normative positions. One pair is claim-rights (roughly corresponding to the actions others owe to us to do or not do) and directed duties (roughly corresponding to the actions we owe to others to do or not do). Another pair is powers (roughly corresponding to how we can change what actions others owe to us to do or not do) and liabilities (roughly corresponding to how others can change what actions we owe to them to do or not do). The third of four pairs is privileges (which roughly correspond to the actions another has no claim against us doing or not doing) and no-claims (which roughly correspond to the actions we have no claim against another doing or not doing). And the final correlated

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<sup>8</sup> This idea is not some form of moral relativism; instead, it is just the very plausible idea that there are some moral considerations that are relative to a particular person (an action may wrong one person without wronging another). It is also not necessarily the case that the moral status of an action relative to a particular person fits what that person believes. Even if I thought my partner was morally permitted to abuse me, my partner doing so would wrong *me*.

pair of normative positions is immunities (roughly corresponding to how others are unable to change what actions we owe to them to do or not do) and disabilities (roughly corresponding to how we are unable to change what actions others owe to us to do or not do). Hohfeld was attempting to account for all of the *legal* relationships people may have with one another, and so listing all of my claim-rights against you would account for all the actions you legally owe it to me to do or not do. But his distinctions can, and very often are, extended to other normative domains, in particular the moral domain, which is the domain I will focus on. In the moral domain, listing all of my claim-rights against you would describe all the actions you morally owe it to me to do or not do (or put another way, this list represents all the actions I am morally entitled to you doing or not doing).

According to a Hohfeldian account of rights, I have a claim-right against John kissing me. My claim-right against John kissing me is correlated with a duty John owes to me not to kiss me. These claim-rights and duties capture the ways we owe it to each other to interact. Powers, on the other hand, explain the ways that we can change people's claim-rights and directed duties. Consent, on this view, is the use of a normative power to intentionally waive a claim-right. When I consent to John kissing me, I change the moral world by removing my previously held claim-right against John kissing me. In waiving this claim-right, I also make it so that John no longer has a duty owed to me that he not kiss me. However, my consent to John kissing me would not remove the duty John owes to his partner not to kiss me. Thus this account can capture the intuition that (1) I did consent to John kissing me, and (2) in doing so, I did make some moral change; I, at least temporarily, suspended my claim-right against John kissing me, and (3) yet John's action was still morally problematic, given John's partner's claim-right against John kissing me.

To recap, I am considering the suggestion that the moral change made by consent involves altering the action's moral status relative to the consenter. This general view can be cashed out in different ways depending on how we talk about the moral status of an action relative to a person. We then introduced one of the most influential ways to cash out the general idea: using Hohfeldian claim-rights to explain how consent alters the moral landscape. The view now considered, hence “the right-waiving account of consent”, is that before A consents to B doing  $\phi$ , A has a claim-right that B not do  $\phi$ , and then when A consents to B doing  $\phi$ , A does not have a claim-right against B doing  $\phi$ <sup>9</sup>. This more nuanced account of the moral change of consent allows us to explain how my consenting to John kissing me does make a moral change, even if it does not make the action morally permissible (given his commitment to his partner). While the right-waiving account of consent is more plausible than the previous view and is popular, I believe it still fails to capture the moral change brought about by consent.

Brison (2002), Phillips (2013, pgs. 49-54, 70), McGregor (2005, pg. 221), and Liberto (2022, pgs. 66-70) argue against the right-waiving account of consent by claiming that this view is committed to the false claim that whenever a person consents to an action there is a consent-independent action that the person can consent or not consent to. Some actions, they argue, are fundamentally consensual, and some are fundamentally nonconsensual; it is not the case that every action we consent to is such that it could occur both with and without consent.

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<sup>9</sup> Note: this view is perfectly compatible with the idea that A can revoke their consent to B doing  $\phi$  and, in revoking consent, making it so that A has a claim-right against B doing  $\phi$  once again. While consent, on this view, involves A waiving a claim-right against B doing  $\phi$ , it is a separate matter whether or not A retains the moral power to reinstate their claim-right against B doing  $\phi$  and whether or not some external factors may reinstate A's claim-right against B doing  $\phi$  (e.g., if I consent to you using my car during the weekend, then throughout the weekend I have no claim-right against you using my car but come Monday, I once again have this a claim-right).

For example, imagine sex between A and B that has gone well; the sex is mutually engaged, the partners are receptive and communicative, the activity is enjoyed and desired, and so on. This extended joint action could not occur without A and B both consenting because that is a part of what constitutes this joint activity. Neither A nor B have a claim-right against this action.<sup>10</sup> If this action were to occur, then it would not be wrong either A or B, *but* it can only happen if both parties consent because consent is an essential part of the action. Nonetheless, according to Brison and others, A and B do consent to this instance of sex. So, it cannot be that in consenting A changes the moral world by waiving a claim-right they had against the mutually engaged, respectful, and receptive sex since A never had such a claim-right. For Brison and others, it is not that A's consenting makes this sex not in violation of A's claim-right, but instead consent makes this instance of good sex possible.

Significantly more could be said both to explain this objection to the right-waiving account of consent and to assess this objection (after all, no assessment of this objection has been provided). Still, I am content to merely introduce this objection and move on to developing a novel<sup>11</sup> objection to the right-waiving account of consent. I choose to focus on developing a new objection for two reasons. One, an interested reader can already consult the works I have cited, particularly Brison (2002) or Liberto (2022, pp. 66-70), for a more detailed explanation of this objection. And two, while I am sympathetic to the ideas these authors raise

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<sup>10</sup> Part of why I am undecided on these arguments is because I feel it is odd to consider this an action as opposed to an event or series of actions.

<sup>11</sup> This is not to say the type of scenario I will lay out (one in which a person consents to an action and yet that action remains morally impermissible due to considerations regarding the consenter) is novel but, to the best of my knowledge, this type of scenario hasn't been used to argue against the right-waiving account of consent.

and I agree with their rejection of the right-waiving account of consent, I remain undecided as to whether their objections are successful.

## §2.2 The Needed Device Problem for the Right-Waiving Account of Consent

Consider the following scenario:

**Needed Device:** Amy and Bob suffer from a condition that causes their hearts to be unable to pump blood throughout their bodies effectively. Thankfully, Amy and Bob's conditions are alleviated by ventricular assist devices (hence, "VADs"). A VAD involves an internal pump powered by external batteries. Bob's heart is significantly weaker than Amy's. Without a VAD, Bob would feel like he is suffocating and be at serious risk of heart failure. Whereas, without a VAD, Amy would feel out of breath and eventually get migraines, but she would not be at risk of death or more severe symptoms. They are both fully aware of their own and the other's condition. Amy and Bob go hiking, and for some reason, Amy's primary and backup batteries die, and Bob's primary battery dies. The only battery still working is Bob's backup, which can only power one VAD. Bob, in full soundness of mind, with an understanding of Amy and Bob's relative conditions, and an understanding of the consequences of this action, voluntarily offers his battery to Amy. Amy accepts the battery, and Bob painfully dies soon after.

The right-waiving account of consent is committed to the following three claims:

1. Amy owes a duty to Bob that she not take his battery if and only if Bob has a claim-right against Amy taking his battery<sup>12</sup>
2. If Bob consented to Amy taking his battery (at time  $t$ )<sup>13</sup>, then Bob waived his claim-right against Amy taking his battery (at time  $t$ )
3. If Bob waived his claim-right against Amy taking his battery (at time  $t$ ), then Bob did not have a claim-right against Amy taking his battery (at time  $t$ )

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<sup>12</sup> For my purposes, all that is needed is that the right-waiving view is committed to the left to right direction of the biconditional of claim 1 (so, all I need is that they are committed to a strictly weaker claim than claim 1). Nevertheless, they are committed to the biconditional and the biconditional captures more of the connection between claim-rights and directed duties and so, I use the full biconditional.

<sup>13</sup> Time  $t$  is immediately after Bob offers Amy his battery. Temporal indexing doesn't play much of a role in this problem. I mention it mostly to indicate that I am neither strawman-ing the right-waiving account of consent (by saying they are committed to the highly implausible claim that once a claim-right is waived it can never come back into effect) nor am I doing something sneaky by having the claims be about different moments in **Needed Device**.

But these claims are inconsistent with the following intuitive claims about **Needed Device**.

4. Bob consented to Amy taking his battery (at time  $t$ )
5. Amy owes a duty to Bob that she not take his battery (at time  $t$ )

The right-waiving account of consent is committed to the first claim because, on a Hohfeldian account of claim-rights and duties, A having a claim-right against B doing  $\phi$  is logically equivalent to B owing a duty to A to not  $\phi$  (Hohfeld 1913 and 1917, Finnis 1972, Herstein 2023, and Wernar and Cruft 2025). Hohfeld (1913, p. 32) writes, “In other words, if X has a right against Y that he stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place”. A’s claim-rights against B and B’s duties owed to A both independently capture all the ways B ought to act (or not act) regarding A – these concepts are meant to give us interchangeable ways of describing how B owes it to A to act or not act (Hohfeld 1913, pp. 30 – 33 and Hohfeld 1917, p. 717). The right-waiving account of consent is committed to claim 1, “Amy owes a duty to Bob that she not take his battery if and only if Bob has a claim-right against Amy taking his battery” due to their posited connection between claim-rights and duties.

The second claim is that if Bob consented to Amy taking his battery (at time  $t$ ), then Bob waived his claim-right against Amy taking his battery (at time  $t$ ). The rights-waiving account of consent is the idea that consent changes the moral world through a person waiving a claim-right they had in the sort of way outlined in claim 2. Claim 2 is what I deny, and it is so central to my current opponent's position that I do not believe more needs to be said to argue that the right-waiving account is committed to this claim.

The third claim, “If Bob waived his claim-right against Amy taking his battery, then Bob did not have a claim-right against Amy taking his battery”, comes from what it means to

waive a claim-right. The idea behind the right-waiving account of consent is that A has a claim-right against B doing  $\phi$  and so B owes a duty to A to not  $\phi$ , but A can remove this claim-right and thus make it so that B no longer owes a duty to A to not  $\phi$ . If waiving doesn't involve the removal of a claim-right, what other change to a person's Hohfeldian relations could waiving cause? I am not saying that the right-waiving account of consent is committed to the implausible idea that, once waived, A's claim-right against B doing  $\phi$  is gone forever or that A doesn't retain the power to reinstate their claim-right against B doing  $\phi$ . All I am saying is that the view is committed to saying that while/if Bob waives his claim-right against Amy taking his battery, Bob does not have a claim-right against Amy taking his battery. And that, from claim 2, while Bob is consenting to Amy taking his battery, he waives his claim-right against Amy taking it. So, while Bob consents to Amy taking his battery, Bob does not have a claim-right against Amy taking his battery. At this point, we can turn to defending the last two claims, which are not specific to the right-waiving account of consent but instead are intuitive claims about **Needed Device**.

Claim 4 is that Bob consents to Amy taking his battery. Claim 4 is supported by the fact that Bob is fully informed of the medical consequences, the relative seriousness of both his and Amy's conditions, and the potential risks involved, and yet he voluntarily, sincerely, and upon capable reflection offered his battery to Amy. Amy did not coerce or manipulate Bob in any way. Bob's offer to Amy to take his battery stems solely from his own, sufficiently capable, practical reasoning, and he effectively communicated to Amy that she may take it.

It is important to remember that the right-waiving account of consent is a theory about what moral change is brought about by consent, not a theory about when or how people consent. The right-waiving account says nothing about the necessary or sufficient conditions

for when a person consents; that takes us into the attitudinal vs. performative debate mentioned in §1. And virtually whatever one might plausibly think is required for consent to occur, we can modify the case description so that this requirement is met without harm to my argument. For example, if Ferzan (2016) is correct that consent happens when one freely and capably reaches the mental decision that an action “is okay with me”, we need only add that Bob made this mental decision. Or if Alexander is correct that consent happens when one freely and capably forms the intention to “to forgo one’s moral complaint against another’s act” (1996, p. 166), we need only add that Bob formed this intention. Or if Dougherty (2015) is correct that a person consents when they both have a particular mental state and engage in some specific communicative act, we need only say that Bob has done these things. And so on for other potential consent requirements. On any view of how and when a person consents that I am aware of, claim 4 holds, or holds if we add a few more details.

Claim 5 is that Amy owes a duty to Bob not to take his battery. This claim is supported by several details outlined in **Needed Device**. Despite Bob’s consent, Amy’s acceptance of the battery significantly endangered Bob’s life, leading directly to his death. Amy knowingly imposed upon Bob a disproportionately severe harm — the feeling of suffocating and the risk of death — compared to the harm she would have experienced (light-headedness and, if she wasn’t able to get new batteries for an extended period of time, a migraine). Amy was not in significant danger; she and Bob weren’t lost on the hike, and they still had cell phones, so Amy would be able to get a new battery soon. And so, to subject Bob to significant harm and the risk of death displays a severe undervaluation of Bob’s well-being as compared to her own. As a person worthy of moral considerations, Bob deserved for Amy to take on the minor harm in this case rather than for him to suffer a significant harm and the risk (which ended up



being realized) of death. She owed it to Bob not to take his battery even after he consented to her doing so. In case it helps draw the intuitive pull, really imagine this was a true story and that Amy and Bob were your friends. When you hear that your friend Bob is dead and you hear why, wouldn't you think that Amy ought not have taken Bob's battery for Bob's sake (despite Bob's voluntary and informed offer)? Intuitively, Amy owed it to Bob not to take his battery even though Bob freely offered it. And so, claim 5, "Amy owes a duty to Bob not to take his battery," is well supported.

Further, the right-waiving account of consent is not an account of what actions are permissible or impermissible, nor is it an account of what actions we owe to each other to do or not do. It is an account about how consent alters the moral world by, at least temporarily, removing a claim-right where A's claim-rights against B represent how A deserves to have B act or not act. And if any of a vast array of accounts in normative ethics (such as the various forms of consequentialism, Kantian deontology, or Aristotelian virtue ethics) are correct, then either Amy's taking the battery was impermissible or we need only say a bit more (e.g., about her mental state) to have her action be impermissible. And it is because of Bob's standing as a moral being that the action is impermissible, which is presumably all that is needed to say Amy owes a duty to Bob not to take his battery.

At this point, claims 4 and 5 have been defended, and we have seen that the right-waiving account is committed to claims 1, 2, and 3, and yet the five claims are jointly inconsistent. The strong justification for claims 4 and 5 suggests that it is one of the claims that the right-waiving account is committed to that is false. I suggest it is claim 2, "If Bob consented to Amy taking his battery (at time *t*), then Bob waived his claim-right against Amy taking his battery (at time *t*)" that is false.

### **§2.3 Some Attempts to Save the Right-Waiving Account and Why They Fail**

Could a proponent of the right-waiving account of consent deny the correlativity of claim-rights and directed duties and so no longer be committed to claim 1? Presumably, such a proponent would adopt this reasoning because they think that Amy does owe a duty to Bob not to take his battery and that, while Bob is consenting, he does not have a claim-right against Amy taking his battery.<sup>14</sup>

In my opinion, denying claim 1 no longer makes you a proponent of the right-waiving account of consent. Denying the connection between claim-rights and directed duties marks a significant enough departure from Hohfeld that I would consider such a theorist to be using an alternative account of rights. And while someone could take many of Hohfeld's ideas while denying that claim-rights and directed duties are correlatives, this theorist would need to explain the difference between a claim-right and the corresponding directed duty, which would not be an easy task.

For the traditional moral Hohfeldian, A's claim-rights against B and B's duties owed to A fall out from the idea that B ought to act in specific ways because of A. The traditional moral Hohfeldian doesn't need a metaphysically robust theory of claim-rights or duties; these are just ways to describe what we owe to each other. But a proponent who wants to deny the correlativity of the two concepts does not have this luxury. This is because if they deny the correlativity of the two concepts, then presumably it is not the case that talk of claim-rights and talk of directed duties are just interchangeable ways of expressing which behaviors we owe to each other. Regardless, at this point, the ball would be in such a theorist's court; they

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<sup>14</sup> I owe this objection to conversation with Matthew Hanser, this is not to say he endorses the objection just that he brought this avenue of response to my attention.

would need to tell us more about claim-rights and directed duties in order for us to evaluate their position.

One might object to claim 4 by saying that while Bob attempts to consent to Amy taking his battery, he cannot in fact consent to this – like how one cannot consent to being enslaved. Such an objector might point to the great harm Bob would suffer if Amy took his battery as prohibiting his capacity to consent to her action. I find this objection unconvincing. I take it that violations of consent are fundamentally related to violations or disrespect of another person's autonomy, while it is true Amy would cause great harm to Bob by taking his battery (and owes a duty to Bob not to take his battery), doing so would not violate or disrespect his autonomy and thus, would not constitute a consent violation. Whereas if Bob did not successfully consent to Amy taking his battery (e.g., if we change things such that she coerced him into letting her take the battery), then her taking the battery would violate or disrespect his autonomy in addition to causing him harm and death.<sup>15</sup> Even if Amy taking Bob's battery is not in Bob's best interest, we ought not paternalistically claim that Bob did not consent. One can consent to actions that don't result in good outcomes for the person consenting. Whether you think Bob ought not to have consented, or was overly self-sacrificing in doing so, is a different matter which does not alter the fact that the five claims are jointly inconsistent.

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<sup>15</sup> This reasoning can also account for why someone is not able to consent to being enslaved since anyone taking that person as a slave would be violating or disrespecting their autonomy (even if the person seemed to consent). The reason a person cannot consent to being enslaved is not because of the horrible consequences they would suffer but because doing so would fundamentally violate their autonomy. While Bob would face horrible consequences if Amy takes his battery, her doing so would not violate or disrespect his autonomy.

## §2.4 Concluding remarks about what consent is not

The **Needed Device** problem with the right-waiving account of consent is similar to the cheating problem for the impermissible-to-permissible account of consent. Before Bob consents to Amy taking his battery, Bob has two independent grounds for his claim-right against Amy taking his battery: (1) Amy taking his battery would violate his authority over the action, and (2) Amy taking his battery would cause him great harm. After Bob consents to Amy taking his battery, the former grounds for his claim-right against Amy taking his battery no longer apply, but the latter grounds for his claim-right still apply. I am fine with keeping the useful ideas of claim-rights and directed duties and the like, but I deny that consent is the use of a normative power in the strictly Hohfeldian sense, because consent does not always make a change to one's claim-rights or another's directed duties.

Consent does not necessarily change the all-things-considered moral status of an action; I can consent to John kissing me even when his doing so remains impermissible because of his commitment to his partner. In considering how my consent affects the moral status of John's action, we suggested that consent changes the moral status of an action as it relates to the consenter. Before I consented to John kissing me, his doing so would wrong me, whereas after I consented, his kissing me would no longer wrong me – it wasn't because of what he owed to me that he should not kiss me, but instead because of what he owed to his partner. While this led us to a more plausible account about the moral change made by consent, situations such as **Needed Device** reveal that it is possible for a person to consent to another's action but yet that other still owing it to the consenter not to do the action; as when Amy still owed a duty to Bob to not take his battery despite him consenting to her doing so. These situations suggest that the moral change made by consent is even more fine-grained than

directly changing the action's moral status relative to the consenter. Similar to Liberto (2022), I believe that the fundamental change consent makes to the moral landscape is an action's status relative to the consenter's authority.

### **§3 Normative Power, What**

My view is that the moral change made by consent is the making of an action be in accordance with one's moral allowing authority. Of course, to explain this view, I must first say what "moral allowing authority" is and explain what it is for an action to be in accordance with someone's moral allowing authority.

#### **§3.1 Consent as making an action in accordance with one's allowing authority**

At the most basic level, if a person has authority over an action, then they have the ability to voluntarily and directly alter the normative status of that action. There are different normative domains in which one can have authority. If a person has legal authority over an action, then the law demands that the action's occurrence or omission should be up to them in a particular way. If a person has moral authority over an action, then morality demands that the action's occurrence or omission should be up to them in a particular way. Since I am theorizing about moral consent, this chapter's focus is on moral authority, but it will be illuminating to talk of legal authority as well.

I used the hand-wavey terminology of "in a particular way" because there are different ways in which an action ought to be up to a person. One way for an action's occurrence to be 'up to' a person, is for them to have a say in the normative permissibility of that action. Let us call this type of authority "allowing authority". For example, in ordinary circumstances, I have

(moral/legal<sup>16</sup>) allowing authority over you entering my house, because my decisions influence whether you may (morally/legally) enter my house. My (moral/legal) allowing authority over you entering my house does not, for example, give me a say in whether you (morally/legally) must enter my house. That would require another kind of authority, “binding authority”. While allowing authority will be our focus, because it is the type of authority linked to consent, it may be helpful to consider an example of binding authority. In ordinary circumstances, while you are inside my house, I have (moral/legal) binding authority over your leaving, because I have a say in whether you are (morally/legally) required to leave. We could discuss other types of authority and the relationships between them but for this chapter only allowing authority matters and so we’ll move to discussing what it is for an action to be in accordance with one’s authority.

For an action that I have (moral/legal) allowing authority over to be in accordance with my authority, it must be that the action occurs only if I have (morally/legally) consented to that action. This answer may feel shallow because it still leaves us with the question, “How does one morally consent to an action being done?”. But we do now have an answer to the question I have been focusing on so far, “How does consent change the moral world?”<sup>17</sup> My answer is that consent changes the moral world by making the consented action be in accordance with the consenter’s allowing authority. While my answer doesn’t yet provide a complete account of consent, it at least gives us some information to work with. In the following sections, I aim to clarify further the idea that consent makes an action be in

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<sup>16</sup> This, of course, depends on what legal standards we are adopting, but we can simply stipulate that the legal system we are using is as such.

<sup>17</sup> The distinction between these two questions is discussed in §1 and is the same as Liberto’s 2022 distinction between “the question of dynamics” and “the ontological question”.

accordance with the consenters's allowing authority, use this idea to examine some cases, and provide additional justification for the view.

### **§3.2 The duty of respect and consent**

We owe it to each other to act in accordance with each other's moral authority. For example, whether John kisses me should depend significantly on my choice in the matter. His action ought to be at least partially up to me, and if he acts without respecting my will on this matter, then he acts in contradiction to what he morally owes to me. When I consent to John kissing me, I do not remove his duty to act in accordance with my authority over him kissing me, nor do I remove my authority over him kissing me. Instead, when I consent to his kissing me, I make his kissing me be in accordance with my authority, and so his duty to act in accordance with my authority does not prohibit him from kissing me. Whereas, before I consented, this duty did prohibit him from kissing me.

If someone has moral authority over an action, others have a duty to respect that authority. Consent is a way of making an action consistent with one's moral authority, thereby allowing the consent receiver to do this action while respecting the consent-giver's authority. We all owe a duty to each other to respect each other's moral authority, which is to say specific actions ought to be up to particular people, even when they aren't the agent performing the action, and we owe it to each other to respect this moral fact. When, say, you consent to me entering your house, you do not remove or suspend the duty of respect that I owe to you, nor do you waive or suspend your authority over me entering your house; instead, you make it so that I may enter your home while respecting your authority over this action.

### §3.3 Some cases in the lens of the authority fitting account

We can shift to discussing legal authority relative to a hypothetical set of laws to get a better handle on things. Let us imagine that the law is such that taking money from my bank account is illegal unless I have signed a document that states you may withdraw money from my account. In such a case, the law has structured things such that I have allowing authority over you withdrawing money from my bank account because I have a say in whether the action is legally permissible. And the law has outlined how I can give my legal consent for you to withdraw money from my bank account: I can consent by signing a specific type of document that allows you to withdraw money from my account legally. In such a case, your withdrawal from my bank account is in accordance with my legal allowing authority only if I have signed the relevant document.

We can also examine the **Needed Device** case from this lens. Bob has allowing authority over Amy taking his battery because Amy taking his battery ought to be at least partially up to him – this is not to say that if he consents, then she may take the battery – but it is to say that, before Bob consents, the fact that Amy (like everyone else) has a duty to act in accordance with Bob’s moral authority counts against her taking the battery being morally permissible. After Bob consents, the fact that Amy has a duty to act in accordance with Bob’s moral authority no longer counts against the moral permissibility of her taking his battery. Amy taking Bob’s battery after he consents respects the fact that Bob’s decision carries moral weight regarding this action. However, in this case, Amy also has a duty not to cause Bob great harm, and this duty counts against the permissibility of Amy taking the battery both before and after Bob consents. This captures our earlier intuition that, before Bob consents to Amy taking his battery, Amy owes it to Bob not to take his battery, both because this is an action he deserves to have a say in and because this is an action that would have a devastating



impact on his well-being. And that after Bob consents, only the latter grounds for Amy's duty still apply.

After Bob consented to Amy taking his battery, does her duty to respect his decision-making on this matter require that she take the battery? What about if Bob was insistent that she take his battery? Neither Bob's consent nor his insistence causes Amy's duty to respect Bob's authority on this matter to create an obligation to take his battery. This is because Bob does not have binding authority over this action; his decisions on this matter do not influence whether Amy is obligated to take the battery (unlike how I have the binding authority to influence whether a guest is obligated to leave my house). There are, as discussed, different ways in which someone's decision can carry normative significance. Consent is linked with the normative authority over whether an action may occur (i.e., allowing authority), not whether an action must occur. We have the power to allow a person to use something we own, but we typically don't have the power to command them to do so.

### **§3.4 Invalidating conditions in light of this view**

In my opinion, one of the greatest virtues of the view that consent alters what actions count as in accordance with one's authority is its ability to predict and explain why there is no consent when invalidating circumstances apply. If you threaten to burn my home down unless I let you inside, then even if I say, "you can come inside," the decision about whether you may enter my home wasn't left up to me in the way I deserved. You entering my home, despite my saying you could, is not in accordance with my authority because it wasn't left to me to make this decision freely. Intuitively, you entering my house in this case does not respect my authority over your doing so because you intentionally bend my will in the matter with your

threat. And so, it falls out neatly from my view that I did not consent<sup>18</sup> to you entering my house in this case.

Likewise, if you manipulated me into “allowing” you into my home, you have hijacked my decision-making process and not truly allowed the decision to be up to me. When you cause me to say, “You can enter my home” only through deceit or intense manipulation, you violate and disrespect my authority over you entering my house as much, or more, than if you entered my home without interacting with me at all. In both cases, your action does not respect my authority over the action and, as such, treats me in a way I deserve not to be treated. You don’t, in a genuine sense, allow me to choose whether or not you enter my house; instead, you try to force my decision. In my opinion, the connection between:

- (1) how invalidating circumstances (such as coercion or manipulation) undermine authority, and
- (2) how there is no permission-granting moral change in cases where there are invalidating circumstances

provide compelling evidence for my thesis that the permission-granting moral change made when A consents to  $\phi$  is by making  $\phi$  in accordance with A’s authority.

#### **§4 Differences between Liberto’s view and mine**

My view is inspired by Liberto’s *Green Light Ethics*. I agree with her central insight that permissive consent should be understood in terms of respecting a person’s authority over matters that ought to be up to them, rather than as waiving a right against the action. On both of our views, the moral change consent makes is a change in which particular acts count as in accordance with one’s authority. However, there are some areas of disagreement. For one, I

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<sup>18</sup> As mentioned in §1, there may be different meanings for “consent” but the concept I am trying to theorize about is fundamentally related to a particular type of moral change.

take the consent-relevant moral authority to be over actions, whereas Liberto takes it to be over “domains”. And two, I disagree with her account about how consent can be rendered, particularly in what she calls “procurement” cases.

#### **§4.1 Authority over actions vs. authority over domains**

Liberto frames consent in terms of domain authority: people hold special authority over certain domains, such as one’s body or one’s home, and others wrong them when acting in those domains outside the subject’s control. In that register, consent functions as a gatekeeping power: one may not enter, act within, or interact with the domain unless the subject authorizes it. Sometimes Liberto suggests that consent alters the boundaries of a domain; in other places, she treats consent as shifting which acts within a domain are permitted. I accept the spirit of domain talk as a useful pragmatic shorthand because it compresses many particular acts that one has authority over into an intelligible bundle like “authority over one’s body” (which I take as saying “authority over a vast array of actions which effect one’s body”) or “authority over one’s home” (which I take as saying “authority over a vast array of actions which effect one’s home”). But at times, talking about authority over a domain runs into difficulty in capturing the complete picture.

To see a time when sticking to only talking about authority over domains, rather than authority over actions, doesn’t allow us to capture the moral facts, consider the following case of self-defense. An attacker lunges with a knife, and the potential victim grabs and pushes the attacker’s arm to avoid being stabbed. I take it there are two moral facts we would need to capture (1) that the victim’s grabbing of the attacker’s arm is not in violation of the attacker’s authority (i.e., it is not in violation of the degree to which the attacker ought to have a say in this), and that (2) the attacker does still retain authority over their body (or over many actions

that affect their body). If we take moral authority to be over actions, this is a straightforward case to explain. The attacker does have moral authority over most actions affecting their body, but they don't have authority over this token defensive act. But if we restrict ourselves to only talking about authority over a domain ("the attacker's authority over their body"), then self-defense cases become hard to explain.

Tautologically, either the victim, "V", violates the attacker's, "A's", authority over A's body, or it is not the case that V violates A's authority over A's body. But both paths seem unpromising without appealing to authority over actions.

There are good reasons to think that the left disjunct, that the victim violates the attacker's authority, is false in the case as laid out. Intuitively, V does nothing wrong in grabbing A's arm to stop A from stabbing V. This does not yet imply that V doesn't violate A's authority, but it does imply that if V violates A's authority, this is a justified violation of A's authority. While adding that the violation is "justified" lessens the unintuitiveness that "V violates A's authority", it does not save this path. If V's action is a justified violation against A's authority, then there are competing moral considerations – the violation of A's authority counts against the permissibility of V's grabbing A's arm, but the fact that this is done to prevent A from stabbing V overrides the earlier moral consideration and makes this action all things considered permissible. But this implies that what A wants or tells V to do regarding V's grabbing A's arm holds some moral weight. But intuitively, this implication is false; once A attacks V, their decisions about whether V may grab their arm or not carry no moral weight.

The right disjunct is, I believe, true, but it is hard to properly account for this without appealing to authority over actions. On my account, I can say A had no authority over V grabbing A's arm. But it seems that, by taking authority over only domains, to have V's

grabbing A's arm not violate A's authority, one would have to say that A has no authority over their own body in this case. But, there are actions that could be done to A's body that A should still have a say in – that ought not be done to A unless A decides otherwise. So, it seems false to say that A no longer has authority over their body.

I believe Liberto would, like most, endorse the claim that V does not violate A's authority. There are two paths Liberto might take to overcome my objection that this claim is in tension with her view about authority. One, she could say that authority can also be over actions, after all, she doesn't commit herself to the idea that authority over domains is the only type of authority. Two, she could explain how "V's grabbing A's arm doesn't violate A's authority" can be captured just by talking about authority over domains.

On the first path, where authority is also over actions, my worry is that authority over domains is unnecessary – it is, as I suggest, at times a useful way of speaking, but this isn't what authority fundamentally relates to. In which case, the use of domains in much of her conceptual apparatus ought to be removed – indeed, I think this can be done and actually make her view simpler (in fact, I take some of this chapter to be my attempt to do so). Take, for example, Liberto's definition of a "Divergence Strike" where "P" and "S" are people, " $\phi$ " is an action, and "D" is a moral domain:

The Divergence Strike: P deprives S of the conformity to which S is entitled between "P doing  $\phi$  in D (the domain of S)" and whatever S selected, using the discretionary feature of his right, for moral availability to P. – *Liberto 2022*, pg. 95

Liberto's concept of "The Divergence Strike" is meant to represent one of the core cases of a consent violation, but it is difficult to understand. And, once we actually make some of the

substitutions, the language is very odd.<sup>19</sup> But by focusing on authority over actions, instead of over domains, we can simplify Liberto's concept of a Divergence Strike into something like, "Divergence Strike: S has moral authority over P doing  $\phi$ , P does  $\phi$ , and P's doing  $\phi$  is not in accordance with S's authority". The substitutions here are much easier to understand. For example, there is a divergence strike when I have moral authority over John kissing me, John kisses me, and John's kissing me is not in accordance with my authority. So, while Liberto could say that there is authority over actions and authority over domains, it is unclear why this would be preferable to saying that there is authority over actions and that we sometimes talk about authority over domains in order to communicate authority over a wide array of related actions.

To situate ourselves in the dialectic, I believe that cases such as where a potential victim grabs the attacker's arm are in tension with Liberto's account of authority. This is because either the potential victim violates the attacker's authority or they do not violate the attacker's authority. I discussed why I think the left disjunct is false, even if we caveat and say that this is a justified violation of the attacker's authority. I believe the right disjunct is true, and I think Liberto would agree. But it is hard for Liberto to endorse the right disjunct. This is because I believe there are only two unpromising paths Liberto could take to explain how the attacker's authority is not violated. The path we have considered so far is for Liberto to appeal to authority over actions as well as domains. But one, it is unclear how this resolves

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<sup>19</sup> For example, if "P" is Perry, "S" is Sally, " $\phi$ " is kissing Sally, and "D" is Sally's body – substitution leads to: "Divergence Strike: Perry deprives Sally of the conformity to which Sally is entitled between "Perry doing kissing Sally in Sally's body (the domain of Sally) and whatever Sally selected, using the discretionary feature of his right, for moral availability to Perry." If what we are supposed to sub in for "D" is something like "the domain of Sally's body", the wording is a bit better but is still very odd to talk of "Perry kissing Sally in the domain of Sally's body".

the tension between there being no violation of the attacker's authority and the idea that if we take authority to be over domains, then it seems like the attacker still has authority over their body, in which case it's unclear why the potential victim's arm grabbing isn't an, albeit justified, violation of the attacker's bodily authority. And two, it is unclear what is gained by positing authority over domains and actions, rather than the more parsimonious view that there is only authority over actions, but that we might talk like there is authority over domains because doing so is a useful way to refer to a vast array of actions regarding that domain. Now we will consider whether Liberto could explain how the attacker's authority isn't violated just by talking about authority over one's body.

Perhaps Liberto could say that the attacker's authority over their body diminishes when they attack the potential victim, such that the potential victim's grabbing the attacker's arm is not in violation of the attacker's bodily authority. But this makes it sound like the attacker no longer has authority over specific actions involving their own body. And so, this seems to sneak in authority over actions all over again.

It is worth saying that many cases besides just self-defense can be used to put tension on the idea that authority is primarily over domains (e.g., one's legal authority in relation to police entering one's house with a warrant), but hopefully this example suffices to show why I think authority is fundamentally over actions as opposed to over domains.

Cases involving "Unbounded Features of the Moral World" (Liberto 2022, pp. 38-39) may also support the idea that authority is related to actions as opposed to domains. Liberto (2022, pp. 38-39) notes that there are times when it seems as if consent and authority might be possible despite there being no domain involved. One of her examples of this involves a colleague gossiping about Liberto. According to Liberto, it seems like Liberto may have

authority over whether the colleague may gossip about Liberto, and that Liberto could even consent to her colleague's gossip, despite there being no clear domain involved. Ultimately, I want to remain neutral on whether authority is involved in these cases – as does Liberto – and on whether these cases cannot be described in terms of authority over domains. But it is worth saying these cases would not be exceptional in any way if authority were over actions. On the view that our moral authority is fundamentally tied to actions (rather than domains), there being no relevant domain I have authority over is not in tension with my having authority over my colleague gossiping about me.

Liberto and I both agree that consent retains the duty of respect and changes which acts would count as violations, rather than erasing a right. I acknowledge that my view is inspired by hers. But I do think the core insights we agree on can be expressed more clearly and less problematically by treating moral authority as fundamentally tied to actions and talk of moral authority over a domain as pragmatic shorthand.

#### **§4.2 How consent is rendered: effective signaling and procurement cases**

Liberto presents two different ways in which someone can consent. The first is:

Effective Signaling: S implements the decision to send a signal to P that (a) S understands to give P a permission, and (b) the signal itself makes it possible for him to practically deliberate towards doing  $\phi$  in D in a way that affords her effective control over 'P doing  $\phi$  in D.' This effective control is that to which she is entitled in virtue of her moral authority in D. – *Liberto 2022*, p. 143

While I would suggest we remove talk about domains, I agree that one consents to another doing a particular action that one has moral authority over when one intentionally produces a signal (or signals) that allows the other to do this action while respecting one's authority over that action. In paradigmatic cases of consent, subjects render consent by sending a signal that they themselves take to authorize the behavior and that equips the receiver to deliberate and



act under the subject's ongoing authority. However, there is still the open question: "Are there other ways to render consent?"

Liberto takes the answer to the previous question to be "yes". She believes that consent can occur in what she calls "procurement cases", whereby instead of the consenter producing a signal that allows the consent-receiver to do the action while respecting the consenter's authority, the consenter overrides the consent-receiver's practical reasoning such that the consenter directly causes the consent-receiver to do the action that the consenter has authority over. For example, in *Wheeling-In* (Liberto 2022, pp. 138 – 143), Patrick is in a wheelchair, and Sonia takes control of his wheelchair and pushes Patrick into her home without any discussion between the two. Liberto claims that Sonia consents to Patrick entering her (Sonia's) house because Sonia "procured" Patrick's entering her house. Additionally, Liberto takes Procurement cases to go against accounts of consent that require communication, because she believes Sonia consents to Patrick entering her house, despite there being no communication to that effect.<sup>20</sup> I believe that both her verdict that Sonia does not signal that Patrick may enter her home and also her verdict that Sonia consents to Patrick entering her home are questionable.

Dougherty and others endorsing the Performative view have repeatedly said that one's body language and actions can, at times, meet the communication requirement for consent. Given that Sonia voluntarily wheels Patrick into her house, it is evident from her actions that she is okay with Patrick entering her home. And so, it is not clear that someone like Dougherty couldn't just say that Sonia consents to Patrick entering her house, even though she hasn't said

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<sup>20</sup> A possible interpretation is that Liberto takes "Wheeling In" to be a procurement case, but that it (unlike *Mariana's Plan*, which will be discussed) does not undermine accounts of consent that require communication.

anything. This said, if one thinks that Sonia consents to Patrick entering her home, then it seems that Sonia could consent without any communicative uptake from Patrick. After all, one variation Liberto discusses is that Patrick is asleep and therefore cannot fulfill any uptake requirement. But I'm unconvinced that Sonia consents to Patrick entering her home, especially if we imagine he is sleeping.

I am unconvinced that Sonia consents to Patrick entering Sonia's house because Patrick does not intentionally perform that action. It is Sonia's act that brings him in. Patrick "enters" Sonia's house in a similar way to how groceries "enter" when one carries them home; this isn't something Patrick or the groceries have done, but something that has been done to them.<sup>21</sup> So, I agree with Liberto's verdict that there is no violation of Sonia's authority here, but I am unconvinced that this is because Sonia consents rather than because there is no action done by Patrick of the type over which Sonia holds allowing authority.

Liberto's other case involving consent by procurement is *Mariana's Plan* (inspired by Shakespeare's "Measure for Measure"). She describes it this way:

Deputy Angelo attempts to coerce Isabella, a convent novice, into having sex with him, by telling her that he will have her brother tortured and executed if she does not come to his garden house in the night and engage in sexual intercourse. Isabella arranges with Mariana, the woman betrothed to but jilted by Deputy Angelo, to switch places with her in the darkness of night. Mariana is glad to switch, as the consummation of their betrothal would force Angelo to marry her (which she wants, despite knowing of Angelo's villainy). Mariana takes Isabella's place in the night and, unbeknownst to Angelo, has sex with him in Isabella's stead—not out of any great concern for Isabella, or to save her from harm, but for her own ends. – Liberto 2022, pg. 133

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<sup>21</sup> Indeed, Sonia's treating Patrick more like an object than like a moral agent capable of deciding where he goes is likely why we may have some unease with this case. And "procurement" cases, due to the fact that they involve overriding a person's practical reasoning, will always have this feature.

Liberto believes that Mariana consents to have sex with Angelo<sup>22</sup> via “procurement,” and that there is no signaling from Mariana that fits the communication requirement Dougherty and other performative theorists say is required for consent.

This is a difficult case to have intuitions on, but it is worth pointing out that Liberto’s verdict that Mariana consents is in tension with other parts of her text. For example:

We only have effective gatekeeping control over the behavior of others when our authority itself prevents them from entering our domain, through their practical deliberations and in the absence of other motivations or constraints that would prevent them from violating our rights. To afford us this effective authority, others must wait for us to make the active, permissive change in the world before entering our domains. – Liberto 2022, p. 147

And also, Liberto’s argument that Sue in Alexander, Hurd, and Westen’s *Wanted Sex* scenario doesn’t consent (Liberto 2022, pp. 83 – 87). In *Wanted Sex*, Sue wants to have sex with Sam but communicates the opposite to Sam because she fears that doing otherwise will cause Sam to think she is too “easy”. Despite Sue’s saying she didn’t want to have sex, Sam initiates sex anyway, which Alexander, Hurd, and Westen stipulate that Sue is happy about. Alexander, Hurd, and Westen think that Sue has consented even though Sam acts culpably because he had no reasonable way of knowing that Sue consented. Liberto argues that Sue does not consent because:

Sue does not desire for Sam to stop his specific sexual acts. However—for other purposes—she employs the only tools she has available to her for effectively stopping Sam’s sexual acts: her resistance—whether verbal or physical (and, in the story, it is forceful). So, when Sam ignores those signals of refusal—is deliberately unmoved by them—he renders her only tools for exercising stopping control ineffective. This, in turn, renders her moral stopping authority ineffective in the domain of her body. Sue is in a situation where her moral authority—that which she retains even if she has given sexual consent by exercising her

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<sup>22</sup> This not to say she thinks Angelo also consents.

gatekeeping authority—does not match up with her effective authority (that effective control to which she is entitled). – Liberto 2022 pg.85

But, presumably, considerations similar to the ones Liberto uses to argue that Sue doesn't consent could be used as reasons to argue that Mariana doesn't consent. Angelo's conduct is deliberately unresponsive to the authority of the person he is interacting with. Even if Mariana privately hopes for the encounter, Angelo does not deliberate in a way that treats Mariana's authority over the relevant acts as settling whether they may occur. For *Mariana's Plan* to play the role Liberto wants, i.e., to be a counterexample to the performative view of consent, Mariana neither physically nor verbally communicates agreement to Angelo's actions. But in such a case, it is unclear why Sue counts as not consenting but Mariana counts as consenting.

In sum, Liberto provides two different ways that consent can occur – “effective signaling” and “procurement”. Her idea that consent can happen through procurement allows her to deal with cases that she believes involve consent without any of the typical signaling or communication involved in consent, such as *Mariana's Plan*. I agree that moral consent can occur through effective signaling. But I believe that her counterexamples to the performative view fall short, and I am skeptical that consent can occur through procurement.

## **§5 Concluding Remarks**

I began by discussing the everyday and yet puzzling moral phenomenon of consent whereby one can, somehow and in some way, intentionally change the moral world, so that a friend can permissibly enter one's house even though they could not morally do so before. The main question to consider was, “In what way do we change the moral world when we consent?”. While pleasantly simple, the idea that consent blanketly changes the action from being impermissible before consent to permissible after consent, could not account for impermissible yet consensual extra-marital affairs. In light of these issues, it was suggested

that perhaps consent alters the moral status of an action as relative to the consent giver. But it seemed like Bob in **Needed Device** could consent to Amy performing a specific action, and yet Amy owed it to Bob not to do so. At that point, I introduced my view that permissive consent is best understood as making a particular action be in accordance with the consenter's allowing authority. On this "authority-fitting" picture, we have a duty to respect certain people's decisions about specific actions, but they have the power to consent to those actions, which makes it so that our doing the action does not violate our duty of respect.

This view handled, **Needed Device** nicely. After Bob's consent, but not before, Amy could take Bob's battery and still fulfill her duty to respect Bob's authority over her taking the battery but, nevertheless, her taking Bob's battery would violate her independent duty to Bob not to impose grave, disproportionate harm to him. As another point in favor of the authority-fitting account of consent, how invalidating conditions prevent consent is easy to explain on this view. Coercing or manipulating a person into saying that an action may occur does not genuinely leave that action up to the person with authority over it. When the decision about whether an action may occur is not genuinely left to an agent or they cannot capably and freely make that decision, no authority-accordance is produced.

The authority-fitting account of consent is similar to, and inspired by, Liberto's (2022) "scope-shifting account of consent". But there are at least two differences between her view and mine. First, I take particular actions to be the fundamental unit over which authority ranges, treating "domains" (body, home, data, etc.) as helpful but ultimately heuristic summaries. This action relative authority, I argued, clarifies cases that appear strained on domain relative authority descriptions: such as self-defense (where the attacker has no moral allowing authority over the victim's grabbing their arm, but yet still has authority over many

actions regarding their body) and “unbounded authority” (e.g., one’s authority over others gossiping about one).

If we think of permissive consent as the targeted exercise of allowing authority, we can vindicate the phenomenon that first drew our attention – turning a would-be trespass into a dinner party – without either overselling consent as master permission or trivializing it as a mere signal. The authority-fitting account preserves the intuitive, fine-grained moral change we care about – respecting the degree to which a person is morally entitled to have a say over an action – without inflating consent into an all-things-considered permission. Consent is neither all-changing nor insignificant; one’s consent is a way of making another’s course of action match the respect one deserves. This re-orientation also explains why so much of our interpersonal ethics revolves not only around outcomes but around how decisions are left to, or taken from, the people to whom they are due.

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## **Chapter 2**

### **The Moral Necessity of Consent**



## §1 Introduction

Consent to sex has often<sup>1</sup> been thought of as both necessary and sufficient not to wrong any of the involved parties.<sup>2</sup> Given this, it is unsurprising that most of the ethics of sex has focused on understanding consent; dealing with questions such as, “What is consent?”, “When is consent invalidated?”, and so on. However, a growing number of philosophers reject this way of thinking about consent.

Cahill (2016), Kukla (2018), and Woodard (2022), among others, argue against the idea that consent is sufficient for sex not wronging at least one of the involved parties. A person can consent to sex that still wrongs that person. I agree with these philosophers, and I think their arguments have important philosophic and public significance.

However, I disagree with philosophers such as MacKinnon (2017), Palmer (2017), Gardner (2018), Kukla (2018 and 2024)<sup>3</sup>, and Ichikawa (2020) who all argue that sex does not need to involve each participant’s consent to be morally benign<sup>4</sup> - call their thesis, “THE

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<sup>1</sup> c.f., Archard 1998; Mappes 1987; Miller & Wertheimer 2010; Primoratz 2001; Wertheimer 2003.

<sup>2</sup> This position is often put as, “consent to sex is necessary and sufficient for sex to be morally permissible”. But given that an affair is morally wrong even if the people having sex consent, the position must be put more carefully.

<sup>3</sup> Kukla (2018) has been interpreted as arguing that consent is inapplicable for some permissible sexual actions. It is not clear to me that this is the correct interpretation for Kukla (2018) however in Kukla (2024), their position is that permissive consent (the type of consent I am discussing) is not always involved in permissible sex but that there is another kind of consent which is – and that this other kind of consent is what we are discussing when we are talking about consensual sex. Given that I will be discussing permissive consent, it is fair to consider this paper as going against some of the ideas of Kukla (2024), but given Kukla’s distinction between types of consent, I will, for the most part, not directly engage with Kukla’s ideas here.

<sup>4</sup> By “morally benign,” I mean that there are no moral considerations against the action. I take this to be a stricter notion than morally permissible. For example, while using your neighbor’s hose without their permission to put out a nearby fire may be all things considered morally permissible, it would not be morally benign since there were property rights considerations against this action. One perhaps oddity of calling this concept “benign” is that I include morally good actions (so long as there are no moral considerations against the action) in this category (e.g., helping a stranger in need without causing them or anyone else harm).

**MORAL NON-NECESSITY OF CONSENT**". At first, this may sound like MacKinnon, Palmer, Gardner, and Ichikawa argue for the reprehensible view that there are situations in which a person's sexual autonomy was violated, yet this violation did not wrong the victim. While I disagree with **THE MORAL NON-NECESSITY OF CONSENT** and will critique the arguments given for it, none of these philosophers advocate for the reprehensible view.

Instead, they believe that for a person to consent to sex, or any action, it must be the case that certain presuppositions are met and that in the best of sexual encounters, these presuppositions are not met. And so, sex, in those cases, won't be the sort of thing that a person could consent to. To quote Palmer (2017, p. 6), "while consent is clearly absent from the worst sexual encounters it will also be absent in the most positive sexual encounters jointly instigated by mutually active partners, because both partners are in a state beyond consent".

If **THE MORAL NON-NECESSITY OF CONSENT** were true, then, plausibly, the standard legal practice of using a lack of consent as part of the definition of sexual assault would need to change. After all, if **THE MORAL NON-NECESSITY OF CONSENT** were true, then a person is not necessarily wronged by sex that does not involve their consent. Indeed, this implication of **THE MORAL NON-NECESSITY OF CONSENT** is one of the reasons why both MacKinnon and Palmer have advocated for redefining sexual assault<sup>5</sup> without reference to a lack of consent.<sup>6</sup>

While the legal and moral implications of this debate in the sexual domain alone are significant, given the way that these philosophers argue for **THE MORAL NON-NECESSITY OF**

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<sup>5</sup> MacKinnon mostly writes about rape, but she mentions that she uses "rape" and "sexual assault" almost interchangeably (see MacKinnon 2017, p. 431 fn. 1).

<sup>6</sup> MacKinnon and Palmer offer differing ways on how the law should change. See MacKinnon 2017, p. 474, for her preferred account. See Palmer 2017, p. 16 for her preferred account.

**CONSENT** and the common<sup>7</sup> belief that consent in the sexual domain is like consent in other domains, the implications are even more vast. For example, if, as suggested by MacKinnon (2017), a person consenting to an action presupposes that they are reluctant or don't want that action, then when I happily have friends at my house for games, it is not the case that I consented to them entering my home. And so, the standard legal practice of defining "trespassing" as "entering another's property without that person's consent" would likely need revision as well. Similar points can be made regarding theft, violations of our right of publicity, privacy violations, and more. And so, this topic has deep and broad significance both in moral and legal domains. Since I will argue against **THE MORAL NON-NECESSITY OF CONSENT**, this paper supports the idea that consent can still play some<sup>8</sup> of its canonical moral and legal role.

## §2 The Unwanted Presupposition

**UNWANTED PRESUPPOSITION**     That  $x$  consents to  $\phi$  presupposes that  $x$  does not enthusiastically want  $\phi$  to occur.

The **UNWANTED PRESUPPOSITION** is most prominently championed by MacKinnon<sup>9</sup> who believes that consent is a form of acquiescence or yielding to the will of another. I take it that thinking of consent in this way is currently uncommon, but MacKinnon (2017) points

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<sup>7</sup> See Kukla 2024 for a dissenting position on this.

<sup>8</sup> I say "some" because, as mentioned, I agree with Cahill (2016), Kukla (2018), and Woodard (2022) that a person consenting to sex won't by itself guarantee that sex does not wrong them in some way.

<sup>9</sup> I also take MacKinnon to endorse **PASSIVE PRESUPPOSITION**; critique of this presupposition will be discussed in the next section.

to some precedent for understanding consent in this way. With this understanding of consent, it is easy to see how **THE MORAL NON-NECESSITY OF CONSENT** follows.

To start with a non-sexual example, if I am very excited for my friends to come over to my house to play a board game, then it is not the case that I acquiesce — understood as reluctant agreement — to their entering my house. To adapt the earlier quote from Palmer (2017, p. 6): while acquiescence is absent from the worst of home enterings (i.e., trespasses), it will also be absent in the most positive of home enterings because all parties are in a state beyond acquiescence. Likewise, if consenting entails acquiescence (which I deny), then sexual encounters that are mutually and enthusiastically wanted would not involve consent – because they don’t involve *reluctant* agreement (i.e., acquiescence). Given that mutually enthusiastically wanted sex doesn’t necessarily wrong any of the participants (indeed, this is how sex should be), if consenting entails acquiescence (which I deny), then **THE MORAL NON-NECESSITY OF CONSENT** is true.

MacKinnon cites two definitions of consent, as well as Westen’s (2004) *The Logic of Consent*,<sup>10</sup> to support the idea that consent involves acquiescence. But she also acknowledges many more modern definitions of consent do not involve acquiescence (MacKinnon 2017, pp. 453 - 455), and one can point to many<sup>11</sup> more lexical and legal definitions that would apply when the consenting party enthusiastically welcomes the action. And so, she also defends the

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<sup>10</sup> It is true that Westen 2010 uses the word “acquiescence” when giving an account of permissive consent, however he writes as though a person can acquiesce to an action that they enthusiastically want. This is an unfortunate and, in my opinion, poor choice of words.

<sup>11</sup> For example, the current versions of the Oxford English Dictionary, the Cambridge English Dictionary, the Collins Dictionary, the Merriam-Webster Dictionary, California Penal Code §261.6, and New York Penal Code §130.05.

idea that consent is a form of acquiescence by considering how ordinary speakers talk about consent. MacKinnon writes:

Consenting is not what women do when they want to be having sex. Sex women want is never described by them or anyone else as consensual. No one says, 'We had a great hot night, she (or I or we) consented.' - MacKinnon (2017 pg. 450)

However, this argument conflates what would be odd to say in a situation with what would be false to say of that situation. "No one says" what MacKinnon suggests, because the speaker first established that the sex was a very good experience, and so the listeners would understand that the speaker consented. Given that the speaker consented is implied by the fact that they said it was a "great hot night", them then saying that they consented would be unnecessary and unusual, which is why "no one says" this, but that doesn't make it false that they consented.

While it may be pragmatically odd to describe an event that a person enthusiastically wanted using permission-granting phrases such as "they consented" or "they allowed", this does not entail that they don't grant this permission. In fact, often the linguistic oddity in these cases is because there are stronger claims that could be made – think of the linguistic oddity, yet truth, of 'some humans are mortal'. If I enthusiastically wanted my friends to come over to my house and my desire was common knowledge, it would be odd yet true to say that I allowed them into my home. And if I enthusiastically want my friends to come over to my house, and this was not common knowledge, it would be misleading (but true) for me to say that I allowed my friends to come over. It would be misleading because there are stronger claims we could have made (e.g., that I enthusiastically welcomed them into my house). So, the fact that we didn't make those stronger claims pragmatically implies, but does not entail, that the stronger claims are false.

To make a statement like MacKinnon's – no one says, 'I was so happy my friends could come over last night; I allowed them into my home' – it is true no one would say such a thing, but that doesn't mean that an enthusiastic host does not allow welcomed guests into their house. And this is the same when saying that I consented to my friends coming over to my house; this is true, but odd to say, if I enthusiastically wanted them to come over, and the listener knew that. Likewise, it would be odd to say that a person consented to sex when they enthusiastically wanted to have sex and all listeners knew this; however, it would still be true.

In other words, I believe that MacKinnon is conflating a linguistic oddity coming from a false implicature with a linguistic oddity coming from a false presupposition. Claims with false implicatures can still be true, whereas (absent logical connectives or sentential operators) claims with false presuppositions are not true. The idea that we are dealing with an implicature as opposed to a presupposition can be supported by "the cancellability test" (see Beaver et al. 2024). Implicatures can be felicitously canceled (e.g., it is okay to say "I allowed my friends to come over to my house; in fact, I enthusiastically wanted them to come over"). In contrast, presuppositions not in the scope of logical connectives or sentential operators cannot be felicitously canceled (e.g., it would be inapt to say "I acquiesced to my friends coming over; in fact, I enthusiastically wanted them to come over"). And importantly, one can felicitously say, "I consented to sex; in fact, I enthusiastically wanted to have sex," and this indicates that consenting to sex does *not* presuppose that one does *not* enthusiastically want sex – one can both consent and enthusiastically want sex.<sup>12</sup>

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<sup>12</sup> There is little beyond intuition that I can do to justify my claim that we can felicitously say, "I consented to sex, in fact I enthusiastically wanted to have sex". But I ask the reader to seriously consider if "I consented to sex, in fact, I enthusiastically wanted to have sex" is as insensible as "I acquiesced to sex, in fact, I enthusiastically wanted to have sex" (where the speaker tries to cancel a presupposition). I take it that few think that the two sentences sound equally as infelicitous, and even to those people, I would say that the idea of

My giving permission for another to  $\phi$  is consistent with my enthusiastically wanting them to do  $\phi$ . Even if it would be odd, in this case, to say out loud, “I give John permission to ...”, this is related to the pragmatics of utterances, not the meanings of the words. And the sense of consent in discussion is a sort of permission giving and is likewise consistent with enthusiastic desire.<sup>13</sup>

### §3 The Passive Presupposition

**PASSIVE PRESUPPOSITION** That  $x$  consents to  $\phi$  presupposes that  $x$ , neither individually nor as part of a group, does  $\phi$ .<sup>14</sup>

The most common and persuasive reason for accepting **THE MORAL NON-NECESSITY OF CONSENT** comes from the idea that a person cannot consent to an action that they, either individually or as part of a group, do. There are many different reasons various philosophers endorse **PASSIVE PRESUPPOSITION** (e.g., thinking of consent as a Hohfeldian normative power; see Kramer 2000 and Healey 2019) but a relatively neutral gloss that fits well with what was discussed in the previous section is: when we consent to a particular action, we are morally allowing that action, and one does not *allow* an action they do.<sup>15</sup>

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consent as a form of permission-granting, which is how many philosophers think of consent, is compatible with enthusiastic desire.

<sup>13</sup> I am not saying that consent is sufficient to ensure enthusiastic wanting (and as mentioned earlier, I don’t think that all parties consenting is sufficient to ensure that no party is wronged), my point is just that, contra MacKinnon, the two are compatible.

<sup>14</sup> The “nor as part of a group” is included to capture Gardner’s (2018) idea related to joint actions, which will be discussed later.

<sup>15</sup> People do say things like, “you should allow yourself to take a break every now and then”. While it would be interesting to investigate how best to understand this way of speaking, doing so is outside the scope of this paper. See Muñoz 2024 for a related discussion on the issue.

The next part in this argument for **THE MORAL NON-NECESSITY OF CONSENT** is that in the best sexual encounters, sex is a joint action<sup>16</sup> collectively done by all the participants. There is no participant who merely<sup>17</sup> morally allows sex; instead, all participants are jointly doing this collective action. In these cases, sex will be jointly done by all participants, and so, if **PASSIVE PRESUPPOSITION**, then none of these participants consents to sex. Given that there is nothing morally problematic about these instances – indeed, this is how sex should be – there are morally benign scenarios where a person does not (in the exclusion sense<sup>18</sup>) consent to sex. And so, sex need not involve each participant’s consent in order to be morally benign (i.e., **THE MORAL NON-NECESSITY OF CONSENT**).

I’ve represented the above argument as follows and included footnotes that provide quotes of similar claims in the literature:

**PASSIVE  
PRESUPPOSITION**

That  $x$  consents to  $\phi$  presupposes that  $x$ , neither individually nor as part of a group, does  $\phi$ .<sup>19</sup>

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<sup>16</sup> Even accepting that some actions are extended (e.g., making an omelet) and done jointly by more than one person, I am unsure if sex could ever truly be a single action but (1) to discuss this would go too deep metaphysics of actions, and (2) I am aiming to reconstruct an opposing position in this section.

<sup>17</sup> It is worth noting here that what my opponent would actually need is to drop the “merely” but yet the position sounds less plausible when it is put as “no participant morally allows the sex”. As argued previously, a person can consent, where consent is a permission granting power, to an action they enthusiastically desire. “Merely” builds in extra information (e.g., “Alice’s job was merely a way to earn money” is incompatible with Alice deeply enjoying her job whereas “Alice’s job was a way to earn money” is compatible with Alice deeply enjoying her job). One could argue that for a person to consent to an action means that they merely morally allow that action, but against this position I would point to my arguments in §2.0, fn. 12, and considerations of parsimony.

<sup>18</sup> See Horn & Wansing 2022.

<sup>19</sup> “By consenting, one is placing oneself in the position of patient and the other in the position of agent, so far as what is consented to is concerned. From there, one can quickly see that the question ‘was there consent?’ presupposes an asymmetry of exactly the kind that I suggested is not to be found in good (teamwork) sex. It presupposes that the sexual activity was not fully agent– agent symmetrical” – Gardner 2018, pg. 58.

“Intrinsic to consent is the actor and the acted-upon” – MacKinnon 2016, pg. 440



<b>ETHICAL OBSERVATION</b>	In ideal sex, sex is so mutually engaged that all participants are part of a group doing this joint action. <sup>20</sup>
<b>BRIDGING PREMISE</b>	If <b>PASSIVE PRESUPPOSITION</b> and <b>ETHICAL OBSERVATION</b> , then <b>THE MORAL NON-NECESSITY OF CONSENT</b>
<b>THE MORAL NON-NECESSITY OF CONSENT</b>	Sex need not involve each participant's consent in order to be morally benign. <sup>21</sup>

### §3.1 Against the Argument from **PASSIVE PRESUPPOSITION**

I think whether **PASSIVE PRESUPPOSITION** is true or false ends up being a very complicated issue. Specifically, complications arise when we consider whether or not situations in which a person is asked to do something, say, proofread a paper, we can meaningfully say they have consented to do the requested action (see Ichikawa 2020). Regardless, even if these situations do involve counterexamples to **PASSIVE PRESUPPOSITION**, proponents of **THE MORAL NON-NECESSITY OF CONSENT** can simply

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“Consent as a concept describes a disparate interaction between two parties: active A initiates, passive B agrees reluctantly in or yields to A’s initiative” – MacKinnon 2016, pg. 440

“Consent is inherently asymmetric... a consent framework implies that sex always involves one (active) person doing something to another (passive) person.” – Palmer 2017, pg. 5

<sup>20</sup> “In reality, sexual encounters often develop organically and mutually, without the parties taking on fixed active or passive roles ... the most positive sexual encounters [are] jointly instigated by mutually active partners, because both partners are in a state beyond consent, a state of active involvement and participation rather than reaction or submission.” – Palmer 2017 pg., 6.

“With good sex ... there is no agent–patient asymmetry.” – Gardner 2018 pg., 56.

<sup>21</sup> “Thus, while consent is clearly absent from the worst sexual encounters it will also be absent in the most positive sexual encounters jointly instigated by mutually active partners, because both partners are in a state beyond consent, a state of active involvement and participation rather than reaction or submission.” – Palmer 2017 pg., 6.

“Shute and I already developed the thought that consent is insufficient to vindicate sex, to guarantee its good quality or even its moral acceptability. Here I am advancing the more explosive proposition that, when the sexual going is good, consent is also unnecessary.” – Gardner 2018 pg. 60

“Consenting is not what women do when they want to be having sex” – MacKinnon 2017 pg. 450

make a slight modification to their argument<sup>22</sup>; and so, I save this topic for another paper. I am also skeptical that sex is ever a single joint action, and if sex is never a single joint action, then **ETHICAL OBSERVATION** is false. Yet, while I believe the denial of any one of the premises of this argument is plausible, I will focus on arguing that **BRIDGING PREMISE** is false.<sup>23</sup> Even granting **PASSIVE PRESUPPOSITION** and **ETHICAL OBSERVATION**, **THE MORAL NON-NECESSITY OF CONSENT** does not follow.

When giving an argument for **THE MORAL NON-NECESSITY OF CONSENT** in prose in §3, I wrote:

... in the best sexual encounters, sex is a joint action collectively done by all the participants. There is no participant who merely morally allows sex; instead, all participants are jointly doing this collective action. In these cases, sex will be jointly done by all participants, and so, if **PASSIVE PRESUPPOSITION**, then none of these participants consents to sex. Given that there is nothing morally problematic about these instances – indeed, this is how sex should be – there are morally benign scenarios where a person does not (in the exclusion sense) consent to sex. And so, sex need not involve each participant’s consent in order to be morally benign (i.e., **THE MORAL NON-NECESSITY OF CONSENT**).

Where I think this argument goes wrong, if we are granting **PASSIVE PRESUPPOSITION** and **ETHICAL OBSERVATION**, is the inference made between the last two sentences. If a morally benign instance of sex really was a single joint action done by all the participants and if a person’s consenting to an action presupposes that they are not the one, or one of the people,

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<sup>22</sup> One could swap **PASSIVE PRESUPPOSITION** for “**PASSIVE OR REQUESTED PRESUPPOSITION**- That x consents to  $\phi$  presupposes that x, neither individually nor as part of a group, does  $\phi$  OR someone other than x asks x to do  $\phi$ ”. Then they could modify **ETHICAL OBSERVATION** to add “and no one is asking the other to do any particular action”. After all it is often the case that in moral benign sex no one is asking their partner to do any particular action and instead partners are doing what they decide without being asked.

<sup>23</sup> **BRIDGING PREMISE** is intended as a subjunctive conditional since if it were a material conditional, its antecedent being false would make it true; also, there would be no point in debating the truth value of **BRIDGING PREMISE** instead of debating the truth value of **PASSIVE PRESUPPOSITION**, **ETHICAL OBSERVATION**, and **THE MORAL NON-NECESSITY OF CONSENT**.

doing that action, then it is true that there are morally benign scenarios where a person does not (in the exclusion sense) consent to sex. That there are morally benign scenarios where a person does not (in the exclusion sense) consent to sex may sound like the conclusion MacKinnon, Gardner, and Palmer wanted, but in discussing why *The Moral Non-Necessity Of Consent* does not follow from this, we will see why this won't work for their purposes.

Why **THE MORAL NON-NECESSITY OF CONSENT** doesn't follow from there being morally benign scenarios where a person does not (in the exclusion sense) consent to sex is because even if sex could be conceived of as a single joint action, there would nevertheless be many actions done by one person to another during sex. Even if sex is a single joint action (which I'm skeptical of), this would not entail that there are not shorter actions that constitute sex.<sup>24</sup> For example, A will kiss B's shoulder, B will touch A's body, and so on. And if A does not consent to B's touching A's body, then A will have been deeply wronged.

In fact, this gives us a better picture of how consent is ongoing and important at every juncture and why ongoing communication and attention to one's partner, or partners, is so important. While consent being inapplicable to actions one does with others would make it so that consent to sex – where sex is conceived of as a single action – would not be morally required, that does not mean that consent isn't morally required to be present during sex. For even in accepting these views about consent and sex, there would still be many actions done by one partner to another that require consent.

Sex as a whole being done jointly does not entail that each action that is a part of sex is done jointly. During sex, not all the small actions that constitute sex are done jointly; it is

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<sup>24</sup> Perhaps a useful analogy is: even if a deck of cards is one object that does not entail that the five of hearts isn't also an object. Likewise, even if riding a bicycle is a single action that does not entail that moving one's legs in such and such way isn't also an action that happens while one is riding a bicycle.

not that both A and B jointly do A's kissing B's shoulder. And consent must be involved at this level for sex to be morally benign. And so, **PASSIVE PRESUPPOSITION** and **ETHICAL OBSERVATION** do not refute the idea that the presence of consent during sex is morally, and ought to be legally, required.

#### §4 The Behest Presupposition

**BEHEST PRESUPPOSITION**      That  $x$  consents to  $\phi$  presupposes that someone else is trying to get  $x$  to  $\phi$ .<sup>25</sup>

Ichikawa (2020, p. 11) writes “Consent to  $\phi$ , I suggest, presupposes that someone else is trying to get one to  $\phi$ ” and “But your having ethical sex does not require that someone else is trying to get you to do something. Therefore, your having ethical sex does not require your consent.” (Ichikawa 2020, p. 10).

##### §4.1 The Argument Against BEHEST PRESUPPOSITION

The **BEHEST PRESUPPOSITION**, if taken exactly as stated by Ichikawa (2020), has a vast array of decisive counterexamples. There is an intuitive modification to **BEHEST PRESUPPOSITION** that overcomes the counterexamples, but, as I will argue, there is no clear argument from the modified version to **THE MORAL NON-NECESSITY OF CONSENT**. And so, I believe there is no barrier to using consent as a moral and legal requirement for permissible sex from this strain of thought.

The **BEHEST PRESUPPOSITION**, along with the fact that it is infelicitous to say statements that have a presupposition failure, entails that it is appropriate to talk about your consent or not consenting to  $\phi$  *only if someone else is trying to get you to  $\phi$* . But no one tries

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<sup>25</sup> “Consent to  $\phi$ , I suggest, presupposes that someone else is trying to get one to  $\phi$ ” – Ichikawa 2020 p. 11

to get *you* to do *their* action; such a thing doesn't even make sense. And so, the **BEHEST PRESUPPOSITION** implies the shocking, and false, idea that we only consent to a subset of our own actions, not any action done by others. For example, let  $\phi$  be Bob's kissing Allan, Bob is not trying to get Allan to  $\phi$  (i.e., Bob's kissing Allan), and so, according to the **BEHEST PRESUPPOSITION**, Bob's kissing Allan is not an action that we can appropriately talk about whether Allan consented or not to. This is exceedingly unintuitive as virtually every standard example when talking about consent to an action uses an action done by someone other than the consent giver (e.g., Allan consenting to Bob kissing Allan, Amy consenting to Beatrice entering Amy's house, etc.).

Ichikawa predicts this problem at least in the cases of medical procedures and getting tattoos (Ichikawa 2020, p. 17). Regarding medical procedures, Ichikawa thinks there is something incorrect or infelicitous about saying that John consented to his surgery, but there are other actions nearby that we can felicitously ask whether John consented to, which may lessen the unintuitiveness. For example, the **BEHEST PRESUPPOSITION** is compatible with saying that John consented to not holding the hospital legally or morally accountable (at least under such-and-such conditions), that John consented to pay the medical bills incurred, that John consented to not resist parts of the procedure, etc., since these are actions that medical staff are trying to get John to do. A proponent of the **BEHEST PRESUPPOSITION** may even go on to claim that John's consenting to pay his medical bills (or to some other action the hospital tries to get John to do) is actually what we mean when we say, "John consented to surgery".

This gives us an idea about how Ichikawa might try to address my earlier objection that:

- (1) If the **BEHEST PRESUPPOSITION** were true, then Bob's kissing Allan is not an action that Allan can consent or not consent to, and

- (2) Bob's kissing Allan is an action that Allan can consent or not consent to.
- (3) So, the **BEHEST PRESUPPOSITION** is false.

On this attempt to overcome my objection, while Bob's kissing Allan is still not an action that Allan can consent or not consent to (so (2) is false), we can explain away some of the unintuitiveness of this by pointing out that Bob will be trying to have Allan allow Bob's kissing Allan. And so, we can talk about whether or not Allan consented to allow this kiss or did not consent to allow this kiss.

There are three problems with this response. First, I think that it is just false that what Allan is consenting to in these cases is "allowing Bob to kiss Allan" as opposed to the more straightforward idea that Allan is consenting to Bob kissing Allan. But this is unlikely to sway anyone who would accept the **BEHEST PRESUPPOSITION**, and so I give two additional problems. Second, at some point, the unintuitive implications of **BEHEST PRESUPPOSITION** ought to encourage us to modus tollens against **BEHEST PRESUPPOSITION** instead of modus ponens to these unintuitive implications (particularly, since Ichikawa doesn't give much of an argument for **BEHEST PRESUPPOSITION**). What I mean is that even if this response to my objection, lessens some sting of the unintuitiveness of actions such as someone else kissing you, or entering your home, or touching you, or performing surgery on you, etc. not being actions you consent or don't consent to, at what point does this view die from a thousand paper cuts (given that each one of those actions were actions we would have pretheoretically thought could be consented to).

The third problem with this view is that it will incorrectly diagnose some cases as consent-inapplicable rather than consent-violating. Ichikawa believes that in ideal instances of sex, no one is trying to get you to do any particular action, but what isn't considered in the article is that there can also be abhorrent, consent-violating cases in which the perpetrator isn't

trying to get the victim to do or allow anything. For example, imagine Bob doesn't care if Allan allows or tries to stop Bob's kissing Allan, in such a case, it isn't true that someone other than Allan is trying to have Allan do any action. And so, if **BEHEST PRESUPPOSITION**, then this is a situation in which it is infelicitous to say that Allan did not consent to Bob's kissing Allan.<sup>26</sup> But Bob kissing Allan in this situation would be a serious consent violation; we would not think of it as just a situation in which Allan neither consents nor doesn't consent. To put this in terms similar to those used by MacKinnon and, at times, Ichikawa, the requirement of consent not only protects A when B is trying to bend A's will, it also protects A when B doesn't care what A wills and intends to do the action regardless.

Given some passages from Ichikawa 2020, what he might have in mind is not actually **BEHEST PRESUPPOSITION** but:

**BEHEST PRESUPPOSITION\*** That  $x$  consents to  $\phi$  presupposes that someone else is trying to get  $\phi$  to occur.<sup>27</sup>

By remaining neutral on who is doing the action and only making the claim that it is someone else who is trying to have this action done, **BEHEST PRESUPPOSITION\*** overcomes all of the objections raised against **BEHEST PRESUPPOSITION**. For example, even in the case where Bob is not trying to get Allan to allow Bob's kissing Allan, Bob is trying to kiss Allan;

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<sup>26</sup> As Ichikawa 2020 points out, presuppositions "project" over negation (see Beaver et al. 2024).

<sup>27</sup> This presupposition being met certainly would not be sufficient for consent talk to be appropriate. For example, Biden intentionally scratching his own ear right now would meet the presupposition that someone other than me is trying to have Biden's scratching his own ear happen, but it is still infelicitous for me to say that I consent to Biden scratching his own ear. But that isn't a problem; what matters is whether this condition being met is *necessary* for us to felicitously talk about consent. For what it's worth, adding "and  $x$  has moral authority over  $\phi$ " seems promising if we are trying to get the necessary and sufficient conditions for when it is felicitous to talk about consent.

and so, **BEHEST PRESUPPOSITION\*** is compatible with Bob's kissing Allan being an action that Allan can consent or not consent to.

I am inclined to think **BEHEST PRESUPPOSITION\*** is true but the issue for Ichikawa, is that there is no clear argument from **BEHEST PRESUPPOSITION\*** to **THE MORAL NON-NECESSITY OF CONSENT**. The same feature that allows **BEHEST PRESUPPOSITION\*** to overcome the objections to **BEHEST PRESUPPOSITION** – i.e., its being compatible with one consenting or not consenting to the actions someone else tries<sup>28</sup> to do – undermines its ability to support **THE MORAL NON-NECESSITY OF CONSENT**. This is because, while Ichikawa is right that there can be permissible sex where no one is trying to get their partner to do a particular action, sex does not happen by accident. At least some of the actions each partner does during sex will be ones they tried to do, and so, it is compatible with **BEHEST PRESUPPOSITION\*** to ask whether the partner consented to that action. For example, when A intentionally kisses B's shoulder, this is an action A tries to do, and **BEHEST PRESUPPOSITION\***, unlike **BEHEST PRESUPPOSITION**, does not predict presupposition failure when talking about whether B consented to A kissing B's shoulder.

## §5 Concluding Remarks

Arguments for **THE MORAL NON-NECESSITY OF CONSENT** often begin by positing a presupposition built into the very notion of consent—be it the **UNWANTED PRESUPPOSITION** that to consent to an action requires some reluctance towards that action, the **PASSIVE PRESUPPOSITION** that a consenter cannot be among the agents performing the

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<sup>28</sup> There is an implicature (but not a presupposition) when we say that A tried to do  $\phi$ , that  $\phi$  was not done. But we can say that A tried and succeeded to  $\phi$ , which indicates that this is implicature. Regardless, 'try' in the above is not meant to rule out successfully completing the action – and this is something Ichikawa would agree with as well. I take it that any action someone intentionally does is an action they tried to do.



action, or the **BEHEST PRESUPPOSITION** that someone else must be trying to get the consent to do a particular action. However, these purported features of consent either do not withstand closer scrutiny or they do not show that consent is unnecessary for sex to be morally benign.

First, the charge that consent requires reluctance conflates what is odd to say with what would be false to say. As argued, we do not typically announce our consent when our enthusiasm is already obvious—precisely because stronger statements (e.g., “I was overjoyed”) would be more appropriate. Yet that does not entail the falsehood of our also having consented. It is linguistically fine to say, “I consented to my friends coming over, in fact, I was thrilled about them coming over,” which indicates that enthusiastic desire and granting moral permission are perfectly compatible. This is very similar to how, while saying “Alice allowed Beatrice to come over” might pragmatically imply that Alice was reluctant for Beatrice to come over, the statement would still be true in cases when Alice enthusiastically wanted Beatrice to come over.

Second, even if one grants **PASSIVE PRESUPPOSITION** and, as such, endorses that a person cannot consent to actions they themselves do, this does not eliminate the moral need for consent regarding the numerous constituent actions that make up a sexual encounter. Even if we grant that ideal sex may be described as a single joint action, there are still many sub-actions (one partner kissing another’s shoulder, for instance) that one individual does to another. Even granting **PASSIVE PRESUPPOSITION**, these smaller acts still require each participant’s consent for sex to remain morally benign. In fact, looking at consent in relation to each action that happens during sex gives us a better picture of how consent is an ongoing process and why communication with one’s partner(s) during sex is crucial.

Finally, proponents of a view like **BEHEST PRESUPPOSITION** face a dilemma. Either they take the implausible view that consent is never applicable to others' actions, or they accept a modified version of **BEHEST PRESUPPOSITION** that allows us to speak of consenting to or not consenting to others' actions. The implausibility of the first horn speaks for itself in terms of why one shouldn't take this path, and, in §4.1, I argue that attempts to soften the unintuitiveness of this claim fail. On the second horn of this dilemma, there is no clear argument for **THE MORAL NON-NECESSITY OF CONSENT** because once we allow that a person can consent to the actions another is trying to do, there will always be actions done intentionally by each participant during permissible sex. So, this modified version of **BEHEST PRESUPPOSITION** is compatible with consent being essential for morally benign sex.

Insofar as these challenges to consent fail to undermine its importance in morally and legally delimiting permissible sexual activity, the notion of consent still stands as a vital safeguard for sexual autonomy and bodily integrity. Good sex indeed requires more than just consent—mutual excitement, empathy, communication, attentiveness, comfort, and so on. But these additional features in good sex do not negate consent's baseline moral necessity. Consent continues to serve as a valuable boundary marker that can guide legal frameworks and ethical intuition alike. The commonsense view that consent is necessary (even if not wholly sufficient) for morally and legally benign sex remains open. Given the impact of consent on criminal law, property law, and broader social interactions, it remains paramount that we retain a robust concept of consent rather than forego it on the basis of dubious linguistic assumptions. Ultimately, this discussion reaffirms the significance of consent as a core feature of our moral and legal landscape.

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## **Chapter 3**

### The Domain of Consent

What is the domain of things we can meaningfully consent or not consent to? Surely, I may consent or not consent to others entering my house. My consent or lack of consent to another entering my house affects the morality of this action; my “consent turns a trespass into a dinner party” (Hurd 1996, p. 123). But, on the other end, I can’t meaningfully consent or not consent to a stranger scratching their own arm.<sup>1</sup> No matter how I feel about them doing this action, it is not in accordance with or violation of my consent; my consent and nonconsent are inapplicable to it. To give another example, the fact that some apples are red is far outside the domain of things my consent is applicable to. Even saying, “I don’t consent to some apples being red” is infelicitous<sup>2</sup>, this fact is neither in accordance with nor in violation of my consent, my consent and my nonconsent are inapplicable to it.

Yet, there are some things for which it is unclear whether they fall within the domain of things one may consent to or not consent to. Typically, the uncertainty in this area stems from an uncertainty in a person’s moral authority. To illustrate, imagine that I have a 5-year-old son who wants to go with his friend on their family vacation; in this case, my agreement or disagreement has moral force – this action is within the domain of my consent – and if the other family takes my 5-year-old child on the vacation, they violate my consent and wrong me. But if my son were 36, and capable of making these sorts of decisions, my agreement or disagreement has no moral force – this action is outside the domain of my consent. Yet there

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<sup>1</sup> I use “consent” as some use “valid consent”. In other words, I don’t use “consent” to refer to just a signification of agreement but instead to refer to a morally transformative concept. On this way of speaking if someone is threatened or manipulated into agreeing to an action, they don’t consent to that action. Additionally, if an action is outside of one’s moral authority, then it is not an action that can be in accordance with or violation of one’s consent (see Liberto 2022 pgs. 5-8, 35).

<sup>2</sup> There may be a way to understand “I don’t consent to water being composed of hydrogen and oxygen” on which it is true and felicitous. But I will save discussion on this until I introduce some terms to help avoid ambiguity.

are some ages in between – e.g., when my son is 18 – where it is unclear whether the action falls within the scope of my consent.

The focus of this paper is on a special case in this gray area, special because its controversial status does not stem from debate about what we have moral authority over, but rather from the concept of consent itself. The case in question is: are at least some of one's actions done in virtue of the will of another, within one's domain of consent.<sup>3</sup> For example, if a friend asks if you could watch their cat for the weekend, is this the sort of thing you can consent or not consent to? Put another way, is there a uniform moral concept of consent that applies both when we voluntarily agree to a friend coming over to our house and when we voluntarily agree to watch a friend's cat?

Many philosophers have largely assumed one position or another on this topic without significant argumentation but, it turns out, that there are compelling reasons both for and against the claim that at least some of one's actions done in virtue of the will of another are within the domain of one's consent. There is an underdiscussed puzzle here that is complex and interesting and so, my primary goal in this paper is to bring attention to this puzzle and show its significance. Secondly, I will explore some potential solutions and indicate which one I favor, though I believe this topic is far from settled. Briefly, my preferred solution provides an explanation for how actions one does in virtue of the will of another are within one's domain of consent, even if consent is understood as a form of permission-granting. I

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<sup>3</sup> By “in virtue of the will of another” I mean that the action A does is because B is trying to get A to do that action. The “trying” here can be rather weak, for example, I take it that a friend who asks if you would be willing to watch their cat is ‘trying’ to get you to watch their cat, even if they won't be upset if you say you can't. Typically, A's trying to get B to do  $\phi$  will involve A asking B to do  $\phi$ , but A could also physically force or psychologically manipulate A to do  $\phi$ . For example, when a bank robber points their gun at a bank teller and demands that the teller to put money into a bag, clearly the robber, “A”, is trying to get the teller, “B”, to put money into the bag, “ $\phi$ ”.

will show how these two ideas may seem to be in tension with each other, but the solution I prefer resolves this tension.

Before diving in further, it is helpful to introduce some terminology. I will say that a thing<sup>4</sup> is “consent-applicable” for a particular person to indicate that this thing falls within the domain of things that person can be felicitously described as consenting or not consenting to. Fittingly, I will say that a thing is “consent-inapplicable” for a particular person to indicate that the thing is not consent-applicable for them. For example, a stranger entering my house is consent-applicable for me, whereas oranges are consent-inapplicable for me (or anyone); oranges are not the sort of thing I can morally permit or forbid, no matter how I feel about them. Further, I will say that a thing is “consent-violating” for a particular person to indicate that the thing is consent-applicable for that person but that the person does not consent to it. Lastly, for brevity and clarity, instead of framing the debate as whether some actions performed in virtue of another's will are within one's domain of consent, I will frame the debate as whether some requested actions are consent-applicable.

Notably, not all actions done in virtue of the will of another would typically be called “requested”. For example, suppose I offer to watch my friend's cat and they accept my offer. In that case, we might not typically call my watching their cat a “requested action” – since I offered to do this – yet, given that I leave whether my action occurs up to them, if they accept my offer, I do this action in virtue of their will. And, as another example, if someone manipulates me to do some action, it might be that they never explicitly asked me to do the action, yet still I do the action in virtue of their will. When these details matter, I will speak

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<sup>4</sup> I use “thing” instead of “action” because I take it that certain states of affairs and properties, such as *being married*, are within the domain of a person's consent. However, this paper will focus on actions.



more strictly, but otherwise saying “requested actions” instead of “actions done in virtue of the will of another” will make matters more digestible.

Introducing these terms allows us to more easily speak about and understand the topics in question and it helps us avoid a potential ambiguity in negated statements about consent. For illustration, consider the sentence, “Perry did not consent to Jane entering 766 Cypress Walk”. Following Horn and Wansing (2022), there are two possible ways to understand this sentence:

1. **Presupposition-preserving:**

On, plausibly, the most natural interpretation of the sentence, the sentence entails that Jane’s action—entering 766 Cypress Walk—is **consent-violating for Perry**. On this interpretation, the sentence is true only if Perry had a right to exclude Jane from entering and Jane did, or would have, violated that right by entering without Perry's permission.

2. **Presupposition-canceling:**

Alternatively, the sentence could mean that the proposition expressed by “Perry consents to Jane entering 766 Cypress Walk” is not true. On this interpretation, the sentence is, as before, true when Jane’s action is consent-violating for Perry, but, unlike before, it is also true when Jane’s action is consent-inapplicable for Perry. For example, if Perry doesn't own the property and has no authority over who enters, then the sentence, on this interpretation, would be true. It is not the case that Perry consented because, for him to consent (in the morally significant sense used in this paper), he would have had to have some authority over the action.

By distinguishing between **consent-inapplicable** and **consent-violating**, we have the tools to avoid this ambiguity and remain neutral on some controversial issues regarding presupposition failure and negation.

## §1 A Puzzle about Consent

### §1.1 Initial Support for Some Requested Actions being Consent-Applicable

The initial motivation for believing that some requested actions are consent-applicable is that this fits an ordinary way of talking. Unless there are reasons to think otherwise, we ought to take this way of speaking at face value. Unsurprisingly, the puzzle takes off because

there are indeed reasons against thinking any requested action is consent-applicable. But first, it is worth supporting the idea that natural language is as claimed above.

While one rightfully bristles when students use dictionaries to capture the fundamental nature of a philosophic concept, dictionaries are at least a good guide to how people use terms. And so, the claim that some requested actions are consent-applicable fits an ordinary way of talking is supported by the fact that many definitions of “consent” allow for actions one “agrees to do”. For example, the current Cambridge English Dictionary gives this definition of “consent”, “C2: to agree to do something, or to allow someone to do something”. Similarly, the current Oxford English Dictionary states, “I.1.b. transitive. With infinitive or clause as object: to agree to do the thing specified; to agree or give permission that the thing specified be done”.<sup>5</sup> And, to use an example given by Chadha (2020 pg. 625) and Ichikawa (2020 fn. 25), if Sam asks Tracy for a massage and Tracy agrees, it is natural to say, “Tracy consented to giving Sam a massage”. Even Simmons (1976), who writes that “consent in the strict sense (as Plamenatz notes) is always given to the actions of other persons” (pg. 275), admits “there is a perfectly natural and acceptable sense of the word ‘consent’” (pg. 275) on which it is appropriate to say that “Mr. Smiley has graciously consented to speak at the award dinner” (pg. 275).

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<sup>5</sup> Other examples of definitions that support the consent-applicability of requested actions are:

“If you consent to something, you agree to do it or to allow it to be done.” – Collins Dictionary

“Compliance in or approval of what is done or proposed by another” – Merriam-Webster

And, on the legal side:

“In prosecutions under Section 261, 286, 287, or 289, or former Section 262 or 288a, in which consent is at issue, “consent” means positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.” – CA Penal Code § 261.6 (2023).

“1) n. a voluntary agreement to another's proposition. 2) v. to voluntarily agree to an act or proposal of another, which may range from contracts to sexual relations.” – Global Legal Lexicon

Beyond just looking at the use of “consent” in natural language, various philosophers also endorse the idea that some requested actions are consent-applicable. For example, in explaining what consent is, David Archard writes:

It may be that I consent to do the thing in question – I agree to organise the meeting, and I should then take steps to realise that end. It may be that I consent to someone's else doing of something, in which case I am obliged not to obstruct their doing of it or to assist their doing of it in a manner indicated by the giving of the consent. – (Archard 1998 pg. 3)

Additionally, Kleinig (2010 pgs. 3-4) and Healey (2019 pgs. 499-500) can, debatably, also be taken as endorsing the idea that some actions one does at the request of another are consent-applicable. Further, Ichikawa (2020) not only agrees that some requested actions are consent-applicable, he goes as far as to suggest that *only* requested actions are consent-applicable; implying that any action done by another (e.g., your friend entering your house) is consent-inapplicable.

## **§1.2 No requested action is consent-applicable**

Why then do philosophers as disparate and many as Plamenatz (1968 pg. 13 – 19), Simmons (1976 pg. 274 – 276), Alexander (1996), Hurd (1996), Shiffrin (2008 pg. 501), Dougherty (2015 pg. 232 – 233), MacKinnon (2016), Gardner (2018), and Liberto (2022), among others, write about consent only as a power over the actions of another person? For if consent is only applicable to the actions of another person, then one’s own action, even if it was requested by another, would be consent-inapplicable. The reason comes from how these philosophers think about consent.

When we try to understand what consent is, we are often led to theories according to which it would never make sense to say that a person consents to an action, regardless of

whether another person requested it. For example, we start by thinking about how it is usually wrong for another person to touch us, enter our property, or use our possessions, but that we have the ability to permit others to do so. This is a deeply interesting and significant ability agents have, which gives them the power to morally permit another's action. And it is natural to think that when we say that I consent to Jane using my laptop, it is this concept of moral permission-granting that we are referring to.

To be clear and careful, this is not to say that I make her use of my laptop all things considered morally permissible through my consent, but instead that I remove one moral prohibition against the action. For example, even if I consent to her using my laptop to develop and send computer viruses (perhaps we are in this scheme together) her use of my laptop would still be impermissible – but my consenting to her using my laptop in this way does make it so that her action does not violate my property rights.

However, when it comes to actions that we ourselves are asked to perform, the permission-granting picture does not seem to fit. To use an example from Simmons (1976), suppose Mr. Smiley is invited to speak at an award dinner. While everyday language might allow us to say, “Smiley consented to speak at the dinner,” interpreting this as Smiley morally permitting his action of speaking at the dinner is, possibly, conceptually paradoxical and undoubtedly inaccurate. When we say, “Smiley consented to speak at the dinner”, we are not saying that Mr. Smiley permitted himself to speak at the dinner (hence the inaccuracy) and it is unclear if it is even possible for someone to morally permit any of their own actions (hence the possibly conceptually paradoxical).

First, it is worth examining the conceptual tension in the idea of moral self-permission. For A to morally permit B's action, there must be a moral obligation against B's

action that A can release B from. But in the case where  $A = B$ , this would mean that there is a moral obligation against B's action and that B can release themselves from this obligation. But if B can release themselves from this moral obligation that they are "bound" by not to do the action and thus make the action morally permissible, it seems B was never really obligated not to do the action. And so, if  $A = B$ , then A cannot morally permit any action of B, because doing so would entail a contradiction, namely that B is obligated not to do the action (since to "morally permit" an action the action must first be impermissible) and that B is not obligated not to do the action (since it is morally "up to" B whether or not they can do the action). And so, if consent is a form of moral permission-granting, then it would be impossible to consent to one's own actions, regardless of whether or not those actions were requested by someone else.

In sum, while it makes sense for us to have the ability to morally permit other people's actions, if we assume that someone can morally permit an action of their own, we seem to wind up with a contradiction. So, by reductio, no one can morally permit an action of their own. If consent is a form of moral permission-granting and our own actions are outside the scope of things we may choose to permit or not permit, then our own actions are consent-inapplicable. Given that an action A does at another's request is still an action A does (and, so, A's action), actions A does at another's request are consent-inapplicable.

In truth, I am more sympathetic than most to the possibility of self-permission, particularly when considering people struggling with addiction or certain mental illnesses, and I believe this topic deserves further research.<sup>6</sup> But regardless, at first glance, there seems

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<sup>6</sup> Take someone struggling with an alcohol addiction, if we accept a line of thinking whereby you can morally wrong yourself by doing certain actions, drinking alcohol might be impermissible for this individual because it wrongs themselves. But I think that a recovering addict could have the ability to morally permit themselves to have a drink. One night, they might reason carefully and decide to allow themselves one drink on this special

to be no permission-granting phenomenon involved when we say, “Smiley graciously consented to speak at the dinner”.<sup>7</sup> After all, we are certainly not saying that speaking at the dinner would have been impermissible for Smiley, but he permitted this action. Mr. Smiley permitting himself to give a speech at the dinner would be awfully presumptuous of him! And so, if consent must involve permission-granting, there does not seem to be any action that Mr. Smiley consents to, since there is no action that he is permitting.

### **§1.3 The Puzzle So Far**

In the preceding passages, I have hinted at a tension in some of the ways we think about consent; the following is an attempt to represent this tension in the form of an antinomy:

1. There is a unified phenomenon called “consent” that is involved in some situations in which one agrees to another doing an action and in some situations in which one agrees to do an action for another.
2. The phenomenon called “consent” that is involved in some situations in which one agrees to another doing an action is a form of permission-granting.
3. The phenomenon called “consent” that is involved in some situations in which one agrees to do an action for another is not a form of permission-granting.
4. If (2) and (3), not (1).

Given that 1-4 are inconsistent, at least one must be false. But what makes things interesting is that it is not easy to plausibly justify denying any one of the claims in this antinomy.

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condition, particularly since they know that “quitting cold turkey” is not the only, or necessarily best, method to overcoming addiction. Contrast this with the person on another night, having a drink due to a “weakness of will” and so even though they think they ought not drink alcohol in this case, they do anyway. If in the second case but not the first the addict wrongs themselves, then it may be that the addict morally permitted their own action in the first but not the second case. These contrasting cases indicate that self-permission might sometimes play a genuine moral transformative role, but this is a complicated and interesting subject on which I wish to remain neutral. I believe that a potential issue with the original argument against the possibility of self-permission I gave, is that it assumed that if someone can grant themselves permission to do an action, in doing that action they will always have granted themselves that permission. But in my experience, this assumption is not always true, especially when someone is struggling with addiction.

<sup>7</sup> As suggested by my “at first glance” and “seems”, I will consider the possibility that there really is a subtle form of permission-granting going on in this case.

Denying claims (2) or (4) will not be explored in this paper. Claim (4) states that if the relevant phenomenon in some situations involving the actions of other people is a form of permission-granting and the relevant phenomenon in situations involving requested actions is not a form of permission-granting, then these phenomena are not identical. (4) is just an instance of Leibniz's Law of the Indiscernibility of Identicals and so is beyond reproach for purposes of this paper.

Denying Claim (2) – i.e., that the phenomenon called “consent” involved in some situations in which one agrees to another doing an action is a form of permission-granting – is more plausible but will not be considered here. This is in part because developing a complete account of consent on which it is not a form of permission-granting would take our focus too far afield of the puzzle I am discussing. And in part because the sense in which I mean that consent is a form of permission-granting is so modest that I think few would disagree. All I mean by claim (2) is that in these situations consent gives a sort of moral permission for an action that didn't exist pre-consent. This doesn't mean that the consent makes the action all things considered morally permissible, and this permission-granting is compatible with enthusiastic desire (see Chapter 2).<sup>8</sup>

Instead, I will focus on denying claims (1) and (3). I believe that denying claim (1) will be a popular response, and this response even has some basis in the existing literature on this topic. Nevertheless, I think claim (1) is true, and that the discussion of claim (1) in §2

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<sup>8</sup> I believe that at least some of the theorists who claim that consent isn't a form of permission-granting do so because they believe that consent is more active or enthusiastic. But I don't think this is a good reason to deny that consent involves permission-granting, rather than deny that consent *only* involves permission-granting. After all, even when I deeply want my friends to come over for my dinner party, I do permit them into my house. Even if saying that I permit my friends into my house is a bit odd in this case, given that it is an understatement, it is nevertheless true.

will help us see how perplexing the antinomy really is. My preferred resolution for this antinomy is the denial of claim (3), which I will discuss in §3.

## **§2 Denying Claim (1) and Disambiguating ‘Consent’**

One way to resolve the antinomy is by denying claim (1). According to this way of resolving the antinomy, there is no unified moral phenomenon that applies to both consenting to others’ actions and consenting to perform requested actions oneself. Likely, such a theorist would say that there are two distinct senses of “consent” relevant to this antinomy. In one sense, “consent” does refer to a moral permission-granting. In this sense, the actions of others that one has moral authority over are consent-applicable. However, using this sense of “consent”, one’s own actions, even if done in virtue of the will of another, are consent-inapplicable. But, continues the hypothetical advocate for this resolution, there is also a different sense of “consent” on which actions one does in virtue of the will of another are consent-applicable, whereas actions done by others are consent-inapplicable. According to this proposed resolution to our antinomy, there is no uniform concept of consent instantiated both in cases when one performs a requested action and in cases when another performs an action one has moral authority over. For ease of reference, let us call this proposed resolution to the antinomy “the disambiguation solution”.

Ultimately, I believe that the disambiguation solution is incorrect and that claim (1) is true. In §2.1, I will give some initial reasons for rejecting the disambiguation solution to the puzzle. In §2.2, I will consider a potential defense of the disambiguation solution, in light of §2.1, and I will reply to that potential defense. In §2.3, I will give an additional reason for rejecting the disambiguation solution.



## §2.1 Same concept as the best explanation for similarities

When we look deeply enough at the two cases – consenting to the actions of another and consenting to perform a requested action – the similarities are abundant. In each instance, there is an action that ought, in a certain way, be up to the potential consentor, and by consenting to the action, the consentor agrees that this action may occur if the consent-receiver wishes. When Jane asks to enter my house, and when John asks for a massage, they are each proposing a course of action that falls within my moral authority<sup>9</sup> – it is morally up to me to decide whether the action occurs or not. And if either action were to occur without my approval, then that action wrongs me. This is true both for Jane entering my house and for me massaging John; the latter is just easily overlooked because it is less common for my own actions to be not up to me to decide freely. However, in both cases, the action could occur against the will of the person with moral authority over the action if the requester coerces or manipulates them.

For example, suppose John is my boss and hints that refusing to give him a massage will cost me my job, despite giving him a massage being far outside the scope of my responsibilities. In such a case, I may give John a massage, but that action was not left up to me in the way I deserved. I am morally entitled to freely choose whether or not I give someone a massage, but by stacking the consequences so negatively against my refraining from massaging John, he has contradicted the authority over this action that I am entitled to.

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<sup>9</sup> I take it that most actions a person does fall within that person's moral authority. All that seems to be required is that it be permissible for them to do the action and permissible for them not to do the action. In the case where John asks me for a massage, giving him a massage isn't originally within my moral authority, but it becomes so when he consents to the massage (which he does when asking for the massage). So, at the time of deciding whether or not to give him a massage, this action is in my moral authority. Additionally, it could (and I think is) the case that multiple people have moral authority over an action, such as my giving John a massage (in which case the action needs the consent of each person).

Even though I may go through the motions of the action, its occurrence wasn't up to me in the way I am entitled.

We can compare this to a case where Jane threatens to fire me unless she can come over to my house for a cup of tea – perhaps, she learned that I had a co-worker over at my house for tea, and she implies that if she isn't likewise invited, I might as well find employment elsewhere. In this case, while I may verbally say that Jane can come over to my house, her doing so wasn't really left up to me in the way it ought to have been. I have moral authority over her entering my home, which means I should be able to freely decide whether she may enter. But by stacking the consequences so negatively against her not entering my house, her doing so wasn't left up to me in the way it ought to have been.

Hopefully, by comparing these two cases, we can see the similarities in my consent (or lack of consent) when massaging John – a requested action – and my consent (or lack of consent) to John entering my house – an action he does. In both cases, I ought to have been able to freely decide whether or not these actions may occur.

Paradigmatically, cases in which one consents to do an action and cases in which one consents to another doing an action involve the potential consent-recipient asking the potential consent-giver whether an action may occur.<sup>10</sup> In both cases, the potential consent-giver is morally entitled to the potential action occurring only if the potential consent-giver freely and capably decides that the action may occur. These similarities provide evidence that there is a uniform concept of consent involved in both cases, whether regarding the actions of others or actions one does at another's request.

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<sup>10</sup> By “paradigmatically,” I mean to imply that the core cases are like this, but that there are cases that might not be as described. For example, when I invite a friend over to my house, I have consented to their coming over, but this wouldn't involve my friend asking me first (Kukla 2018 and Ichikawa 2020 would disagree with me on this but see Chapter 2 for an argumentation on why this is so).

The prospect of treating “consent to an action” and “consent to do an action” as involving distinct concepts of consent is often justified by the fact that only the former seems to fit neatly with permission-granting accounts of consent. But the deep structural parallels — the standard proposal-acceptance mechanics and the same vulnerabilities to coercion, deceit, manipulation, and lack of capacity — give a strong reason to favor a unified account. Positing two separate concepts would, at the least, require explaining away these pervasive commonalities without clear gain. Given these reasons, along with considerations of parsimony<sup>11</sup> and ordinary language<sup>12</sup> usage, we should understand both cases as involving a single moral phenomenon. At the very least, at this point, the proponent of the disambiguation solution ought to tell us more about “consenting to do an action for another” and how it is different than “consent to the action of another”.

Since some texts in the literature do give evidence for one way in which a proponent of the disambiguation solution might explain “consent to do an action for another” as distinct from “consent to the action of another,” I will consider this in the following section.

## **§2.2 An alternative explanation for the similarities and a reply**

A natural way to defend the disambiguation solution in light of the similarities mentioned in §2.1 is to say that (a) “consenting to do an action” really means promising to

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<sup>11</sup> Presumably, if it is possible to explain both situations equally well without positing two fundamentally different moral concepts of consent, this is preferable. The question, of course, is “is there a way of understanding consent such that it is a uniform moral concept which applies to both types of cases?”. This is something I will turn to when looking at other possible solutions to the puzzle.

<sup>12</sup> In §1.1, the point was not that some definitions of “consent” apply to agreeing to an action done by another and some other definitions of “consent” apply to agreeing to do an action, as would be expected of an ambiguous term, but instead that there are single definitions of “consent” which apply to both cases. I take this to support the idea that linguistically we treat “consent” in these different situations as referring to the same concept. For example, the Cambridge English Dictionary (and presumably any English dictionary), does not define “bat” as a “a piece of baseball equipment meant for hitting a baseball or a small flying nocturnal animal capable of echolocation” but instead gives two separate definitions. Again, I don’t take this to prove that there is a uniform moral concept at play in both situations, but instead use it to justify claims about how natural language is.

do that action, and that (b) consenting and promising have many similarities but are different moral concepts. This move explains the moral phenomena involved in consenting to do an action using existing moral concepts (and so, isn't less parsimonious), provides an alternative explanation for the similarities mentioned in §2.1, and already has a basis in the literature (and so, isn't ad hoc). For example, Dougherty writes:

The English word 'consent' is used broadly to refer to different moral phenomena. Only one of these is this book's topic. This is the consent that releases other people from duties. It is sometimes called 'permissive consent' (Manson 2016). Permissive consent contrasts with other agreements, like promises or transfers of property. These agreements can create duties and bring about other changes in our moral relationships with each other. – *Dougherty* 2021 pp. 11-12

And Simmons writes:

In Locke's discussion in his Second Treatise, we can distinguish (although Locke himself does not) three sorts of acts which for him count as acts of consent. First, there are promises; second, there are written contracts; and third, there are acts of consent which are essentially authorizations of the actions of others. My own inclination is to say that of the three, only the third sort of act is a genuine act of consent. But there are certainly good reasons for grouping the three together; all are deliberate, voluntary acts whose underlying purpose is to change the structure of rights of the parties involved and to generate obligations on the "consenters." In addition, there is a perfectly natural and acceptable sense of the word "consent" which is virtually synonymous with "promise"; thus, when we say that Mr. Smiley has graciously consented to speak at the award dinner, "consented" means here precisely "promised" or "agreed." – *Simmons* 1976 p. 275

The interlocutor replying to my objection to the disambiguation solution continues: Both consenting (in the promising sense) and consenting (in the permission-granting sense) are normative powers which transform the moral status of actions and arise from free and informed agreement with another person. And so, the similarities mentioned in §2.1 are to be expected, promising and consenting are indeed very similar – Dougherty (2015 fn. 11), for example, provides a list of works that note this similarity. But the two are fundamentally

different moral phenomena. Promising adds moral obligations to oneself, whereas consenting removes obligations from another. While people may sometimes use “consent” to refer to both moral phenomena, they are distinct phenomena.

However, I disagree that all instances where we aptly say that “A has consented to do  $\phi$ ”, are cases where A has promised to do  $\phi$ . This can be a bit tricky to show because often when we say, “A has consented to do  $\phi$ ”, A has *also* promised to do  $\phi$ . However, this is not always the case. One can consent to do a requested action, without promising to do that action – and if this is correct, then consenting to do a requested action can’t just be promising to do that action.

For example, let’s imagine that Jane asks John for a massage and John says, “Sure, give me five minutes” then, after a few minutes he says “Actually, I’m not really up for giving a massage; I am quite tired”. I don’t take it that John has broken a promise in this case. He agreed to give Jane a massage, and in this case in doing so, he consented to giving her a massage, but he did not promise to do it. And, while his changing his mind and not giving the massage might leave Jane feeling disappointed, it wouldn’t constitute breaking a promise – Jane wouldn’t be morally wronged by John. The idea that Jane isn’t wronged by John fits well with the idea that John only consented to give Jane a massage – since consent is revocable by the consent giver – and not so well with the idea that John promised to give her a massage – since promises are not revocable by the promise giver. One can decide to no longer consent to do the requested action but one cannot simply decide not to be bound by a promise.<sup>13</sup> It is true that John *could* promise to give Jane a massage – for example, if Jane instead asked him

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<sup>13</sup> Of course, the promiser could be released from the promise, or the promise could be voided by extenuating circumstances, or the promiser could break the promise – but in all cases they don’t simply will the promise away.

if he promises to give her a massage later, perhaps stressing a need to know if she can rely on this action happening later or not – but this doesn’t contradict my point which is that it is possible that he could consent to giving her a massage without promising to do so. Likewise, I may rescind my offer to watch my friend’s cat but if this has taken on the status of a promise – which it often will – then my backing out of watching the cat becomes more morally problematic.

Many rounds of objection and reply could be hashed out here but since there is an additional problem for the disambiguation solution, which is not addressed by this defense, it is better to move to discussing said problem.

### **§2.3 The same wrong regarding consent-violations**

Another reason for rejecting the disambiguation solution comes from the similarity between the wrongness of an action that occurs without the relevant person’s consent to do the action and the wrongness of an action that occurs without the relevant person’s consent to the action done to them. The idea here is particularly powerful against a disambiguation solution along the lines of §2.2 – where consenting to do an action is understood as promising to do that action – but poses a problem for the disambiguation solution in general.

In §2.2, I suggested a way of disambiguating “consenting to do an action” and “consenting to an action” that was particularly good at explaining the similarities mentioned in §2.1. On this account “consenting to do an action” was understood as “promising to do that action”. For uniformity, it seems like this account would also understand “A did not consent to do  $\phi$ ” as “A did not promise to do  $\phi$ ”. But these two statements give completely different descriptions of a situation.

Imagine A does a sexual action because B threatens to harm A if A does not do this action. We can explain the wrong A suffered by saying that this action was consent-violating for A, but what is reprehensible about the situation is in no way captured by the fact that A did not promise to do the sexual action. It would be absurd to say that the morally problematic aspect in this situation (i.e., where A did a sexual action to B because of B's threats) is because A did not promise. Yet it is correct that the morally problematic aspect in this situation is because A did not consent. It is not inherently morally problematic to ask or desire that A do an action without A promising to do that action. Whereas there is something deeply morally problematic to ask or desire that A do an action without A consenting to do that action.

Promising fails to capture the moral phenomena of consenting to do an action because there is a significant moral difference between the action happening without a person promising to do that action, and that action happening without a person consenting to do that action. Thus, an attempt to say that there are two different senses of "consent" in the antinomy, one which refers to the moral phenomenon of promising and the other which refers to the moral phenomenon of permissive consent, fails. When we note the absence of the moral concept referred to when we say someone consented to do an action, we are not just noting the absence of a promise – we are noting a deep violation to a person's agency.

Of course, one could try to fill in the details of the disambiguation solution along different lines. However, on any way of disambiguating the two, one is endorsing the idea that there is not the same moral phenomenon involved when we "consent to do an action" and when we "consent to an action". And so, an issue for any potential disambiguation is that it seems like the wrong involved in an action that occurs without the relevant person's consent to do the action is the same as the wrong involved in an action that occurs without the relevant

person's consent to the action done to them. As support, most laws do not (and should not) treat the following differently:

- (i) B threatens harm to A unless A does a sexual action to B,
- (ii) B threatens harm to A unless A allows B to do a sexual action to A.

If the action does occur, then in both cases we would say that A did not consent. And in saying that A did not consent, we seem to be referring to the absence of the same moral phenomenon. I take it that there is not a morally significant difference between cases (i) and (ii) and, fittingly, many legal frameworks<sup>14</sup> support this idea in having a singular account of consent that both (i) and (ii) would be in violation of.

Examples here can, naturally, be triggering but they can be helpful to more concretely explain what is meant. If a reader wishes to avoid such examples, they may skip to §3.

Imagine, an employer threatens to fire an employee unless that employee performs oral sex on the employer. If the employee does perform this action, we would, correctly, say that they didn't consent to doing this because of the coercion in question. The consent-violation in this case does not seem morally significantly different than the consent-violation in a case where the employer threatened to fire the employee unless the employee allowed the employer to do some sexual action to said employee. Yet one of these cases involves the employee doing an action and the other involves the employer doing an action. And so, the similarity indicates that a uniform concept of consent is applicable<sup>15</sup> both to some actions someone else does to you and to some actions others ask of you. Your consent matters, whether

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<sup>14</sup> See: §273.1 (particularly subsection 2.c) of the Canadian Criminal Code, California Penal Code §261, §74 of the 2003 Sexual Offences Act for the United Kingdom.

<sup>15</sup> A person's consent being "applicable" doesn't entail that they consented, but instead that it is appropriate to talk about your consent or nonconsent (see §1.0).



it is regarding an action someone else is doing to you or regarding an action they are trying to get you to do.

By denying a unified moral concept of consent, the disambiguation solution is at odds with the similarity of consent-violations when the action is done to the person and consent-violations when the action is requested of them. There are reasons to believe that consent plays a role in protecting personal agency and autonomy, regardless of whether the action is done to or requested of the individual. At the very least, these problems with the disambiguation solution give us compelling grounds to look for alternative solutions to the puzzle, which I shall turn to now.

### **§3 Denying claim (3)**

To compellingly justify the denial of claim (3), one should explain how consenting to a requested action involves permission-granting. There are at least two different explanations one could plausibly give for how consenting to do a requested action involves permission-granting. The first explanation holds that the requester performs the requested action; this will be discussed in §3.1. The second, and preferred, explanation is that, while the consenter doesn't literally permit their own action when they consent to do an action for another, the consenter does permit the other to use the consenter to do said action. Denying claim (3) via this second explanation is my preferred way of resolving the antinomy as a whole.

#### **§3.1 The requester's action**

One way to explain the falsehood of claim (3) relies on the idea that the requested action isn't truly performed by the person who consents. On this view, the person consenting to the requested action isn't the one, or at least not the only one, doing the requested action – they are merely the vehicle or instrument through which another's agency is expressed.

When I use a tool to do a particular action, say, a printer to print this paper, we say that I printed the paper – even though most of the physical movements of this action occurred inside the printer. Of course, it is very different when most of the physical movements of an action are carried out by another person than by a tool, but we do sometimes attribute actions to an agent even when a different agent physically carried out the action. Consider the case of someone hiring a hitman. If Allan hires Beatrice to kill Claude, and Beatrice does so, we might say that Allan killed Claude, even though Allan never pulled the trigger. The responsibility—and thus the relevant action—is Allan's.<sup>16</sup>

Perhaps we can use examples like this to show that when another person is trying to get me to do an action, there is a sense in which they do the action. And if I consented to do the action, I willingly let them do this action through me. But if I don't consent to do the action, then I do not willingly let them do this action through me. For example, when I watch my friend's cat at her request, maybe there is a sense in which she is the one doing this action through me. And, in the case where a boss coerced an employee to do an action, the boss is the one doing the action (through the employee), but the employee did not consent to this.

This view, if correct, would straightforwardly allow us to explain how consenting to do a requested action involves permission-granting: just as in typical cases of consent, when one consents to do a requested action, one permits the consent recipient to do the consented action. On this view, consenting to do a requested action just is a type of consenting to the action of another that involves the consenter in a particular way.

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<sup>16</sup> In actuality I think that this moves too quickly from Allan having (shared) moral responsibility for killing Claude to Allan literally having killed Claude. It may be true that Allan killed Claude, but I think that we ought to be wary of inferring this just off the fact that Allan has some moral responsibility over the action. But, in this paragraph, I am exploring an idea, not endorsing it; the corresponding text isn't meant to represent my position.

This view has some good aspects and could use the Hobbesian actor/author distinction to flesh out more details,<sup>17</sup> but it is ultimately implausible. First, to highlight some of the good aspects, this view helps explain why coercers or manipulators are the wrongdoers even when the physical performance of the act comes from the victim. In such cases, the victim functions more like an unwilling conduit for another person's will than as an autonomous actor. And if we accepted that it really was the person requesting the action doing the action, there is no longer any issue in wondering how it could be that the potential consent-giver in this case could permit or forbid this action. Since if it were the case that the requested action is done by the requester, then consenting to a requested action would just be like consenting to another person doing an action.

However, this approach is dubious at best. When my friend asks me to watch her cat, she asks *me* to do some action; she isn't asking me if *she* can do some action. It is not as though she is actually watching her cat. In the other case, attributing moral responsibility to the boss for the threatened employee's action is intuitive, but saying that it is literally the boss doing the action seems false—the problem seems to be that they are forcing someone else to do something. When A requests an action of B, they are requesting that B do an action, not that they be allowed to do this action through B.

While I think this view, taken strictly, is implausible, I believe that it does get close to a plausible way of justifying the denial of claim (3), which is that when a person consents to

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<sup>17</sup> Hobbes (1651 Ch. XVI) writes about how a person, “the actor”, might represent another agent, “the author”. When this is done legitimately, the physical actions done by the actor are done by the author. So, mixing some of these Hobbesian ideas with the ideas in this paper, we could say something like, “If a client requests their lawyer to do some legal action and the lawyer consents to do that action, then when the lawyer physically carries out that action it is the client who has done the action - the lawyer is representing the client when doing this requested action”. I think this idea is fine if we are talking about the client taking on the moral or legal responsibility of the lawyer's actions. However, I find it implausible if we mean the client has literally done the action.

do a requested action, they consent to being used to do that action. I will now turn to this potential way of justifying the denial of claim (3).

### **§3.2 Permitting another to use your agency**

A promising way to deny claim (3) is to adopt a more subtle permission-granting picture in situations involving requested actions. On this view, consenting to do a requested action is not granting oneself permission to act but, instead, it involves permitting another person to utilize one's agency to achieve their ends. When I consent to watch my friend's cat for her, I am not permitting myself to watch her cat, nor am I granting her permission to watch her cat through me, à la the previous explanation. Instead, I am granting my friend permission to use my agency to achieve this end. Consenting to do a requested action is not a self-directed permission to do that action, nor is it an other-directed permission for the requester to do that action. Instead, consenting to do a requested action is an other-directed permission for the requester to use the consenter's agency to do said action.

This perspective neatly explains familiar interpersonal interactions. When a friend asks for help moving, and you consent, you are not permitting yourself to lift boxes; instead, you authorize your friend to use your time, effort, and energy. And, unlike the case in which you promised your friend you would help them unpack, you may withdraw your consent to being used in this way at some point without having wronged your friend.

Importantly, this view also helps us understand consent violations clearly and consistently. When someone coerces or manipulates another into performing an action, the moral wrong is in overriding the victim's rightful control over how their agency is utilized. Although the victim physically performs the action, they do not genuinely authorize this use

of their agency. It is precisely this unauthorized deployment of one's agency that constitutes the deep moral violation.

When done respectfully, I am happy when my agency itself can help a friend achieve their goal. Indeed, I prefer my friends to use and value my thinking or skills more than they use or value my car. But when someone uses my agency to accomplish an end without due respect, this is one of the deepest violations that can occur. After all, what can be more central to an agent than their agency itself? What could be worse to steal than one's own decision-making?

Additionally, this approach aligns beautifully with Kantian ideas. Within Kantian ethics, there is an important distinction between using someone merely as a means, which is impermissible, and using someone as a means, which can be morally permissible. And while the specifics are debated, many Kantian scholars believe that consent is paramount in distinguishing between using someone as a mere means and using them as a means (see Kleingeld 2020). In other words, many Kantian scholars claim that when a person does not consent to an action we perform, we use them merely as a means; but when they consent to the action, even while we are still using them as a means, we are not using them merely as a means. What is so interesting here, given the purposes of this paper, is that the distinction of being used as a means and being used merely as a means applies both to cases where an action is done to the person and to cases where an action is done by the person (as I will show below). And so, this fits excellently with the idea that there is a unified account of consent such that some actions of others are consent-applicable and some requested actions are consent-applicable.

Let's consider some examples to illuminate how the idea of one being used as a means is applicable both for actions done to one and requested of one. If someone intentionally touches me to achieve some goal of theirs, then they are using me as a means to their end. This could be problematic, as when I don't consent to their touch, then they are not respecting my moral authority and use me as a mere means. Or it could be non-problematic, as when they do the action only if I consent, in this case, they use me as a means but not as a mere means. But also, Kantians would say that if I go to a barber for a haircut, I use the barber as a means. In the barber case if I undermine their ability to make an informed voluntary decision on this matter (e.g., by pretending that the counterfeit money I am paying with is real), then I am treating them as a mere means. With the ideas from this paper, what we can say is that the barber didn't consent to being used to cut my hair in this case because my deception (with the counterfeit money) undermined their consent.

To put the points from the last few paragraphs succinctly, there are two Kantian ideas that, taken together, provide support for a unification between consenting to an action done by another and consenting to do a requested action. The two Kantian ideas that, together, support a unified account of consent are as follows. One: the idea that consent makes the difference between being used as a means and being used merely as a means. And, two: the idea that the distinction between "being used as a means" and "being used as a mere means" applies both in cases where the actions are done to one (as in the example where someone touches me) and in cases where the actions are done by one in virtue of the will of another (as in the example where I hire a barber).

To put the points from this whole section together, interpreting consent to do a requested action as permission to have one's agency utilized by another offers a compelling

way out of the puzzle initially raised. With this explanation of consenting to do a requested action, there is no longer a tension between consent as a form of permission-granting and consenting to do a requested action. Claim (3) thus can be denied. Understood in this manner, both when we consent to do a requested action and when we consent to an action performed by another, permission-granting is involved. When we consent to an action done by another, we morally permit them to do this action, and when we consent to do a requested action, we morally permit another to use our agency to do this action.

## **§4 Concluding Remarks**

### **§4.1 Significance and Future Research**

The puzzle discussed in this paper holds significance for both our conceptual understanding of consent and its practical implications in related ethical domains. Clarifying the domain of consent not only deepens our grasp of consent itself but also illuminates broader issues regarding personal agency, moral authority, and interpersonal interactions. Many solutions to this puzzle have interesting downstream implications.

To provide evidence that dealing with the puzzle can have downstream implications and because the topic is, in and of itself, worth discussing, I would like to show how my preferred resolution to the antinomy has significance for topics in labor ethics. On my preferred resolution of the antinomy, one's consent to do a requested action involves permitting another to utilize one's agency to do this action. This gives us a way to conceptualize employment through the lens of consent. We can meaningfully describe an employee as consenting (or not consenting) to perform tasks related to their role, thereby authorizing their employer to exercise their agency toward certain ends. The fact that various factors can vitiate consent helps us outline the boundaries of permissible employment

practices. Thinking of employment as involving consent – and of this consent as the same phenomenon involved in consenting to the actions of others – clarifies why some employment practices widely thought to be impermissible are indeed impermissible and helps us reach conclusions in some gray areas.

This can be better understood through examples. We likely already have intuitions around the typical impermissibility of child labor, but explaining permissible employment as requiring consent – and consent as requiring sufficient rational capacity – helps explain the typical wrongness of child labor. And the idea that scientists conducting research for an organization are consenting to the organization utilizing the scientists' agency for the organization's ends suggests that the scientists should be reasonably informed on the organization's purpose for this research. For example, explosives are used for a variety of purposes from mining to war, if a company was researching explosive compounds, the idea that permissible employment involves the employee's consenting to do their job indicates that the company would need to inform its researchers about what organizations – e.g., a military – have access to this research, given that consent requires morally relevant information not being withheld.

These implications and insights, which stem from justifying the denial of (3) by thinking of consent to do a requested action as permitting another to utilize one's agency, show us that how we solve this puzzle not only reveals insights into what consent is like, but also may have implications in related areas. Given that consent is an immensely important concept in a vast range of ethical areas, I believe this puzzle deserves attention and future research.



## §4.2 Summary and Closing Remarks

This paper examined an antinomy about the domain of consent: whether the same moral phenomenon figures both (i) when one agrees to another's doing  $\phi$  and (ii) when one agrees to do  $\phi$  in virtue of the will of another. Ordinary language supports treating some requested actions as involving consent, and standard theorizing portrays consent as a form of permission-granting. But the straightforward attempt to treat "x consenting to do  $\phi$ " as x permitting themselves to do  $\phi$  was implausible.

I argued that disambiguating "consent" into two different phenomena (e.g., permissive consent vs. promising) is unattractive. It fails to explain the deep structural parallels between the two classes of cases (proposal/acceptance dynamics, the same vulnerability to coercion, deception, incapacity), and it misdescribes the wrong in consent-violating cases. What is missing when someone is pressured into doing  $\phi$  is not merely a promise but consent. Legal and moral assessments likewise treat the absence of consent in (i) and (ii) as the same kind of wrong.

My preferred resolution denies claim (3). I think that consenting to do a requested action involves permission-granting. The permission at stake is not self-permission to act, but authorization for the requester to use the consenter's agency toward the requested end. On this unified view, consent functions similarly across requested actions and the actions of others: when we consent to another's action, we permit them to do it; when we consent to do a requested action, we permit them to make use of our agency to do the action. This resolution preserves the core insight that consent is a form of permission-granting, vindicates ordinary language, explains the similar wrongness of consent-violations in both kinds of cases, and fits

attractively with Kantian distinctions between being used as a means and being used merely as a means.

Addressing this puzzle sharpens our understanding of consent's nature and domain; and, importantly, most plausible resolutions have rich downstream implications. Different ways of resolving the tension, whether by unifying the cases or distinguishing them, reshape how we diagnose consent-violations and assess practices in labor, medicine, law, and everyday ethics. I hope more researchers will take up the puzzle directly, because while I have indicated my preferred resolution, I feel that much more work needs to be done in this area.

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