

The Moral Necessity of Consent

Morgan Davies

Abstract

In this paper, I defend that consent is necessary for sex to be morally benign, despite a growing trend to the contrary. Detractors do not claim that violating sexual autonomy is morally benign but instead argue that consent presupposes features 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. I argue this conclusion is mistaken. The claim that consent presupposes reluctance confuses linguistic conventions with moral facts; the idea that consent cannot apply to sex done jointly overlooks that even the most mutually engaged sex will have actions done by one person to another; and the behest presupposition is either implausible or fails to exclude consent’s necessity. I conclude that consent remains an indispensable ethical boundary marker, preserving its legal and moral importance in protecting sexual autonomy.

Word Count: 7005

§1.0 Introduction

Consent to sex has often¹ been thought as both necessary and sufficient to not wrong any of the involved parties.² 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. Put another, overly simplistic, way, there can be morally problematic aspects in a particular sexual encounter even if everyone consented. I agree with these philosophers, and I think their arguments have important philosophic and public significance.

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

² 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.

On the other hand, philosophers such as MacKinnon (2017), Palmer (2017), Gardner (2018), Kukla (2018 and 2024)³, and Ichikawa (2020) argue that sex need not involve each participant's consent in order to be morally benign⁴ - call their thesis, "**THE 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 pg. 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 common 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

³ 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.

⁴ 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 right considerations that against this action. One, perhaps, oddity of calling this concept "benign" is I include morally good actions (so long as there are no moral considerations against the action) to fit this category (e.g., helping a stranger in need without causing them or anyone else harm).

necessarily wronged by sex which 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 assault⁵ without reference to a lack of consent.⁶

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 CONSENT** and the common⁷ 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 common legal practice of defining "trespassing" as "entering another's property without that person's consent", would likely also need revision. 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 some⁸ of its canonical moral and legal role.

§2.0 Against the Unwanted Presupposition

UNWANTED PRESUPPOSITION

That x consents to ϕ presupposes that x does not enthusiastically want ϕ to occur.

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

⁶ MacKinnon and Palmer offer differing ways on how the law should change. See MacKinnon 2017, pg. 474, for her preferred account. See Palmer 2017, pg. 16 for her preferred account.

⁷ See Kukla 2024 for a dissenting position on this.

⁸ 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.

The **UNWANTED PRESUPPOSITION** is most prominently championed by MacKinnon⁹ 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 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 neutral 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 them entering my house. To adapt the earlier quote from Palmer (2017 pg. 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 the work of Westen 2010¹⁰ to support the idea that consent involves acquiescence. But she also acknowledges many, more modern, definitions of consent do not involve acquiescence (MacKinnon 2017 pgs. 453 - 455) and one can point to many¹¹ more lexical and legal definitions that would apply when the consenting

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

¹⁰ 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.

¹¹ 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.

party enthusiastically welcomes the action. And so, she defends the idea that consent is a form of acquiescence by considering how consent is talked about by ordinary speakers. 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 it would be understood by the listeners 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 want my friends to come over to my house and this 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) and so the fact that we didn’t say 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”) whereas 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.¹²

Me giving permission for another to ϕ is consistent with my enthusiastically wanting them to do ϕ . Even if it would be odd, in this case, to say out loud, “I give John permission to ...” this

¹² 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 consent as a form of permission granting, which is how many philosophers think of consent, is compatible with enthusiastic desire.

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.¹³

§3.0 The Argument from PASSIVE PRESUPPOSITION

PASSIVE PRESUPPOSITION That x consents to ϕ presupposes that x , neither individually nor as part of a group, does ϕ .¹⁴

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.¹⁵

The next part in this argument for **THE MORAL NON-NECESSITY OF CONSENT** is that in the best sexual encounters, sex is a joint action¹⁶ collectively done by all the participants. There is no participant who merely¹⁷ morally allows sex; instead, all participants are jointly doing this

¹³ 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.

¹⁴ The "nor as part of a group" is included to capture Gardner's (2018) idea related to joint actions, which will be discussed later.

¹⁵ 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.

¹⁶ 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.

¹⁷ 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

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 sense¹⁸) 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 ϕ presupposes that x , neither individually nor as part of a group, does ϕ . ¹⁹
ETHICAL OBSERVATION	In ideal sex, sex is so mutually engaged that all participants are part of a group doing this joint action. ²⁰
BRIDGING PREMISE	If PASSIVE PRESUPPOSITION and ETHICAL OBSERVATION , then THE MORAL NON-NECESSITY OF CONSENT
THE MORAL NON-NECESSITY OF CONSENT	Sex need not involve each participant’s consent in order to be morally benign. ²¹

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.

¹⁸ See Horn & Wansing 2022.

¹⁹ “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

“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

²⁰ “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.

²¹ “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.

§3.1 Against the Argument from PASSIVE PRESUPPOSITION

I am inclined to think that **PASSIVE PRESUPPOSITION** is false; specifically, I agree with Ichikawa 2020 that there are situations where A proposes that B do a particular action and we can, without presupposition failure, talk about whether B consented to do that action. However, whether these are cases of *permissive* consent and thus constitute a counterexample to **PASSIVE PRESUPPOSITION** for permissive consent is complex and, regardless, the way I would deny it would allow a revenge argument²²; 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.²³ 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 §3.0, 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

“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

²² Since the counterexamples to **PASSIVE PRESUPPOSITION** I have in mind are instances where the consenter is asked to do an action, one 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.

²³ **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**.

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, 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 seeing 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.²⁴ 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

²⁴ 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.

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. Going back to Gardner's jazz band example, while it may be that every member of the band jointly plays music, not every member of the band jointly plays the bass. Likewise, during sex not all the small actions that constitute sex are done jointly, it is 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 ϕ presupposes that someone else is trying to get x to ϕ .²⁵

Ichikawa (2020 pg. 11) writes “Consent to ϕ , I suggest, presupposes that someone else is trying to get one to ϕ ” 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 pg. 10).

§4.1 The Argument Against BEHEST PRESUPPOSITION

The **BEHEST PRESUPPOSITION**, if taken exactly as stated by Ichikawa (2020), has a vast array of powerful counterexamples. There is an intuitive modification to **BEHEST**

²⁵ “Consent to ϕ , I suggest, presupposes that someone else is trying to get one to ϕ ” – Ichikawa 2020 pg., 11

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 ϕ *only if someone else is trying to get you to ϕ* . But no one tries 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 ϕ be Bob's kissing Allan, Bob is not trying to get Allan to ϕ (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 pg. 17). In regard to 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 follow this by claiming that John consenting to paying his medical bills (or 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-ing against **BEHEST PRESUPPOSITION** instead of modus ponens-ing 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 as opposed to consent-violating. Ichikawa believes that in ideal cases 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 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.²⁶ But Bob kissing Allan would be a deep consent-violation, we would not think that this was just a situation in which Allan neither consents nor doesn't consent. To put this in terms similar to ones 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 ϕ presupposes that someone else is trying to get ϕ to occur.²⁷

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 be done, **BEHEST PRESUPPOSITION*** overcomes all of the objections raised against **BEHEST PRESUPPOSITION**. For example, even in the case where Bob is

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

²⁷ 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 ϕ " seems promising if we are trying to get the necessary and sufficient conditions for when it is felicitous to talk about consent.

not trying to get Allan to allow Bob's kissing Allan, Bob is trying to kiss Allan; 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 which 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 tries²⁸ 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 on 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.

§5.0 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 action, or the

²⁸ There is an implicature (but not a presupposition) when we say that A tried to do ϕ , that ϕ was not done. But we can say that A tried and succeeded to ϕ , 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.

BEHEST PRESUPPOSITION that someone else must be trying to get the consentor 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 simply 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 are still done by one individual 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 incredibly important.

Finally, proponents of a view like **BEHEST PRESUPPOSITION** are stuck with a dilemma. Either they take the implausible view that consent is never applicable to actions of others, or they

accept a modified version of **BEHEST PRESUPPOSITION** that allows us to speak about consenting or not consenting to actions others are trying to do. 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 to **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 and so this modified version of **BEHEST PRESUPPOSITION** is compatible with consent being important and applicable to various actions during 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. It is true that good sex requires more than just consent—mutual excitement, empathy, communication, attentiveness, comfort, etc... . None of that negates 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 endures—and should continue to endure—as a core feature of our moral and legal landscape.

References

- Alexander, Larry. (1996). The Moral Magic of Consent (II). *Legal Theory* 2 (3):165-174.
- Archard, David. (1998) *Sexual Consent*, Boulder, CO: Westview Press.
- Beaver, David I., Bart Geurts, and Kristie Denlinger, "Presupposition", *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/spr2021/entries/presupposition/>>.
- Blome-Tillmann, Michael (2008). Conversational implicature and the cancellability test. *Analysis* 68 (2):156-160.
- Cahill, Ann J. (2016). Unjust Sex vs. Rape. *Hypatia* 31 (4):746-761.
- Davis, Wayne, "Implicature", *The Stanford Encyclopedia of Philosophy* (Fall 2019 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/fall2019/entries/implicature/>>.
- Dougherty, Tom. (2015). Yes Means Yes: Consent as Communication. *Philosophy and Public Affairs* 43 (3):224-253.
- Gardner, John. (2018). The Opposite of Rape. *Oxford Journal of Legal Studies*, 38(1), 48–70.
- Grice, Paul, (1989). *Studies in the Way of Words*, Cambridge, Massachusetts: Harvard University Press.
- Healey, Richard, (2019). Consent, Rights, and Reasons for Action. *Criminal Law and Philosophy* (13), 499–513.
- Horn, Laurence and Heinrich Wansing, "Negation", *The Stanford Encyclopedia of Philosophy* (Winter 2022 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <<https://plato.stanford.edu/archives/win2022/entries/negation/>>.
- Hurd, Heidi. (1996). The Moral Magic of Consent. *Legal Theory* 2 (2):121-146.
- Ichikawa, Johnathan (2020). Presupposition and Consent. *Feminist Philosophy Quarterly*, 6(4), Article 4.
- Kramer, Matthew. (2000). Rights Without Trimmings. in M. Kramer, N. E. Simmonds, and H. Steiner (Eds.), *A Debate Over Rights* (pp. 7–112). Oxford University Press
- Kukla, Quill (writing as Rebecca Kukla) (2018). That's What She Said: The Language of Sexual Negotiation. *Ethics*, 129(1), 70–97.
- MacKinnon, Catherine. (2016). *Rape redefined*. 10(2).
- Mappes, Thomas. (1987) "Sexual Morality and the Concept of Using Another Person", in *Social Ethics: Morality and Social Policy*, third edition, Thomas Mappes and James Zembaty (ed.), New York: McGraw-Hill, 248–262.
- Miller, Franklin and Wertheimer, Alan. (2010), *The Ethics of Consent: Theory and Practice*, Oxford: Oxford University Press.
- Muñoz, Daniel, "Obligations to Oneself", *The Stanford Encyclopedia of Philosophy* (Winter 2024 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <<https://plato.stanford.edu/archives/win2024/entries/self-obligations/>>.

- Palmer, Tanya. (2017). Distinguishing Sex from Sexual Violation: Consent, Negotiation and Freedom to Negotiate. In *Consent: Domestic and Comparative Perspectives* (1st ed., pp. 9–24). Routledge.
- Primoratz, Igor. (2001) “Sexual Morality: Is Consent Enough?” *Ethical Theory and Moral Practice*, 4(3): 201–218.
- Simmons, John. Consent, 1998, doi:10.4324/9780415249126-S011-1. Routledge Encyclopedia of Philosophy, Taylor and Francis.
- Wertheimer, Alan. (2003) *Consent to Sexual Relations*, Cambridge: Cambridge University Press.
- Woodard, Elise (2022). Bad Sex and Consent. In David Boonin (ed.), *Handbook of Sexual Ethics*. Palgrave. pp. 301-324.