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Consent and Normativity

1 Introduction

It is nearly universally accepted, by philosophers and common opinion alike, that the giving and receiving of valid consent is *normatively transformative*: A's validly consenting to B's φ -ing changes the normative situation from its being impermissible for B to φ before A consents to its being permissible for B to φ after A has consented. The idea that consent has this normatively transformative power is prominent in bioethics and in the ethics of health-care more generally (including biomedical and psychological research) and it also plays a central role in discussions of sexual ethics and in various areas of political and legal theory.

I have two independent but related aims in this paper. The first, which is a fairly modest aim, is to present some considerations that provide at least a presumptive case in favour of what I will call *Mental State Views of Consent*. The second, more ambitious aim, is to challenge the idea that consent has, or indeed can have, the normatively transformative power that most people assume it has. At first glance it may seem obvious that an agent's consenting to the performance of an action by another agent can, and does, alter the normative status of that action, but on reflection it is philosophically puzzling how this can be. First, those who endorse the idea that consent is normatively transformative must identify a range of possible actions which is such that actions in that range are impermissible before consent and permissible after consent. I will argue that is no easy task. Second, how is it that, simply by consenting to the performance of an action, φ , an agent can reshape the balance of reasons for or against the performance of φ ? In general, for any action, φ , to which consent may be granted or withheld, there are antecedent, consent-independent, reasons for and/or against the performance of φ ; i.e. there are reasons that obtain prior to, and independently of, an agent's consenting to someone's performance of φ . It is puzzling how an agent's consenting can add or subtract to those antecedent reasons. The second aim of this paper is to articulate and defend these objections

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to the assumed normatively transformative power of consent. I will also explore various responses to them. As far as I can tell, even if I fail to achieve the more modest aim (to show that there is good reason to believe that a Mental State view of consent is correct), that failure has no obvious bearing on the success or failure of the more ambitious aim since it is perfectly coherent to agree with everything I say in the second part whilst strongly disagreeing with what I say in the first part. In the first half of this paper I will use John Kleinig's theory of consent as a foil for arguing for a Mental State view of consent and for setting the stage for part two where I argue that consent is not necessarily normatively transformative; that, on the contrary, *consent is necessarily not normatively transformative*.

2 What is Consent?

What is it to consent? Throughout this paper, for simplicity, I will make a number of assumptions. First, I will assume that the standard *consent relation* is [A consents to B's φ -ing]. Second, I will assume that A and B are separate persons – indeed that A and B are agents: they have a general capacity to form and act on what they believe to be normative considerations. Third, I will assume that A and B are individuals – i.e. that A and B are not corporate entities. Finally, I will assume that ' φ ' stands for actions only.

With these assumptions in place we can say that there are, broadly, two kinds of views about what consent is:

1. *Mental State Views of Consent*: To consent is to be in a certain state of mind.

One such view is represented by Peter Westen who says that to consent is to be in ' . . . a state of mind of acquiescence . . . a felt willingness to agree with – or to choose – what another person seeks or proposes.'¹ Other Mental State theorists may disagree and argue that being in some other specific state of mind should be identified with consenting. Yet other theorists may hold that there is a range of mental states that are such that being in any one of them constitutes consenting.² These kinds of views should be distinguished from

¹ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Aldershot: Ashgate, 2003), p. 5.

² There is of course a big difference between believing that to consent is to φ (where this is the 'is' of identity) and believing that to consent is *constituted* by φ -ing. Nonetheless, for simplicity, I will use the two expressions interchangeably unless I explicitly say different.

2. *Communicative Act Views of Consent*: To consent is to engage in a particular communicative act.

A strong version of this view is represented by John Kleinig who says that ‘Consent is centrally and most appropriately a communicative act that serves to alter the moral relations in which A and B stand – and that for the moral relations to have been altered for B, a communicative act must have occurred.’³ Communicative Act theorists may of course also have different views about which particular communicative act one has to perform in order to consent. They may also deny the claim that acts of consent are necessarily normatively transformative. As with Mental State views one could also, as Kleinig does, hold the view that there’s a range of communicative acts that are such that performing any one of them constitutes consent: ‘The form taken by the act of consent may vary considerably, though it will commonly be constituted by some gesture, word, or other recordable behavior that conventionally and contextually expresses it.’⁴ In this paper I will assume that these kinds of theories of consent are mutually exclusive and jointly exhaustive. If this assumption is correct, and given the assumption that there really are instances of consent, an argument against either kind of view will *ipso facto* be an argument in favour of the other kind of view.

Before I go on to present my argument against Communicative Act views – and thus, given the assumption above, in favour of a Mental State view – I need to point out an important distinction that cuts across the Mental State/Communicative Act distinction and which complicates things. This is the distinction between *conceptual/semantic* views about what ‘consent’ means and metaphysical views about what consent is. Consider the following passage from Kleinig:

Consent is not a neutral act that is then separately justified as having normative force, but is normative through and through even though it also has a descriptive content. *To say that A consented to φ is not to report some evaluatively neutral doing, such as A’s saying ‘yes,’ which is then to be followed by further discussion about the significance of saying ‘yes.’ Instead, it is intended to convey that whatever it was that A did to consent (including, perhaps, saying ‘yes’), it also possessed a certain normative force.*⁵

(My italics.)

³ John Kleinig, ‘The Nature of Consent’ in Franklin Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (Oxford: Oxford University Press, 2010), p. 4.

⁴ *Ibid.*, p. 11.

⁵ *Ibid.*, p. 5.

Contrast this with the following passage from Tom Beauchamp:

‘Consent,’ ‘the obligation to obtain consent,’ and ‘the right to consent’ are strikingly different notions. . . . ‘The obligation to obtain consent’ and ‘the right to consent’ . . . are moral notions, but . . . ‘consent’ [is] not obviously [a] moral [notion]. It seems a matter of fact (or perhaps of metaphysics or the philosophy of mind), not a matter of ethics or value, whether one . . . consents.’⁶ (My italics.)

These views differ in at least three respects; the most important for present purposes is that, on Kleinig’s view, it is *conceptually* necessary – i.e. true in virtue of meaning – that if A consents to B’s ϕ -ing, then A has performed a communicative act that transforms the shape of the normative situation. This view, then, essentially contains the following three claims:

- (i) To consent is to perform a communicative act
- (ii) Consent is necessarily normatively transformative
- (iii) (i) and (ii) are conceptual truths.

If I’ve understood him correctly, Beauchamp denies all three of these claims. I think he is right in doing so. Let us start with claim (iii).

According to this claim, it is analytically true that consent consists in performing a communicative act which is such that when performed it necessarily transforms the normative situation. Of course, it is perfectly possible to agree with (i) and (ii) and reject (iii). In other words, it is perfectly coherent to think that to consent is to perform a communicative act which is necessarily normatively transformative and deny that this is guaranteed by semantic fiat. So what’s wrong with (iii)? Taking our lead from G. E. Moore and his Open Question Argument we can argue that if we endorse a view like Kleinig’s we commit ourselves to holding that someone who sincerely asks questions like

A consented to B’s ϕ -ing, but did A communicate this (to B)?

and

A consented to B’s ϕ -ing, but did this change the normative shape of the situation?

is not a competent user of ‘consent’. However, there seems to be no conceptual confusion involved in asking these questions – these questions appear to be, in Moore’s words ‘open questions’.⁷ If someone can ask questions like these without

⁶ Tom Beauchamp, ‘Autonomy and Consent’, in Franklin Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (Oxford: Oxford University Press, 2010), p. 56.

⁷ See G.E. Moore, *Principia Ethica*, Cambridge: Cambridge University Press, 1903; revised edition with “Preface to the second edition” and other papers, T. Baldwin (ed.), Cambridge:

conceptual confusion ‘consent’ does not conceptually entail either (i) or (ii). The soundness of the Open Question Argument as a test for synonymy or conceptual entailment has of course been challenged⁸ but even if the argument above fails to demonstrate conclusively that ‘consent’ does not entail (i) and (ii) at the very least it forces those who endorse a conceptual entailment view to explain why questions like the ones above appear open. Without such an explanation there is good reason to be suspicious of views according to which ‘consent’ conceptually entails things like (i) and (ii) – i.e. without such an explanation there is good reason to reject (iii).

A more plausible Communicative Act theory denies the conceptual entailment claim and runs the story via metaphysical necessity instead.⁹ On such a view, it is metaphysically, but not conceptually, necessary that A’s consenting entails that (i) A has performed a communicative act and (ii) A’s consenting ~~necessarily~~ transforms the shape of the normative situation.¹⁰ I will argue that a correct view of consent entails neither of these things since consent is not constituted by a communicative act and consent is not necessarily normatively transformative – in fact, it is *necessarily not* normatively transformative. I will end this section by arguing against the idea that consenting is performing a communicative act. The claim that consent is necessarily normatively transformative will be the focus of the next section.

What reason is there to believe that to consent is to perform a communicative act? Recall that Kleinig says: ‘ . . . consent is centrally and most appropriately a communicative act that serves to alter the moral relations in which A and B stand – and that for the moral relations to have been altered for B, a communicative act must have occurred.’ I will assume that thoughts like these provide the main motivation behind Communicative Act views. The general line of reasoning seems to be that

⊢ If A consents to B’s ϕ -ing then the moral relations between A and B have changed for B (and A) in virtue of A’s consenting.

Cambridge University Press, 1993 (page references in this entry are to the revised edition), pp 62–69.

⁸ See W.K. Frankena, ‘The Naturalistic Fallacy’, *Mind*, Vol. 48, No. 192 (Oct., 1939), pp. 464–477

⁹ Issues are further complicated by the fact that it is possible to hold views according to which one of the elements is entailed by conceptual necessity and the other element isn’t. Setting this complication to the side, we should note that if conceptual necessity entails metaphysical necessity, any argument that has force against views which connect consent and normatively transformative communicative actions via metaphysical necessity will *ipso facto* have force against views which attempt to do it via conceptual necessity.

¹⁰ A familiar parallel here is the view that although ‘Water’ does not *mean* ‘H₂O’, water is H₂O.

2. The moral relations between A and B have changed for B in virtue of A's consenting only if B is aware of A's consent.
3. B is aware of A's consent only if A communicates A's consent to B.
So,
4. A consents to B's ϕ -ing only if A communicates A's consent to B.
5. A communicates A's consent to B only if A performs a communicative act.
So,
6. A consents to B's ϕ -ing only if A performs a communicative act.¹¹

If this is correct, then to the extent that Communicative Act views are motivated by an argument of this kind, such views are not well-motivated since the argument is unsound. Premise 1 will be the focus of the next section. Although premise 3 is certainly questionable,¹² I shall focus my attention on premise 2.

Premise 2 says that the moral relations between A and B change for B in virtue of A's consenting only if B is aware of A's consent. As a general view about the nature of moral relations this is patently false. Changes in moral relations is one thing and people being aware of those changes is another. If B becomes aware of the fact that the moral relations between him and A have changed, then what B becomes aware of (*that the moral relations between him and A have changed*) is something that occurred *prior to*, and *independently of*, his becoming aware of it. If this were not the case, then *what* is it that B becomes aware of? So moral relations between A and B can change without A and B being aware of this. To illustrate: Suppose, plausibly enough, that we are morally obliged to have a special concern for the wellbeing of our close friends. A and B are best friends. For some reason A does something that constitutes a serious breach of that friendship. The breach is so serious that it constitutes a

¹¹ Support for the idea that something like this argument lies behind Communicative Act views (and certainly behind Kleinig's view) is provided by Kleinig himself who says: 'The position that I articulate and defend . . . is that there is always an expressive dimension to consent – that consent must be signified – and that only if consent takes the form of a communicative act can the moral relations between A and B be transformed. Absent such communication, B has no business doing that for which A's consent is needed even if A condones or would acquiesce to it. Consent is a social act in which A conveys something to B – something that, once communicated . . . now gives B a moral right or entitlement that B previously lacked.' *Op. Cit.*, p. 10.

¹² Why suppose that B is aware of A's consent only if A communicates A's consent to B? To do so is arguably question-begging against Mental State views. Suppose consent consists in being in a particular mental state. For some states of mind, it seems possible to know that a person is in that state of mind without them having communicated that state of mind to us. But if this is so, why couldn't the state of mind which constitutes consent be such a state of mind?

betrayal of their friendship. In addition A is also completely unrepentant about this betrayal. Unfortunately for B, in addition to A's betrayal, B is unaware of it. A has violated a serious moral obligation he had to B, and on any sensible view of friendship A is no longer B's friend – let alone best friend (although B will no doubt still believe that A is). As a result B is no longer bound by the obligations of friendship and is no longer obliged to have a special concern for A's well-being. In light of this Premise 2 looks highly implausible.

But perhaps, although it's true in general that moral relations can change without people normatively affected by that change realising it, consent is different in this respect? Perhaps consent is such that it can work its 'moral magic' (to use Heidi Hurd's phrase¹³) only if it is communicated? Kleinig says:

What is critical [for consent] is that A communicates with B such that B knows that A has authorized B to ϕ . Consent requires signification – not in the sense that a state of mind is reported but in the sense that a right or entitlement is created or permission given or obligation assumed. Consent is not about agreeing with but to, and the latter, as a morally transformative act, requires signification.¹⁴

But this again prompts the question: why can't A create a right or entitlement or give permission to B without B knowing that such a right or entitlement has been created, or that such a permission has been given? After all, a legislative body can create legal rights and entitlements *for me* without my knowing that it has done so. If and when I become aware of the fact that such a legal right or entitlement has been created (and that I now have such a right or entitlement) what I become aware of is something that is true independently of me being aware of it. The same is true for moral rights and entitlements.

Let us relate this back to consent. Consider the following case. The only means you and I have of communicating is by writing handwritten letters and posting them. You write me a letter asking for permission to come and stay at my house in two weeks' time. I receive the letter and read it on Monday. The same day I write a response saying you are more than welcome to stay at my place. I post the letter on Monday evening. You receive the letter on Wednesday and you read it then, finding out that I'm happy for you to stay at my place. Everyone can agree that I have consented to your staying at my house, but *when* did I so consent? On the Monday or the Wednesday? It seems obvious that I consented on Monday and that you *found out* about my consenting on the

¹³ See her 'The Moral Magic of Consent' in *Legal Theory*, 2 (1996), pp 121–146.

¹⁴ *Op. Cit.*, p. 11.

Wednesday. Kleinig, it seems to me, would have to say that I consented on the Wednesday. This rings false. Insofar as Communicative Act views are motivated by the idea that the essence of consent is to create, *and impart knowledge of*, permissions (etc.), then to this extent such views should be rejected. We need to ask ourselves what is lost if we draw a distinction between consenting on the one hand, and communicating that consent on the other? My contention is that the answer is ‘nothing’. The central problem for Communicative Act views as I see it is that they cannot allow for cases of uncommunicated consent. It seems a patient can consent to an operation but be unable to communicate this to the surgeon – perhaps her cognitive faculties are in full working order, but she is paralysed and cannot speak. Another scenario is where a potential research subject fills out a consent form but the form is lost before it reaches the researcher or the relevant ethics committee. These seem like genuine possibilities, but it’s very difficult to see how a Communicative Act view can allow for such cases. I think that in the end we do better to reject Communicative Act views of consent.

3 Why Consent is Not Normatively Transformative

As we saw earlier, Kleinig’s view has three central elements to it: (i) To consent is to perform a communicative act; (ii) Consent is necessarily normatively transformative, and (iii) The two previous claims are conceptual truths. So far, I have argued against (i) and (iii). In the remainder of this paper I will argue against (ii). Before I do this I need to say something about the distinction between consent and *valid* consent. Just what valid consent is thought to amount to will emerge presently, but for now we need to recognise that in order for this distinction to be of any use, there must be clear possible (at least) cases of non-valid, or invalid, consent. Most people when they talk about valid consent have in mind instances where someone consents and that person satisfies certain conditions, call them C. Conversely, invalid consent is consent that is given without C having been satisfied. Importantly, on such views, consent is normatively transformative if and only if it is valid. Others, like Kleinig, have a different view. On this view, if someone fails to satisfy C, they simply fail to consent. On this view all consent is valid consent and there is no such thing as invalid consent. As Kleinig puts it: ‘ . . . invalid consent no more counts as consent than an invalid vote counts as a vote.’¹⁵ This remark helps us understand why

¹⁵ *Ibid.*, p. 15.

Kleinig thinks that consent is necessarily normatively transformative. Since there is no such thing as invalid consent, if some (communicative) act fails to be normatively transformative, that act is simply not an act of consent *full stop*. We should reject this view. Consider again the analogy with the invalid vote. A more accurate analogy is provided by the distinction between valid and invalid arguments. Both kinds of arguments are genuine instances of arguments (at least up to a limit), but only the former has any chance of being imbued with normative force. If one endorses a ‘normativised’ theory of consent, like Kleinig’s, the normatively transformative power of consent comes for free, but it does so at the price of having a seriously extensionally inadequate theory of consent. This is not a price worth paying.

We can put this debate to the side and focus on the fact that there is near universal agreement that certain conditions (‘C’ as I referred to them above) have to be met in order for someone’s consent to be valid (or, in Kleinig’s terminology, for someone’s act to be an instance of consent) and thus for it to be normatively transformative. Although theorists disagree about the details of these conditions – about how many conditions there are and what exactly their content is – there seems to be a consensus that A is in a position to validly consent to B’s φ -ing if and only if A satisfies the following three conditions:



The competence condition

A’s general cognitive and emotional abilities at the time of consenting are ‘sufficiently mature’ and they are not at the time of consenting impaired by conditions like being depressed, seriously intoxicated, in excruciating pain, agitated, and irritable, etc.

2. *The knowledge condition*

A has sufficient knowledge of all the facts that are relevant to B’s φ -ing. (What is the purpose of B’s φ -ing? How is B’s φ -ing related to that purpose? What are the potential payoffs and risks of B’s φ -ing?)¹⁶

3. *The voluntariness condition*

A is not being coerced, unduly persuaded, or manipulated. (A’s assenting to B’s φ -ing must be above the threshold of voluntariness.)

¹⁶ I take the knowledge condition to subsume what is sometimes called ‘The intention condition’ – roughly, the condition that A assents to B’s φ -ing under a certain description of B’s φ -ing. When I let you borrow my hammer, I’m not letting you borrow an offensive weapon. I also take the knowledge condition to subsume what is sometimes called ‘The disclosure condition’ – roughly, that B discloses to A all relevant information he is in possession of.

So A is in a position to validly consent to B's φ -ing if and only if these conditions obtain, and if A is in this position and does consent, it is argued, his so doing transforms the normative situation. In the rest of this paper I will drop 'valid' and only use it when context requires it. So what, then, is supposed to happen, normatively speaking, when A consents? Those who believe that consent is normatively transformative will endorse what I will call

The Transformation Thesis (T):

Necessarily, A's validly consenting to B's φ -ing changes the situation from there being decisive reason for B not to φ before A consents to its not being the case that there is decisive reason for B not to φ after A consents.¹⁷ (There is decisive reason for someone to φ just in case the balance of total reasons for and/or against φ -ing favours φ -ing.)

Everyone agrees that in order for **T** to be plausible the acts that ' φ ' ranges over must be restricted in certain ways. For example, it can never be the case that there is decisive reason for B to make A his slave, or to kill A for some trivial reason. So A cannot validly consent to becoming B's slave or to allow B to kill him for some trivial reason. If B's φ -ing is consent-independently impermissible, then A's consenting to B's φ -ing cannot make it permissible.¹⁸ Are further restrictions necessary? To answer this, consider the following case

Tattoo

B approaches A and asks if A is interested in getting a large facial tattoo. A is made aware of all the following salient facts about the procedure and outcome: 1. The procedure will be very expensive. 2 It will be very painful. 3. The tattoo will be ugly and permanent. 4. The tattoo will cause friends and family serious discomfort. 5. A will enjoy wearing it for only a very short period. 6. B will be slightly better off financially by tattooing A. A consents.

¹⁷ This idea is frequently spelled out in terms of moral permissibility:

A's consenting to B's φ -ing changes the situation from its being morally impermissible for B to φ before

A consents to its being morally permissible for B to φ after A consents.

From this idea, we can derive **T** via the two very plausible principles

Necessarily, if it is morally impermissible for B to φ then there is decisive reason for B not to φ

Necessarily, if it is morally permissible for B to φ then it is not the case that there is decisive reason for B not to φ

¹⁸ In a legal context A's (validly) consenting to B's φ -ing can change the legal permissibility of B's φ -ing. And just like in the moral case, if B's φ -ing is consent-independently legally impermissible, A's consenting to B's φ -ing cannot make B's φ -ing legally permissible (at least in all recognisable, and minimally sensible legal systems). It is plausible that consent can be 'legally transformative' without being morally transformative just as it is plausible that consent can be morally transformative without being legally transformative. The law is after all, at least sometimes and in some places, an ass.

What are we to make of this case? Recall the knowledge condition: ‘A has sufficient knowledge of all the facts that are relevant to B’s φ -ing.’ In addition to the relevant facts listed in the example, here are some more relevant facts: First, 1–4 are very strong reasons in favour of A’s not having the tattoo. Second, 5 and 6 are comparatively very weak reasons in favour of A’s having it. Third, the combined weight of 1–4 is far greater than the combined weight of 5 and 6. So, fourth, the balance of reasons favours A’s not getting the tattoo. So, fifth, there is decisive reason against A’s getting the tattoo. Now, either A knows that there is decisive reason against having the tattoo or he doesn’t. If A doesn’t know this then, since this fact is highly relevant to the case, A plausibly fails to satisfy the knowledge condition and his consenting is not valid. If, on the other hand, he does know that there is decisive reason against getting the tattoo, but he consents nonetheless, then he suffers from a form of practical irrationality, he is weak-willed. But if A is weak-willed, then he does not satisfy the competence condition.¹⁹ So either way, A cannot validly consent to having the tattoo.

Since there is nothing special about *Tattoo* the point generalises. This suggests, perhaps somewhat surprisingly, that A’s consenting to B’s φ -ing is valid just in case A’s consenting to B’s φ -ing is in accordance with the balance of reasons for or against B’s φ -ing. But if A can validly consent to B’s φ -ing just in case A’s consenting is in accordance with the balance of reasons for or against B’s φ -ing, how can A’s consenting to B’s φ -ing change the normative situation? It’s very difficult to see what the range of ‘validly consentable’ actions could be. In what range of cases can **T** be applied and actually work its moral magic? For simplicity, let us assume that there are no cases where the reasons for and against B’s φ -ing are exactly balanced. On this assumption, the balance of reasons will either favour B’s φ -ing or it will favour B’s not- φ -ing. This means that there is either decisive reason for B’s φ -ing or there is decisive reason against B’s φ -ing. If there is decisive reason for B’s φ -ing then it is not the case that there is decisive reason against B’s φ -ing. Let us also assume, again for simplicity, that A either consents or withholds consent. We have four possibilities here:

- (a) There is decisive reason for B’s φ -ing and A withholds consent to B’s φ -ing.
- (b) There is decisive reason for B’s φ -ing and A consents to B’s φ -ing.
- (c) There is decisive reason against B’s φ -ing and A withholds consent to B’s φ -ing.
- (d) There is decisive reason against B’s φ -ing and A consents to B’s φ -ing.

¹⁹ It’s not entirely implausible to suggest that A fails the voluntariness condition as well: when we act against our better judgment we are manipulating and unduly influencing ourselves. Even if this manipulation and undue influence is something that is experienced as alien and unbidden, we are nonetheless being manipulated and unduly influenced.

So what are the cases in which **T** can actually be applied? Well, the only cases that are relevant for **T**'s application are those in which, prior to A's valid consent, there is decisive reason against B's ϕ -ing (i.e. cases where the balance of reasons favours B's not- ϕ -ing). That means that **T** has no application in (a) and (b) – these are cases in which there are decisive consent-independent reasons for B's ϕ -ing. **T** has no application in (c) either since, although there is decisive reason against B's ϕ -ing, A withholds his consent. This leaves (d), but as we have already seen A's consent in cases like (d) is invalid (because of ignorance or irrationality, or both). We can call this *the application problem*. What this problem shows, I think, is that at best, the range of actions to which A can validly consent is vanishingly small; at worst it shows that there is no such thing as valid consent as the range of actions to which A can validly consent is empty.

In reply to the argument that **T** cannot be applied to cases like (d) it might be argued that the knowledge referred to in the knowledge condition of voluntary consent does not include the kind of normative knowledge I have been talking about. All that's needed in order to meet this condition is that one knows all the relevant non-normative facts – like the fact that the tattoo will be expensive and that it will be permanent, etc. Even if it's a fact that what is to count as relevant knowledge is determined by what facts are reasons for or against consenting, the agent need not have knowledge of *this* fact. If salient normative knowledge is unnecessary the charge of irrationality loses all its traction: one is practically irrational only if one acts contrary to what one believes the balance of reasons dictates. This is not a plausible response. To start with, it is unacceptably *ad hoc*. We need some principled reason why knowledge of this kind should be excluded from the knowledge condition. Even if some such reason can be provided, this response seems to assume that irrationality is possible only where there is *normative ascent*: where one has explicitly formed a belief about what there is decisive reason to do. So if one does not have such a belief a charge of irrationality loses all its traction. This is highly dubious. Normative ascent is not necessary for irrationality. Someone who knows that getting a facial tattoo will be very expensive, that it will be very painful, ugly, and permanent and still consents to it is practically irrational. Such a person either has the *tacit* belief that these considerations provide decisive reason against having the tattoo, or he doesn't. If he does have such a tacit belief the charge of irrationality remains in full force. If he doesn't have such a belief, then whatever we want to say about this person, he or she is certainly not sufficiently competent.

Another response to the application problem would be to argue that the kind of practical irrationality I am accusing A of in cases where he knowingly acts contrary to the balance of reasons should be excluded from the competence condition on the grounds that it's not a severe enough condition to render him incompetent. But if practical irrationality of this kind is to be excluded what reason could there be for including things like being depressed, seriously intoxicated, in excruciating pain, agitated, and irritable etc.? These are included in the competence condition precisely *because* they are likely to cause an agent to become, among other things, practically irrational.

There may be better responses to the application problem, but since I don't know what these are I can't consider them here. Instead I want to shift focus on to a bread-and-butter case in the consent literature: the Jehovah's Witness who refuses to receive a blood transfusion:

Blood transfusion

Unless A gets a blood transfusion he will die. B is well-placed to administer a quick, safe, and near enough cost-free transfusion, and A knows this. A refuses to consent on account of, as he believes, God's disapproval of blood transfusions.

Many people consider the administering of the blood transfusion impermissible until the patient consents to the procedure and the transfusion thereby becomes permissible. For the reasons canvassed above, this is puzzling. But I am going to put this puzzling feature to the side and focus on a slightly different aspect of consent: the reasons for and against consenting.

In *Blood Transfusion* let us suppose that the reasons in favour of B's administering the transfusion include the following: A will not experience any of the pain that he would experience were he not to have the transfusion; A will live and continue to lead a life that's well worth living, having many wonderful experiences and accomplishing many worthwhile things; A's friends and family will be delighted. These are all very powerful reasons in favour of B's administering the transfusion. Again, let us call B's administering the transfusion ' ϕ '. If, as we are supposing, it is impermissible for B not to ϕ there must be reasons against B's ϕ -ing that are strong enough to outweigh the normative force of the considerations that favour B's ϕ -ing. What provides this extraordinarily powerful reason or reasons? As I see it, there are only two options here. Either this reason is a consent-independent reason, or the reason is simply the fact that A withholds his consent. If A's consent really does change the normative situation, it's very difficult to see how a consent-independent reason (or a set of consent-independent reasons) against B's ϕ -ing could be a decisive reason against B's ϕ -ing. If the decisive reason against B's ϕ -ing really were a consent-independent

reason, then presumably this reason would still obtain after A consents and A's consent would not change the balance of reasons. In light of this, if A's consent really does change the balance of reasons it must be the fact that he withholds his consent that provides the decisive reason against B's ϕ -ing.

But now we must ask, how is it possible that *this* could be a reason with sufficient weight to make it a decisive reason against B's ϕ -ing? The fact that A withholds his consent does not seem to be the right sort of consideration to play the role of a reason – let alone a decisive reason. Regardless of whether consenting consists in being in a particular mental state or in performing a communicative act, consenting and withholding consent are themselves the sorts of things for which reasons can sensibly be asked and offered. Either there is reason for A to withhold consent or there isn't. If there is no reason for A to withhold consent it's difficult to see how A's withholding consent can *create* a decisive reason for B to ϕ . Such a creation of a decisive reason would involve an objectionable kind of voluntarism about the normative: it would involve bootstrapping a decisive reason into existence *ex nihilo*. If, on the other hand, there is reason to withhold consent, this reason would have to be a consent-independent reason since A's withholding consenting can't be a reason for itself. But if there is consent-independent reason for A to withhold consent it is equally difficult to see how the fact that A withholds consent *adds* to the stock of reasons that obtain independently of his doing so. Supposing then, that there is a consent-independent reason for A to withhold consent in *Blood Transfusion*, what could this reason be?

Again, there seem to be only two alternatives. Either the reason is the fact that A believes that God disapproves of blood transfusions, or the reason is provided by the content of A's belief (that God disapproves of blood transfusions). It's implausible that both could be reasons since this would again involve an objectionable double counting of reasons. Let's take the second option first. Once more, there are two options: Either A's belief is true or it is not. If A's belief is false (i.e. his belief has a false proposition as its content) then, aside from the obvious suspicion that A fails the knowledge condition necessary for valid consent, how can a false proposition provide the relevant reason? There is a robust consensus among philosophers of normativity that only facts (or fact-like things, like the obtaining states of affairs perhaps?) provide reasons. So on this option, there is no reason for A to withhold consent and since this is so his withholding consent does not provide a decisive reason against B's ϕ -ing. The other option then is that A's belief is true (i.e. God forbids blood transfusions). But if it is this consideration that gives A reason to withhold consent, then surely it is *this*

consideration that provides the (decisive) reason against B's φ -ing.²⁰ A's withholding of consent seems entirely redundant – A's withholding of consent is merely *normatively epiphenomenal*.

But what about the first option? Recall that on this option, it is the fact that A believes that God forbids blood transfusions that is the decisive reason for A's withholding consent. Those who endorse this general line of thought are no doubt more likely to express this by saying that A's having this belief is part of A's deep commitments and forms an essential part of his life plan, and there is considerable normative pressure on us to respect others' deep commitments and life plans. This line of reasoning is not very plausible; it's certainly implausible if we understand the claim as being content-independently true. We can easily imagine gangsters and others who have wicked commitments and abhorrent life plans. It would be a serious mistake to think that there is a normative pressure on us to respect such commitments and plans. Nonetheless, for the sake of argument, let's grant that we have very powerful reasons to respect people's deep commitments and life plans. Suppose then that A is deeply committed to his religion and its tenets shape his long term plans, his ambitions, and the general ways in which he relates to and interacts with other people. The thought is that administering the blood transfusion is incompatible with showing due respect for A's deep commitments. But, if we are to respect A's deep commitments and such respect can be shown only by not administering the blood transfusion, then this (presumably decisive) reason obtains *independently* of whether A consents or not. However, like we have seen before, if A consents to the transfusion, then A has either forgotten about his deep commitments or he is irrational. So A's consent to the transfusion is not valid and therefore cannot change the balance of reasons. If on the other hand A withholds his consent, his so doing is, again, at best an acknowledgement of the reasons that obtain independently of his consenting or withholding consent. Either way, A's withholding of consent makes no normative difference, and nor does his consenting.

One line of thought that has not been explored yet appeals to the bad consequences of ignoring consent. Suppose A refuses the transfusion. Imagine what would happen if B knowingly went ahead and began to administer the transfusion anyway. Presumably, A would resist in some way and the situation

²⁰ Of course, as Socrates taught us, since there must be an explanation for why God forbids blood transfusions, it will be the normative reason that will figure in this explanation that provides A with the *real* reason for withholding consent and which counts decisively against B's φ -ing.

would turn very ugly. In addition, if, as is very likely, consent is *legally* transformative (in the way briefly discussed on p.12 n19) B would no doubt have to face various legal sanctions, including imprisonment. If B's job involves performing blood transfusions he will very likely be fired from his job. It's very easy to imagine all sorts of bad things happening to B if he were to attempt to administer the transfusion without A's consent. All these bad things that would happen to B were he to initiate the procedure without A's consent are all powerful reasons against (trying to) administer the blood transfusion. But given all this, does this mean that A's not consenting provides a powerful reason against B's administering the transfusion? No, it doesn't. A's not consenting is at best an *enabling condition* for the obtaining of reasons against administering the transfusion. What counts against B's ϕ -ing is the fact that bad things will happen to him if he ϕ s. Of course, those bad things would not happen if A consents (i.e. those reasons would not obtain were A to consent), but this does in no way show that A's withholding of consent itself provide reasons against B's ϕ -ing. If B ϕ s without obtaining A's consent A may well feel violated in various ways by this and the explanation for his so feeling will of course be that B ϕ s without obtaining his consent. But this does not show that A's withholding of consent is a reason against B's ϕ -ing either. Rather, B's ϕ -ing without A's consent is what enables there to be reasons against B's ϕ -ing.

I'll end this paper by briefly discussing two ways in which consent might be normative after all. The first is that A's withholding of consent may provide B with reason to *believe* that there is reason against his ϕ -ing. I say 'may' because it seems likely that the epistemic status of A's withholding consent needs to be settled by considerations that arise in the epistemology of testimony. A's withholding of consent may, in many contexts, reasonably be thought of as A's testifying that there are strong reasons against his ϕ -ing. This line of thought naturally inherits all the complexities of the epistemology of testimony, so I will not say anything more about this line of thought – save one thing: Even if A's withholding of consent is good reason to believe that there is reason against ϕ -ing, since the fact that there is reason to believe that p does not entail p, A's withholding consent does not entail that there is reason against ϕ -ing.

~~There are many things we have reason to care about and to protect.~~ We all have good reason to care about ourselves and others and to protect ourselves and others from being exploited, manipulated, coerced, deceived, and in other ways used as mere means. However, given our limited altruism, our less than perfect knowledge, and our general moral fallibility, there is excellent reason for us to create and maintain legal and social institutions that protect the dignity and interests of all against our own moral and epistemic shortcomings. That we should require people's consent before we can permissibly – in a legal

and social sense – act in various ways with respect to one another is one of the best ways we have to ensure that people’s dignity and interests are to the greatest feasible extent protected. This is an unashamedly *instrumental* approach to consent: creating and maintaining legal and social institutions of this kind arguably serves that very worthwhile goal better than any other feasible alternative. So there is excellent reason to create and maintain institutions that place consent at the centre of many of our interactions with each other. This *still* doesn’t show that consent itself is normatively transformative.

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References
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