

FICTITIOUS CONSENTS: WHAT THEY ARE AND WHAT THEY CAN DO

By

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ABSTRACT OF THE DISSERTATION

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Consent, plus the appropriate attendant circumstances, is the difference between a trespass and a housewarming party, an assault and a medical exam. Consent gains the ability to work this “moral magic” from the value of autonomy and the way consent respects and enhances it. While often requiring prescriptive consent, we occasionally treat agents as if they have consented when we know they haven’t. In other words, we impute consent to them, knowing that the consent is fictitious. This dissertation examines practices which have been called fictitious, or imputed, consent, looking at the normative basis of the practices, the justification for calling them consent, and the applications of imputed consent proper.

The dissertation focuses on three specific practices: constructive consent, informed consent, and hypothetical individualized consent. Through these practices, the dissertation explores why we give these alleged fictions normative force and if we are correct to do so. Though I argue that the first two aren’t truly imputed consents, their shortcomings direct our attention to imputed consent’s two criteria: (1) the practice enhances and respects autonomy in the same way consent does, and (2) it doesn’t involve prescriptive consent. Failing to meet (1), constructive consent illustrates the need for caution in labelling practices – particularly those that rely on moral values other than autonomy – as “consent.” In failing to meet (2), informed consent highlights a structural aspect of consent: consent applies to an action, not to the action’s consequences. The last

practice, hypothetical individualized consent, meets both criteria. It demonstrates that fictitious consent can enhance and respect autonomy and then explores its normative powers through applying it to the non-identity problem in population ethics.

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Introduction

Consent, and its “moral magic,”¹ can make an otherwise impermissible action permissible. Much attention has been directed to demystifying this magic, but less attention has been paid to consent-like practices. These pseudo-consents arise when the law and society attribute consent to an agent despite a clear lack of actual consent. These are cases where consent as we normally think of it – as either a communicative action or a mental attitude – is not present, and the “consenter” does not actually give permission, agreement, or acquiescence to the one who acts upon her. Peter Westen calls this attribution “imputed consent,” though the concept also goes by the name “fictitious consent.” Seeking to rectify the comparative lack of attention given to imputed consent, this dissertation examines the normative basis of imputed consent, the justification for calling it consent, and the conditions under which we can permissibly impute consent. These three issues are related in the following way: It is the normative basis imputed and prescriptive (or standard) consent share that justifies our calling imputed consent “consent,” and we impute consent under conditions in which autonomy and self-determination are respected or enhanced as they would be in cases of prescriptive consent.

Establishing the shared normative basis of imputed consent and prescriptive consent is important for practical as well as theoretical reasons. There is some virtue in having names accurately reflect their concepts. If we are going to call something consent – even if we admit it is fictitious consent – it should share some resemblance with consent. The least problematic way of establishing this resemblance is by showing that

¹ This phrase comes from Heidi Hurd’s “The Moral Magic of Consent.”

both prescriptive and imputed consent gain their normative power from the same source. More importantly, we should avoid misleading others into thinking that there is a theoretical connection between the two concepts if there is none. The dangers of making such an erroneous conclusion will be discussed in more detail later, but it should be clear that mislabeling a concept to give it a normative association it lacks can gloss over many moral ills. This link thus becomes a way to distinguish practices which ought to be called imputed consent from those that ought not, hopefully leading to a reevaluation of some common political and social practices.

In assessing what is typically called imputed consent, I take my starting point from Peter Westen's work and terminology in *The Logic of Consent*. Specifically, I draw upon his typology of imputed consent: constructive, hypothetical, and informed. His accounts will be supplemented by work from legal philosophy, bioethics, population ethics, political philosophy, and actual laws and court cases. Though I amend and expand his accounts of these practices to reflect their legal and moral usage, his work has greatly informed what follows. Each dissertation chapter focuses on one type of prima facie imputed consent (a practice which has been treated as imputed or fictitious consent). They explore the normative basis for why we treat an agent as if she has consented and assess whether such a basis justifies the title of consent. They also set forth the conditions under which it is appropriate to use this type of consent, if what occurs is actually a type of consent, and explore what normative work fictitious consent can do. By emphasizing that imputed consent has the same moral foundation as prescriptive consent and by altering Westen's typology, I hope to contribute to the ongoing debate about the ways in which our moral obligations can be altered.

The remainder of this section will briefly introduce both prescriptive and imputed consent as well as an overview of the chapters.

Prescriptive Consent

Each dissertation chapter focuses on a specific candidate for imputed consent, but they all rest upon certain assumptions regarding prescriptive consent. I here address these assumptions and, in the process, clarify what issues surrounding consent that I will be placing aside.

For the purposes of this project, I assume that the conditions that make an agent's consent valid or transformative (terms I use interchangeably) are always in place unless explicitly stated otherwise. This means that consent will always affect some type of change in the legal or moral landscape. While I do not offer an account of the elements of consent, I use the phrase "prescriptive consent" to indicate that all these elements are present; whatever an agent needs to do to consent – whether it be having a positive affective mental state or doing a specific communicative action – I assume she does so successfully. In doing so, I avoid the debate about whether consent is merely a mental state. I leave open the possibility that other factors may make acting with another's consent all things considered impermissible or may prohibit an agent from giving consent to a particular act in the first place. I also won't comment on how we should assess agents who mistakenly believe that they have received consent and so act as if they have.

With these clarifications in place, I treat prescriptive consent as a three-place transaction involving a consent-giver G, consent-receiver R, and an action or omission²

² I also want to leave open the possibility that attitudes and emotions might be suitable candidates for Φ if it turns out we have moral obligations not to have certain attitudes or emotions towards others.

Φ^3 in which G exercises a power that grants R a privilege (or something like it) to Φ with regard to G. The presence of this transaction affects our moral and, in some cases, legal evaluations of R if R Φ 's. With consent (and the appropriate good will on G's part), R's taking of G's property becomes receiving a gift instead of a theft. Because agents can give permission to another to engage in activities towards them that would otherwise be wrongful, impermissible, or punishable, agents can control the moral obligations surrounding them in a way that enables them to exert greater control and exercise self-determination over their lives.

The source of this ability to alter obligations and assessments is often posited to reside in the value of an agent's autonomy. Though I will not argue for this claim, it is widely endorsed in the literature on consent.⁴ In assessing what is meant by "autonomy," I follow most authors in relying on my reader's preexisting sense of the term, stipulating only that this concept views self-legislation or self-governance as synonyms for autonomy. To further flesh-out the account, I use Feinberg's framework in which autonomy can be a capacity, a condition, an ideal, or a right.⁵ In the context of consent, I argue that we should view autonomy as a capacity and as the successful exercise of that ability (i.e. a condition). Consent's relationship to autonomy is then this: consent respects autonomy qua capacity and enhances it qua condition. When we give another person's consent normative force, we recognize her status as a special type of normative agent. Consent then becomes a tool for her to use in more effectively governing her life.

³ Kleining, "The Nature of Consent."

⁴ See Chapter 1 pages 13-14 for a detailed literature review on this point.

⁵ See Feinberg, *Harm to Self*, Chapter 18.

Though there is strong agreement on why this transformation occurs, there is more debate about how it occurs and what exactly it entails. The transformation may loosely be thought of as a permission or authorization to act given by G to R that occurs because of a change in the normative force of the reasons against acting grounded in G's rights or well-being. What actually happens, in a metaphysical sense, is more difficult to say (and will be discussed briefly in Chapter Two). Placing aside the issue of how consent acts on reasons, there is a rather large consensus – with intuitive support – about the impact of consent: a consented to action cannot violate G's rights, cannot be the appropriate subject of a complaint by G, and does, in some way, render the resulting action permissible with regards to G.

This rough sketch of consent will be helpful in assessing what candidates for imputed consent should be given the title of consent. The elements which are particularly relevant later are that consent promotes the autonomy of the consenter-giver directly and that this promotion occurs through respecting and enhancing autonomy.

Imputed Consent

While various authors discuss different types of imputed consent, Westen offers the first well-known discussion of them as a class. He motivates the existence of imputed consent by appeal to how we view injuries that occur in the normal course of hockey games. Basically, we do not view these injuries as assault even though not every player either explicitly communicates consent to be body checked or has a pro-mental attitude towards being body checked. Furthermore, we do not even think that such consent is necessary. We treat the players as if they have consented to the “assaults” occurring within the rules or standard practices of the game in virtue of their participation in the

game. Though this consent sometimes goes by the name implicit consent, Westen calls it imputed consent in order to distinguish it from cases of prescriptive consent where consent is tacit.⁶

For Westen, this imputed consent is a mere legal figment; to impute consent is “to create a legal fiction – a fiction that S actually acquiesced to x” (271). Regardless of the fiction, imputed consent transforms illegal actions into legal ones. In part because of this transformative legal power, Westen claims that there is a “family resemblance” between imputed and prescriptive consent. Specifically, he claims that “[fictions of prescriptive consent] further some of the same values of personal agency that underlie acts of prescriptive consent” (Westen 272). Because of these shared goals, he advocates for maintaining the legal fiction instead of replacing it with functionally similar alternatives.

Although I am hesitant to endorse the family resemblance claim for all of his categories of imputed consent, the claim does lend a normative dimension to what Westen views as a purely legal concept. Since the values that are furthered in cases of legal prescriptive consent are moral values, the shared resemblance, if accurate, would give reason to view imputed consent’s transformation of rights as moral as well as legal. I thus treat these terms as referring to practices that makes a legal *and moral* difference.

Drawing on the similarities and differences between imputed and prescriptive consent, I propose the following two criteria for imputed consent: (1) the practice enhances and respects autonomy in the same way consent does, and (2) it doesn’t involve prescriptive consent. Failing to meet (1), constructive consent illustrates the need for caution in labelling practices – particularly those that rely on moral values other than

⁶ I differ from Westen in his categorization of these athletic “assaults.” See the appendix.

autonomy – as “consent.” In failing to meet (2), informed consent highlights a structural aspect of consent: consent applies to an action, not to the action’s consequences. The remaining practice, hypothetical consent, meets both criteria. It demonstrates that fictitious consent can enhance and respect autonomy and then explores its normative powers.

As a last matter of clarification, I want to reiterate that the focus of this work is on the imputation of consent – on treating another as if she consents *absent the belief that she actually has*. The dissertation will not address the broader issue of when it is permissible for an agent to act as though another has consented. An answer to this question would have to address other questions, such as whether it is permissible to act on a reasonable yet mistaken belief that consent has been given.

The Next Steps

Each chapter stands independently from the other chapters (and even this introduction), but all are driven by a desire to better understand our practices of fictitious consent. They will progress from least autonomy-based to most, starting with a practice that should not be called consent at all and ending with a practice that is, I argue, prescriptive consent.

Chapter 1 focuses on constructive consent – on the practice of treating an agent as if she consented based on her participation in some other action. By looking at this “consent” as it exists in law and our common moral practices, I argue that constructive consent does not respect and enhance autonomy in the same way prescriptive consent does. Because this imputation is motivated by non-autonomy based concerns, constructive consent highlights the dangers of labelling something as consent when it

doesn't reflect the value of autonomy. An appendix explains why sports – often included in the category of constructive consent – does not fall under this label.

Chapter 2 addresses hypothetical consent, specifically hypothetical individualized consent. In this practice, we treat another as if she consents based on a finding that she would consent if she were able to. To make this determination, we look at the particulars beliefs, desires, commitments, and values of the agent. The chapter argues that this practice does respect and enhance autonomy in much the same way prescriptive does: it respects an agent as a self-legislator and allows her to alter her “moral landscape.” We should thus attribute to hypothetical individualized consent the same “moral magic” of consent. I then demonstrate that imputed consent can do important normative work by applying this practice to Derek Parfit's Non-Identity Problem. In this context, I use hypothetical consent to illustrate that defenses of the person-affecting intuition are incomplete unless they engage with consent.

The last chapter addresses two common misconceptions surrounding informed consent. Both obscure the status of informed consent as prescriptive consent simpliciter. Contra-Westen and others, I argue that this type of consent – often thought of as consent to risks – isn't fictitious at all. Its failure to meet this second criteria for imputed consent illuminates that agents consent to *actions* and highlights the relational aspect of consent. Consent affects the normative relationship between the consent-giver and consent-receiver, acting on rights and obligations existing between them. It alters what counts as violations of these obligations, which are actions or omissions done by the consent-receiver and not mere risks. Though agents must consent to actions under relevant act-descriptions (e.g. surgery with X risk of blindness) for the consent to be morally – and in

some cases legally – transformative, the object of consent remains the action (e.g. the act of performing surgery). This observation then leads to the second misconception about the practice, which is that it is a special subset of consent or even a distinct practice categorized by a heightened information requirement. Yet, the information requirement is present for all types of consent and, though contextualist, is the same standard in all cases. With this clarification in mind, the dissertation then proposes an account of this contextualized information requirement.

By analyzing these practices, I aim to better understand our consent and consent-like practices – not only showing what practices we should keep and which ones we should revise and rename but also illustrating how imputed consent, despite being a fiction, still plays a normatively important role in our lives.

CHAPTER ONE

Constructive “Consent”: A Problematic Fiction

Consent, plus the appropriate attendant circumstances, is the difference between a trespass and a housewarming party, an assault and a medical exam. Consent gains the ability to work this “moral magic”⁷ from the value of autonomy, which consent respects and enhances. While often requiring prescriptive consent (consent as we normally think of it), we occasionally treat agents as if they consented when we know they haven’t. In other words, we impute consent to them, knowing that the consent is fictitious. This attribution has been called “imputed consent” and “fictitious consent.” When such fictitious consent arises, the practice borrows its normative legitimacy from prescriptive consent. For this borrowing to be successful, the imputed consent must respect and enhance autonomy in the same way consent proper does. If, and only if, the fictitious practice does so, should it then affect the relevant rights and duties as prescriptive consent would.

Here are two policies which are thought to be justified by imputed consent: monitoring prison phone calls without prisoners’ express consent and not charging movie-goers with assault when they touch another person without permission as they move through the row of seats. The alleged form of imputed consent which is claimed to apply in these cases is called constructive consent. In this practice, we treat an agent as if she consented to Φ because the agent did Ψ . For example, it is because of their decision to enter into public spaces that we treat movie-goers or pedestrians as if they consent to incidental contact by others. As a practice, constructive consent is quite common – playing an important role in both law and daily life. Despite this commonness, I argue

⁷ This phrase comes from Heidi Hurd’s “The Moral Magic of Consent.”

that our justification for treating the actions in these cases as permissible (if we are justified in doing so in any particular case) is not grounded in autonomy but instead in other values. This alteration of rights, then, is not a type of imputed consent, and in calling this practice by the name consent, we hide and perhaps ignore crucial factors in considering whether an action is permissible. Because these other values may be in tension with autonomy, we ought to be explicit that such cases do not involve consent and its common justification. The upshot is a cause for reevaluation of some of our common legal fictions and moral assessments.

Section I introduces constructive consent and examines how it operates in law and daily life. It analyzes legal cases surrounding so-called implied consent laws to blood alcohol concentration testing and to monitoring prison phones. It also looks to our assessment of minor physical contact in public spaces, like sidewalks and theaters. Section II determines which underlying norms guide and justify the application of constructive consent at a general level and in the cases described. It concludes that these norms do not necessarily include autonomy but instead reflect practical considerations or other moral values. In light of this conclusion, Section III explores why we ought to be cautious about maintaining the fictitious labelling of consent.

Section I: Constructive Consent

Introduction

Imputed consent is a fiction, but it is a fiction that shares an important resemblance to prescriptive⁸ consent. This resemblance gives imputed consent its

⁸ I use the term “prescriptive” not in its normative sense but in its secondary sense, meaning “acquired by, founded on, or determined by prescription or by long-standing custom” (Merriam-Webster’s Dictionary). The modifier will serve as a means of distinguishing between consent as we normally think of it and imputed consent.

normative power and arises because both practices (should) further and reflect the same normative value: autonomy. Given autonomy's role in legal and moral theory, imputed consent is thus both a legal and a moral concept that affects our moral evaluations and legal judgments. In treating it as having direct moral relevance, I diverge from those, such as Peter Westen, who view it as purely a legal fiction.

Constructive consent is a fiction as well. In this practice, the agent hasn't given consent. Instead, we impute consent to Φ because the agent did Ψ . Constructive consent can even be present when the agent is actively expressing a denial of consent to the action. Using a moralized revision of Westen's definition, I define the practice as follows:

Constructive Consent: Based upon S's prescriptive acquiescence to something else it is permissible to treat S as if she prescriptively consents to the conduct that is at issue.⁹

It is important to clarify that this practice isn't tacit or implied consent. An agent gives tacit or implied prescriptive consent when she indirectly communicates her consent. However, in constructive consent, the acquiescence to "something else" isn't a means of indicating consent to the "conduct at issue." Instead, we are merely treating the agent *as if* she consented.

In this regard, constructive consent is like legitimate forms of imputed consent; both are fictitious. However, imputed consent gains its normative force from the resemblance it shares with prescriptive consent. Though some, such as Westen, argue that constructive consent shares in this resemblance as well and so ought to retain the name

⁹ See Westen 271. I have replaced "the law treats" with "it is permissible to treat" for reasons mentioned above.

consent, constructive consent significantly differs from imputed consent. To refute this claim of resemblance, I begin by sketching the tree; we'll measure how far the apple falls from it later.

The “tree” (consent) is a three-place relation involving G (consent giver), R (consent receiver), and an action or omission, Φ ,¹⁰ in which G exercises a power that grants R a privilege, or something similar, to Φ with regard to G. For the purposes of this paper, the phrase “prescriptive consent” indicates that all act and/or mental elements of consent are present and that the consent is valid. In this way I avoid taking any stance on the exact necessary and sufficient elements of prescriptive consent. I also leave open the possibility that other factors may make R's Φ -ing with consent all things considered impermissible or may prohibit G from giving consent in the first place. However, regardless of where one falls on the above issues, something transformative does occur when G gives R consent that alters our response to R if R Φ 's.

The source of this ability to alter obligations and assessments is often posited to reside in the value of an agent's autonomy. While I will not argue for this claim, it is widely endorsed in the literature on consent.¹¹ For example, Heidi Hurd views consent as a “power of personhood” and argues that this power's source is our commitment to

¹⁰ See Kleining, “The Nature of Consent,” for the relational structure of consent.

¹¹ While most views of consent link the practice to autonomy, not all do. For example, James Stacey Taylor argues that “that the ethical foundation of [medical] informed consent is really concern for human well-being” (“Autonomy and Informed Consent: A Much Misunderstood Relationship,” 384). If one denies the inherent “magic” of consent, then two views of consent arise. First, one could take a utilitarian approach and view consent as serving merely an instrumental purpose for maximizing utility, happiness, wealth, etc. In this view, consent affects moral change only via its epistemic role of providing evidence of the agent's preferences. Second, one could view consent as providing evidence of some other underlying mental state and treat that underlying state as being normatively relevant for non-utilitarian and non-autonomy reasons. (I treat those who view the underlying state as being normatively relevant for autonomy-based reasons to be in the dominant autonomy-camp of consent.)

If these alternative views are correct, then some of the details of what follows may not be relevant. However, the overall methodology will still apply and, I suspect, calling constructive consent “consent” will still be problematic.

autonomy (121). Larry Alexander endorses Hurd's view and, perhaps, goes even further in claiming that "one who cannot alter others' obligations through consent is not fully autonomous" (165). Joan McGregor argues that "from the moral point of view, concern about personal autonomy and self-determination is represented by guaranteeing agents control over their domain through their power of consent" (192). Along similar lines, Emily Sherwin describes consent as "the practical means for exercising autonomy in one's relations with others" and views its mechanism as connected to the value of self-governance (212). Echoing the theme of autonomy and self-determination, Donald VanDeVeer holds that the importance of consent derives from "a right or legitimate claim of competent persons to direct their own lives within the domain of acts not wrongful to others" (62). John Davis¹² and Vera Bergelson¹³ also claim the normative basis of consent's transformative power is autonomy.

Some, such as Victor Tadros,¹⁴ Markus Dubber,¹⁵ and Meir Dan-Cohen,¹⁶ accept a strong relation between autonomy and consent but argue that dignity serves as a limiting factor on this power, rendering consent to actions which violate dignity to be non-transformative. R. George Wright proposes a more complex relationship between consent and dignity; the two are not coextensive, but consent serves as a proxy for dignity.¹⁷ In all but this last view, autonomy does the heavy moral lifting – even if the work it does is limited.

¹² See "Precedent Autonomy and Subsequent Consent."

¹³ See Bergelson, "Consent to Harm."

¹⁴ See Tadros, "Consent to Harm."

¹⁵ See "Toward a Constitutional Law of Crime and Punishment."

¹⁶ See "Basic Values and the Victim's State of Mind."

¹⁷ "Consenting Adult," in particular see page 1398.

Unfortunately, little is written on what is meant by autonomy when asserting it is the basis of consent's magic. Some, such as Hurd,¹⁸ McGregor,¹⁹ and Sherwin,²⁰ relate autonomy to self-legislation or self-governance. This link between self-governance and autonomy is fairly common. However, it is often unclear whether autonomy is, to use Feinberg's framework, a capacity, a condition, an ideal, or a right.²¹ In the context of consent, I claim we should view autonomy as either a capacity or as the successful exercise of that capacity.

By respecting an agent's consent, we respect her ability to govern herself – we respect her capacity to make choices and decisions regarding her life. As a condition, autonomy is enhanced through consent. Consent enables agents to more effectively govern their lives by changing the rights and obligations of others that pertain to them. By consenting, we “control the normative situation by declaration,” (Owens, 412) “alter the moral fabric, rearrange the moral furniture, redraw the moral landscape,” (Hurd, 124) and “change the world by changing the structure of rights and obligations of the parties involved” (McGregor, 192). This power to alter our moral landscape reflects our capacity for self-legislation and empowers us to transform the normative status of others' actions. Consent isn't the only way we can achieve this alteration, but it is one of the more common tools we have at our disposal. Unfortunately, constructive consent does not share this function.

¹⁸ “The capacity for autonomy is the capacity for self-legislation.” (Hurd, 124)

¹⁹ “Valuing autonomy is valuing the self-governing person.” (McGregor, 191)

²⁰ See Sherwin, 211-212.

²¹ See Ch. 18 of his *Harm to Self*

Examples of Constructive Consent

To illustrate constructive consent, and the dangers that arise by calling it “consent,” I focus on three situations in which constructive consent is commonly attributed: monitoring inmates’ phone calls, administering blood alcohol concentration tests to unconscious drivers, and minor physical contact in public spaces.²² Though I ultimately reject the analyses of these cases as involving imputed consent, they all meet the criteria for constructive consent. Furthermore, in these cases courts or the law invoke the language of consent as opposed to labeling the practices an exercise of state power justified by an overriding state interest. By doing so, they signal their (mistaken) belief that there is at least some normatively significant resemblance between the practice and consent.

Monitoring of Inmate Phone Calls

It’s common practice to record phone calls made by prison inmates on institutional phones. It’s also common practice to inform prisoners of this monitoring through a combination of signs near the phones, a pre-recorded message alerting both the caller and the recipient that the call is subject to monitoring, or some additional form of written notice. When these recordings have been presented at trial, prisoners have sought to suppress the evidence by asserting that the recordings violate the Fourth Amendment and the Federal Wiretapping Statute [Title III]²³. Title III has one relevant exception: monitoring with the consent of one of the parties.²⁴

²² Westen also adds common physical contact in athletic contests to this list. For reasons explored in the Appendix, I deviate from this practice

²³ This act is also referred to as Title III of the of Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510 *et seq.*

²⁴ 18 U.S.C. § 2511(2)(c)

The courts are largely unanimous in their treatment of the consent exception:

The majority rule among jurisdictions that have addressed this issue is that an inmate “implicitly consents” to the recording of that inmate's outgoing prison telephone conversations when the inmate chooses to make a telephone call after receiving adequate prior warning that the telephone may be recorded. *State v. Johnson*, C.A. No. 1007020056, 2011 WL 4908637 (Del. Super. Ct. Oct. 5, 2011).

In making this claim, the Delaware court referenced opinions by the First, Second, Eighth, and Tenth Circuits from 1992-2006.²⁵ To this list, it could have added two earlier cases from the Second Circuit decided in 1987²⁶ and 1988.²⁷ The common theme of these decisions is that consent can be inferred from a “decision to use the prison telephone despite adequate warnings that doing so would subject his communications to monitoring.” *United States v. Verdin-Garcia*, 516 F.3d 884, 894 (10th Cir. 2008). Though some inmates were required to sign a form stating they were aware of the monitoring,²⁸ no inmate expressly stated his consent to the monitoring. While some prisons’ notifications included language that “use constitutes consent,” the circuits who hold that consent is present have affirmed the use of the tapes absent this language.

According to legislative records, the consent required for the exception can be either express or implied.²⁹ Since the inmates’ consent is predicated on another action they take (i.e., using the institutional phones), the consent involved in these cases is either implied (or tacit) prescriptive consent or constructive consent. Of the categories of

²⁵ *United States v. Footman*, 215 F.3d 145 (1st Cir.2000); *United States v. Workman*, 80 F.3d 688 (2d Cir.1996); *United States v. Horr*, 963 F.2d 1124 (8th Cir.1992); *United States v. Faulkner*, 439 F.3d 1221(10th Cir.2006).

²⁶ *United States v. Amen*, 831 F.2d 373 (2d Cir.1987).

²⁷ *United States v. Willoughby*, 860 F.2d 15 (2d Cir. 1988).

²⁸ See *Footman*, 215 F.3d at 154; *Horr*, 963 F.2d at 1126; *Amen*, 831 F.2d at 379 (defendant was presented with the form but refused to sign it); and *Willoughby*, 860 F.2d at 20.

²⁹ See the Senate Report accompanying the bill (S.Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S.Code Cong. & Admin. News 2112.).

alleged consent, these are the only two that operate indirectly; consent in these cases is not based on a belief about the agent's mental states, a direct communication regarding that action, or on the judgment that such a communication would be made. Instead, the attribution or imputation of consent is based on the agent's actions or communications regarding something other than the object of alleged consent. If the consent is implied, then the inmates' actions of using the phone is a means of indirectly indicating consent to the monitoring. Picking up the receiver would be the equivalent to the patient quipping "start the laughing gas" to indicate consent to a dental procedure involving this anesthetic.³⁰ If the consent is constructive, then the inmate's use of the phone is what grounds the imputation of alleged consent.

The Tenth Circuit holds that the consent involved is implied: "We note that by [implied consent] we mean actual consent inferred from circumstances other than an express declaration, and not constructive consent implied by operation of law." *Verdin-Garcia*, 516 F.3d at 894. However, the behavior of the inmates and the conditions under which consent is inferred seem to support an alternative conclusion. Though I doubt that even a majority of inmates met either the mental or communicative requirements for prescriptive consent, the problem is that we have no evidence of them meeting or failing to meet these requirements. The courts seem to look no further than the use of the phone with an awareness of the risk of monitoring. While an awareness of monitoring was most likely present, the awareness in itself is not sufficient for prescriptive consent even when it's implied. The First and Seventh Circuits support the view that awareness is distinct from consent. The First Circuit held that using a phone while the defendant "should have

³⁰ The dentist example was taken from Westen, *The Logic of Consent*, p. 274.

known his call would probably be monitored” is not a sufficient basis on which to infer actual consent. *Campiti v. Walonis*, 611 F.2d 387, 393 (1st Cir. 1979). The Seventh Circuit took a stronger stance, placing itself in more direct conflict with the majority position in *United States v. Daniels*, 902 F.2d 1238 (7th Cir. 1990), and *United States v. Feekes*, 879 F.2d 1562 (7th Cir. 1989). In the earlier case, the court describes the majority view as “troubling” and notes its “apprehension” at admitting the evidence under the consent exemption:

To take a risk is not the same thing as to consent. The implication of the argument is that since wiretapping is known to be a widely employed investigative tool, anyone suspected of criminal (particularly drug) activity who uses a phone consents to have his phone tapped – particularly if he speaks in code, thereby manifesting an awareness of the risk. *Feekes* 879 F.2d at 1565.

The court views this implication as casting doubt on its sister courts’ conclusions. It later describes those arguments as “the kind of argument that makes lawyers figures of fun to the lay community” and once again reiterates its concerns with the ‘awareness plus use equals consent’ formula:

But knowledge and consent are not synonyms... We would be surprised at an argument that if illegal wiretapping were widespread anyone who used a phone would have consented to its being tapped and would therefore be debarred from complaining of the illegality. *Daniels*, 902 F.2d at 1245.

I find the issues raised by the Seventh Circuit persuasive. Their cases illustrate that mere knowledge of monitoring and use of the monitored device does not necessarily convey prescriptive consent (a statement that I suspect many agree with in light of revelations about the NSA’s own monitoring program). Since most of the cases adhering to the majority rule do not mention the requirement of non-constructive implied consent, a charitable explanation of what is occurring in

the majority position is that those courts are imputing constructive consent instead of finding prescriptive, implied consent.

The courts' discussions regarding the Fourth Amendment provides further support for viewing the consent as constructive and not prescriptive. Most circuits deal with the constitutional objection by noting that there is a lowered expectation of privacy in prisons. Interestingly, there is no mention of consent in these discussions. If the defendant had actually consented to the recording of the phone call, the Fourth Amendment concern would be waived. However, instead of dismissing the objection on consent-based grounds, the courts point to the lowered expectation of privacy in prisons and to the policy reasons justifying this aspect of prison life. This alternative grounding is understandable if there was no actual consent and the courts were, instead, merely treating the inmates as if they had consented. Thus, despite one court's statements to the contrary, monitoring inmates' phone conversations is best described as a case of constructive and not prescriptive consent.³¹

Blood Alcohol Concentration [BAC] Tests

As of 2013, all 50 states have passed "implied consent" laws which impute consent to the administration of chemical tests to determine blood alcohol concentration levels to all drivers on public roads. *Missouri v. McNeely*, 133 S.Ct. 1552, 1566 (2013). Despite common statutory language that any person operating a vehicle on state roads consents or is deemed to consent³² to BAC testing, the test is not (constitutionally) given

³¹ If the reader is unconvinced that the consent at issue here is constructive, I ask that special notice be paid to the structural similarities between these cases and those in the next section. In both contexts, the agent participates in some practice (phone calling or driving) and, as a result of this participation, is treated as if she consents to something else (monitoring or chemical BAC tests).

³² States vary as to whether they use "gives consent" or "shall be deemed to have given consent." Arizona (ARIZ. REV. STAT. ANN. § 28-1321) adopts the former language; Kansas (KAN. STAT. ANN. § 8-

on the basis of consent if a conscious driver refuses to submit.³³ Unlike cases of imputed consent, an agent's express refusal is treated as a withdrawal of consent. Implied consent laws with regard to the conscious, then, are not actual cases of imputed consent but instead laws which penalize refusal to submit to testing.

However, when the agent is unconscious or in a state that renders her unable to refuse, she is generally³⁴ treated as if she consented.³⁵ This consent is constructive. In virtue of driving, the unconscious agent is treated as if she consented. In imputing consent in such cases, there is no analysis as to whether testing is what the agent would have consented to if she were conscious. In fact, such testing can be done over the agent's previously expressed views and against her best interest. Even a clear indication that the

1001), Nevada (NEV. REV. STAT. ANN. § 484C.160), Wisconsin (WIS. STAT. ANN. § 343.305), New Mexico (N.M. STAT. ANN. § 66-8-107) and Missouri (MO. STAT. ANN. 577.020) adopt the latter.

³³ Some state legislatures, such as Arizona's (ARIZ. REV. STAT. ANN. § 28-1321(D)(1)), include explicit provisions that no test is to be administered if the driver refuses; others, such as Wisconsin's (WIS. STAT. ANN. 343.305 (2)), use the term "request" instead of a verb like "compel." [Note: in response to a State Supreme Court decision, Nevada has proposed an amendment changing "directed" to "requested" in NEV. REV. STAT. ANN. 484C.160.]

In other states, courts have held that drawing blood after the driver has refused absent a warrant or another exception to the warrant requirement is unconstitutional. See *Byars v. State*, 336 P.3d 939, 945-946 (Nev. 2014); *Cooper v. State*, 277 Ga. 282, 291 587 S.E.2d 605, 612 (2003) (implied consent law is unconstitutional "to the extent that [it] requires chemical testing" without probable cause of impairment); *State v. Declerck*, 49 Kan. App. 2d 908, 317 P.3d 794, 802 (2014) (implied consent law was unconstitutional "to the extent it requires a search and seizure absent probable cause the person was operating... a vehicle under the influence"); *McDuff v. State*, 763 So. 2d 850, 853-55 (Miss. 2000) (statute providing that "[t]he operator of any motor vehicle involved in an accident that results in death shall be tested" is unconstitutional because it "requires search and seizure absent probable cause"). See also *State v. Padley*, 354 Wis.2d 545, 564-565 (Wis. Ct. App. 2014) and *McNeely*, 133 S.Ct. at 1555-1556 (both claiming that refusal indicates withdrawal of consent).

The normal, non-consensual exemptions to warrantless searches and seizures still apply.

³⁴ There are two possible outliers to the practice of imputing consent to unconscious drivers: Pennsylvania and North Carolina. The Supreme Courts of both states have granted petitions to hear cases concerning warrantless BAC testing of unconscious or unresponsive drivers under the implied consent laws. The Pennsylvania case is *Commonwealth v. Myers* 118 A.3d 1122 (Pa.Super. 2015). Here, the Superior Court of Pennsylvania held that drawing blood without a warrant from an unconscious driver was unjustified, despite the state's implied consent law. The Supreme Court of Pennsylvania granted the Petition for Allowance of Appeal on February 3, 2016. In North Carolina, the Court of Appeals of North Carolina ruled that the use of blood drawn from an unconscious DWI suspect without a warrant for BAC testing was not permitted (*State v. Romano* 785 S.E.2d 168 (N.C. Ct. App. 2016)). The Supreme Court of North Carolina granted review on August 18, 2016. No decision has been issued yet in either case.

³⁵ Many states have codified this in their implied consent statutes. For example, see N.M. STAT. ANN. § 66-8-108 and ARIZ. REV. STAT. ANN. § 28-1321 (C).

driver objects to the test – such as a card by her driver’s license stating her objections to testing or a refusal of consent painted on her body – wouldn’t prevent the imputation. When discussing BAC cases in the future, it should be understood to refer to only this subset of cases.

Minor Physical Contact

In public, occasional minor physical contact is common: a bump on a crowded sidewalk, pressing up against another as a rider makes her way to the subway door, and even an occasional toe-stepping when another is trying to escape from the middle of a theater row. Given that assault is, roughly, unconsented-to contact, the question arises why these daily occurrences aren’t brought before a court. The answer, for Westen, is that we all “give” imputed consent when on the subway or the sidewalk. To illustrate this point, he presents the “Fastidious Football Fan” scenario. The football fan, S, loves going to games but hates being touched and so takes steps to minimize physical contact; he sits in an aisle seat, arrives late, and leaves early. However, one game was halted in the third quarter before he could leave, leading to crowded aisles. Despite his shouts that “I don’t want anyone to touch me” – a phrase he stated upon entering the stadium – people in the crowd pressed against S. One such person, A, could have avoided pressing against S but didn’t bother. S later asks the Delaware district attorney to charge A with assault. The district attorney refused, stating that S consented to the touching within the meaning of the relevant Delaware statute. (Westen, 322)

The attorney’s comments would be odd if the statute required prescriptive consent. However, section 451 of the Delaware Penal Code states “[a]ny person who enters the presence of other people consents to the normal physical contacts incident to

such presence” (DEL. CODE ANN. 11 § 451). This consent is not actual (unless we adopt the reasoning of the Tenth Circuit, in which case knowledge that one may be touched in public spaces plus a decision to go to such places entails actual consent to the touching). Yet, it remains legally and, perhaps, morally transformative. Both the law and society treat S as if he consented based on his acquiescence to something else (i.e. being in a public space); in other words, they are imputing constructive consent to S.

Section II: Normative Grounding of Constructive Consent

Assuming the role constructive consent plays in these cases is legitimate, what gives it this legitimacy? Recall that if its legitimacy is borrowed from consent, it should respect and enhance autonomy in the same way prescriptive consent does. Since constructive consent can override a lack of prescriptive consent and even an explicit refusal of consent, the fictitious practice does not appear to respect autonomy as a capacity; it is, in some cases, a direct violation of our capacity to choose for ourselves how to alter our moral landscape by imposing alterations against our will. Furthermore, it can be and is imposed on an agent even though she is unaware that by doing Φ she will be treated as if she consents to Ψ .

While this consideration does give us strong reason to look suspiciously at constructive consent’s claim to the name “consent,” one could assert that the practice respects autonomy by enhancing it. To see how this argument might progress, I turn again to Westen. Westen, who has written extensively on imputed consents, grounds the transformative power of constructive consent in its resemblance to prescriptive consent. Specifically, he claims that the principle which underlies the permissible use of prescriptive consent resembles the principle underlying constructive consent. Because of

this resemblance, he asserts we can frame social practices and laws in terms of constructive consent. According to Westen, the practices' underlying principles share a similarity because both consents "enable persons to choose for themselves what would otherwise be unlawful" (279). They achieve this end through similar structures: "prescriptive consent enables persons to choose x where they otherwise could not, while the norms that underlie constructive consent enable persons to choose a social activity where they otherwise could not" (Westen 279). In other words, both enhance the exercise of autonomy. This enabling power to choose actions is, for Westen, what underlies the defense of prescriptive consent and is another articulation of the claim that consent enhances our autonomy qua condition. He thus bases the enabling power of constructive consent on the empirical claim that the social practice the agent engages in (such as driving) could not exist without the burden of the acts the agents constructively consent to (such as BAC testing). Emphasizing the choice element in constructive consent, he views the fiction as furthering personal agency. This furthering could then be linked to a respect for autonomy qua capacity, thereby meeting the criteria of both respecting and enhancing autonomy.

However, this characterization of constructive consent is misleading. The social practices that constructive consent attaches to don't necessarily require consenting to the burdens associated with that activity. The association between driving and BAC testing is not conceptual, unlike an invasive surgery and an incision. We can easily make sense of an agent driving without consenting to invasive testing of her breath or blood; however, if an agent claims to consent to an appendectomy (currently an invasive surgery) but doesn't consent to incisions, we would, presumably, be perplexed. Similarly, the

association is also not one of natural or nomic necessity. Being in a public space and withholding consent to being touched does not seem to challenge the laws of science; however, if I consent to having a stack of my papers set on fire but don't consent to their being turned into ash, those around me would be very puzzled. The action freely chosen and the action to which consent is imputed, then, are not linked together in any sort of metaphysically or conceptually important way. As Westen notes, the link between them is established by the state's (and for our purposes, society's) judgment.³⁶ It is solely because the state and society have deemed one action relevant to another that consent is imputed.

The clarification of the link between the social activity and the "consented" to action is important because it highlights that constructive consent is merely a socially contingent element of the practice. Constructive consent could be replaced with prescriptive consent; for example, consent to BAC tests could be a condition for receiving a driving licenses. Imputing consent, then, is not required for engaging in the social activity that enhances personal agency. Furthermore, the action "consented" to in constructive cases is not on the expanded menu list of activities unlike in cases of prescriptive consent. In prescriptive consent where the agent is directly choosing what she consents to; in constructive consent the agent chooses one thing and then is imputed consent to some other unrelated (at least logically and metaphysically unrelated) thing. In the latter, an agent orders lobster and gets lobster with a mandatory side of arsenic, in the

³⁶ The implication is that without imputing consent to those who engage in the social practice, the state would outlaw the social practice. In at least some cases, this seems like a preposterous claim. If a state didn't have a law stating that agents consent to minor physical conduct in public spaces, I seriously doubt that state would outlaw gatherings in public (particularly given the First Amendment). I suspect something similar with driving and BAC laws.

former, the agent orders lobsters and gets just lobster. Since the agent could engage in the social practice without the fiction of constructive consent, the question then arises what justifies the imposition of “consent.” In other words, if we want to know why the practice of constructive consent is permissible, the foundational question is why the state or society would link the choice and the burden in the first place.³⁷

The answer to this question for specific applications of constructive consent – and even Westen’s formulation of its general underlying value – appear to be grounded in a range of moral values other than autonomy. Westen explains that what supports the imputation of consent is that an agent chose to take advantage of the benefits of a practice which depends upon the sharing of “personal sacrifices” and “concomitant burdens” (278). Framed this way, constructive consent more closely resembles a solution to a distribution problem than a direct enhancer for personal agency, relying on fairness or distributive justice rather than autonomy. We impute consent because it would be unfair for the agent not to bear the burdens associated with the benefits she derives from her actions.

While the value of fairness (and many other moral values) may ultimately reduce, or partially reduce, to the value of autonomy, we can make a distinction between being motivated by fairness concerns and being motivated by a desire to respect the consenter’s autonomy or increase the exercise of it independently of fairness. Even if such a fairness

³⁷ To be clear, I’m not claiming or implying that this question will never have an answer that can legitimize the imposition of the burden on the agent. In some cases, there may be such an answer, and in some cases the answer may even make reference to autonomy. However, for the practice to be called consent, its answer can’t simply make reference to autonomy but must do so in a way similar to the answer given for why prescriptive consent has normative force. The rest of this section will argue that such an answer isn’t present for both the general justification of constructive consent or for its particular applications discussed in the previous section.

rule would promote the equal autonomy of all,³⁸ it is important to recall that imputed consent must respect and enhance autonomy in the same way prescriptive consent does. This means that a practice, if it is to be called imputed consent, must focus on the consenters' autonomy and must promote it directly – i.e. the promotion should not be mediated through other moral values. These conditions are important because, even granting that moral norms such as fairness do indirectly promote autonomy, there would still be a difference in *how* autonomy is promoted. Each practice has different rules of application and different validity conditions. Consider the following scenario: I take \$5 from your wallet, and a bystander asks “why?” Answer 1 is that you consented. We think consent makes a normative difference because of the type of moral agent you are, and in deciding whether I acted permissibly we will inquire about whether the consent was valid (e.g. were you sober?) Answer 2 is that you intentionally broke my fancy \$5 pen, and I’m taking the money as compensation. Here, we give a different moral story to explain why my action is permissible. Notably, this story will affect what factors we are concerned about when assessing the permissibility of my action. We might not care about whether you were sober when you broke my pen, but we may care that you need that \$5 for lunch. Such a concern wouldn’t be relevant under answer 1, even if both answers make reference to autonomy at some point. Noting that constructive consent may promote autonomy in general or autonomy indirectly, then, will be insufficient for establishing that it should be called consent.

If we look to the reasons motivating the specific implied consent laws discussed in Section I, we will find additional supporting rationales that make no direct reference to

³⁸ My thanks to Anna Moltchanova for raising the concern that some constructive consent practices may promote autonomy in this indirect way in her comments at the 2017 Pacific APA.

autonomy. One of the clearest areas of alternative rationales is the implied consent laws for BAC tests. The State in *McNeely* claimed that implied consent laws further the “compelling governmental interest in combating drunk driving.” *McNeely* 133 S.Ct. at 1565. In Wisconsin, the statute was “intended to facilitate the ability of police to secure evidence of intoxication or controlled substances” *Padley*, 354 Wis.2d at 563. The aim of Arizona’s implied consent law is equally public-safety orientated: “The purpose... is to remove from Arizona highways those drivers who may be a menace to themselves and others because of intoxication” *Sherrill v. Department of Transportation*, 165 Ariz. 495, 498 (1990). Each of these rationales focus on promoting “the health, safety, and welfare of the public.” *Declerck*, 317 P.3d at 803. As with the general justification for constructive consent, this justification for imputing consent to BAC tests is to promote something other than autonomy. The states defend the laws based on public welfare and safety – a grounding which differs significantly from that given for prescriptive consent or even constructive consent more generally.

The rationales for imputed consent in the remainder of cases are less explicitly stated by courts or legislatures. For the monitoring of prison phone calls, I suspect that the courts had prison security at least in the back of their minds – particularly since this concern often appeared in the Fourth Amendment analyses. (It’s important to note that the cases don’t offer any evidence that the legislatures had anything other than standard, autonomy-respecting consent in mind when creating the exemption.) Allowing monitoring due to security concerns would distinguish that line of cases from the holding of the First Circuit in *Williams v. Poulos*, 11 F.3d 271 (1st Cir. 1993). *Williams* also concerned monitoring of phone calls but in a corporate setting. Despite a very similar

warning that phone calls would be subject to random monitoring, the court held that the consent exemption to Title III did not apply.

As for minor physical contact, Westen's fictional agent A voices a normative reason to impute consent: "It was a situation we were all in together" (322). In crowded spaces, requiring some to exert extra effort to avoid touching another intuitively appears unfair. By imputing consent to all in a crowd, we treat all alike. From a legislative standpoint, to not codify this exception to assault would present a prosecutorial nightmare. Practically speaking, the imputation of consent saves state resources and opens the courtroom for other cases.

Though looking to case law has its limits, the reason constructive consent is being given legal force is because the legislatures and courts were giving normative weight to concerns like public safety, prison security, fairness, and resource management. If we ask why the otherwise impermissibly invasive actions are permissible, our answers will most likely make reference to the values above even if a different balance is struck. To the extent that we also think the actions in question are morally appropriate, our analyses will rely on these values, which may very well be in conflict with some autonomy-based reasons.

Section III: The Dangers of Misleading Names

Since legal and moral imputations of constructive consent are motivated by non-autonomy based concerns, we should be careful not to give too much weight to this fiction. If the imputation of consent is not directed by the value of personal agency, then it may work to diminish the very autonomy consent proper seeks to promote. At a minimum, it will redirect the evaluator's attention away from autonomy-based concerns

when determining which considerations are relevant. Hiding this potential for conflict creates the risk that agents will not appropriately balance moral concerns when deciding if they ought to impute consent to another and may prevent the legislature from fully taking into account the cost – in terms of diminished agency – of their laws. As in the case of monitoring prison phones, it may also enable courts to extend a law beyond its legislature purpose.

To illustrate this danger, let's first consider the case where intuitions of imputed consent (or intuitions that the actions done with imputed consent are permissible) are most likely strongest: "The Fastidious Football Fan." We treat people in public places as if they have consented to contact because not doing so would impose a cost on others: possible litigation might have a chilling effect; A would have to expend extra effort to avoid touching S; etc. Though common, these costs are not always present. In their absence, we should question whether it remains appropriate to act as if the other has consented. If constructive consent promotes autonomy, however, then there is no need to reevaluate what actions are permissible.

Consider the following three variants of "The Fastidious Football Fan."

Fan 1: Fan 1 hates being touched. He carries a sign that states his lack of consent to contact and loudly announces his lack of consent periodically.

In the third quarter, he leaves. On his way out, there are two people walking towards him in the hallway, which is a little under five persons wide. He is walking very close to the wall, and no one else is present. The one closest to Fan 1, B, sees the sign and knows that Fan 1 doesn't want to be touched. She also knows that she could slightly alter her path to avoid

touching Fan 1. Despite this, B lightly brushes Fan 1's shoulder as she walks past him. She could have easily avoided the contact at no real cost to herself.

Fan 2: Fan 2 has the same views, sign, and practices as Fan 1. As he leaves, a somewhat large group sitting around him leaves as well. It's not the crowded mob the Fastidious Fan faces, but the area is more populated than Fan 1's hallway. With some effort, those in the group could avoid touching Fan 2. However, they make no such effort. C is a member of this group and touches Fan 2.

Fan 3: Fan 3 was at the same game as Fastidious Fan but is not bothered by minor contact in public spaces. When another fan, D, bumps into Fan 3, he says "It's a mad house in here! Don't try to avoid touching me. I don't mind. It happens." The other fan thus ceases her efforts to avoid touching Fan 3.

If we are right to treat to Fans S, 1, 2, and 3 as if they consented, then we should evaluate A, B, C, and D as if their actions are the same. Intuitively, this does not seem correct. Though A and D both act permissibly, their actions have different justifications. Fan 3 exercises his agency by giving consent to D in a way that Fastidious Fan S does not. Thus, D's contact is justified because Fan 3 has given permission (by a practice that respects autonomy qua capacity) whereas A's contact is permissible because of fairness concerns and perhaps, from a legal perspective, a limitation on the state's resources.

B and C differ from A and D in that their actions aren't clearly morally permissible. Intuitively, B's action appears impermissible to me. At no cost, she could

have avoided touching Fan 1 and, in doing so, respected his bodily integrity. While there are practical reasons why we may not wish the State to bring charges, morally B lacked an autonomy based permission to touch Fan 1, and her touching was not justified by other norms. At a minimum, some slight negative moral evaluation of her actions seems appropriate. The case of Fan 2 is more difficult because there is some cost to C's not touching Fan 2, but what's important isn't whether C acted permissibly but how we would determine if C acted permissibly. To make this determination, we cannot stop at asking if Fan 2 acquiesced to attending the event. Instead, we must also consider whether it would be fair to require C to refrain from touching Fan 2. While Westen might claim that this process is simply the process of determining if we ought to impute consent, considerations of the consentor's autonomy do not directly play a role in making this determination. Therefore, the description becomes misleading, not merely fictitious.

In a legal context, the implications for BAC tests are particularly interesting. A conscious driver can withdraw her consent to the tests. To take blood in the face of this withdrawal, without exigent circumstances, is unconstitutional. The puzzle then is why a driver cannot withdraw consent when she is unconscious by making visible or easily accessible a record of a clear statement, made when she was competent, that she doesn't consent to testing. Consenting to BAC tests is not a necessary cost of participating in the social practice of driving – that much is made clear by the possibility of withdrawing consent when a driver is awake and aware. Assuming that there are reasons to draw blood from unconscious drivers, these reasons will need to be weighed *against* values of autonomy and bodily integrity. Cloaking the practice in terms of consent renders the process of balancing the reasons for the policy against the concern for the driver's

autonomy to be, at its face, nonsensical. Yet, this balancing is exactly the kind of deliberation agents should engage in when administering these tests.

The danger of imputing consent increases the further we explore legal territory. Consider the monitoring of inmate phone calls. The consent language allows judges to avoid balancing inmates' autonomy against policy considerations. The issue goes from a debate about under what conditions prison officials can act against the autonomy of inmates to a dismissal of their legal claims based on their own exercise of agency. Since the consent in these cases is purely fictitious and not autonomy enhancing, the courts may even be extending the consent exemption to Title III beyond what the legislature authorized.

The cases considered are merely illustrative of the larger problem with constructive consent. The practice's structure – using one action as the basis to treat an agent as if she consents to something else – arises in political philosophy (e.g. a citizen's continued presence in a country is the basis of imputing consent to state authority³⁹; use of public goods grounds imputation of consent to taxes), new laws (e.g. implied consent

³⁹ This, of course, gestures at a version of social contract theory. While my comments here don't touch upon versions relying on hypothetical consent, they may give reason to rethink versions relying on tacit consent used to justify existing (as opposed to merely hypothetical) governments. Specifically, we should ask whether such theories rely on actual, prescriptive consent – that may be indirectly, or tacitly, given – or instead rely on a fictitious consent. The similarities between, for example, Locke's social contract theory and the monitoring of inmate phone calls seem particularly relevant. Both Locke's account and the majority of the Circuit Courts use the language of actual consent, inferred from an (arguably) unrelated action. Even if we place concerns about whether validity conditions are met in either case, we should still ask whether the agents actually gave or attempted to give consent. To attempt to give consent but have it be invalid is one thing; to never give consent at all is another. At a minimum, we might ask whether the alleged "consenters" intended to consent – a criterion most consent theorist agree upon regardless of whether they hold prescriptive consent is merely a mental act or also has a communicative element. [See Hume's "Of the Original Contract" for a discussion of, among other things, why there are concerns about the validity of consent given in the context of a social contract theory. For Locke's social contract theory, see his *Second Treatise of Government*.]

laws for “textalyzers”⁴⁰), and everyday interactions (e.g. Lord Matthew Hale’s – thankfully outdated – conception of the marital exemption to rape law⁴¹). Using the term “consent” to describe the result of social balancing involved in assessing whether these imputations are permissible lulls evaluators of action or policy into thinking that an infringement of autonomy need not be considered, since consent is presumed to be present. However, we now readily acknowledge that at least one of these practices, the marital exemption to rape, is blatantly autonomy violating. Yet, it meets the structure of constructive consent: in virtue of getting married, society and the law imputes consent to sex, which it judges to be required for marriage. Though the judgment of necessity has changed, this shift illustrates the point made in previous sections: why society views treating another as if she consented relies on a hodgepodge of other moral values or practical concerns. Given the variety of rationales underlying specific applications of constructive consent, we maybe should jettison the name altogether in an acknowledgement that the underlying justifications, when present, share nothing in common.

This underlying debate should not be hidden behind a legal fiction but instead engaged with explicitly. Though not all legal and moral fictitious should be jettisoned, we should avoid maintaining the harmful ones. If the fiction of imputing consent is given normative weight, it can be used to work a transformative magic on legal and moral duties that only autonomy-respecting consent should. While this weight is not

⁴⁰ These are devices which access cellphones to determine if a driver was texting while driving. See New York State Senate Bill S6325A.

⁴¹ In virtue of her marriage, the wife was treated as if she consented to sex with her husband whenever it occurs.: “[A] husband cannot be guilty of a rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract” (Hale 629).

problematic when imputed consent meets this standard, the structure and actual use of constructive consent fails to do so. The fiction of constructive consent thus poses practical dangers, hides theoretical conflicts, and, at its base, is misleadingly labelled. Because of these conflicts and dangers, we should avoid taking the “consent” aspect of constructive consent at face value. Instead, we should reject the resemblance claim and cease maintaining the mirage of “consent,” in favor of an explicit awareness that specific applications of the practice, when justified, are supported by a variety of norms – none of which are the autonomy of the “consenters.”

CHAPTER TWO

Hypothetical Consent and the Non-Identity Problem: Why a Denial of the Worse-off Principle Cannot Solve the Paradox

The Non-Identity Problem involves some action that, if done, would cause specific people to exist and also cause those same people pain and suffering which exceeds the normal bumps and bruises of typical life. The common intuition is that when there are alternative permissible actions available, causing the pain and suffering is wrong. The problem arises when trying to articulate why this action is morally wrong. Consider the following case⁴²: A couple decided to conceive through artificial insemination. They selected a blind sperm-donor to increase the chances that their children would be as well. They had two children – Jehanne and Gauvin – who are both blind. There is every reason to believe that these kids will have lives worth living even with their condition. Though there is some debate about whether it is wrong to increase one's chances of conceiving a child with a disability, many claim that the parents acted wrongly. Specifically, the common intuitive response is that they acted wrongly because they harmed their children. However, Jehanne and Gauvin aren't made worse off than they otherwise would have been. If their parents hadn't have used that specific sperm-donor, then neither child would have existed. Instead, some other children would. This, then, is the general puzzle: how can the action be wrong when no one is worse off because of it?

⁴² The following case is from Liza Mundy's *Washington Post* article "A World of Their Own", published March 31, 2002. I have altered the case slightly, replacing deafness with blindness. In this paper, I also assume that being born blind is worse than being born sighted, and that it is wrong for parents to intentionally conceive a blind child when they could have conceived a sighted child. Though this assumption is commonly made, I do note that this claim might be contentious and don't wish to take a stance on whether the assumption is correct.

To explain the wrongness of choosing this type of action, Derek Parfit presents an impersonal account that claims the action is impermissible solely because it brings about a particular state of affairs. Under his impersonal view, though an action “is bad if it is bad for people,” *why* the action is bad does not appeal to the fact it is “bad for people” (*Reasons and Persons*, 371). To return to the case above, choosing the blind sperm-donor was wrong not because it caused Jehanne or Gauvin (or even society writ large) to be in negative states but because it created a world that was worse than it otherwise could have been. His account thus rejects a person-affecting explanation of morality (or, at least that part of morality concerned with human well-being and beneficence).

Since Parfit’s introduction of the problem, many have resisted his conclusion that a person-affecting account cannot solve the Non-Identity Problem [NIP]. They instead assert that the action is wrong *because* of the harm or wrong done to individuals. Following Johann Frick, I’ll call this stance the *person-affecting intuition*.⁴³ Those rejecting his solution, such as Elizabeth Harman, Matthew Hanser, and James Woodward, support a person-affecting account by denying the worse-off principle. This principle holds that people are neither harmed nor wronged unless they are made worse off than they otherwise would have been. By rejecting this principle, they seek to reestablish that the action does harm or wrong individuals, thereby explaining the action’s wrongness.

⁴³ Frick defines the intuition as follows: “if an action is morally wrong, its wrongness is always a matter of affecting some person in a way that wrongs this person” (2). However, since Parfit limits his view to the part of morality concerned with human well-being, I am hesitant to endorse the “always” in this definition and instead use the term “person-affecting intuition” as a claim only about the part of morality concerned with beneficence. I leave open whether it is, in fact, as extensive an intuition as Frick claims.

However, replacing the worse-off principle with a non-comparative account of harming or wronging is insufficient to establish this conclusion because of hypothetical consent. Consenting affects the reasons against performing the consented-to action, altering the action's normative weight. Even under a non-comparative account of harms and wrongs, consent retains this normative power. Given the role hypothetical consent plays in our treatment of those who, like future persons, are currently unable to give consent, any account that defends the person-affecting intuition as a solution to the NIP will be unsuccessful unless it also shows that we cannot impute consent to these persons. The accounts considered are thus incomplete solutions to the NIP.

Section I introduces the NIP and the worse-off principle. It then considers Harman's, Hanser's, and Woodward's solutions to the problem. Section II focuses on consent, defining hypothetical consent and demonstrating its relevance to non-identity cases. Section III explains why hypothetical consent raises problems for the accounts considered in Section I and addresses three objections from Woodward.

Section I: The Non-Identity Problem and Person-affecting Responses NIP

The Non-Identity Problem arises when we are considering an action that determines the identity of people who later exist. The general problem⁴⁴ is, I think, best introduced by example:

The Risky Policy: As a community we must choose between two energy policies. Both are completely safe for at least three centuries, but one, requiring the burial of nuclear waste in areas that may become earthquake-prone in the distant future, involves longer-term risk. If we choose the

⁴⁴ The problem comes in two varieties: those in which the same number of people exist regardless of which action one chooses (Same Number) and those in which a different number of people exist depending on which action is taken (Different Number). My comments on why a rejection of the worse-off principle will not by itself be sufficient to reach the conclusions found in person-affecting accounts will apply regardless of which variation is under discussion, though often the authors I engage with discuss Same Number cases.

Risky Policy, the standard of living will be somewhat higher over the next century. We choose the Risky Policy. As a result, there is a catastrophe many centuries later: an earthquake releases radiation that kills thousands of people. The people who will be killed in this catastrophe have lives worth living, and would not have existed had we chosen the other policy. (Parfit 371-372)

Most agree that we acted wrongly by choosing the Risky Policy; we impose a risk on later generations for a slightly higher standard of now and in the near future. The accounts considered all attempt to explain why this action is wrong.

The task of establishing the impermissibility of choosing the Risky Policy is challenging and unique because our decision affects which individuals come into existence. This difference in persons is because of what Parfit calls the Time-Dependence Claim 2⁴⁵ [TD2]: “If any particular person had not been conceived within a month of the time when he was in fact conceived, he would in fact never have existed.” (352) TD2 rests on biological facts; almost any action can affect which particular spermatozoon joins with an ovum to form a zygote, thereby affecting the genetic composition of the resulting offspring. A difference of approximately a month would mean an entirely different ovum as well, leading to a distinct set of cells.

Because of TD2, the only way for the individuals injured in *Risky Policy* to exist is if we choose the riskier policy. Given facts about society, a major decision about energy policy would have impacts large and small: the location of jobs, wealth distribution, where people lived, who met whom, and a variety of mundane things would all affect the timing of conception and the genetic contributors to the ensuing embryo.

⁴⁵ The Time Dependence Claim states: “If any particular person had not been conceived when he was in fact conceived, it is in fact true that he would never have existed.” (351) Parfit amends this to TD2 to avoid possible indeterminacies and controversies about whether a child conceived from the same ovum but a different spermatozoon (from the same batch of spermatozoon as the one which the earlier zygote’s would have come from) would still be the same child.

The end result is different reproductive pairs copulating at different times, leading to the existence of different people. Hence, the puzzle: the action that intuitively harms or wrongs future individuals is necessary for their existence. Since the alternative is non-existence, our decision does not make the individuals in *Risky Policy*, who by stipulation have lives worth living, worse off.

This conclusion is problematic for the person-affecting intuition when paired with the worse-off principle. This principle comes in two varieties. The first claims that individuals have not been harmed if they are not worse off or the action is not worse for them; the second asserts that rights violations require the victim to be worse off or the violation to be worse for them.⁴⁶ Under both variants, the future generation in *Risky Policy* hasn't been harmed or had their rights violated. With these options off the table, the standard candidates for person-affecting reasons are no longer in play.

If the worse-off principle is correct, then the explanation of the wrongness of choosing the Risky Policy must rely on impersonal moral considerations. Parfit puts forth such an impersonal explanation in his Principle Q: "If in either of two possible outcomes the same number of people would ever live, it will be worse if those who live are worse off, or have a lower quality of life, than those who would have lived" (360).⁴⁷ Under this account, the decision is wrong not because it wrongs someone but because it brings about a worse state of affairs.

⁴⁶ Harman, Hanser, and Woodward all formulate the worse-off principle in terms of "worse off" rather than "worse for." While I grant (for the sake of argument) that their formulations of the principle are plausible and accurate, we might prefer "worse for" to "worse off" for reasons relating to the badness of death if agents do not exist after death. For the remainder of this paper, however, I follow the other authors and speak in terms of "worse off," meaning it to cover cases where an action kills another.

⁴⁷ Parfit holds that Q is a partial solution to the NIP that applies only in same number cases. The larger solution, Theory X, will entail Q (instead of a person-affecting theory) in Same Number non-identity cases.

Some have disputed Parfit's conclusion and tried to assert a person-affecting reason against choosing the Risky Policy by rejecting one or both of the variations of the worse-off principle; Harman and Hanser reject the harm version, Woodward the rights version.

Responses: Harman, Hanser, and Woodward

Before turning to the person-affecting accounts, I would like to clarify a methodological point. My aim is to show that the standard defenses of the person-affecting intuition are incomplete because they do not address the possibility of imputing hypothetical consent to future people. To illustrate that this concern isn't limited to the details of their specific views, I will grant most of the claims in Harman's, Hanser's, and Woodward's arguments. Instead, I will focus on the common structure of their arguments: (1) deny the worse-off principle, (2) put forth a non-comparative alternative, (3) claim that a harm/rights violation occurs, and then (4) use the harm/rights violation to ground the impermissibility. Focusing on (3) and (4), I explicitly resist only the inference from establishing a harm or prima facie rights violation (something which would, absent consent, be a rights violation) to concluding that the harm or prima facie violation provides normative weight, in person-affecting terms, against choosing the Risky Policy. I use this approach to show that even if we are extremely charitable to the particular details of a person-affecting view, more work needs to be done for this type of argument to succeed.

Harman's solution to the NIP asserts that the non-counterfactual harm done to future individuals is a reason against choosing the Risky Policy. This harm, and the reason it gives rise to, explains why the choice is wrong. Though she doesn't offer a

complete analysis of harming, she holds that “causing pain, early death, bodily damage, and deformation is harming” and so rejects the worse-off principle (92).⁴⁸ Under her non-comparative account of harm, the future people’s suffering clearly is a harm even if they were not made worse off by the suffering. She then uses this harm to ground the impermissibility of choosing the Risky Policy. Her argument proceeds from “(2) There are reasons against the Policy in virtue of the harm to future individuals” to “(1) It is wrong to adopt the Policy because of the harm to the future individuals who will suffer” (92). I won’t focus on the steps linking these statements,⁴⁹ but I want to highlight the move from the assertion that adopting the Risky Policy harms individuals to the claim that the harm generates reasons against the Policy (i.e. her (2)). If consent can be imputed to the individuals in the future generation, then the harm does not retain its force as a reason against acting. Thus, even if we grant Harman’s non-counterfactual account of harming and her argument from (2) to (1), a person-affecting solution to the NIP could still be elusive because we are not warranted in asserting (2).

Like Harman, Hanser rejects the worse-off principle.⁵⁰ He does so by asking why choosing the Risky Policy would be impermissible if the same people would exist regardless of our decision. He then argues that this choice would be impermissible for the very same reason that the choice in different-person cases is impermissible. Roughly, both decisions are impermissible because the resulting catastrophes would cause the

⁴⁸ Harman defines the worse-off principle as follows: “An action harms a person only if it makes the person worse off than she would otherwise have been if the action had not been performed” (90). See footnote 46 for a comment about “worse off” versus “worse for.”

⁴⁹ For an account of why (1) may be wrong even if (2) is right, see Frick’s “Future Persons and Victimless Wrongdoing.”

⁵⁰ He formulates Parfit’s version of the worse-off principle as follows: “(5) A choice does not harm someone in the morally relevant sense unless it makes him worse off than he would have been had the choice not been made” (Hanser 52).

death of many individuals “in the prime of life.” To these people, “death, then, would surely come...as the greatest of evils” (Hanser 58). Because the current generation’s decision causally leads to the harm, they are responsible for it. We can thus describe what occurs in *Risky Policy* as “someone’s suffering a harm, by virtue of [another] having performed a certain action” (Hanser 59). This description grounds the person-affecting account of why the action is impermissible.

Having a more modest goal, Woodward differs from Harman and Hanser in two broad respects. First, he explains the impermissibility in most non-identity cases by appealing to rights violations instead of harms.⁵¹ Second, he admits that there are some NIP cases where one’s morally permissible reasons for acting can only be explained by Parfit’s impersonal principle Q. His aim, then, is merely to reassert the relevance of non-consequentialist reasons to the NIP. While this more modest goal does make his view slightly more amenable to my conclusions, he does not give an account of the limits of the person-affecting intuition and rejects the relevance of consent to the NIP.

Like Harman and Hanser, he begins his defense of the person-affecting intuition with a denial of the worse-off principle. He defines this principle as follows:

N: An action A performed by X cannot wrong person P...if P is not worse off as a result of A than he would be under any alternative action which could be performed by X. Nor, in these circumstances, can A violate an obligation owed to P, or a right possessed by P. (Woodward, “The Non-Identity Problem,” 808-809)

He rejects N, in part, by considering examples in which P violates a specific obligation owed to Q even though Q, on balance, is better off than if P had not taken that action. To illustrate this point, he puts forth three detailed cases: racial discrimination that prevents a

⁵¹ He does view rights violations as harms (see “The Non-Identity Problem,” page 818), but this description is secondary to his overall account; the notion of rights violations is what does the explanatory work.

person belonging to a racial minority from buying a ticket on a plane that crashed; breaking a trivial promise to a gossip who is thrilled to chitchat with others about the scandal; and a WWII concentration camp survivor who developed attributes that later led to a fullness and richness in his life (Woodward, “The Non-Identity Problem, 809-811).⁵² Looking to these examples, he asserts the airline, the promise-breaker, and the Nazis all wronged their respective victims because they violated specific obligations; the fact that in violating these obligations they also made their victims better off than they would have been if not for the violation is irrelevant to whether their victims were wronged with regard to the specific right⁵³ that was violated. While there may be objections to his explanation of the cases, I grant him the non-comparative account of rights violations to illustrate that his account is incomplete without considering the implications of hypothetical consent.

Woodward then argues that future people have rights against others knowingly pursuing policies that would kill or injure them without justification when alternative actions are available. By choosing the Risky Policy, the current generation becomes unable to fulfil its obligation not to injure future generations. The failure to meet this obligation counts against choosing the Risky Policy and offers a person-affecting explanation of the Policy’s wrongness.

⁵² The last case is drawn from Viktor Frankl’s memoir, *Man’s Search for Meaning* (New York: Simon & Schuster, 1959).

⁵³ In “Reply” he clarifies that rights are to be understood as protecting “disparate specific interests,” instead of a “general interest in overall well-being” (801). By adopting an interest theory of rights he may leave himself open to objections when he shifts to the NIP. After all, speaking of the interest of X when X doesn’t exist may be problematic. (My thanks to Alec Walen for bringing this to my attention.) However, for reasons stated above, I grant him the premise that future people can have these types of rights or, perhaps more plausibly, that the fact they will/would have rights can impact current evaluations of our actions.

Woodward considers two objections to his account that are mentioned – though not necessarily endorsed – in Parfit’s *Reasons and Persons*. The first objection states that the future people would not regret being born, and so the decision that causes their existence does not harm them.⁵⁴ The second objection asserts that future persons waive their rights to not be killed, injured, etc.⁵⁵ Given the various ways of filling-in the details, he addresses both objections at once, drawing on broader theoretical points. Woodward’s responses may have implications for my own argument – despite relevant differences between hypothetical consent and a lack of regret – so I will introduce them now. His four main responses⁵⁶ are: (1) one may deny that retrospective consent or lack of regret justifies a rights violation; (2) we ought not to assume that future persons would not regret their existence; (3) not regretting one’s existence does not necessarily entail not regretting the decision that led to one’s existence; and (4) “any appeal to consent...presupposes that the consenting agent does or will exist as a member of the moral community” (“The Non-Identity Problem” 824, 823-825). I will discuss (4) in Section II and (1)-(3) in Section III.

Section II: (Hypothetical) Consent

What’s missing from the accounts discussed above is an engagement with hypothetical individualized consent. For hypothetical consent to play the role that I would like it to in the NIP discussion, I must first show that it is a plausible normative account and, second, illustrate its relevance to the NIP.

⁵⁴ See Parfit 373-374.

⁵⁵ See Parfit 364-365, 373.

⁵⁶ These are the main responses for the purposes of this paper. His other response is a circularity concern: the future individuals would regret the action that led to their existence because it is morally wrong. Because consent can alter the moral landscape in a way that lack of regret cannot, the circularity concern does not arise for hypothetical consent. If the current generation was justified in imputing hypothetical consent, then the action leading to the future generation’s existence wasn’t wrong, *ceteris paribus*.

The Normative Account

In addressing the first, I assume that there is a morally transformative concept called prescriptive consent⁵⁷ that gains normative force from its relation to autonomy. The respectability of hypothetical consent as a moral concept is derived from its resemblance to prescriptive consent. For the purposes of this paper, I won't take a stance on the necessary or sufficient elements of valid prescriptive consent or on other peripheral issues about consent. I make these assumptions because hypothetical consent is not prescriptive consent but instead merely resembles it (albeit in a normatively important way). Thus, whether prescriptive consent is a mental state or communicative act won't be directly relevant. I also assume that the particular cases of consent discussed are valid, or morally transformative, unless indicated otherwise.

The “moral magic”⁵⁸ of prescriptive consent – and by relation hypothetical consent – gains its normative force from autonomy. While I will not argue for this claim, it is widely endorsed in the literature on consent.⁵⁹ Unfortunately, most authors write very

⁵⁷ I use the term “prescriptive” not in its normative sense but in its secondary sense, meaning “acquired by, founded on, or determined by prescription or by long-standing custom.” (Merriam-Webster’s Dictionary). The modifier will serve as a means of distinguishing between consent as we normally think of it and hypothetical consent. Since I do not want to wade too deeply into the waters of what non-fictitious/prescriptive consent is, I would like to keep the term as “empty” as possible – leaving space for the reader to fill in her or his favorite account of what we typically call consent.

⁵⁸ This term, as best I can discover, first appears in Heidi Hurd’s “The Moral Magic of Consent.”

⁵⁹ For example, Heidi Hurd views consent as a “power of personhood” and argues that this power’s source is our commitment to autonomy (“The Moral Magic of Consent” 121). Larry Alexander endorses Hurd’s view and, perhaps, goes even further in claiming that “one who cannot alter others’ obligations through consent is not fully autonomous” (“Moral Magic of Consent (II)” 165). Joan McGregor argues that “from the moral point of view, concern about personal autonomy and self-determination is represented by guaranteeing agents control over their domain through their power of consent” (“Why When She Says No She Doesn’t Mean Maybe and Doesn’t Mean Yes: A Critical Reconstruction of Consent, Sex, and The Law,” 192). Along similar lines, Emily Sherwin describes consent as “the practical means for exercising autonomy in one’s relations with others” and views its mechanism as connected to the value of self-governance (“Infelicitous Sex,” 212). Echoing the theme of autonomy and self-determination, Donald VanDeVeer holds that the importance of consent derives from “a right or legitimate claim of competent persons to direct their own lives within the domain of acts not wrongful to others” (*Paternalistic Intervention: The Moral Bounds on Benevolence*, 62). John Davis and Vera Bergelson also claim the normative basis of consent’s transformative power is autonomy.

little on what is meant by autonomy when asserting it is the basis of consent's magic. Commonly, authors relate autonomy with self-legislation or self-governance (for example, see Hurd,⁶⁰ McGregor,⁶¹ and Sherwin⁶²). However, where ambiguity emerges is whether autonomy is, to use Feinberg's framework, a capacity, a condition, an ideal, or a right.⁶³ In the context of consent, I claim we should view autonomy as a capacity which consent respects and the successful exercise of that ability which consent enhances.

By respecting an agent's consent, we respect her ability to govern herself – we respect her capacity to make choices and decisions regarding her life. As a condition, autonomy is enhanced through consent; consent is a tool agents can use to more effectively govern their lives. It enables moral agents to change the rights and obligations of others that pertain to the consenter. By consenting, we “control the normative situation by declaration,” “alter the moral fabric, rearrange the moral furniture, redraw the moral landscape,” and “change the world by changing the structure of rights and obligations of the parties involved” (Owens, 412; Hurd, 124; McGregor, 192). This power to alter the landscape of the moral reasons that pertain to us – and those we have protective authority over – reflects our capacity for self-legislation and enables us to transform the normative status of the actions of others.

Some, such as Victor Tadros and Meir Dan-Cohen, accept a strong relation between autonomy and consent but argue that dignity serves as a limiting factor on this power, rendering consent to actions which violate dignity to be non-transformative. R. George Wright proposes a more complex relationship between consent and dignity; the two are not coextensive, but consent serves as a proxy for dignity. In all but this last view, autonomy does the heavy moral lifting – even if the work it does is limited.

⁶⁰ “The capacity for autonomy is the capacity for self-legislation.” (Hurd, 124)

⁶¹ “Valuing autonomy is valuing the self-governing person.” (McGregor, 191)

⁶² See Sherwin, 211-212.

⁶³ See Ch. 18 of his *Harm to Self*.

Hypothetical consent enhances and respects autonomy in the same way prescriptive consent does. Drawing on Peter Westen's account, I will use the following "moralized"⁶⁴ and amended revision of his definition:

Hypothetical Consent: Based upon findings that S is currently unable to prescriptively consent to Φ but would consent to Φ if S were able to at the time, it is permissible to treat S and the reasons associated with Φ -ing as if S prescriptively consents to Φ .

It is important to note that hypothetical consent is not merely a subtype of prescriptive consent. Whatever is necessary for an agent to actually give consent is missing; the hypothetical consentor, by definition, cannot give prescriptive consent.

This type of consent emerges in a variety of contexts in one of two forms. First, hypothetical consent has a more abstract version that arises most famously in John Rawls's work. This consent is best described as *hypothetical non-individualized consent* or, to use VanDeer's term, *hypothetical rational consent* (VanDeVeer 71). Hypothetical non-individualized consent asks what a fully rational agent who is aware of all relevant facts would consent to. I want to make clear that this is not the type of hypothetical consent I think raises the strongest challenge against the person-affecting views. I am not proposing that we imagine those involved in the NIP standing behind a veil of ignorance and asking which world they would prefer. Nor are my claims contractualist; I don't ask what an abstract agent could rationally reject.⁶⁵

⁶⁴For Westen, hypothetical consent is a legal concept. However, he argues that there is a "family resemblance" between hypothetical and prescriptive consent. Since prescriptive consent is normative due to its grounding in autonomy, the claim of family resemblance lends a normative dimension to Westen's claim. For his definition of the term, see Westen, 271.

⁶⁵ See *Reasons and Persons*, page 392, for objections to this use and Thomson's *The Realm of Rights* (in particular footnote 5 on pages 188-189) for a criticism of hypothetical non-individualized consent.

Instead, the version of hypothetical consent I use is *hypothetical individualized consent*.⁶⁶ Hypothetical individualized consent looks to an agent's "normal capacities for deliberation and choice" (VanDeVeer 75). This type differs from its non-individualized counterpart in its purpose, focusing on decisions which aim to be sensitive to a particular person's wishes (e.g. what forms of care or means of life-preservation would Alex consent to) instead of deriving general governing principles from abstract rational persons.⁶⁷ As a result, these two types differ in the features attributed to the "consenter." Hypothetical individualized consent inquires of a particular person (in our case, a non-existent but no less particular person) if she would have consented had she been able to by considering all of her known or likely attributes.⁶⁸ It takes into account the agent's desires and commitments instead of abstracting away from them. To illustrate this process, consider the Canadian case of *Malette v. Shulman* (1990). In this case, Malette was rendered unconscious, suffered severe blood loss, and needed a blood transfusion. In considering whether she would have consented to this procedure, the court ruled that her physician, Shulman, ought to have looked to her particular values and beliefs. Since Shulman knew Malette was a Jehovah's Witness and would have refused the blood transfusion, he violated her person without consent by giving her the transfusion.

⁶⁶ Again, VanDeVeer's term, 75.

⁶⁷ This framework is admittedly in tension with some views of autonomy, such as Kant's, which tightly link autonomy with one's rational, non-individualized self.

⁶⁸ For a legal statement of how hypothetical consent works which emphasizes the importance of determining what the particular person would have chosen, see the Supreme Court of New Jersey's statement in *Matter of Jobes*: "Under the substituted judgment doctrine...a surrogate decision maker considers the patient's personal value system for guidance. The surrogate considers the patient's prior statements about and reactions to medical issues, and all the facets of the patient's personality that the surrogate is familiar with – with, of course, particular reference to his or her relevant philosophical, theological, and ethical values – in order to extrapolate what course of medical treatment the patient would choose."

Like prescriptive consent, hypothetical individualized consent reflects the values of self-determination and autonomy. It allows a person to control what happens to her body and interests when she cannot expressly alter the moral landscape surrounding her. By looking to her commitments, deeply held projects, previously expressed wishes, values, ethical beliefs, etc. others try to determine what an agent would have consented to. They thereby recognize that she has the power to alter the moral status of actions that affect her and are responsive to this power, exercising it for her as she would have done if she were able. Hypothetical individualized consent thus enables us to recognize and respond to an agent's autonomy instead of treating her as a non-autonomous moral patient (say by adopting a purely welfare view). In other words, hypothetical consent is a way for us to exercise control over our interests, bodies, and rights when we are unable to do so through prescriptive consent because of situational factors (e.g. we are unconscious or cannot physically be contacted).

To illustrate this point, consider the following cases:

Joanna: Joanna is pregnant and a devout Catholic. She believes that fetuses have souls and that directly killing them is murder. During her pregnancy, she falls unconscious due to a medical complication. Her life can be saved with procedure M, but M requires a dilation and evacuation [D&E] – a legal abortion method. If she were conscious, she would not consent to this procedure because of her moral beliefs.⁶⁹

⁶⁹ If needed to further motivate the intuition that performing M on her would be wrong, assume also that, were she to die, her body could be sustained on life support and the fetus carried to term and then successfully delivered.

Jane: Jane is pregnant and strongly pro-choice. She believes that fetuses lack the necessary mental capacities to be persons and so they may permissibly be killed to save the life of a person. During her pregnancy she falls unconscious due to a medical complication. Her life can be saved with procedure M, which requires a D&E. If she were conscious, she would consent to this procedure because of her moral beliefs.

I assume that Joanna could permissibly refuse M and Jane could permissibly consent to M if they were competent to do so at the time. In doing so, they would exercise their ability to alter (or refuse to alter) the rights and obligations others owe to them. However, in the above cases they are unable to directly exercise their power to do this. Depending on how one conceives of the duties in these cases, a physician must either save both Jill and Joanna (because of her duty to rescue) or save neither Jill nor Joanna (because doing so is assault). This result, however, seems morally unsatisfying; the physician in either case would be ignoring the fact that Jane and Joanna are the types of beings that can alter their moral landscapes to reflect their moral beliefs. The result renders the women unable to exercise control over the moral obligations that pertain to them in this situation.

Hypothetical individualized consent remedies this situation. The practice protects the rights of those who would give and withhold consent by effectuating what changes agents would make to the rights and duties surrounding them if they were able to do so at the time – ideally by guiding the actions of others but also, as in the case of *Malette v. Shulman*, by recognizing that a violation did occur. Since hypothetical consent allows others to respect an agent's autonomy and provides a means for her to exercise this

autonomy when she otherwise would be unable to do so, it possess the same morally transformative power as prescriptive consent.

Relevance to the NIP

For hypothetical consent to be relevant to the NIP, cases like *Risky Policy* have to be the sort of cases that hypothetical consent could apply to. For consent in general to be applicable, there are a few criteria. Consider: consent-giver G gives consent to consent-receiver R to Φ . Here, G, R, and Φ have to stand in the right relation to each other, Φ must be the appropriate object of consent, and G must be an agent that can be a consent-giver. The same rules apply for hypothetical consent (though G must only be an agent that can be a hypothetical consent-giver). I'll address these criteria in order.

First, G and R have to stand in the right relation to each other vis-à-vis Φ . I cannot give consent to you to borrow one of Bill Gates's cars. Nor can he give permission to you to sing in your shower. Assuming a normal living situation, you don't need anyone's consent to sing in your own shower because no one has a claim against you that you refrain from doing so; you have a Hohfeldian privilege to sing and so don't need consent. While there is such a claim in the case of borrowing another's car, I can only consent to alterations of the rights and obligations that are owed to me (and perhaps those I have guardianship over); I cannot do so for strangers. In non-identity cases, the future and present generations do stand in the right relationship. The wronged party would normally have a claim against others performing actions that cause physical pain, deformity, death, and disability – particularly if we accept the non-comparative accounts of wrong or harm. Under the person-affecting views, it is to them that the current generation owes a duty. If

anyone can give consent to others to engage in actions which violate this claim, it is them.

However, some claim that the content of consent poses limitations on when consent is transformative. This claim would challenge the requirement that Φ be the appropriate object of consent. There are three possible types of limitations. The first two types are concerned with undermining consent's normative grounding. In accounts such as Wright's⁷⁰ or Dan-Cohen's,⁷¹ this limitation is dignity; our dignity, in some way, restricts the scope of consent. In the more mainstream accounts of consent's normative source, the limitation might be actions which undermine or seriously threaten our autonomy. I emphasize might because it is unclear if we should claim that an agent can't autonomously undermine her autonomy because of the value of autonomy. The third type of possible limitation to things we can consent to arises from self-regarding duties. For example, Victor Tadros holds that there are some actions an agent cannot permissibly consent to because it would violate self-regarding duties.⁷² Consenting to things which violate these duties may thus be impermissible and affect the validity of consent.

Though there is much work to be done establishing these limitations and determining their scope, I am willing to grant that *if* any of these limitations exist, then there may be some versions of the NIP to which hypothetical consent is not relevant. Such a conclusion would depend on which limitations could be successfully defended and the details of the specific version of the non-identity case. However, it seems

⁷⁰ See "Consenting Adults," in particular page 1399 for claims of "the priority of dignity to consent."

⁷¹ See "Basic Values and the Victim's State of Mind," in particular Section IV.

⁷² See "Consent to Harm." This possible limitation *may* reduce to one of the first two if all self-regarding duties are grounded in either dignity or autonomy and all underminings of dignity or autonomy are violations of self-regarding duties.

unlikely, no matter how narrow or expansive the limitations are, that they cover all non-identity cases. Perhaps it would undermine an agent's dignity to consent to blindness in order to spare her parent the hassle of taking a pill for two months, if this were the sole reason for giving consent.⁷³ But surely this conclusion cannot establish that the advocate for the person-affecting intuition can claim no future people could ever consent in the NIP. Even making such a claim for lethal NIP cases seems problematic. While it may be true that there are some cases in which agents cannot consent to (or be imputed consent to) a killing of themselves,⁷⁴ it is not obvious this limitation would apply in all or even most non-identity cases. It seems permissible to consent to a shortening of one's life in many cases. An agent can refuse medical treatment that would lengthen her life, and we allow agents to engage in behaviors that carry a risk, sometimes even behaviors that are rather meaningless and carry a very high risk, of a statistically early death. In the right context, we may even think it admirable when an agent consents to an action or procedure that will almost certainly result in an untimely death.

While it may be the case that the action in all non-identity cases is not always the appropriate subject of consent, a challenge remains for the person-affecting camp. Absent more consensus regarding the larger issues surrounding what things we cannot consent to, those who reassert the importance of person-affecting reasons cannot rely on this

⁷³ This example is a merger of David Boonin's Wilma Case (*The Non-Identity Problem and the Ethics of Future People*) and Tadros's normative conclusion from his blood transfusion case on page 8 of "Consent to Harm" ("Suppose that my child has an ailment that causes her discomfort. Giving her a blood transfusion could prevent the discomfort. But the transfusion will shorten my life by 20 years. It seems wrong for a doctor, or anyone else, to perform the transfusion even though I consent to it.").

⁷⁴ For example, the general public sentiment is that Bernd Jürgen Armando Brandes could not validly consent to Armin Meiwes killing and then eating him. See Mark Landler's "Cannibal Convicted of Manslaughter; German Court Orders an 8 1/2-year Sentence," in *The New York Times*.

claim (without developing it much further) to dismiss the importance or relevance of hypothetical consent more broadly.

The third hurdle to establishing the relevance of hypothetical consent to the NIP is showing that future persons can be imputed consent. Obviously future people can't give prescriptive consent. If they could, then we wouldn't be discussing hypothetical consent. And, while hypothetical individualized consent does do moral work, there appears to be an important difference between Jane or Joanna and pre-conception Jehanne or Gauvin. In the former case, we are merely attributing consciousness and sufficient knowledge of a procedure to the agent; in the latter, we are attributing existence to the agent. Their status as non-existent might thus be thought to raise particular worries for the application of hypothetical individualized consent. In moving forward, I will remain neutral on whether these worries are fatal for a theory that advocates for a blanket application of hypothetical individualized consent to future persons. Instead, I will situate my remarks within the commitments of person-affecting accounts.

Woodward and Parfit have both raised concerns about the non-existence of "consenters" and using consent (or something similar) in the NIP. Woodward considers the claim that we cannot use consent because it "presupposes that the consenting agent does or will exist as a member of the moral community" (824). Simply put, I do not see why an agent's non-existence is a problem *given the commitments of person-affecting accounts*. If future individuals can have rights and claims that we must respect now, why can't we assume those individuals have the power to alter those rights and claims? Though they cannot prescriptively alter their rights at the moment a decision is made, neither can those who are temporarily incompetent. Granted, the latter exist while the

former do not, but the arguments we've considered for the person-affecting intuition do not view this as an impediment to harming them or violating their rights. In the same way their future interests can give us reasons to avoid actions that will harm those interests, their future autonomy can give us reasons to respect that autonomy. There is a *prima facie* reason for symmetry here: if their future/conditional status as persons can ground an impermissibility, surely their future/conditional interests, desires, and beliefs can ground a consent-based permission.

While lack of existence does impact our application of hypothetical consent, this reflects prudential concerns instead of a relevant normative difference. For example, while we know that the future people will have rights and a certain moral status, we can't always know how particular people would alter those rights and exercise their moral powers. This problem can occur even with existing persons, but it is admittedly a more common problem when dealing with those further away in time. Though I address this epistemic asymmetry in more detail in the last section, roughly, my response is this: in some cases I think we can have a reasonable belief about how a future person would exercise her autonomy. And, even if we aren't currently in an appropriate epistemic position to impute individualized consent, this lack of knowledge doesn't entail that we shouldn't respect or enhance the autonomy of future agents. As with all epistemic limitations, it merely impacts how we can best do this and, perhaps, gives us reasons to try to increase our knowledge.

A second concern relating to the application of hypothetical consent in this context regards which "time slice" we look to in determining the consenters' values, beliefs, etc. Throughout her life, a person changes her commitments, desires, and beliefs.

If we ask whether she would consent to Φ at t_1 , we might get a different answer than if we asked at t_2 . For cases like *Risky Policy*, we should approach this fact the same way we do with existing persons. It is the time slice we are about to harm whose desires and values matter (assuming she is competent). Though we can give consent in advance of certain actions, unless we have also entered into an agreement or made promises to give consent, we can withdraw consent at any point. So, when envisioning the future persons who are to give or withhold consent, we should look at them as they are in the last moment which they would be able to give or withdraw consent. Cases like “A World of Their Own” are more difficult. The harm exists over an agent’s entire life instead of occurring at a discrete moment in time. This means we can’t look to the agent as she is prior to the infliction of the harm – she doesn’t exist then. However, we can take one of two approaches. First, we could look at every time slice competent to give consent which is harmed by the action and ask whether she would consent at that particular time. We would then impute consent in the case of unanimity or, perhaps, when the ayes have a majority or super majority. Second, we could look to the agent’s commitments, desires, and beliefs at the first time which she would be able to competently give consent (around age 18 or so). I favor the second approach, though at times I think both are defensible. My preference for the second is because it more closely resembles how prescriptive consent works. We often consent to actions which will have lasting effects. Yet, what my future time slices would want is irrelevant to whether I can give consent *now* based on my current values and commitments. My 80-year old self may hate that tattoo I got, but this shouldn’t matter when asking whether I consent (or would consent) to the tattoo I am going to get today.

Parfit's concern is related to his worries about appealing to what he calls *Ideal Contractualism* to solve the NIP and related puzzles. Ideal Contractualism is, roughly, hypothetical non-individualized consent; it asks what moral principles we would endorse if we knew nothing about ourselves. For population issues, Parfit thinks that we cannot appeal to this method because we cannot meet the impartiality requirement. In deliberating about what to do, he holds we either assume that we or the relevant agents will exist regardless of what decision is made or assume that we do not know whether we will exist. The first option violates the impartiality requirement. The second, according to Parfit, is not an option because "we cannot assume that, in the actual history of the world, it might be true that we never existed" (392).

The application I propose differs from the Ideal Contractualist Method in two important regards. First, hypothetical individualized consent is not the Ideal Contractualist Method – there is no abstraction from factors about the individual. Because of this, impartiality plays no role in the normative account, and so the worry about violating impartiality is irrelevant. Second, and more importantly, it does not require us to do what Parfit holds is impossible or to imagine the future individuals doing the impossible. The current generation is being asked neither to imagine a world in which they do not exist nor to imagine future individuals imagining the impossible. Instead, the current generation is being asked to imagine what a future generation would consent to, where the deliberation involves at most an imagination of a different possible history in which they (the future generation) don't exist.⁷⁵

⁷⁵ Parfit holds that this type of imaginative endeavor is possible. See *Reasons and Persons*, page 392.

To support this response to Parfit (and so illustrate that hypothetical individualized consent can be relevant to the NIP), consider *Time Traveler*. In this case, time travel exists, and a time traveler asks your permission to go back in time and alter some event that would prevent your existence. In this context, I think we can make sense of contemplating our complete non-existence (not merely our lack of continued existence) and of deciding between non-existence and existence. While we cannot know exactly what it would be like not to exist, we can still make a choice when the time traveler approaches us. If we can consent to the time traveler altering the past in such a way that leads to our non-existence, then we could also consent or withhold consent to another action that has our non-existence as a side effect. Asking if we can impute consent in a non-identity case is like imagining what a conversation between a time traveler and a future person would be like: just before the catastrophe is to occur, someone from the time of *Risky Policy* hops out of a time machine, approaches a person, explains what will happen, and asks “Do you consent to what you are about to undergo?” Placing aside issues about the metaphysics of time travel, the above conversation seems sensible to me.

Furthermore, the consent given or withheld in this case seems valid. In an earlier section I stated that I will assume that all consent in this paper is valid unless otherwise stated. While I will continue to assume that the agents meet any mental⁷⁶ or informational

⁷⁶ For an alternative view to this assumption, see John Schuessler’s “Non-Identity: Solving the Waiver Problem for Future People’s Rights.” In this article he argues that life produces biased psychological states which undermine consent. The crucial premise is that “human beings usually develop a strong liking (akin to an addiction) [for the good life]” which renders them incompetent to give consent to matter regarding existence or continued existence (88-89). For our purposes, the further claim would be that this bias/addiction, which future people would probably have, should not be considered in determining whether we can impute consent to them. Though more empirical work needs to be done, I have suspicions about whether the claim of bias or an addiction-like state is true. Even granting this, it is not entirely clear that it should be the type of thing which undermines competence. After all, biases abound in human life; being

requirements (e.g. the future individuals would be sufficiently mentally competent and would possess all relevant information if they existed), I explicitly address the issue of coercion given that the alternative to consent is non-existence.

The issues surrounding what coercion is and how it affects permissibility are vast,⁷⁷ so I focus on coercion which negates consent, rendering the consent invalid. I assume that both offers and threats can be coercive – erring on the side of over- rather than under-inclusiveness.⁷⁸ I also adopt the base-line approach⁷⁹ in which we look at the less desired possible outcome and see if it is normal or in-line with what would happen absent the proposal.

In *Risky Policy*, the two options facing the potential consenters look like this:

(1a) If you consent to the harms necessary for your existing, you will exist.

(2a) If you don't consent to the harms necessary for your existing, you won't exist.

By stipulation, existing in the future of *Risky Policy* is more desirable than not existing; if it wasn't, then coercion wouldn't be a concern. The two options above superficially resemble this pair:

(1b) If you give me your valuables, I won't harm you.

(2b) If you keep your valuables, I will harm you.

(1b) and (2b) obviously involve coercion; victims of robberies don't give valid consent to have their belongings taken away. However, the baselines in (2a) and (2b) differ. In the

bias-free is a very high bar for an agent to meet and would render many instance of consent invalid (e.g. any consent that is subject to framing-effects or, if his claim is true, consent to life-saving treatment).

⁷⁷ See Scott Anderson's "Coercion" for an overview of the issues.

⁷⁸ The practical upshot of this assumption is that I won't spend time parsing out whether what occurs in the NIP is an offer or a threat.

⁷⁹ For more information on baseline accounts, see Berman's "The Normative Functions of Coercion Claims" and Gorr's "Toward a Theory of Coercion."

second case, the baseline for the unfavorable option is keeping your valuables and not coming to harm. This is, after all, what normally does or ought to⁸⁰ happen when you keep your belongings. (2b) is worse than this, so the proposal is coercive. Given the physical facts of the case, the baseline for (2a) is simply nonexistence. If you don't consent to things physically necessary for your existence (initial or continued), then those things won't normally or ought not to come to pass. You then won't exist. (2a) is thus not worse than the baseline.

To illustrate the permissibility of (1a) and (1b), consider the following offer/threat made by a doctor to her patient:

(1c) If you consent to the incision necessary for the appendectomy, you (probably) won't die of acute appendicitis.

(2c) If you don't consent to the incision, you will die of acute appendicitis.

The doctor in (c) isn't coercing her patient, just as the current generation isn't coercing future individuals. The two less-desirable options represent the baseline – what would be normal, absent any interference from the proposal givers; the proposals, thus, aren't coercive.

Hypothetical individualized consent, then, is relevant to non-identity cases. If we find that the future persons would have validly consented had they been able to, then we should act as if they have given valid consent. This imputation thus affects what actions are permissible and what reasons we have against acting.

⁸⁰ The baseline can be either moralized or non-moralized. I remain neutral on which one is right and instead stipulate that in these particular cases they are the same (e.g. people normally do and should keep their belongings).

Section III: Hypothetical Consent and the Non-Identity Problem

A Recap

Before moving forward, I would like to remind the reader what happened in Section I: we looked at two ways of defending the claim that person-affecting reasons – using the language of either harms or rights violations – solve the NIP. Both ways involve a rejection of some variation of the worse-off principle. I claimed that even if we grant the authors their rejection of the worse-off principle, their accounts cannot prove that person-affecting reasons ground the impermissibility of choosing the wrong action in non-identity cases. The following subsection will explain why this is.

Consent and the NIP

Prescriptively and validly consented-to harms do not retain the same moral status as unconsented-to harms, and consented-to rights violations no longer are rights violations. When a consent-giver, G, gives valid consent to consent-receiver, R, to perform a certain action, something morally transformative occurs. As agents we may not always consent to what is in our best interest, but by exercising our autonomy through consent, or having it respected through imputed consent, we alter the landscape of the moral reasons that pertain to us.⁸¹ By extension, the same change in status occurs for hypothetical consent.

What exactly happens to the reasons involved is more difficult to say. When considering this issue, Michelle Dempsey puts forth a seemingly exhaustive list of options: the reasons are cancelled; the reasons are excluded from consideration; and the

⁸¹ What follows is not meant to be a full argument supporting the conclusion that consent alters the normative landscape in such a way that consented-to harm no longer counts morally as “harm to person X.” Such a task is, unfortunately, beyond this paper. Instead, I merely wish to motivate this conclusion – to render it plausible and appealing. By doing at least this, I hope to show that person-affecting arguments are incomplete.

reasons can be permissibly excluded from consideration.⁸² The first option erases any normative weight the reasons have. In the second, the reasons retain their weight but are removed from the realm of normative deliberative. The end result for both of these is the same. In the third option, R can permissibly remove the reasons from the realm of deliberation; however, she does not have to and can instead choose to keep them “in play.”

All of these options pose problems for the person-affecting accounts, but the rights-based version is in slightly worse shape. For the rights-based argument to succeed, it must be the case that rights are violated in at least some NIP cases. Yet, regardless of the metaphysics of consent and reasons, there is rather large consensus – with intuitive support – that valid consent waives any rights that the consenter has against the receiver of consent that she not perform the action consented to. Consent “abolishes an obligation” (Owens 405) and “dispel[s] rights and duties” (Hurd 124). The interests which the right protects may still be considered; however, these interests – if in fact they can prohibit an action – won’t generate a rights violation and would merely reduce Woodward’s view to a harm-based view. Thus, if hypothetical consent justifies treating a person as if she had consented, the current generation would not violate the future individuals’ rights assuming hypothetical consent can be imputed in the particular case.

The harm-based versions fare slightly better, but not by much. If either of the first two options is true, then any person-affecting reasons against choosing the Risky Policy cannot retain their normative weight. Thus, the views defending the person-affecting intuition must include an argument against imputing consent or find some other way to

⁸² See pages 19-21 for her discussion of these options.

make the harm experienced relevant again in person-affecting terms.⁸³ The third option might be seen as friendlier to those who reject the worse-off principle of harming; the harm can, after all, still act as a reason against acting. However, those offering such an account would need to explain why the choice against excluding the relevant reasons is required and not merely supererogatory (for then choosing the Risky Policy would only be a failure to do what is supererogatory and not necessarily impermissible). This explanation must be in person-affecting terms. If it is not, then the new account seems to be motivated – at its core – by underlying non-person affecting reasons, and the talk of person-affecting concerns becomes only secondary.

As a caveat, I note that consent doesn't do away with all of our reasons to act related to the consentee; it does away only with those reasons which stand in need of a consent-like justification if they are violated. We have deontic constraints relating to other persons qua moral agents which are, *prima facie*, wrong to violate. Consent, in one of the above ways, operates on these considerations. However, people also have well-being interests that do not generate obligations, such as an interest in being complimented or having others share in their excitement. It is not obviously wrong to fail to consider these non-deontically protected interests if the other is still treated with respect (though perhaps violating such interests would be grounds for a negative character assessment). I will call these interests that affect an agent's well-being but do not give rise to general deontic obligations *well-being* interests*.

⁸³ While I have my doubts about whether this is possible for Harman's and Hanser's accounts, I do think the harm can still play some role as a reason by focusing on the role the agent plays in bringing about the consented-to harm. For example, G gives R consent to hit her. R is a pacifist. Even though R won't wrong G by hitting her, R still considers the harm done to G as a reason against hitting G because R does not want to play a causal role in producing harm.

These well-being* interests *may* be unaffected by consent and so permissibly considered. This type of interest can be present in cases where G consents to R's Φ -ing but does not want or desire R to Φ . Whether G can consent without a positive mental state about R's Φ -ing is a matter of debate, but, assuming for the sake argument that it is possible, R could then consider the fact that Φ -ing would make G sad, disappointed, etc.⁸⁴ For example, G consents to getting rid of his grandmother's vase. R thinks the vase is hideous and secretly wishes the cat would destroy it. However, R knows that G deeply cares for the vase and so keeps it out of concern for G's feelings. If this reason survives consent, it is because R does not need G's consent to perform an action that would make G sad. In other words, making G sad – particularly as a side effect of an otherwise permissible action – was already on the moral landscape pre-consent. The persistence of these reasons does mean that some person-affecting reasons may survive imputing consent in non-identity cases. However, the challenge for Harman and Hanser is to go from these interests against acting to the *impermissibility* of acting as a general solution to the NIP.

Regardless of how consent acts on reasons, then, we cannot count the harm done to future generations as a person-affecting reason which generates an impermissibility if we impute consent to the harm. By hypothetically consenting, the moral landscape is altered in such a way that the harm no longer carries the same negative moral weight. The harm itself – as a negative state – may still count against the action, but the harm qua “harm to Person G” no longer weighs against choosing the Risky Policy.

⁸⁴ See Tadros, *Wrongs and Crimes*, pages 209-210 for some reasons why we would want to claim that G can consent to Φ without desiring Φ .

Objections

In this subsection, I address three remaining objections to my use of hypothetical consent in evaluating person-affecting accounts. All three come from or are inspired by Woodward's responses to lines of argument found (though not necessarily endorsed) in *Reasons and Persons* that focus on the attitudes of the prima facie victims. These three objections are roughly: (1) retrospective consent or future lack of regret cannot justify a past action; (2) an agent can regret q, a necessary condition of p, without regretting p; and (3) we may lack sufficient evidence to impute consent to future generations. I will address each in order.

First, Woodward argues that "retrospective consent or lack of regret [doesn't] justif[y] rights violations" ("The Non-Identity Problem" 823). In other words, the objection expresses skepticism that a future event can reach back in time and change history.⁸⁵ In the case of the NIP, this objection claims that the future consent of currently non-existing persons to an action done in the present cannot alter the nature of what is done. While this objection is a plausible reason to reject retrospective consent, it misunderstands what is occurring in hypothetical consent. Future actual consent is not necessary for hypothetical consent to be valid. The fact that there is a reasonable finding that an agent would counterfactually consent to an action if she would have been able to at the time is what justifies an action undertaken with hypothetical consent. Any alteration of the morality of the action occurs at this time – not later. The reactions of the future persons may be evidence as to whether the action done was actually what they would have consented to, but such reactions do not alter the moral permissibility of the

⁸⁵ Both Feinberg and VanDeVeer raise this objection when discussing retrospective consent.

action. For example, if a physician reasonably believes, based on evidence indicating specific desires and commitments, that an unconscious patient would consent to a procedure P, then she can impute consent to P. The moral status of her action changes at this point – not later. Whether the patient approves of the procedure after the fact is irrelevant to this imputation.

Second, Woodward notes that an agent can be pleased with the result of a situation yet regret parts of that situation. I grant Woodward this point for regret; for example, I do not regret that my loved ones exist; yet, I regret that World War II occurred (a necessary condition for many of my loved ones' existence). However, hypothetical consent is not the same as lack of regret, and, furthermore, consent is being sought for the action that causes the harm – not for the future individuals' existence. Woodward's point, though, can be amended to be relevant to consent: we are justified in imputing consent only to existence but not to the conditions which are necessary for that existence.

However, this objection is not relevant to the NIP. In non-identity cases, the action which causes the existence is the very same action that causes the "harm." The evaluation of whether we should impute consent asks whether the agents would consent to *this* action. The fact that the action may have some unpleasant consequences is something which we must take into consideration. However, to claim that any agent can consent to the good effects of Φ but not the bad effects of Φ seems to miss the point that an agent consents to an action – she consents to Φ . It would not make sense for me to consent to the doctor performing an appendectomy that will remove my troublesome appendix but not consent to her performing an appendectomy that involves an abdominal incision when it is the very same appendectomy. If I uttered this in the exam room, the doctor would think I did

not understand the medical facts and a philosopher would think I didn't know what consent was. We should have the same response when imagining the future individuals consenting to the policy that causes their existence but not consenting to the very same policy that causes them pain and suffering.

Third, Woodward rejects the inference of consent from the fact that the consenters' lives will be worth living. I agree with him on this point and embrace it as a limitation of my account. We often assume that if the positives outweigh the negatives of an action, then *of course* the affected parties would consent.⁸⁶ When looking at the NIP, most see nothing (non-existence) weighed against a positive (a life worth-living) and so think that existence should be preferred. This weighing, however, is more complicated than it appears, and the two may be incomparable. Moreover, even if they aren't incomparable, it is not clear why existence should clearly win, and there is of course the additional problem that sometimes people do not consent to something that would have a personal net benefit.

However, I do think we – or, more accurately, the relevant experts – can make an educated guess about what future generations would consent to through the use of political science and other social sciences (and perhaps, eventually, even hard sciences like neuroscience or genetics). Recall that the version of hypothetical consent being used seeks to determine what particular persons would consent to – not idealized impartial beings. Religious prohibitions, cultural values, and even philosophical trends all could impact what decisions these particular people would make. While we cannot know for

⁸⁶ Consider an example from the medical context: if the pains of surgery are not worse than leaving the condition untreated, then of course the unconscious patient would consent to the procedure. Something similar may also occur among those who support voluntary euthanasia and providing medical aid to persons who attempt, and still seek to commit, suicide.

sure what the future would look like, we can make informed predictions. For example, if the current generation suspects that there will be a strong environmental movement in the future, then the future persons could reasonably be expected to withhold consent on those grounds.⁸⁷ Or, if perfectionism will be all the rage in a few years, the current generation could easily imagine a group of people who would not consent to a marred existence. The current generation may even consider whether the future generation would refuse consent based on the intuition that choosing the Risky Policy is morally impermissible.

Alternatively, perhaps a religion which emphasizes sacrifice for one's ancestors is becoming more dominant, leading to a reasonable assumption that future generations would, if able, give consent for the sake of their ancestors. Though this may be a daunting task for non-identity cases that span centuries, not every NIP involves this expansive time-frame. Recall the case of Gauvin and Jehanne. This decision, like many NIP cases, involved future people that came into existence only a few months from the time of the relevant decision and were raised in the deciders' own home.⁸⁸

Undergoing such a speculative task may not be possible in all non-identity cases, and in some situations the result may very well be that consent cannot be imputed.⁸⁹

⁸⁷ Consent can be withheld for a number of reasons, none of which necessarily have to relate to protecting the interest the right is meant to protect. For example, I could refuse to consent to a friend staying with me in my apartment not because of any reasons relating to property rights but instead because I want to make her think she did something wrong and buy me a present to apologize.

⁸⁸ The place of rearing is relevant because the deciders would presumably have more control over the values the relevant persons would adopt and so would have less uncertainty about whether they would consent. For other examples, see Parfit's case of *The 14-Year-Old Girl* (358) or Boonin's Wilma/Pebbles case (2).

⁸⁹ When discussing future *generations*, it is statistically likely that at least some future persons wouldn't consent, even if for every person we think it likely that she would consent. How to handle this puzzle is a problem for a different paper, but even if we resolve it in the way most favorable to the person-affecting intuition, defenses of this intuition are still incomplete. Let's stipulate that in *Risky Policy*, 1% of the population wouldn't consent. It appears odd to say that choosing the Risky Policy is impermissible because of the harm done to these few. Not only does it make the choice less bad than it intuitively is (it is only the harm to the 1% that counts after all), it also does not harmonize with our intuitions that, when dealing

Thus, my conclusion is tentative, at least in the following way: it's consistent with the existence of person-affecting reasons grounding the impermissibility of certain actions in specific non-identity cases. However, the point remains that a mere denial of the worse-off claim is not sufficient to reassert that making the wrong decision in non-identity cases in general violates person-affecting reasons, rendering the current accounts incomplete.

If we are to take the harm and rights violations done to future people seriously (in the way person-affecting accounts suggest), then we should also take their autonomy seriously as well. This means letting hypothetical individualized consent work its magic in some non-identity cases. To defend the person-affecting intuition, then, the accounts must either argue that we can't impute consent to the future people or that person-affecting reasons survive the imputation of consent. Alternatively, they may accept that in some non-identity cases, doing the intuitively wrong action isn't actually wrong, or at least not wrong for person-affecting reasons.

with large groups, it is sometimes permissible to disregard the lack of consent of a few if the rest of the group consents and desires the action to proceed.

CHAPTER THREE

Two Misconceptions about Informed Consent

Two common misconceptions about informed consent arise in law, medicine, and our standard normative engagements. Both obscure the status of informed consent as being nothing more than consent simpliciter. Or, more accurately, they obscure the status of all valid consent as informed consent. However, these misconceptions direct our attention to important lessons about consent, albeit at the cost of possibly misguided legal doctrines and unnecessary confusion. This paper corrects these errors while gleaming the insights of them.

The first misconception is that informed consent is consent to *risks*. This view distorts the relational aspect of consent. Consent, even when involving surgeries or Russian roulette, is consent to an action or omission done by another and not to risks. At best, informed consent is consent to risky actions. Though subtle, this shift speaks against categorizing informed consent as fictitious or imputed consent. While a resort to fiction is needed when explaining why we treat an agent as if she consented to a harm when we admit she consented only to the risk of harm, the revised account is purely nonfiction.

The second misconception of consent also furthers the mistaken view that informed consent is a distinct practice. Often informed consent is treated as separate from standard consent, is characterized by heightened information requirements and a duty on the part of others to provide the consenter with this information, and is limited to certain “high stakes” areas of life, like sex and surgeries. As a result, violations of informed consent are governed by different rules and assessments. For example, in the majority of U.S. jurisdictions, performing medical procedures without informed consent is tried under negligence liability or a hybrid liability instead of battery liability. Yet, if informed

consent is not a form of fictitious consent, then why is it governed by a different liability standard? The typical answer points to both the duty to inform and the heightened information requirement. However, the former is an issue that should be kept separate from consent and the latter is insufficient to erect a division between “informed” consent and consent simpliciter.

By looking to the actions we label informed consent, I suggest that we can gain insight into how to determine and apply the information requirement.⁹⁰ Specifically I suggest a contextualist approach to the information requirement in which the amount of information required for the consent to be valid or transformative looks to the broader aims of consent. Drawing from Neil Manson and Onora O’Neill’s *Rethinking Informed Consent in Bioethics*, we can look to the agent’s practical and cognitive commitments to determine what information is necessary to provide a sufficient grasp of the inferential relations between them and the action. We can then focus on the relational aspect between the consent-giver and consent-receiver, as well as other moral or practical concerns, to determine the separate issue of whether the receiver has a duty to disclose relevant information to the consenter. Separating this issue from the question of whether consent was given – or whether the consent is valid⁹¹ – and even our assessment of an

⁹⁰ I follow Feinberg in his use of this term, which he attributes to Louis Katzner (“The Ethics of Human Experimentation: The Information Condition” in *Medical Responsibility, Paternalism, Informed Consent, and Euthanasia*).

⁹¹ There are two ways of speaking of alleged consent that fails the information requirement, is coerced, or is given by someone who is incompetent. One way states that there is no consent present at all. The fraud or robbery victim just doesn’t consent. The other way states that consent is present but holds that the consent is invalid, e.g. the robbery victim does consent but the consent is not valid. In both cases, no “moral magic” occurs. Since I lack the space to engage with these alternatives fully (and am inclined to think this is mostly a semantic dispute), I will often speak in terms of the former view for ease of writing, but my remarks also apply to the alternative way of speaking – simply replace “consent” with “valid consent.”

agent who acts with merely apparent consent, provides greater clarity in our normative reasoning about consent.

This chapter is broken into two parts, each focusing on a specific misconception. Section I illustrates how viewing informed consent as consent to risks ignores the relational structure of consent. It then argues for taking informed consent back into the fold of standard, non-fictitious consent. Section II rejects the separation of informed consent from consent simpliciter. It proposes a contextualist account of the information requirement and then argues that whether duties to provide information are met is distinct from whether consent is present or valid.

Section I: Informed Consent*: Consenting to Risks

“Informed consent” can mean many things. It often denotes authorization or consent given after a sufficient disclosure of relevant information. Though this meaning is problematic, there is another sense which is even more troubling: “informed consent may denote a mechanism for the acceptance or assumption of risk” (Joffe and Trough 350) or “acquiescence to running a risk of x” (Westen 271).⁹² This meaning may be even more common than its authorization alternative: “When Americans think of informed consent, however, they probably think of consent to risks of personal injury” (Shuck 902). In this (mis)conceptualization, consent is given to a risk. This account of informed consent – which I call informed consent* – ignores the structure of consent and raises a non-existent problem.

⁹² Feinberg speaks of “consent to risk” when discussing consent that is informed (278). Though not discussing informed consent specifically, Tadros also speaks as if consent can be to risks and then is merely extended to the manifestation of the risk if such a manifestation occurs (242-243).

Consent, in its most basic structure, is a three-place relationship⁹³ among a consent-giver, G, a consent-receiver, R, and the thing consented to, Φ . The first component is (hopefully) uncontroversial. Consent, “as a power of personhood,”⁹⁴ requires a person (or, at least a pseudo-person, such as a corporation). Similarly, since consent works on obligations owed to G, consent must have a recipient, which is the entity possessing these obligations. Following this structure, the object of consent must be something that can violate rights and obligations. This something is, with perhaps a few exceptions⁹⁵, actions or omissions.⁹⁶ I violate my obligations to you by *acting* or *failing to act*. To remove this act component from the equation transforms the transaction into something that is no longer about altering the normative relationship between G and R. It would be akin to G giving R consent for the moon to shine or consent to borrow a stranger’s car. The oddness of this statement arises precisely because the moon shining and the property rights relating to a stranger’s car are not part of the normative landscape connecting G and R. These things do not violate the duty R owes to G, and so G’s giving permission to R to engage in these acts by releasing R from a duty owed to her is nonsensical. Informed consent*’s structure of G giving consent to R for a mere risk – divorced from the actions of R – is similarly unable to capture the relational aspect of

⁹³ See Kleining, “The Nature of Consent,” for the relational structure of consent.

⁹⁴ Hurd uses this phrase. See page 121.

⁹⁵ I note that there might be a few exceptions to leave open the possibility that attitudes, thoughts, emotions, biases, etc. could directly violate rights and obligations. For example, see Angela Smith’s “Responsibility for Attitudes: Activity and Passivity in Mental Life.” If this view is true and G can permissibly give consent to R to have an otherwise impermissible attitude, etc. towards her, then Φ and future references to Φ should be read as including attitudes, etc. as well as actions and omissions.

⁹⁶ Tadros puts forth the view that consent is an intention, the object of which is the other’s duty and not her action (see Ch.11, in particular page 209). This view is consistent with the framework above. While consent is an intention to release another from a duty, the thing being consented to – the thing for which permission is given – is what would otherwise violate this duty (i.e. actions and omissions). The consenter need not intend that the other perform the act to intend that the act not violated duties owed to her.

consent. A mere risk of some bad state of affairs obtaining – when conceived of as solely the risk and nothing more – is no more a part of the normative ties binding G and R than the moon shining is. Accordingly, whether G is exposed to a risk – absent R’s actions – is just as relevant to R’s obligations to G as the moon’s brightness.

Rephrasing Φ to reflect this normative relationship, we get this account of consenting to a risk of X: G gives consent to R to do an action or omission that carries a risk of X. Despite the similarities of these structures, there are significant differences between the two. By adhering to the suggested alternative, we not only accurately capture what consent is about – altering the rights and obligations that exist between two entities – but also avoid the illusion of fictitious consent. Under informed consent*’s framework, consent is given to a risk of harm and not to the harm itself. Consenting to a 5% chance of blindness is quite different from consenting to blindness. However, if the risk materializes, we treat the agent who consents to the risk as if she consented to the blindness. In treating the agent as if she consented, we are thereby imputing consent to her for a Φ to which she did not actually give consent. While there may be good reasons to do this, it raises a puzzle in need of an answer. Namely, why do we treat an agent who consented to one thing as if she consents to another?⁹⁷

This puzzle is avoided by adhering to the standard consent structure and requiring Φ to be an action or omission. Consider this case: G gives consent to R to perform a surgery, which carries with it a 0.5% chance of blindness and a 99.5% chance of curing

⁹⁷ An alternative version of the puzzle is this: Why do we claim an agent who consented to a risk of harm cannot obtain damages when the harm occurs? Instead of imputing consent to the manifestation of the risk, this puzzle arises in response to “the traditional notion that one who consents to a risk may not obtain damages when the risk materializes in harm” (Simmons 214). While this “traditional notion” does closely resemble the view I’m challenging directly, the latter may have additional problems arising from its use of “consent” (see Ch. 1). Regardless, neither puzzle needs to arise if we properly conceive of what is being consented to.

his cataracts. The surgery, through no fault of R's, causes G to go blind. In analyzing this case, no fiction is needed. G consented to R performing an action, which R then performed. While G might not have consented to an act under the description "blinding me," he can point to no action of R's which violated any moral or legal claim he has on his surgeon because the action which blinded him was the very same action to which he gave consent. This account more easily explains why we deny G standing to sue R for any harm he may have suffered (*volenti non fit injuria*) and why we deny that R violated a duty owed to G. No fiction is needed.

In addition to avoiding "disingenuously transmut[ing] what a person does," (Westen 284) rejecting this fiction also means avoiding questionable distinctions between consent and informed consent as well as problematic accounts of why we give the fiction normative force. To illustrate this, I look at Westen's comments on consent to risk. Westen argues for a distinction between cases in which the agent prefers a certainty of the harm occurring to the alternative of forgoing the risky action and cases in which the agent does not prefer a certainty of harm to the alternative of forgoing the action. These cases are illustrated as follows:

Inflammation: A patient Joan has 20-30 vision in one eye but only 20-100 vision in the other. In order to correct her vision, Joan seeks out a laser surgeon, A, who informs her that, in order to correct vision in the one eye, he must operate on both. A also informs Joan that while there is only a small risk that she will go blind in both eyes, there is a larger, but still less than 15%, risk that she will suffer inflammation in one or both eyes for as much as a week. Joan hopes to escape inflammation, but she would prefer even the certainty of a week of eye inflammation to the alternative of foregoing an opportunity for improved vision and submits to the surgery. To her disappointment, Joan develops a week of inflammation in both eyes.

Blindness: A patient, Helen, has the same eye conditions as Joan, and she goes to the same doctor for the same treatment. Unfortunately, the worst risks materialize in Helen's case, and to her horror she goes blind in both eyes...[Helen] obviously

did not prefer the certainty of total blindness to the alternative of forgoing a laser procedure on eyes that were still healthy! (280-281)

Westen argues that *Inflammation* is a form of prescriptive – or standard – consent and that only *Blindness* is fictitious. The justification for claiming the patient prescriptively consented in the first is that she “preferred even the certainty of a temporary eye infection to the alternative of forgoing the opportunity for improved vision” (Westen 281). In other words, Joan preferred what actually occurred to forgoing the surgery. In contrast, the patient in *Blindness* is ruled not to have prescriptively consented because she did not prefer the certainty of blindness to the surgery. Consent is then imputed because she prefers a risk of blindness (though not the certainty of it) to the alternative of forgoing the surgery. Westen claims this distinction is important because justifications denying recovery for damages in both cases “rest on different factual and normative premises” (282). In *Inflammation*, Westen holds the normative basis for consent is that the patient “choos[es] [the harm] as that which she prefers for herself under the circumstances” (282). In contrast, the patient is treated *as if* she consents in *Blindness* because the risk was reasonable to take and she was sufficiently informed.

This account has three potentially concerning implications.⁹⁸ First, it relies on a version of prescriptive consent that requires preference or some other positive affective state to be had towards Φ . Once we remove this requirement, it is unclear how to differentiate between *Inflammation* and *Blindness*. While the correct view of prescriptive

⁹⁸ There is a fourth potentially concerning implication: “[fictions of informed consent] signal what assumption-of-risk rules possess in common with rules of prescriptive consent” (Westen 284). I discuss the connection between informed consent* and assumption of risk in “Rethinking Assumption of Risk and (Informed) Consent” (draft).

consent may requires such positive mental states,⁹⁹ it is preferable for an account of informed consent to remain neutral on the issue. Second, the account requires us to be agnostic about whether an agent consents to Φ until after she becomes aware of the effects of Φ . In the case of *Blindness*, we wouldn't be able to say if Helen had actually given consent – even though she engaged in the same actions as Joan – until we knew the outcome of the surgery. Since Helen may later come to rejoice in the fact she had the surgery and was blinded, we may have to wait a rather long time to figure out whether consent was present.¹⁰⁰ Third, the account rules out the possibility of consenting to a risky action that has an unreasonable risk. The justification for treating Helen as if she consented to blindness was that taking on such a risk was reasonable. However, agents can consent to actions that carry with it an unreasonable risk of harm. In such cases, we should still give this consent normative effect for autonomy-based considerations.

Section II: *Informed Consent*

The second misconception of informed consent focuses on a disclosure of information in certain high stakes situations. Articulating this conception of informed consent, Feinberg claims that “sometimes the institutional setting and the momentous issue at stake require that consent be ‘informed’” (278). In contrast to the standard image of consent, this picture emphasizes a high transfer of information – reflective of the “momentous” decision about to be made – to the consenter by those who seek consent. The paradigmatic case of this is one we all have probably encountered: a doctor gives

⁹⁹ See Tadros, *Wrongs and Crimes*, pages 209-210 for some reasons why we would want to claim that G can consent to Φ without desiring or preferring Φ .

¹⁰⁰ Relatedly, one might think that this account contains a retrospective element – whether an agent consented or not depends on a future fact, so the future fact somehow reaches back in time and changes the status of what occurred. Such an element is a bit odd and gives cause for pause.

information to a patient, who then either gives or withholds consent to treatment. Under this image, informed consent is limited only to those situations sharing the features mentioned above.

This limitation can be interpreted as informed consent being either a proper subset of consent or as a concept distinct from consent. When viewed as the former, informed consent is generally thought to be a subgroup of consent that involves a duty to provide the consentor with additional information. While some view informed consent as “consent plus,” others present the two as importantly distinct concepts. For example, violations of informed consent are treated differently from actions done without consent simpliciter in U.S. tort doctrine. In most jurisdictions, conducting a medical procedure without informed consent is not treated as a battery but instead is tried under negligence liability or a hybrid liability that requires showing “decision causation.” The upshot is that to recover for damages arising from the surgery, the plaintiff must prove the omission of information made a decisional difference. In other words, the liability does not recognize the dignitary injury of an unconsented-to bodily invasion.¹⁰¹ The different treatment of violations of informed consent and consent simpliciter reflects a framework in which the two are discrete concepts. In most jurisdictions, then, informed consent thus appears to be a special legal doctrine distinct from standard consent, arising in only certain circumstances.

However, this separation, in either its modest or stronger guise, is a mistake. All consent has an information requirement if it is to be normatively transformative. Our current practice of applying the term “informed consent” to only a proper subset of

¹⁰¹ See Simons page 281, Faden and Beauchamp pages 26-34, and VanDeVeer page 174 for a discussion of lack of informed consent and tort liability.

consent or treating it as distinct from consent is motivated, I suspect, by the fact that in certain contexts the information requirement attached to all forms of consent is raised to an unusually high bar or that in some cases there are others who have a duty to provide the consenter with information. However, the latter is an issue separate from whether consent is present or valid while the former doesn't warrant separate treatment for it. Retaining our current practice of using informed consent to refer only to cases where these elements exist causes unnecessary confusion.

Information Requirement

Separating informed consent from the rest of consent would obscure the fact that all consent has an information requirement; it is simply a matter of degree as to how much information consent requires. The practice of calling only a (proper) subset of consent "informed" lends credence to the view that the rest of consent need not be informed, supporting the claim that the consent of the naïve and ignorant should be effective without sufficient argument. This (perhaps) intuitive division does, however, support a contextualist approach to the information requirement. In this approach, the information bar is raised or lowered in response to the circumstances in which consent is given and in light of consent's aims.

Consent, as a power of personhood, aims to respect and enhance autonomy. By respecting an agent's consent, we respect her ability to govern herself – her capacity to make choices and decisions regarding her life. Consent also enables agents to more effectively govern their lives by changing the rights and obligations of others that pertain to them, thereby enhancing autonomy as a condition (e.g. the successful exercise of a

capacity for self-governance).¹⁰² In other words, it allows them to exert control over their lives by giving them the power to release others from duties owed to them.

Transformative consent should meet these aims, and any impositions on whether consent is present, such as the information requirement or restrictions on how the Φ of consent is described,¹⁰³ should thus restrict consent's "magic" to cases where the consenter's autonomy and control is promoted. In determining where this line is, I suggest looking to Manson and O'Neill's framework of practical and cognitive commitments. Practical commitments arise from our desires, values, preferences, etc. whereas cognitive commitments are how we take the world to be and include our descriptions of the actions we are about to take (Manson and O'Neill 51-52). As agents, we use both in acting autonomously. Our choices rely on inferences between these commitments: we have an aim under a certain description, and we then rely on cognitive commitments in implementing this aim.

I propose that the information requirement is contextualist in the following way: the amount of information the consenter must possess is sensitive to the consenter's practical commitments. This is contextualism not about what information must be *conveyed* for consent to be present but about what information must be *possessed* by the consenter. Missing information or false beliefs about what obtains can hinder our ability to shape our lives in ways reflective of our practical commitments. For example, if I am

¹⁰² I am using "condition" in the sense described by Feinberg in Ch. 18 of his *Harm to Self*.

¹⁰³ Some authors, such as Hurd, address similar issues by way of asking about the "propositional content of consent" – referring to how the consenter conceives of the Φ she is consenting to (see pages 126-134). However, in one respect these issues are distinct. Though I suspect what she says about the consenter's intention of consent transfers to her views about the information requirement, strictly speaking questions about what an agent consents to are different from questions about what she has to know for the consent to be valid. For example, our reasons for excluding the consequences of the conduct consented to from the intention of consent will differ from our reasons for excluding them from the information requirement – if such things are to be excluded at all (compare her discussion on pages 133-4 with the discussion below).

unaware that the cup of liquid I am about to is really a cup of arsenic and not tea, then in an important sense my act of drinking it, which I view as an effort to warm and caffeinate myself, does not reflect how I choose to order my life. My lack of information impedes my ability to author my story. If we are to meaningfully exercise self-direction, we must be able to make correct inferences, using our cognitive commitments, to accurately direct how we promote or instantiate our practical commitments. Though we may not always exercise our autonomy to promote our most deeply held practical commitments (e.g. when we act “out of character”), appropriate inferences between these and the world remain necessary for our actions to be a successful exercise of self-governance.

With consent, a similar impediment to autonomy can occur when information is missing or beliefs are mistaken. We relieve others of the duties they owe us as an act of shaping the world in light of what is important to us (or at least important to us at that particular time). Missing information can alter how we view our act of consent, changing it from an action that reflects a practical commitment to an action that reflects a different practical commitment or perhaps none at all. It thus impedes our ability to direct our life towards self-selected ends in a normative space where we are to have sole control – a realm where we are supposed to reign supreme. Because consent given with relevant information missing does not fully reflect our ability to “rearrange our normative furniture” (Hurd 124) in light of our goals and does not enhance the successful exercise of this ability, it should not be given normative force.¹⁰⁴

¹⁰⁴ Though I cannot explore the topic here, I suspect a similar information requirement is necessary when an agent incurs a certain type of obligation as well. These obligations are the ones arising from morally optional duties that one directly incurs (e.g. promises) and not those required qua moral agent or imposed in light of some other action (e.g. a duty of repair or restitution).

It is these errors – errors that impact our ability to make correct inferences between what the world actually is like and our practical commitments – that render consent inert, and certain areas of our life typically have much more importance in light of these commitments than others. This phenomena is, I suspect, why we typically view informed consent as limited to specific cases. There are areas where we commonly have important interests that would require a heightened information requirement. We then look at these cases as involving something “extra” as opposed to merely an application of the same (albeit contextualized) standard. Such a static view of the information requirement, however, means that we more easily overlook areas that fall outside of the typical “informed consent” cases but which, due to the agent’s practical commitments, have a higher informational bar. It also ignores the fact that there is a wide spectrum of informational bars occurring below the “informed consent” threshold. For example, in light of my own practical commitments, I require less knowledge when consenting to another borrowing my pen than borrowing my car – even though in both cases the informational bar is much lower than if I were consenting to a serious surgery. The relevant practical commitments involved in the pen case are limited to something like “being helpful to others” while the other involves this commitment plus something like “be responsible with valuable possessions.” False beliefs about the reliability of the consent-receiver are relevant to my exercise of authority over the duties owed to me in a way that reflects the second commitment but not necessarily the first. The information required is thus contextualized to what is necessary for making proper inferences between practical and cognitive commitments.¹⁰⁵

¹⁰⁵ It is important to not overgeneralize this requirement; not every bit of information that would change whether an agent consented would invalidate consent if missing. It is only those bits of information whose

The contextualized standard also means that, for the same Φ , the information required will vary depending on the agent's practical commitments. Consider two cases:

Book Lending 1: Jordan has a practical commitment to lending books to anyone – regardless of moral or political views. Adolf, a Nazi, asks to borrow a book. Jordan consents.

Book Lending 2: Jasmine has a practical commitment to lending books and a more important practical commitment to not helping Nazis. Adolf, a Nazi, asks to borrow a book. Jasmine is unaware that Adolf is a Nazi and would not have lent the book to him if she knew. Jasmine consents.

In *Book Lending 1*, Jordan's consent is transformative. He has all the information he needs to make correct inferences about how his actions and the world line up with his practical commitments. In contrast, Jasmine does not. She lacks knowledge of a material fact that would greatly change how she views her actions in light of her practical commitments. The upshot is that for consent to be present, we cannot impose a boilerplate template for the information requirement. Though we can generalize, the information requirement is sensitive to the commitments of each consenter. We must consider what information she would need to make the correct inferences, relative to her practical commitments she views as relevant in the situation.

While this information relates to both the description under which I conceive of the act (e.g. "sex with my spouse" versus "sex with the person in my bed") and facts about the act (e.g. a surgery which has a 70% success rate), it need not include future

omission would deny the agent "an opportunity to control her...life according to her own values and judgments" (Tadros 249). For examples of such cases, see Tadros pages 252-253. Roughly, the thought is that an agent could still consent, but the act consented to would have a different meaning. To rephrase this in Mason and O'Neill's terms, the action would reflect or promote different practical commitments.

facts (if such things even exist!) about the causal effects of the action *even if* the agent would have acted differently had she had access to this information. As Feinberg notes, to allow unfortunate losses to invalidate prior consent would turn losing gamblers into victims of larceny, and this surely seems like a wrong result (277). Since I have rejected the fiction of informed consent*, I have closed one option of reconciling the information requirement with the previous sentence: namely that we merely treat an agent as if she consents to the materialization of the risk because she consented to the risk.

However, there is another alternative. Given our epistemic limitations, we have interests in being able to consent in the face of uncertainty. To require full knowledge about an event's consequences would strip us of our ability to release others from the duties they owe us. After all, every action could potentially lead to bizarre and harmful outcomes. Because of this, the information requirement should focus on present facts, which may include present assessments of future risks, but not future occurrences, which are unknowable to us. The same interest also applies to problems where no agent knows the full facts, such as in a scratch-off lottery, even though the relevant facts already exist.

As a disclaimer, where we set this contextualized standard for any consent as a matter of law may differ from where we set it morally. While normatively a subjective approach (where consent is only transformative if the agent has all the information relevant given *her* commitments and *her* situation) better reflects the aims of consent, there may be reasons to adopt a reasonable person standard in law. For example, such a subjective approach could be practically infeasible, leading courts to adopt a second-best approach. However, courts and legislatures should not move to a reasonable person approach for consent because of concerns about fairness to the consent-receiver. Our

standards for excusing conduct done with apparent (but not actual) consent are a separate issue from whether consent was validly given. Recall *Book Lending 2*. If Adolf knew only that Jasmine was a competent adult, it seems odd to blame him for borrowing the book. However, if Adolf knew of Jasmine's practical commitments and her ignorance about his Nazism, it seems as if he does wrong her in an important sense by acting on the consent. The best explanation of this wrongness is that her consent lacks "moral magic." On a more theoretical level, the norms we use to determine if consent is present and transformative reflect consent's relation to the consent-giver's autonomy. Our assessments of whether an agent acted wrongly or blame-worthily are much more extensive. These assessments can easily come apart, and in many cases we may have reasons to claim that consent was not present even though we hold the "consent"-receiver to be blameless.

Duty to Inform

It is also important to note that where we set the informational bar is a separate issue from whether anyone has a duty to provide information to a potential consentor. The common picture of informed consent, however, blurs this distinction and builds into its account a required conveyance of information.

Retaining the standard view of informed consent would muddle what occurs when an agent has a duty to provide information to G but does not and the prima facie consent is acted upon. Here, there are two distinct issues. One is whether an agent violated a duty to provide information. The other is whether an agent violated a duty not to Φ without consent. Our treatment of these issues should differ in three ways. First, a violation of one does not entail a violation of the other. For example, G could have sufficient information

to make consenting to Φ transformative despite the agent failing to provide G with this information. In this case, there would be a breach of duty to supply information but no violation of the duty that consent acted upon.

Second, our assessments of agents who violate these obligations and what judgments we make about them should differ as well. The values which motivate a duty to inform need not be identical to those motivating the duty consent will act upon. These differences should affect how we treat violations of the corresponding obligations. For example, violating a duty not to perform nonconsensual surgery is very different from violating a duty to disclose relevant information about the surgery. An obvious difference between the two is that one is a battery and the other is not. Treating these duties separately also allows us to recognize the wrong caused by each violation. An agent who breaches a duty to inform and Φ 's without consent has doubly wronged someone. And, failing to disclose relevant information is itself a wrong, even if the further violation doesn't occur. Incorporating the duty to disclose within informed consent would prevent us from describing failures to disclose as morally significant if no consent was given.

Third, the agent with the duty to provide the information may be different from the consent-receiver. For example, a financial adviser may have a duty to inform her clients about certain proposed transactions even though she is not the recipient of consent. Where the third-party fails to inform G and G's attempted consent is not transformative, we might claim that R is excused for Φ -ing while holding the non-informer responsible for her breach of duty to G. In cases where R is aware that consent is not present due to lack of information, R would have a duty not to act on this alleged

consent.¹⁰⁶ Though R might choose to provide the information needed to render the consent transformative, doing so would not be required and, while it may relieve the third-party from her duty to inform G, it would not render her initial failure to inform any less of a duty violation. Labelling what occurs in cases of a violation of the duty to inform as lack of informed consent, or Φ -ing without informed consent, would render the distinctions between these obligations and the moral relationships less clear than a framework which separated the question of whether consent is present from an analysis of the duty to provide information to the consenter.

Separating the information requirement from the duty to inform also enables us to address more clearly the issues surrounding the latter. In addressing the duty to inform, there are two questions. First, who has this duty? Second, what does this duty consist in, or, how much information must be conveyed? While under the common account of informed consent, we may be tempted to reply that the consent-receiver has the duty to disclose whatever information is necessary to meet the information requirement, a more nuanced analysis should be done.

In addressing the question of who has the duty to inform, we should take note of the duties that intuitively exist and be open to the possibility that the autonomy-based concerns that ground the information requirement may not ground the determination of who has a duty to inform. In some cases, this duty falls to a doctor providing information about a surgery (who may or may not be the doctor that actually does the surgery), a future sexual partner disclosing her HIV status, or a homeowner telling a potential buyer

¹⁰⁶ This reflects the admittedly undefended principle that we should not act on consent we believe to be invalid even if we are not the cause of the invalidity (e.g. consent that is coerced by a third party, consent given from someone who is incompetent to consent, etc.).

about termites. At times, no one may have a duty to inform the agent, meaning that she does not have a right to this information. While these duties may reflect the importance of the consenters' autonomy, they also could reflect other norms or values either internal or external to the relationship. For example, the physician's obligation may arise from the fiduciary relationship between her and her patient and reflect the values of engendering trust and open communication between the two. In other cases, perhaps the duty is imposed as a matter of convention, reflecting a social and legal rule that distributes the burden of information hunting in a particular way. Exactly what these conventions are is a matter for a separate paper. However, in some cases it seems as if whether a person has a duty to inform G of some material fact will have no clear answer absent an agreed-upon rule. For example, I don't have strong intuitions that, absent social convention, a real estate agent has a duty to inform a potential buyer whether a murder occurred on the property or whether the house has termites. So long as the convention we decide upon is sensitive to fairness concerns, such as an agent being required to give away for free information she labored extensively to gain, my intuition is that the realtor should merely do whatever convention requires.¹⁰⁷ By separating the question of obligation to convey information from the standard for (informed) consent, we allow for an acknowledgement of these other values, recognizing that the conversation surrounding stereotypical cases of informed consent often serve other purposes, such as engendering trust between patient and physician¹⁰⁸ or minimizing the burdens of costly information discovery.

¹⁰⁷ My thanks to Doug Husak for bringing the fairness concerns to my attention.

¹⁰⁸ See Manson and O'Neill, in particular pages 32-33, for a list of some of the other purposes the communicative transaction (their term) associated with consent may serve. See also their Ch. 3 for an account of the communicative norms that govern this transaction. Note that, contra to the view I am advocating, they take informed consent to be this communicative transaction.

Regarding how much information should be conveyed, I once again turn to contextualism. The duty to inform is contextually sensitive to a consentor's current cognitive commitments. "Our inferential capacities...are extremely fertile," meaning that we have vast background knowledge and the ability to make reasonable inferences from this body of knowledge when given new information (Manson and O'Neill 53). In furthering our practical commitments, we rely on this ability, often through speech acts that occur against a background of shared knowledge and in specific contexts with particular linguistic conventions. Governed by communicative norms, these speech acts should be sensitive to context and relevant to the intended audience. The bar for this disclosure requirement (the amount of information which must be transferred to the consentor) thus should follow these norms. This means that fulfilling a duty to different agents who are considering consenting to the same Φ may require a different amount of information disclosure, ranging from extensive to perhaps none at all, depending on what information the consentor already possesses and what is situationally-relevant.

To illustrate this contextualism, consider two cases that involve differences in background knowledge:

Expert: I am a professional MMA fighter who has been punched numerous times.

I give consent to R, another MMA fighter, to punch me.

Novice: I have never been punched before. I give consent to R, a professional

MMA fighter, to punch me.

In *Expert*, it seems as if no transfer of information about the pain of being punched or the possibility for specific injuries is needed because of the presumed background knowledge. However, in *Novice*, this information does need to be conveyed (assuming it

is needed for consent to be valid). The reason for this difference is that we, typically, shouldn't state the obvious. Here are two cases where the contextualism is sensitive to the context, holding the background information constant:

Fire: R asks for G's consent to enter G's property. G's shed is on fire, and R is carrying a water hose. R has plant-killing pesticide on her boots.

Roses: R asks for G's consent to enter G's property. G's roses need watering, and R is carrying a water hose. R has plant-killing pesticide on her boots.

In *Fire*, tossing in the extra information about the pesticide on R's shoes would be, at a minimum, pragmatically odd, given the typical practical commitments of someone in G's situation. This information would be irrelevant to G. In contrast, such information might be relevant in *Roses* and would not obviously violate a linguistic norm if disclosed.

This contextualist account still leaves open how much information should be conveyed for a particular situation. Ought the person with a duty to inform convey all the information needed to bring the consenter "up to par"? Need she convey every relevant bit of information she knows that the other does not? As before, I refer to convention and the values which ground the duty to inform in establishing this line. Where a duty arises because of a fiduciary relationship, we can expect the information transferred to be relatively high, most likely requiring the agent to disclose any relevant information within the fiduciary's field, given the consenter's practical commitments, background knowledge, and situation. For role-relative reasons, she might even have an obligation to disclose more information than is necessary to bring the consenter "up to par." Where the duty is established solely for cost efficiency reasons, we can expect the information required to be disclosed to be more limited. It is only that subset of facts that the informer

is in a position to more efficiently learn that needs disclosure, even if other information would also be relevant. In cases where the duty is couched in an explicitly competitive relationship, we might expect the disclosure bar to be even lower because of how this relationship affects the duties linking the two (depending on how we want to regulate competition). Regardless of where we set the bar, however, the point remains that this bar need not be the same as the bar set by the information requirement on consent; it can be lower or perhaps even higher. The information requirement concerns whether consent is (validly) given, whereas this bar determines whether an agent fulfils a duty to another and is sensitive to the nature of the relationship in which the duty arises.

Waivers, Duties to Inform, and the Information Requirement

Respecting an agent's autonomy doesn't require that either the information requirement be met in all cases or that an agent with a duty to inform do so. An agent can release others from their duty to inform her, choosing to operate in less than ideal informational situations. As Tadros notes, "[people] have an interest in having control over the duties others owe them to provide them with information," and the ability to release others of this duty via consent provides the desired control (250). If an agent determined that the burden of the information or the cost of obtaining it isn't (subjectively) worth the benefit it may bring, she can control whether others have a duty to provide her with it by consenting. For example, a squeamish patient may request that her doctor skip the "gory details" of her eye surgery, opting instead for a less informed picture of the procedure. Here, she is releasing her physician from a duty he owes her. In light of what her waiver says about her practical commitments, we can also infer that this lack of information doesn't invalidate any subsequent consent.

If no one owes the consentor a duty to inform, then we might claim that the consentor herself is responsible for obtaining the information. Since she has an interest in the control consent gives her, she would also have an interest in ensuring that her consent actually has the power to exert such control. In cases where the agent does not seek out additional information needed to meet the standard informational bar, then her choice not to inform herself may constitute a non-legal waiver¹⁰⁹ of the information requirement. Such a waiver would indicate that she wishes her consent to have normative force even if it does not meet this requirement.

Where the agent has mistaken beliefs, however, her failure to meet the information requirement is not reflective of such a choice. Recall the aim of the information requirement: it is to allow an autonomous agent to make the appropriate inferences between the world (her cognitive commitments) and her practical commitments. These inferences are valuable because they enable an agent to successfully implement her commitments, to meaningfully rewrite her own moral landscape in such a way that it is hers. A decision to not seek out additional information is given normative force because she has chosen (either explicitly or implicitly) to exercise her normative power at a less than fully-informed level. However, when she is mistaken about a material fact, neither her attempt to consent nor her informational state as below the informational threshold typically reflect such a choice or self-direction. While there may be some instances of mistaken belief that do reflect self-direction (e.g. climate-change

¹⁰⁹ By “non-legal waiver” I mean a dismissal of a requirement and not a waiver of a right or privilege owed to the person who waives. In the cases I am discussing now, G does not have a right to the information since there is no corresponding duty for someone to inform her. Because of this, the “waiver” is more akin to school waiving a foreign language requirement for a student. There are no rights involved, but there remains a sense of the term “waiver” which captures what occurs. The lack of rights involved is also why the doctrine of estoppel (which prevents an agent from asserting a right) is ill-suited to describe what occurs here.

deniers, conspiracy-theorists, etc.), most do not. In the more typical cases, then, we should not view the mistaken beliefs as indicating a non-legal waiver of the information requirement.

A New Informed Consent

In place of these mistaken accounts of informed consent, I suggest erasing any division between informed consent and consent simpliciter. Trying to separate a subclass of our consenting and labelling it as “informed” merely invites confusion. It either obscures the structure of consent by claiming we can consent to risks, thereby raising unnecessary questions related to fictitious consent, or claims that there is something special about cases of informed consent. Instead, informed consent shares the same structure of standard consent as well as the same information requirement. While instances which have a contextually higher information threshold may also involve duties on the part of others to provide this information, these are two separate issues which should not be lumped together under one label. Stripped of the things that allegedly make informed consent special, we are left with our standard conception of consent, rendering the two categories coextensive.

Appendix: Sports and Consent

Physical contact and injuries in sporting events pose an interesting case study for issues of consent. Most of the common sports in Western culture involve what would otherwise be considered blatant assaults: tackles in both European and American football, checks in hockey, and charging/blocking in basketball. These all seem like actions that would be considered a tort if done at random. However, we typically do not view anything askew with the conduct on the field, as long it remains within the norms of play. One explanation of our nonchalantness is that we attribute consent to the players on the field. Relying on this explanation, Westen initially motivates the existence of imputed consent by appeal to how we view injuries that occur in the normal course of hockey games.¹¹⁰ Specifically, he claims that sports involve constructive consent; by the act of stepping on the field and playing the game, we are justified in treating players as if they have consented.

Westen is correct to note that consent is playing some role in what occurs when we look at sporting events. However, I am suspicious that he is right about which type of consent is at play. My aim in this appendix, however, won't be to extensively argue for the claim that other types of consent are more relevant than constructive consent in sports. Rather, I will only briefly explain the other frameworks for analyzing consent in sporting events to make plausible my exclusion of this realm from the analysis of constructive consent in Chapter One. Lest the reader be unpersuaded, I will then argue that an analysis of sporting events as involving constructive consent furthers my

¹¹⁰ See *Logic of Consent*, page 269.

conclusion regarding the misleadingness of labeling constructive consent as a type of imputed consent.

Section I provides some legal background regarding physical contact in sports. Section II offers the alternative explanations. And, Section III explains how, even if Westen was right about sports, he was still wrong about constructive consent.

Section I: Background

Instances of sports violence between players are rarely criminally prosecuted in the US - the one possible exception being some forms of hockey violence.¹¹¹ This informal practice holds true even when there are bench clearing brawls¹¹² and severe injuries.¹¹³ Prosecution is much more common in Canada, which is where the case Westen initially references, *Regina v. Cey*, is tried. Given the similarities in Canadian and American assault statutes, we will begin our discussion of consent and sports in Canada and then move south.

The three main hockey cases in Canadian criminal law are *Regina v. Cey*, 5 WWR 169 (SK CA 1989), *Regina v. Maki*, 1 C.C.C.2d 333 (Ontario Provincial Ct. 1970), and *Regina v. Green*, 2 C.C.C.2d 442 (Ontario Provincial Ct. 1970). The result of the famous fight between Ted Green of the Boston Bruins and Wayne Maki of the St. Louis Blues,

¹¹¹ “Given the unique social dynamic involved in sports, criminal prosecution of sports participants for conduct that occurs with the playing of the game is rare. Most prosecutions, not surprisingly, have involved hockey games.” *State v. Guidugli*, 157 Ohio App. 3d 383, 392 (2004). (omitted internal quotation marks)

¹¹² In the professional context, consider the following examples: there were no assault charges arising from the August 12, 1984 Atlanta Braves-San Diego Padres baseball game, despite four bench-clearing brawls. Similarly, no charges arose from the 1970 fight erupting between the Kansas City Chiefs and Oakland Raiders. One of the perhaps most famous brawls – the so-called “Malice at the Palace” – did result in assault charges for Pacer players, but those arose from assaults on Piston fans and not other players.

¹¹³ For example, no charges were filed against Kermit Washington (then with the LA Lakers) for punching Rudy Tomjanovich during an on-court fight. Tomjanovich “suffered nose, jaw, and skull fractures, a brain concussion, and leakage of spinal fluid from the brain cavity” (White, 1030). Though there were civil proceedings against Charles Clark for the severe neck injury he inflicted on Dale Hackbart, no criminal liability was imposed. (For the civil case, see *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d. 516 (10th Cir. 1979).)

the last two cases are the “starting point” of the inquiry into the relationship among consent, hockey, and assault (McCutcheon 274).¹¹⁴ Though both Maki and Green were acquitted, their cases established that criminal liability could be imposed in the sporting arena. Importantly, both judges addressed the defense of consent. *Green* held that “[t]here is no doubt that the players who enter the hockey arena consent to a great number of assaults on their person... No hockey player enters on to the ice of the National Hockey League without consenting to and without knowledge of the possibility that he is going to be hit in one of many ways once he is on that ice.” The court implied that the consent was limited, speaking only to the issue of common assault – as opposed to assault causing actual bodily harm – and describing those actions consented to as “normal risks.” *Maki* echoed this view of consent and also noted that it extended to the “risks and hazards of the sport” but not to everything that may occur on the ice. In dealing with this new area of liability, courts “articulated three tests, each phrased slightly differently, to describe permissible player conduct. Players are presumed to consent to conduct ‘incidental to the sport,’ conduct ‘inherent in and reasonably incidental to the normal playing of the game,’ and conduct ‘closely related to the play’” (White 1039). Each test was a way of establishing the scope of the consent the courts attribute to players.

Cey engages with this framework and directly addresses consent in the context of sporting activity.

It is clear that in agreeing to play the game a hockey player consents to some forms of intentional bodily contact and to the risk of injury therefrom. Those forms sanctioned by the rules are the clearest example. Other forms, denounced by the rules but falling within the accepted

¹¹⁴ White also notes that, while later Canadian courts rarely cite precedent, “when they do...they rely on *Maki* and *Green* and overlook later cases” (1037). *Cey* was decided after the publication of White’s piece but remains an important appellate decision in understanding the implied consent doctrine.

standards by which the game is played, may also come within the scope of the consent.

It is equally clear that there are some actions which can take place in the course of a sporting conflict that are so violent it would be perverse to find that anyone taking part in a sporting activity had impliedly consented to subject himself to them. *Cey*

The Court wrestles with where to draw the line between those actions which are consented to and those that are not. It notes that, though consent is ordinarily subjective, “there cannot be as many different consents as there are players on the ice.” *Cey*. The standard for consent in these contexts must thus be objective and uniform. This standard is relativized to the conditions of the game, taking account of age, league, skill, etc. “The conditions under which the game in question is played, the nature of the act which forms the subject matter of the charge, the extent of the force employed, the degree of risk of injury, and the probabilities of serious harm” are also relevant criteria for determining if implied consent covers an action or if the act is “so violent and inherently dangerous as to have been excluded from the implied consent.” *Cey*. This framework transforms many of the contacts in recreational activities and sports into lawful actions while limiting the scope of consent based on the circumstances of game participated in.

This specific consent doctrine found in Canada is acknowledged by courts in the U.S.¹¹⁵ It was adopted in the Model Penal Code prior to the Canadian cases discussed above in 1962; Section 2.11(2) of the Code holds that consent is an absolute defense to bodily harm if “the conduct and the harm are a reasonably foreseeable hazard of joint participation in a lawful athletic competition or competitive sport ...” *State v. Shelley* references this section in holding that the proper inquiry in determining if an agent

¹¹⁵ For example, see *State v. Floyd*, 466 N.W.2d 919, 922 (Iowa App.1990); *People v. Freer*, N.Y.S.2d 976, 979 (1976); *State v. Shelley*, 85 Wash.App. 24 (1997); and *Guidugli*.

consented to contact is “whether the conduct of defendant constituted foreseeable behavior in the play of the game.” *Shelley* 85 Wash.App at 31. Unsurprisingly, it held that a punch did not pass the test. Courts in Iowa, Ohio, and New York have followed Washington in holding that foreseeability is a requirement in attributing consent and that punches, in these cases thrown after play had stopped, were not consented to.¹¹⁶

The *Floyd* opinion is of particular interest since Iowa addresses voluntary participation in sports explicitly in its assault statute. The law states that an act is not assault “[i]f the person... and such other person, are voluntary participants in a sport, social or other activity, not in itself criminal, and such act is a reasonably foreseeable incident of such sport or activity...” IOWA CODE ANN. § 708.1(3)(a). The other exception to assault listed in the section is if the act is done by a school employee breaking up a fight on school grounds or during a school function. Though “consent” seems like an odd concept to read into the second exception, the court discusses the first exception in the language of consent and even refers to it as the consent defense. *Floyd* 466 N.W. 2d at 922.

In response to a particularly violent span of years in the 70’s, legislative action was initiated on the federal level. The House of Representatives introduced a Sports Violence Act in 1980 and again in 1981 that, if passed, would have criminalized the use of “excessive physical force.” It defined excessive physical force as force that:

- (A) has no reasonable relationship to the competitive goals of the sport;
[...and]
 - (C) could not be reasonably foreseen, or was not consented to, by the injured person, as a normal hazard of such person's involvement in such sports ...
- H.R. 7903, 96th Cong., 2d Sess. 115 (1980), Sports Violence Act
(b)(1)(A), (C)

¹¹⁶ See footnote 114 for the list of cases.

Depending on how the document is interpreted, consent is either an appositive to what is reasonably foreseen or a separate thing which serves the same statutory purpose as a hazard being reasonably foreseen. If it is an appositive, then consent – in some form – is always involved in (C). Action that is not reasonably foreseen simply is action that hasn't been consented to. The appositive interpretation seems to be more grammatically correct, but, at a minimum, a hazard's commonness in play would have been functionally equivalent to consent to a hazard. Though never enacted, the bill does shed light on how legislatures were conceiving of this issue and echoes the approach previously discussed at the state level.

The terrain for civil liability of sports injuries is less unified, as one would expect in the common law. Historically, courts were reluctant to impose civil liability for injuries arising in the course of consensual recreational activities. *Kuehner v. Green*, 436 So.2d 78, 81 (Fla. 1983) (Boyd, J., concurring).¹¹⁷ Though that reluctance has continued in some regard, courts now no longer look upon “friendly, mutual combat” in quite the same way. In general, modern courts can use one of three distinct standards in adjudicating recovery for injuries received during sports and games: (1) intentional tort, *i.e.*, assault and battery; (2) willful or reckless misconduct; and (3) negligence. *Marchetti v. Kalish*, 53 Ohio St. 3d 95, 96 (1990).

Most courts allow recovery under the first and second standards. However, these courts differ as to the reasons they give for why that standard is right. Some

¹¹⁷ For an example of such a historical case, see *McAdams v. Windham*, 208 Ala. 492, 493 (1922): “It is a general rule of law that a blow thus inflicted in a friendly, mutual combat—a mere sporting contest—is not unlawfully inflicted... Harm suffered by consent is not, in general, the basis of a civil action.”

courts insert explicit consent language into their analysis, holding those actions that violate rules designed for the safety of the players or that are intentionally inflicted to cause injury are grounds for a cause of action.¹¹⁸ Those following this approach are bedfellows with the Restatement (Second) of Torts, which holds that participating in a game “manifests a willingness to submit to such bodily contacts...as are permitted by its rules or usages” (§50 Apparent Consent, Comment b). In contrast, some courts eschew the Restatement framework. Instead of focusing on if the players consented to the conduct in question, they appear to engage in a more explicit balancing of social values.¹¹⁹ This weighing of values seeks to enable athletic competition to thrive free from fear of litigation while still being conducted in a civil manner.

To make matters slightly murkier for a consent analysis, the courts engaged in the explicit social balancing often speak in terms of “assumption of

¹¹⁸ See *Gauvin v. Clark*, 404 Mass. 450, 454 (1989): “Players, when they engage in sport, agree to undergo some physical contacts which could amount to assault and battery absent the players' consent”; and, *Overall v. Kadella*, 138 Mich.App. 351, 357 (1984): “Participation in a game involves a manifestation of consent to those bodily contacts which are permitted by the rules of the game.”

¹¹⁹ See *Nabozny v. Barnhill*, 31 Ill.App.3d 212, 215 (1975): “This court believes that the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. However...some of the restraints of civilization must accompany every athlete onto the playing field. One of the educational benefits of organized athletic competition to our youth is the development of discipline and self-control.” Note that the term consent does not appear in the opinion. See also *Marchetti*, 53 Ohio St. 3d at 99 (rejecting the Model Penal Code approach): “Thus, our goal is to strike a balance between encouraging vigorous and free participation in recreational or sports activities, while ensuring the safety of the players”; *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. 1982): “Fear of civil liability stemming from negligent acts occurring in an athletic event could curtail the proper fervor with which the game should be played and discourage individual participation, yet it must be recognized that reasonable controls should exist to protect the players and the game. Balancing these seemingly opposite interests, we conclude that a player's reckless disregard for the safety of his fellow participants cannot be tolerated.”); and *Kabella v. Bouschelle*, 672 P.2d 290, 294 (N.M. Ct. App. 1983): “Nevertheless we think for reasons of public policy the [recklessness] standard of care... is applicable to cases in this jurisdiction involving tort claims between participants in athletic activities normally involving physical contact. Vigorous and active participation in sporting events should not be chilled by the threat of litigation.”

risk.”¹²⁰ Assumption of risk [AR] is a common law doctrine that operates as a defense to nonintentional torts. Roughly put, if a risk is a foreseeable part of the activity engaged in, and the agent voluntarily and knowingly engaged in the activity, then the agent assumes the risk and cannot recover for it. Common law holds that the assumption negates any duty owed by others to the assumers – a magic similar to that worked by imputed and prescriptive consent. Yet, it is unclear whether the common law views the negation of duty as based on consent – either imputed or prescriptive. Though the *Second Restatement* uses consent language to speak of the defense, there are – depending on how one counts and categorizes – between two and four types of AR with more and less plausible ties to consent. In many jurisdictions, this doctrine has been subsumed under a comparative fault analysis, which is governed more by fairness norms than those related to consent. The fact that this discussion occurs only in civil cases and not in criminal cases adds a further dimension to the analysis of these cases. Given these complexities, I won’t engage with cases involving AR and sports directly, but I do think these cases can be accommodated into one of the frameworks below.

Section II: Sports and Prescriptive Consent

If consent is involved in sports, it seems as if explicit, prescriptive consent is involved, in one of three ways. The first way is by giving standard prescriptive consent to the “assaults.” Players may explicitly consent to being tackled, checked, etc., perhaps by signing a form indicating their consent. Alternatively, they may give their tacit consent;

¹²⁰ See *Pfenning v. Lineman* 402 for a list of cases which rely on AR in addressing sports injury cases, the most recent of which is *Anand v. Kapoor* (2010).

by removing their gloves and giving a nod at the other player, the “enforcers” on opposing hockey teams can communicate their consent to brawl. In either case, this interaction involves nothing more than consent as we normally conceive of it.

The second way is by explicitly or tacitly (i.e. indirectly, perhaps by lining up at the line of scrimmage) consenting to play the game, thereby giving prescriptive consent to tackles, checks, etc. I will call this type of prescriptive consent “constitutive consent.” Constitutive consent expresses the principle that if an agent consents to Φ , then she consents to all constitutive elements of Φ . For example, if I give valid consent to my physician to perform an appendectomy, then I have thereby given her consent to remove my appendix. I propose a similar assessment for sports. A sport consists of the rules which govern it, the legal moves performed, and, to some extent, the normal fouls that occur during play. To consent to play football, then, is to consent to being governed by rules of the game and to consent to the moves allowed by those rules and the conventions of the game. Under this analysis, tackling is just a part of the package a player consents to when she consents to play football. As the court noted in *State v. Guidugli* “when the victim consents to participating in a particular sport, he or she then consents by the *very nature of the sport* to certain acts of aggressive contact.” (italics added) Admittedly this analysis may not cover contacts which occur outside the conventions of the game. However, I am not entirely sure we should view such contacts as permissible, and the constructive consent framework would also have problems drawing the line in these cases (by engaging in soccer, I surely do not constructively “consent” to *anything* that may happen on the field, such as being attacked with a chainsaw.).

The third way consent may operate in sports is by informed consent. Players may give consent to the risk of being tackled, checked, etc. Westen views this as another form of imputed consent; I argued in Chapter 3 that it is actually a form of prescriptive consent. Either way, the problems which plague constructive consent do not apply to this form of (allegedly fictitious) consent.¹²¹

These analyses of consent in sports give the most straightforward reading of the cases and statutes invoking consent. Language of “agree[ing] to undergo some physical contacts,” or of participation as being “a manifestation of consent” makes the most sense when prescriptive consent is involved (*Gauvin v. Clark*; *Marchetti v. Kalish*). Unlike some other terms, agreement and manifestation seem to indicate that actual consent is involved, even if it is conveyed through actions instead of verbal communication.

Section III: Sports and Constructive Consent

Even though I do not think the consent involved in athletic events is constructive consent, for the sake of this section I will grant this characterization. By doing so, I aim to show that even if I am wrong about the consent involved here, my conclusions regarding constructive “consent” still stand. Specifically, I will show that constructive consent is not necessary for sports to exist and that what grounds our imputations of consent *when we assume that no prescriptive consent is present* are values other than autonomy.

¹²¹ The language commonly used to describe AR most closely resembles the language of consent to risks, and so cases involving this doctrine might be most easily placed in this category. However, some AR cases may also find a home under the constitutive consent analysis. For example, see *Bundschu v. Naffah*: “a defendant owes no duty to protect a plaintiff against certain risks that are so inherent in an activity that they cannot be eliminated” (1221).

If constructive consent is involved in sports, then the practice illustrates that consent to the object of constructive consent is not necessary for the practice's existence. For example, before participating in an athletic event, the players could expressly consent to whatever contact they desire to consent to – whether that be any contact closely related to the play, anything except for specifically prescribed conduct, or only light contact. They could negotiate different “consent packages” for different positions or even choose to play with more individualized consent packages. Though perhaps odd at first glance, this practice already exists to an extent: “enforcers” may be willing to take a larger amount of rough play than other players (whereas goalies are rarely “fair game” for fights), and the more specific form of individualization seems common in pick-up games where a player is recovering from an injury. Imputing consent, then, is not necessary for engaging in the social activity.

Recall that Westen holds that constructive consent is grounded in autonomy because it allows an agent to engage in an activity that can only exist with the imposition of the “consented” to action. In other words, by allowing players to play sports, the imputation of consent expands the options agents can autonomously choose from. However, since the player could engage in sports without utilizing the fiction of constructive consent, the question then arises what justifies the imputation of consent.

Often, the justification for treating players as if they had consented relies on policy concerns.¹²² Evaluators – both legal and lay – hold that sporting events have some

¹²² If we think that prescriptive consent is present, then the remarks of the court can be interpreted as explaining why this consent is given legal force (not all consent is given such force).

social value.¹²³ To the extent that the physical harm is related to or inherent in the activity, it is something that simply must be endured. Civil courts in particular frame their concern about litigation not in terms of limiting autonomy but in terms of “chill[ing] the vigor of athletic competition.” *Gauvin*, 404 Mass. at 454. Courts engage in a balancing act when determining if “consent” should be imputed: “Fear of civil liability stemming from negligent acts occurring in an athletic event could curtail the proper fervor with which the game should be played and discourage individual participation, yet it must be recognized that reasonable controls should exist to protect the players.” *Ross v. Clouser*, 637 S.W.2d at 14. Because of the social value of sports and recreational competitions, courts impute consent to players for the contacts necessary or incidental to play so long as such contacts are not an affront to society’s safety standards.

If we look to our own imputations of consent in these athletic cases, I would wager that they are driven by two concerns. The first comprises the policy reasons discussed above. The second arises from fairness concerns, specifically fairness/equality among players. Player A cannot, *ceteris paribus*, make a claim that Player B not injure her when A retains the permission to injure B. To play football but not consent to being touched gives a player a large, unfair advantage. Unless a player’s pleas of “don’t touch!” are motivated by injury, other players generally will give no heed to the “withdrawal” of consent. The audience most likely will support this decision, making reference to equality – all players (of the same position) should be treated equally and so be equally subject to be tackled when they have the ball.

¹²³ For example, in justifying its support of the *Restatement (Second) of Torts* Section 50, the court in *Shelley* relies on “the social judgment that permits the contest to flourish” and society’s choice “to foster sports competitions.” *Shelley* 85 Wash.App. at 30.

However, these reasons make no direct reference the “consenter’s” autonomy, and the practice doesn’t promote autonomy in the same way prescriptive consent does. Thus, even if physical contact in sports should be viewed as constructive consent, instead of a species of prescriptive or informed consent, it cannot be of any help to the defender of constructive consent’s consent-ness.

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