

# **The Power of Consent**

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Thesis submitted for the degree of  
Doctor of Philosophy  
(Philosophy)

March 2016

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# Abstract

In both everyday morality and law it is generally assumed that individuals are able to waive rights by giving consent. However, a detailed understanding of why consent has normative significance is often lacking. On a popular view about rights, rights are grounded in the interests of agents. In this thesis I consider whether we can also appeal to the interests of agents in order to explain the normative significance of consent. Ultimately, I argue that we can. The central claim of the thesis is that consent has normative significance because it provides a means through which agents can interact whilst relating to one another in a morally decent and valuable way, by recognising one another as bearers of interests worthy of protection. Specifically, by relying on consent to manage their interactions, agents recognise one another as having significant interests in having control over the central aspects of their own lives.

After addressing some preliminaries in Chapter 1, in Chapters 2 and 3 I consider and reject a number of interest-based theories of consent. In Chapter 4 I articulate a relational version of the interest theory of rights, according to which rights establish a normative framework that allows agents to recognise that they accord one another's interests the appropriate role within their practical deliberations. In Chapter 5 I argue for the relational theory of consent. According to the relational theory, consent allows agents to interact in valuable ways whilst recognising one another as having legitimate control over the spheres or domains protected by their rights. In Chapter 6 I show how this theory can be relied upon to provide useful insights into debates regarding the role that can be played by sexual consent in a world marked by entrenched gender injustice.

Word Count: 66, 570.



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# Acknowledgements

I would like to begin by thanking the Arts and Humanities Research Council for funding this project. Without the AHRC's financial backing I would never have been able to write this thesis. I would also like to thank the AHRC and the Society of Applied Philosophy for additional funding which supported a research trip to the University of California, Los Angeles.

My biggest debts of gratitude go to my primary and secondary supervisors, Daniel Viehoff and Chris Bennett. Daniel has not only supervised my PhD thesis, but has, since I arrived in Sheffield as a Masters student in 2010, taught me most of what I know about moral and political philosophy. I can only hope that I will one day be half as good a philosopher as he is. Chris went far beyond what is required as a secondary supervisor, reading many drafts and engaging in many long conversations. Not only did he consistently force me to confront objections I would rather have ignored, but also regularly helped me to see what it was that I myself was trying to say.

I could not have asked for a better environment in which to undertake a PhD in philosophy than the Philosophy Department at The University of Sheffield. The staff and the graduate students who make up the Sheffield community have been a constant source of intellectual stimulation and good fun. I would also like to thank the Department of Philosophy at UCLA, the Department of Politics at The University of York, and the Department of Philosophy at Queen's University (Canada) for including me as a member of their departments for various lengths of time and in various capacities.

I have presented parts of the thesis (and their predecessors) at a number of workshops and conferences and would like to thank the members of those audiences for useful feedback and criticism. They include: Brave New World Graduate Conference at The University of Manchester, the Warwick Graduate Conference in Political and Legal Theory, the participants of a workshop on David Owens's

*Shaping the Normative Landscape* held at the University of Sheffield, The University of Sheffield Graduate Conference on Value, and the Dublin Graduate Philosophy Conference.

I also owe a significant debt of gratitude to those who have both read and given me written comments on work of mine over the last four years. In addition to Daniel and Chris this includes: Joshua Black, Jeremy Butler, Jimmy Lenman, Alistair Macleod, Andrea Sangiovanni, Seana Shiffrin, and Rebecca Stone. Special thanks goes to Jack Wadham, not only for reading much of my work, but also for drinking too many beers, and always coming up with a good example. Extra special thanks goes to Angie Pepper, with whom I have had countless conversations about the content of this thesis, as well as much else besides, and who has helped me to develop whatever philosophical skill I have in more ways than I could mention.

Finally, I would like to thank my family and friends for their love and support, without which I would never have got this far. In particular I would like to thank my parents, Stephen Healey and Jean Clarke, who have always helped me to achieve my ambitions in every way they can; Susan Hodkin, without whose belief and support I would never have got into philosophy; and Angie, without whom I would not be the person I am today.



# 1

## Introduction

### 1.1 The Power of Consent

In both everyday morality and the law it is generally assumed that individuals are able to waive rights by giving consent. In doing so agents make permissible forms of action that would previously have been impermissible. For example, by giving my consent, I can make it permissible for a surgeon to perform the life-saving operation that I desperately need. Or, by giving my consent, I can make it permissible for a colleague to borrow a book from my office. More dangerously, by giving my consent to partake in a boxing match, I can make it permissible for my opponent to hit me hard in the face. Finally, by giving my consent, I can make it permissible for my partner to have sex with me.

These examples represent a small selection of cases in which an individual's consent can make a previously impermissible action permissible. In all of these cases, the consentee would seriously wrong me by performing these acts without my consent.<sup>1</sup> But of course, these are forms of interaction that we regularly wish to engage in: we want to have lifesaving surgery, to lend a colleague a book, to partake in sporting competition, and to have sexual relations. Thus, insofar as consent makes permissible valuable forms of interaction that would otherwise be impermissible, the power of consent plays an important role in our lives.

Moreover, the significance of individual consent is a central tenet within the liberal tradition, and references to consent are littered throughout the history of liberal moral, political, and legal thought.<sup>2</sup> In the *Two Treatise* John Locke famously claimed that, "Men being, as has been said, by nature, all free, equal, and

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<sup>1</sup> This is something of a simplification, since, as I make clear in later chapters, we can often affect the application of the same rights without giving consent.

<sup>2</sup> See, generally, Jeremy Waldron, "Theoretical Foundations of Liberalism," *The Philosophical Quarterly* 37, no. 147, (1987).

independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent.”<sup>3</sup> In *On Liberty*, John Stuart Mill wrote that, “There is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person’s life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent.”<sup>4</sup> More recently, Franklin Miller and Alan Wertheimer have claimed that, “It is difficult to conceive of a moral code, especially within a civilized society, without some recognition to the requirement and moral force of consent.”<sup>5</sup>

Despite the apparent importance of consent, however, philosophers have rarely taken up the question of just why it is that individual consent is normatively significant. Indeed, many have assumed that the power to waive rights by giving consent is simply an uncontroversial feature of autonomous agents. For instance, Seana Shiffrin claims that the power of consent flows “naturally from a plausible understanding of a meaningful right to autonomy.”<sup>6</sup> This stands in stark contrast to the attention paid to related phenomena, including, for example, the nature and genesis of promissory obligations, questions about which have generated a rich and diverse philosophical literature.<sup>7</sup> In part, this concern with promissory obligations arises because many seem to have found the idea that we could give ourselves a new moral obligation just by making a promise baffling. Most famous in this regard is Hume:

[T]is one of the most mysterious and incomprehensible operations that can possibly be imagined, and may even be compared to *transubstantiation* or *holy orders*, where a certain form of words, along

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<sup>3</sup> John Locke, “The Second Treatise,” in *Two Treatise of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (New Haven: Yale University Press, 2003), p. 141 (§95).

<sup>4</sup> J. S. Mill, *On Liberty*, ed. David Bromwich and George Kateb (New Haven: Yale University Press, 2003), p. 82.

<sup>5</sup> Franklin G. Miller and Alan Wertheimer, ed., *The Ethics of Consent: Theory and Practice*, (Oxford: Oxford University Press, 2010), p. ix.

<sup>6</sup> Seana Valentine Shiffrin, “Promising, Intimate Relationships, and Conventionalism,” *Philosophical Review* 117, no. 4 (2008) p. 501. See also Heidi M. Hurd, “The Moral Magic of Consent,” *Legal Theory* 2, no. 2 (1996), p. 124.

<sup>7</sup> Some important recent contributions to this literature include, T.M. Scanlon, *What We Owe To Each Other* (Cambridge, Mass.: Harvard University Press, 1998), Ch. 7; Shiffrin, “Promising, Intimate Relationships, and Conventionalism;” David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012), esp. parts II and III.

with a certain intention, changes entirely the nature of an external object, and even of a human creature.<sup>8</sup>

Yet, as Hume himself noted, consent shares in the mystery of promising.<sup>9</sup> Simply by communicating “a certain form of words, along with a certain intention,” we are able to waive our rights and make previously impermissible actions permissible. If the power to promise is so difficult to fathom, why have philosophers not been equally troubled by the power of consent?<sup>10</sup>

Some might suggest that it is because the answer is relatively obvious. With Shiffrin, most philosophers have assumed that the power to waive rights by giving consent is to be explained by the value of autonomy.<sup>11</sup> Yet the nature and value of autonomy are so widely contested that such a response is uninformative. And as we will see, even adopting a widely accepted view about the value of autonomy, according to which autonomy is centrally concerned with living a life of one’s own creation (a view which is consistent with much of the existing literature on consent), there is no straightforward move that can be made from the value of autonomy to the power of consent.

Why, though, should we want a theory of consent’s normative significance? We firmly believe that it is, for example, wrong to have sex with an agent without their consent, but that they can make sexual relations permissible by giving consent. What difference will it make if we can provide a deeper theoretical explanation for why this should be? There are, I think, at least three reasons. First, the question of just why it is that we can make an act permissible by giving our consent is intrinsically interesting. Second, since consent is implicated in a wide variety of practical contexts, a deeper understanding of why consent has the normative significance it is taken to have (assuming a coherent explanation is available) will have important implications for how we think about consent in these arenas, both at

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<sup>8</sup> David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge (Oxford: Clarendon Press, 1967), p. 524 (Book 3, Part 2, Section 5).

<sup>9</sup> See David Hume, *An Enquiry Concerning the Principles of Morals*, ed. J. B. Schneewind (Indianapolis: Hackett Publishing, 1983), p. 31 (Section 3).

<sup>10</sup> Indeed, those seeking to explain promissory obligations often appeal to what they take to be the much less controversial case of consent. E.g. Shiffrin, “Promising, Intimate Relationships, and Conventionalism,” pp. 500-02. On this point see David Owens, *Shaping the Normative Landscape*, p. 166, fn. 2 and accompanying text.

<sup>11</sup> For example, Waldron, “Theoretical Foundations of Liberalism,” p. 137; Hurd, “The Moral Magic of Consent;” Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003), Ch. 6; Tom Beachamp, “Autonomy and Consent,” in *The Ethics of Consent: Theory and Practice*, eds. Franklin G. Miller and Alan Wertherimer (Oxford: Oxford University Press, 2010).

an individual and institutional level. Indeed, most of the existing philosophical literature on consent has been concerned with consent's significance in some particular context, for example, the sexual,<sup>12</sup> or medical sphere,<sup>13</sup> regarding the question of political authority,<sup>14</sup> or concerning the role of consent in the law.<sup>15</sup> But given its wide range of application, I believe it would be of great benefit to start the other way around, from a more general account of consent and its normative significance, which can then be relied upon as a theoretical backdrop against which to pursue questions in these specific domains.

To take one example, questions about the appropriate standard of sexual consent clearly bear a relation to the question of why sexual consent is valuable. For instance, appropriate standards of sexual consent are likely to differ depending on whether we think that consent is valuable because it promotes individual choice, provides individuals with control over what happens to them, or for some other reason. However, pursuing the question of standards without recourse to a theory of consent means relying on a set of intuitions that may pull in different directions.<sup>16</sup> By contrast, with an account of consent's normative significance available we will be better placed to pursue this question. If, as I will argue, the power of consent is ultimately grounded in our interests in having a sufficient measure of control over the central aspects of our own lives, and our further interests in being able to recognise that others respond appropriately to these control interests, then this provides us with an important starting point regarding the appropriate standards of sexual consent. Very roughly, those standards will only be deemed appropriate if they provide individuals with a sufficient measure of control over their sexual interactions, as well as means to recognise one another as possessing legitimate control.

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<sup>12</sup> David Archard, *Sexual Consent* (Boulder: Westview Press, 1998); Wertheimer, *Consent to Sexual Relations*.

<sup>13</sup> There is a significant literature concerning consent in the medical context. For an overview, see Nir Eyal, "Informed Consent," in *The Stanford Encyclopaedia of Philosophy* (Fall 2012 Edition), ed. Edward N. Zalta, URL = <<http://plato.stanford.edu/archives/fall2012/entries/informed-consent/>>.

<sup>14</sup> A.J. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), Chs. 3 and 4; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), Ch. 4.

<sup>15</sup> E.g. "Symposium on Consent in Sexual Relations," *Legal Theory* 2, nos. 2 and 3 (1996).

<sup>16</sup> I am not here rejecting a reliance on intuitions in moral theory. I simply mean that without having constructed a theory that seeks to unify these intuitions, and bring out the connections between them, we will be worse placed to answer certain questions. For some remarks about methodology see Section 1.2.6 below.

A third motivation for developing a theory of consent's normative significance derives from the central place that the power of consent plays (whether implicitly or explicitly) in the majority of contemporary moral and political theories. As I have said, the idea that certain courses of action are impermissible without the consent of affected agents is very widespread and might be thought of as playing a foundational role in an account of decent moral relations. More specifically, the power of consent will play a crucial role in particular parts of a general moral theory, including a full theory of rights, freedom, autonomy, authority, and so on. Plausibly, then, a better understanding of consent's normative significance will shed light on general aspects of our moral practices and moral relations, provide a new perspective on questions in other areas, and further help to evaluate competing moral theories that need to be able to incorporate a sound theory of consent.

For these reasons, in this thesis I set out to articulate and defend a positive theory of consent's normative significance. Before giving a brief summary of the argument to be made (Section 1.3), in the next section I delimit more carefully the nature of the questions to be answered, give an account of the approach I will be adopting, and deal with some other preliminaries.

## **1.2 Preliminaries**

### *1.2.1 The Normative Significance of Consent: Two Questions*

As I noted above, one of the questions that has been at the centre of the debate concerning the power to promise is how it is that an individual could generate a new moral obligation just by communicating an intention to do so. The reason this question has garnered so much attention is, I think, because of the apparent oddness of being able to morally bind oneself to acting in some way where previously there may have been very few, if any, moral reasons to so act. Furthermore, many have been concerned to explain why it is that, when it comes to the time of fulfilling the promise, the promisor is bound to do so even if nothing good will be achieved as a result.

Whilst valid consent achieves different normative consequences, a similar question applies: how can an agent waive a right of theirs just by intending to do

so?<sup>17</sup> This is what I will refer to as the *question of consent's normative force*. Notice that, like promises, valid consent affects the structure of rights and duties that obtains just by the consenter's intending to do so. Moreover, where an agent has the power of consent, their voluntary and informed consent will suffice to waive a right independently of the reasons that bear on the course of action in question (on which more below).

Importantly, however, the question of consent's normative force is not the only thing that needs to be explained by a theory of consent's normative significance. Indeed, a sole focus on the consenter's ability to manipulate their normative environment obscures something important about consent, namely, the fact that the power of consent manages normative relationships *between* agents. That is to say, in many circumstances B *owes it to A* not to act in some way without A's consent, and A, by giving her consent, has the power to affect this directed reason. Moreover, it seems as if consent is precisely a tool for managing these directed, rather than non-directed, reasons. While there are many non-directed reasons bearing on B's acting in some way *with regard to A*, A's consent only affects directed reasons that specify B's *owing something to A*. For example, there will be many reasons bearing on B's performing experimental surgery upon A, such as the fact the surgery will increase medical knowledge, lead to benefits for other patients, secure a promotion for B, and so on, but these reasons cannot be affected by A's consent because they do not concern what B *owes to A*. (A merely figures in the content of the non-directed reasons.) A theory of consent's normative significance should be able to explain both why an agent's power of consent affects directed rather than non-directed reasons, and why agents should rely on the power of consent in particular to manage these directed reasons, and thus as a means to shape their normative relationships. Call this the *question of consent's relational significance*.

I believe the question of consent's relational significance is at least equally as important as the question of consent's normative force, despite less attention having been paid to the issue. What is more, an autonomy-based response to this question has less immediate appeal. For one, it is not clear why the fact that A has the capacity to live an autonomous life means that B owes it to A not to act in certain

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<sup>17</sup> I mean to leave open, at present, exactly what constitutes a token of consent, e.g., an intention, a communication of an intention, and so forth. For present purposes, instances of "intention" and the like in the text can be seen as placeholders for the best view about consent's ontology. For further discussion see Section 1.2.4 and 5.3.3.

ways without her consent. Moreover, if A's normative power is grounded in her autonomy, it is not obvious why A's power should be limited to an ability to affect directed reasons. Surely A's autonomy would be further fostered if she had the power to affect non-directed reasons as well (whether her own reasons or the reasons of others). As we will see, I will later argue that the answers to both the question of consent's normative force and the question of consent's relational significance are intimately connected.

Primarily I am interested in these two questions as *moral* questions, rather than legal questions. However, I take it that the correct moral account of consent's normative significance will have important implications for the law, and should, ultimately, guide legal practice, even though other considerations will undoubtedly be relevant to the way in which consent should operate in the law. Moreover, I take existing legal practice as a repository of accumulated thought about consent's general practical significance, and not just legal significance. Thus, legal practices may serve as a useful guide in thinking about the normative significance of consent, and whilst existing laws concerning consent are not justified simply in virtue of their existence, we should expect that an adequate theory of consent's normative significance should be able to explain and accommodate significant parts of existing law.

### *1.2.2 Interests and Rights*

According to one popular theory of rights to which I am sympathetic, the rights of agents are grounded in their interests.<sup>18</sup> Since the power of consent is the power to waive rights, in this thesis I will consider whether we can also appeal to the interests of agents in order to explain the normative significance of consent. I will later argue that in order to do so we need to think carefully about the interest theory of rights itself. But before turning to these issues, let me give a brief account of what I mean by the term *interests*.

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<sup>18</sup> The most widely cited modern champion of the interest theory is Joseph Raz. See, in particular, *The Morality of Freedom*, Ch. 7. For a good overview of some of the central issues between interest theorists and will theorists about rights see M. Kramer, N. E. Simmonds, and H. Steiner, *A Debate Over Rights* (Oxford: Oxford University Press, 1998).

The interests of agents are aspects of their well-being. However, since the idea of well-being is heavily contested, this idea is only of limited use.<sup>19</sup> Somewhat more specifically, we can say that what is in an agent's interests concerns what is good for them. When an agent's interests are served their life goes better; when their interests are set back their life goes worse.<sup>20</sup> For example, I take it that agents typically have interests in sufficient nutrition, intellectual stimulation, special relationships such as friendship, bodily integrity, physical and psychological health, and so on. I assume that the content of a person's interests can be broad and wide-ranging. Indeed, as Joel Feinberg remarks, "The language of interests is useful because it allows us to acknowledge the complexity of a person's good, how it contains various components, some of which may be flourishing while others languish."<sup>21</sup> I also assume an objective account of interests, according to which there are facts about what is and is not in a person's interests independently of their attitudes, desires, aims, and the like. However, factors including an agent's attitudes, desires, and aims clearly play an important role in determining what is, objectively, in a person's interests. For example, if an agent has a desire for  $\phi$  then  $\phi$  is likely to be in their interests for this very reason.<sup>22</sup>

Restricting our focus to interest-based theories of the normative significance of consent means setting aside an important family of moral theories that might be grouped together under the heading of *status-based views*. According to status-based views, our rational capacities, or nature as free and equal, or our status as self-owners, or our possession of some other capacity or property, gives rise to a number of important moral rights.<sup>23</sup> This explains, on many such views, both why agents have rights to and against certain forms of treatment, and why they are able to waive these rights by giving consent. Whilst there are many types of status-based view, one

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<sup>19</sup> For an interesting discussion of the idea of well-being and its role in moral theory see, Scanlon, *What We Owe to Each Other*, Ch. 3.

<sup>20</sup> See Owens, *Shaping the Normative Landscape*, p. 7; Joel Feinberg, "Wrongful Life and the Counterfactual Element in Harming," *Social Philosophy and Policy* 4, no. 1 (1986), p. 146.

<sup>21</sup> *Ibid.*

<sup>22</sup> Whilst I adopt the objective view because I think it the most plausible, I suspect that a satisfactory subjective view of interests would be compatible with the central claims I make throughout the thesis.

<sup>23</sup> Note that I am not here concerned with the *grounds* of moral status, i.e., that in virtue of which an entity is morally considerable, and what this considerability amounts to. Rather I am concerned with those views that move directly from an entity's having a certain moral status to specific moral conclusions about the rights and powers therefore possessed by that entity. To be sure, it is generally the case on status-based views that the capacity or property that grounds moral status (e.g. the capacity for practical reason) is also supposed to explain why an entity has particular rights and powers, but this is not an issue I can adequately address here.



prominent strand of thought is that individuals, in virtue of having a certain status, have a right (or rights) to freedom that endows them with a sphere over which they can exercise legitimate authority and control. By giving their consent, however, agent's can waive these rights precisely because this power allows the (otherwise wrongful) actions of others to be consistent with the consenters's freedom.<sup>24</sup>

Status-based views are attractive partly because they provide a simple yet compelling explanation for the strong moral intuition that (competent adults) enjoy a sphere over which they are, to use H. L. A. Hart's phrase, small-scale sovereigns.<sup>25</sup> To be sure, the idea that individuals have a kind of authority over their own lives which means that others can only act in certain ways with their consent is an attractive one, and status-based views might seem to offer a convincing account of why this is so. Indeed, one reason for considering the viability of an interest-based account of consent's normative significance is precisely to see whether such a view can adequately account for what we might call the *authoritative nature of consent*. Consent is authoritative in two related senses. First, the fact that an agent gives (voluntary and informed consent) suffices to waive a right of hers, irrespective of the reasons for which consent is given, or what is consented to.<sup>26</sup> Second, other agents are often not permitted to interfere in certain spheres (one's body, or property) without one's consent.<sup>27</sup> Both aspects of consent's authoritative nature might seem to fit more naturally within a status-based account because they seem more closely related to the freedom of an agent than the promotion or protection of what is in her interests. Thus, one challenge for an interest-based theory is to explain the authoritative nature of consent in terms of the interests of agents. If the only way an interest-based view can do so is by abandoning the idea that consent is authoritative in these ways, then this will, I think, count as a mark in favour of status-based views.

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<sup>24</sup> See H. L. A. Hart, "Are There Any Natural Rights?" in *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984). For a recent explication of such a view in the context of Kant's political philosophy see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009), Ch. 5.

<sup>25</sup> H. L. A. Hart, "Legal Rights," in his *Essays on Bentham* (Oxford: Clarendon Press, 1982), p. 183.

<sup>26</sup> To be clear, this is only true where an agent in fact has the power of consent. For further discussion see 1.2.4.

<sup>27</sup> Things are complicated by the fact that agents can affect whether or not they have certain rights in other ways than through the giving of consent. Thus, the point might be put better in the negative: if A has a right against B with regard to  $\phi$  and A refuses to give B consent to  $\phi$  then B will not be permitted to  $\phi$ .

But why not simply accept a status-based view from the start? I do not intend to offer a knock down objection against all status-based views here, but let me highlight three reasons to help motivate the focus on interest-based views. First, as I have said, we should want to know whether an interest-based view can adequately explain our considered intuitions about the normative significance of consent, since whether it can do so will be relevant to our overall evaluation of competing moral theories (e.g. status-based views as compared to interest-based views).

Second, there is, it seems to me, an intuitive connection between the fact that an agent has a right and its being good for them to have the right. Moreover, it seems equally intuitive to think that if an agent is able to waive her rights by giving consent, it must be good for her, in a sense to be specified, to be able to do so. This is something that status-based views do not easily accommodate.<sup>28</sup> What is more, a sole reliance on status has important implications when it comes to specifying the precise contours of particular rights and powers. Whereas an interest-based view can point to the ways in which precise specifications of particular rights and powers will be more or less good for different agents, a status-based view needs to explain how the fact of agents' rationality, autonomy, or equality alone can provide answers to such questions.<sup>29</sup>

Third, and relatedly, status-based views offer a *non-reductive* explanation for why moral agents possess certain moral rights and powers. That is, what it is to be have a particular moral status is, on the status-based views, to have certain moral rights and powers. However, I am unconvinced that we can reach any substantive moral conclusions of this sort from the mere fact that agent's possess certain capacities or properties (e.g. rationality, autonomy) in virtue of which they are supposed to have a particular status. For instance, why does the fact that I am able to assess reasons and make my own mind up about what to do endow me with moral

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<sup>28</sup> One fascinating way of meeting this challenge, which we will discuss in Chapter 3, is to incorporate the importance of status within an interest-based view by claiming that agents sometimes have interests *in* the possession of a certain normative status – that it is good for them that they have this normative status. This view has recently been developed by David Owens, who relies on it to explain the normative significance of consent, by claiming that agents have interests in certain acts being wrong unless they consent to them. To be sure, Owens owes us an explanation for why agents would have such an interest, a burden I will argue he does not fully discharge. But Owens's theory qualifies for discussion here because what is supposed to do the work on his view is the fact that that having the status of a consentor is good for the agent, meaning that it is something that makes their life go better.

<sup>29</sup> Cf. Andrea Sangiovanni, "Rights and Interests in Ripstein's Kant," in *Freedom and Force: Essays on Kant's Legal Philosophy*, eds. Sari Kisilevsky and Martin Stone (forthcoming).

rights to authority over a certain sphere that I can waive by giving consent?<sup>30</sup> In any case, I think a preferable account of consent would offer a *reductive explanation*, that is, would provide an argument for why agents have certain rights and powers in terms of some more foundational claim or claims. The foundational claim I rely on in this thesis is that those entities that have moral status (whatever in fact grounds that status) have interests that are morally considerable, or, put slightly differently, that we have reason to promote and protect the interests of those with moral status, to some greater or lesser extent.<sup>31</sup> In contrast to status-based views, then, I do not move straight from the claim that an agent has interests to the claim that they have particular moral rights and powers. Rather, I aim to account for those rights and powers in terms of their interests. (I leave open, at present, what the precise nature of the connection between interests and rights is supposed to be.)

### 1.2.3 Rights: The Hohfeldian System and Directed Duties

In line with most contemporary moral, political, and legal philosophy, I will adopt the influential account of the structure of rights initially developed by Wesley Hohfeld.<sup>32</sup> According to Hohfeld's system, rights can be broken down into four basic "incidents." Whilst a right may consist in just one of these incidents, many familiar rights (such as the right to life, or the right to free speech) are "cluster-rights," that is, a complex of various incidents.<sup>33</sup>

Hohfeld's incidents can be divided into two pairs, first-order rights and second-order rights. First-order rights are either *liberties* or *claims*. An individual A has a *liberty* (or *privilege*) right to  $\phi$  if and only if A has no duty not to  $\phi$ . For example, if A has a liberty right to walk down the street, then she has no duty not to walk down the street. A has a *claim-right* against another agent B that B  $\phi$  (or not  $\phi$ ) if and only if B has a duty to  $\phi$  (or not  $\phi$ ). For instance, A has a claim-right against B

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<sup>30</sup> See Sarah Buss, "Valuing Autonomy and Respecting Persons: Manipulation, Seduction, and the Basis of Moral Constraints," *Ethics* 115, no. 2 (2005).

<sup>31</sup> This assumption underpins the interest-based theory of rights, which I am taking as a starting point. A sufficient defence of this claim would require more than a thesis in its own right, so here I simply hope the reader believes the claim has sufficient plausibility to serve as a starting assumption.

<sup>32</sup> See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, ed. Walter Cook (New Haven: Yale University Press, 1919). For a useful exposition of Hohfeld's account see Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990), Ch. 1; and also, Leif Wenar, "Rights," in *The Stanford Encyclopedia of Philosophy* (Fall 2015 edition), ed. Edward N. Zalta, URL = <<http://plato.stanford.edu/archives/fall2015/entries/rights/>>.

<sup>33</sup> Thomson, *The Realm of Rights*, pp. 55-6.

that B repay the money he borrowed if B is under a duty to repay the money. Liberties and claims are first-order rights in the sense that they directly concern whether or not A or B is permitted, or has a duty, to  $\phi$ .

Hohfeld's second pair of incidents can be thought of as second-order rights insofar as they concern the ability or inability of an agent to affect the application of first-order rights (whether their own or others). The third incident, a *power*, is given the following definition by Judith Jarvis Thomson: "I will say that a power is an ability to cause, by an act of one's own, an alteration in a person's rights, either one's own rights or those of another person or persons, or both."<sup>34</sup> The power of consent is one example of a Hohfeldian power, since it is an ability to cause by an act of one's own an alteration in a person's rights. For instance, if A consents to B's punching her then A no longer has a claim-right against B that B not punch her. However, for reasons we will discuss below, this account of powers does not adequately capture the sense in which the power of consent is a normative power.<sup>35</sup> The final Hohfeldian incident is an *immunity*. A has an immunity against B if and only if B lacks the power to affect (some aspect of) A's rights. For example, if A, the leader of a morally corrupt and unjust regime, purports to cancel B's right to life (by passing a law) she will (we can assume) be morally unsuccessful, because B has an immunity against A's exercising this power.

In this thesis I will be primarily concerned with claim-rights and powers (as further specified below). Before moving on, however, it is worth noting another important feature about claim-rights, at least as I am using the term. As I said above, A has a claim-right against B that B not  $\phi$  if and only if B has a duty not to  $\phi$ . That means that, if A has a claim-right vis-à-vis B then A has a right *against* B, and B has a duty *toward* A, not to  $\phi$ . Thus, if B violates A's right then B will *wrong* A, since B owes it to A not to  $\phi$ . In order to capture this idea we can say that where A has a claim-right against B, B has a *directed duty* toward A. For example, when B makes a promise to A to give her comments on her paper, then B has a directed duty toward A to give her comments on the paper. The right explanation for the directed nature of directed duties is a matter of debate,<sup>36</sup> but whatever the right explanation, they play

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<sup>34</sup> Ibid., p. 57.

<sup>35</sup> I leave aside whether Thomson's definition adequately captures what Hohfeld intended by the use of the term power, and whether Hohfeld's usage was, itself, a useful one.

<sup>36</sup> For one recent account see, Gopal Sreenivasan, "Duties and Their Direction," *Ethics* 120, no. 3 (2010).

an important role in the context of consent. This is because, as I noted above, by giving consent we affect directed reasons. We can now say, more specifically, that by giving consent we waive rights that give rise to directed duties.<sup>37</sup> For instance, if A gives B consent not to fulfil his promise (i.e. A releases B from his promise), then A cancels the directed duty B owes A.<sup>38</sup>

#### 1.2.4 Defining Consent

The power of consent is one example of what is usually referred to as a *normative power*. Joseph Raz defines normative powers as follows.

An act is the exercise of a normative power if, and only if, it is recognized as effecting a normative change because, among other possible justifications, it is an act of a type such that, if recognized as effecting a normative change, acts of this type will be generally performed only if the persons concerned want to secure this normative change.<sup>39</sup>

Some examples will help to clarify. Promising is one example of a normative power. On Raz's definition, this is because acts of promising (e.g. saying "I promise") will generally only be performed by agents who want to bring about the normative result that attaches to promising, viz. a promissory obligation.<sup>40</sup> For another example, consider the normative power of sale. By selling something an agent can transfer their legal possession of some object to another agent. They do so by performing certain acts (e.g. exchanging an agreed sum for the goods in question), acts which, again, are generally only performed by those who wish to bring about the normative results of sale, i.e., the exchange of property. Likewise,

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<sup>37</sup> Matters are complicated by the fact that we can consent to the power of others to impose duties, i.e., we can waive our *immunities* by giving others (e.g. the state, the coach, the boss) the power to impose new duties on us. See John Gardner, "Justifications under Authority," *Canadian Journal of Law and Jurisprudence* 23, no. 1 (2010), p. 76. Thomson, *The Realm of Rights*, pp. 352-54. My focus in this thesis will be on cases in which consenters waive claim-rights and thus give other's liberties, but I believe the theory I offer can account for both kinds of consent.

<sup>38</sup> Note that this is compatible with B still having reason to act in the way he had promised to act. I discuss these issues in Section 5.3.4.

<sup>39</sup> Joseph Raz, *Practical Reason and Norms*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 1999), p. 103.

<sup>40</sup> As I go on to say below, in order to justify our possession of such a power we will need some further story about why it is valuable or desirable that agents should have such a power. See *ibid.*, p. 102.

consent is a normative power because agents will generally only give consent (by saying “Go ahead” or signing a form, in the right context) if they want to bring about the normative result brought about by consent, namely, the waiving of a right.<sup>41</sup>

Above I said that Thomson’s definition of a power was insufficient as an account of the normative power of consent (and of normative powers more generally) and we are now in a position to see why. According to Thomson, a power is the “ability to cause, by an act of one’s own, an alteration in a person’s rights, either one’s own rights or those of another person or persons, or both.”<sup>42</sup> The reason Thomson’s definition is insufficient is that a person can cause an alteration in the application of rights and duties (whether their own or others) *without* exercising a normative power. For example, by moving to a new city I will change the taxes that I am legally obligated to pay, and the services that I have a right to.<sup>43</sup> Alternatively, by stepping onto a crowded bus in order to get home after work I can make it the case that others do not violate my rights by awkwardly jostling against my shoulder, even though they would violate my rights if they jostled against me in the same manner in an uncrowded public park. Or, by violently waiving a knife in your face I can make it permissible for you to injure me in self-defence. In all of these cases, my actions affect the application of rights and duties without being the exercise of a normative power, since the justification for holding these acts as affecting normative changes does not involve the fact that people will only act in these ways in order to bring about the normative change in question.<sup>44</sup>

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<sup>41</sup> For an alternative definition of normative powers see Owens, *Shaping the Normative Landscape*, p. 4, according to whom an agent exercises a normative power where they “change what someone is obliged to do by intentionally communicating the intention of hereby so doing.” Whilst I think this more directly captures the idea of a normative power, I prefer Raz’s definition because it remains neutral on whether an intention is always necessary for the exercise of a normative power (which Raz denies – see *Practical Reason and Norms*, p. 104), and whether an agent must communicate in some way in order to exercise a normative power.

<sup>42</sup> *The Realm of Rights*, p. 57.

<sup>43</sup> Raz, *Practical Reason and Norms*, p. 102. As Raz notes, I may well be aware of these normative changes and move because of them without its being true that I exercise a normative power by moving, since the justification for the normative changes in question is not tied to the fact people will only perform such acts (*viz.*, moving to a new city) when they wish to bring about these normative changes.

<sup>44</sup> In the cases discussed in this paragraph we might want to further distinguish between two ways of affecting the application of rights and duties. First, we can alter the normative situation by *acting* in certain ways, such as moving house, or getting on a crowded bus. Second, we can *forfeit* some right of ours, by, for example, threatening others with a knife. Of course, when we forfeit our rights we do so by acting in certain ways. Again, I take it that the distinction will rest on the justification for regarding certain actions as bringing about particular normative consequences. For instance we might say that we forfeit a right only through some fault or error of ours. See Joel Feinberg “Voluntary Euthanasia and the Inalienable Right to Life,” *Philosophy and Public Affairs* 7, no. 2 (1978), p.111.

We can get a little clearer on this idea by distinguishing between the normative *results* of an act and the normative *consequences* of an act.<sup>45</sup> The normative results of an act are the normative changes that stand in an intrinsic or direct relation to the act by definition. For example, to make a valid promise is to generate an obligation. To give valid consent is to waive a right. By contrast, the normative consequences of an act are brought about indirectly, by changing features of the world that have normative significance. For instance, whilst one's place of residence or spatiotemporal location in relation to others has normative significance, nothing in the definition of "moving to San Francisco" or "getting on the bus" involves affecting a normative change. Thus, the normative changes brought about in these cases are the consequences of these acts, whereas the normative change brought about by the exercise of a normative power are the results of the act.<sup>46</sup>

This distinction is important because it is a feature of the power of consent (and other normative powers) that we should want to be able to account for. That is, we want to be able to explain why consent has direct normative significance, as a matter of its normative result rather than its normative consequences. We generally believe that, as R. Jay Wallace has put it, "consent matters directly for the question of whether otherwise proscribed behaviour may be engaged in," and this is something I believe we want to be able to retain in our account of consent's normative significance.<sup>47</sup> This will be important as we go on because, as we will see in Chapter 2, some interest-based accounts of consent suggest that consent's normative significance is essentially indirect, and this will give us reason to reject such theories.

To give consent then is to exercise a normative power, and exercising this normative power brings about certain normative results. Later I will discuss which particular acts constitute acts of consent. For the meantime I will precede on the assumption that consent must be given intentionally, in other words, that one consents only where one acts in a certain way with the intention of giving consent. (I

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<sup>45</sup> See Raz, *Practical Reason and Norms*, p. 103.

<sup>46</sup> Part of the apparent mystery of normative powers is, I think, that they could have normative significance as a *result* rather than a *consequence*, i.e., directly rather than as a result of affecting objective features of the world. I do not fully feel the force of the mystery of this apparent "moral magic," since I take it that an account of why normative powers have certain normative results is of just the same kind as an account of why objective features of the world have normative significance.

<sup>47</sup> R. Jay Wallace, "Reasons, Relations, and Commands: Reflections on Darwall," *Ethics* 118, no. 1 (2007), pp. 29-30.

will vindicate this assumption in Section 5.3.3). I also assume that the particular acts that constitute consent are at least partially determined by convention, e.g., a nod of the head, a signature, or a verbal communication, depending on the context (see Section 6.2).

Thus far I have characterised the normative results achieved by consent by saying that consent serves to waive a right. By this I have meant that if A gives B consent then A waives a claim-right against B such that B is no longer under a directed duty toward A. Whilst this is correct, at this point it will help to distinguish between two slightly different normative results that A's consent may have.<sup>48</sup> We can say that A *alienates* her right by giving B her consent where her consent means that B will not be under a duty toward A *at a later time*. For instance, A may give her consent for B to use her car next month such that B is not under a duty not to use A's car when the time comes around. We can say that A *waives* her right against B if she releases B from his duty at the present time only. For instance, A waives her right against B's having sex with her when she makes it the case that B is not under a duty not to have sex with her *now*.<sup>49</sup> Obviously this distinction raises questions about which rights we can alienate, and which we can only waive (as well as which (if any) we can neither alienate or waive). Whilst I do not comment directly on these questions in what follows, I believe the account of consent's normative significance I develop provides a basis that will help to address such questions.

Not all purported acts of consent in fact constitute valid consent. By saying that consent is valid I simply mean that consent has the normative result it purports to have (of waiving a right). It is generally recognised that some purported acts of consent do not constitute valid consent for three main reasons. First, an agent may attempt to give consent when they do not in fact have the *power* of consent. Whether or not an agent has the power of consent in relation to a particular right of theirs<sup>50</sup> will depend on whether it can be shown that given the justification for the right, and given the justification for the power of consent, that power is something an agent has

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<sup>48</sup> On the alienating/waiving distinction that follows see Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life;" Johann Frick, "Contractualism and Social Risk," *Philosophy and Public Affairs* 43, no. 3 (2015), p. 207, n. 34.

<sup>49</sup> For ease of exposition I will henceforth use the term "waived" to cover both waiving and alienating a right through consent, specifying between the two only where necessary.

<sup>50</sup> Generally, an agent will only have the power of consent over his or her own rights, but there are a significant number of interesting cases in which an agent can have that power with regard to a third-party, e.g., parents with regard to their children. For present purposes I focus on the more straightforward self-regarding cases.



with regard to a particular right. There are many reasons why an agent might not have the power of consent with regard to certain rights. The two most commonly discussed cases are those in which an agent would usually have the power of consent, or will come to have the power of consent, but does not presently have that power. This may be because of the *age* of the agent (e.g. the age of sexual consent), or the *competency* of the agent (e.g. an agent who has a severe cognitive impairment). Furthermore, an agent may be unable to waive some right of hers because of the *harm* that would be caused by the consentee acting in the manner that has been consented to.<sup>51</sup>

Second, consent is widely thought to need to meet a *voluntariness condition*. That is, consent is only valid where it is given voluntarily, however exactly the idea of voluntariness is understood. A clear case of involuntary (and so invalid) consent is sexual consent extracted at gunpoint. Third, consent is generally thought to need to meet an *information condition* to be valid, according to which individuals must have sufficient information about what they are consenting to. For instance, a patient who does not understand that her consent permits the doctor to remove a limb of hers will fail to meet the information condition and so be invalid.

All three of these conditions on consent's normative efficacy are complex and give rise to difficult and interesting question in their own right. For the purposes of this thesis I will rely on what I take to be intuitive examples and assume that consent given in the cases discussed is valid consent unless otherwise stated. Once again, I do not comment directly on the ways in which we should understand these conditions, but I believe that the theory of consent I develop should provide a basis from which to approach these questions.

In some cases I will discuss the normative significance of an agent's non-consent. By this I just mean to refer to the normative state of affairs that obtains given an agent has not consented. In some other cases I will talk about an agent's having *dissented* or *revoked consent*. An agent dissents either where she asserts the fact that she has not in fact consented (such that she has not waived any right of hers), or where she acts so to reinstate her right by removing consent. The usage will be made clear by the context. An agent revokes her consent just where she reinstates

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<sup>51</sup> Whether there are any such rights is a heavily contested issue that I will comment on only obliquely in what follows. For some interesting discussion, see Victor Tadros, "Consent to Harm," *Current Legal Problems* 64 (2011); Seana Valentine Shiffrin, "Harm and its Moral Significance," *Legal Theory* 18, no. 3 (2012).

her right by removing her consent. The ability to revoke consent is in itself a normative power, although I assume that the explanation for this power is part and parcel of an account of consent's normative significance.<sup>52</sup> Having given consent, an agent may not always be able to revoke her consent. Whether this is so depends upon whether she has waived or alienated her right.<sup>53</sup>

Finally, it is worth noting that the normative power of consent is not, in my view, what might be called a *fundamental normative power*. A fundamental normative power would be the ability to create *any* reasons for action, rights, duties, and so forth, just by exercising that fundamental power. If I had a fundamental normative power then I could, for example, give all trees a right to life, or give every agent in the world a duty to give me five pounds per month, or give a passing stranger reasons to do a funny dance on the street. I doubt that any being has such a power (although if God exists he is an obvious candidate). However, I suspect that much of the mystery and suspicion concerning normative powers derives from the implicit assumption that the possession of a normative power (e.g. the power to consent or the power to promise) would be akin to the possession of a fundamental normative power. But that is far from true. Rather, whether agents have the ability to affect the application of rights and duties in the ways I have suggested depends upon whether there are pre-existing reasons why they should be able to do so. In other words, whether agents possess the power of consent, and what the contours or confines of that power consist in, depends upon why it would be valuable for them to possess that power. Raz puts this point the following way.

Consent...is an act purporting to change the normative situation. Not every act of consent succeeds in doing so, and those that succeed do so because they fall under reasons, not themselves created by consent, that show why acts of consent should, within certain limits, be a way of creating rights and duties. We cannot create reasons just by intending to do so and expressing that intention in action. Reasons precede the will. Though the

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<sup>52</sup> See Section 5.3.2.

<sup>53</sup> In some cases in which we talk of consent, it may be that we also give another a claim against us by consenting, as well as a permission. For instance, if Alison consents to Bert's borrowing her book so that he can finish his essay, then this will often imply that Bert now has a claim against Alison to borrow the book for some period of time (i.e. Alison would wrong Bert by revoking her consent). These cases are interesting, since they represent something like a hybrid power of consent and promise. My primary focus in the thesis, however, will be on straightforward cases of consent.

latter can, within limits, create reasons, it can do so only when there is a non-will-based reason why it should.<sup>54</sup>

So in trying to explain and justify the normative significance of consent we are trying to give an account of the reasons why agents should, within certain limits, be able to waive rights of theirs by performing certain actions with the intention of achieving that normative result, and why other agents should, in certain contexts, be responsive to an agent's consent or non-consent.<sup>55</sup>

### 1.2.5 *Desiderata*

At this point it may be useful to draw together some of the previous remarks and to rearticulate the central questions in response to which I aim to develop a theory, as well as two initial desiderata for that theory. The central questions to be addressed are,

- *The Question of Consent's Normative Force.* Why does an agent's consent have normative force, such that when they give consent they waive a right of theirs?
- *The Question of Consent's Relational Significance.* Why does the power of consent extend over directed and not non-directed reasons? Why should we rely on consent to affect the application of these directed reasons?

And the desiderata for that theory are,

- *The Authoritative Nature of Consent.* An account of why it is that when an agent has the power of consent with regard to some right, their valid consent

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<sup>54</sup> Raz, *The Morality of Freedom*, p. 84. See also David Enoch, "Giving Practical Reasons," *Philosophers Imprint* 11, no. 4 (2011).

<sup>55</sup> See Raz, *Practical Reason and Norms*, p. 102, and Raz, *The Morality of Freedom*, p. 97. This fact bears importantly on the question of the way in which those who possess normative powers can exercise them. For example, there has been some debate concerning whether agents can make binding promises to perform immoral acts. Whilst some have assumed that the power to promise *just is* the power to give oneself obligations, independently of their content, this ignores the fact the justification for the power to promise depends on an account of why it is valuable that agents should possess that power. Plausibly, that justification will include limits on the kinds of promises one can make. See Gary Watson, "Promises, Reasons, and Normative Powers," in *Reasons for Action*, eds. David Sobel and Steven Wall (Cambridge: Cambridge University Press, 2009), esp. pp. 167-69.

has normative significance independently of the reasons for which it is given, whether the consented to action will be in the agent's interest, and so on.

- *A Practical and Theoretical Foundation.* A theory that provides a starting point from which to address further practical and theoretical questions about the power of consent.

### 1.2.6 Methodology

Before moving on to give a brief overview of the main claims to be defended, let me say a few things about methodology.

As I have just said, in constructing a theory of consent we are trying to give an account of the reasons, or values, that explain why agents should be able to waive rights of theirs by performing acts of consent. In order to do so I consider a number of possible theories or principles of consent, and test these against fixed moral judgments about what I take to be paradigmatic examples of consent, whilst also considering whether the theory under consideration can give answers to our two central questions in line with the desiderata outlined. Thus, I rely, as do all moral and political philosophers, on our moral intuitions in response to a range of examples. The cases I will discuss most often are cases of sexual and medical consent, and this is because I believe these to be cases in which we have the most clear and fixed intuitions about consent. I suspect that the further we move away from paradigmatic examples such as these, the less clear and less helpful our intuitions become.<sup>56</sup>

However, no intuition or judgement is, in principle, fixed, such that it is not a candidate for revision (even if we find it very hard to imagine the situation in which we would be prepared to give some such judgements up). Rather, we must work back and forward between our judgements and our candidate principles or theory, revising each in line with the other and testing these against new cases until we reach a "reflective equilibrium" (something we are very unlikely to reach in the course of this thesis).<sup>57</sup> By engaging in this process we hope to be able, at least to some reasonable extent, to unify our central intuitions and explain the connections

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<sup>56</sup> Which is not to say we never have cause to think about strange and improbable cases, only to say that we may want to put less weight on the fact that we have certain intuitions in response to those cases.

<sup>57</sup> On the method of reflective equilibrium see John Rawls, *A Theory of Justice*, Rev. Ed. (Cambridge, Mass.: Harvard University Press, 1999), Sec. 9; T. M. Scanlon, "The Aims and Authority of Moral Theory," *Oxford Journal of Legal Studies* 12, no. 1 (1992).

between them such that we are in a position not only to answer the questions from which we begin, but also to provide a basis for assessing our more or less fixed moral judgements, and for making new judgments when faced with new cases.

Having said this, I do not rely solely on the fact that we can bring a set of considered moral judgments about particular cases into alignment with a theoretical account of consent's normative significance. I also provide arguments to the effect that if you accept certain intuitions or claims – both about cases of consent as well as other widely accepted ideas in moral theory – then you should accept the relational theory of consent I outline in Chapter 5. My hope is that the reader will accept a sufficient number of the intuitions upon which I rely, and see the theory I present as an attractive way of accounting for these intuitions in line with the constraints I have set out above.

### **1.3 Thesis Overview**

Let me now present a brief summary of the contents of the chapters to follow.

In the next chapter, Chapter 2, I consider four possible theories of consent's normative significance that are tied together by the fact they each seek to ground that significance in the fact that the possession of the power of consent in certain contexts will serve or protect the interests of agents. Two of these theories focus on the fact that an agent is often in the best epistemic position with regard to her own interests, such that her possession of this power will promote her overall well-being. The other two theories, that I believe are most commonly relied upon by moral and political philosophers, emphasise the importance of the possession of the power of consent for the living of an autonomous life, either because consent represents an agent's autonomous choice, or because agents would be unable to live rich and diverse lives involving interaction with others if they had no means of waiving their rights.

Whilst each theory has its own particular pitfalls, I argue that all four theories fail to adequately explain the authoritative nature of consent. Briefly, theories that are based on the general well-being of agents cannot explain why consent has normative force when it will not serve the interests of the consentor, yet reflection on a number of examples makes clear that we believe an agent's consent will often have normative force in such cases. On a choice-based account of consent, it is an agent's

choices, and not her consent, that is authoritative. Once again, considering a number of examples makes clear that we believe an agent's consent does have normative significance even where it does not represent a choice of hers. Finally, a theory that grounds the power of consent in the need to be able to engage in valuable interaction with others, whilst intuitive, fails to give any account of why an agent's consent in fact has authority. Specifically, assuming that an agent's rights are grounded in her interests, how could an agent waive her rights by giving consent when acts of consent – declarations, signatures, etc. – will in no way affect her underlying interests?

These theories brings to the fore an important problem faced by any moral theory that seeks to ground moral rights and wrongs in an account of interests, and that is the problem of moving from an account of morally significant interests to an account of moral rights and wrongs in a way that satisfies our considered judgements. In particular, I think these theories highlight the difficulty of trying to move directly from the former to the latter. Indeed, I take this problem, which I will refer to as the *bridging problem*, to be one of the most significant challenges faced by any interest-based moral theory.

Before exploring this idea further, however, Chapter 3 considers one of the only explicit and detailed interest-based theories of consent, which has recently been developed by David Owens. Owens's theory of consent is part of a broader theory concerning our ability to shape the normative landscape through the choices we make. He argues that standard interest-based theories go wrong because they ignore an important class of interests possessed by agents: *normative interests*.<sup>58</sup> Normative interests, Owens claims, are interests in normative phenomena, such as *rights* and *obligations*. In the case of consent Owens argues that we have a *permissive interest*, an interest in certain acts being *wrong* unless we consent to them. By relying on the permissive interest Owens is able to account for many of the problems faced by the standard interest-based theories considered in Chapter 2, and to give an account of consent's authority.

I level three main objections against Owens's theory. First, I argue that his theory does not offer a plausible account of why consent is valuable, that is, of why it matters to us that we rely on one another's consent as a means for managing our

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<sup>58</sup> See Owens, *Shaping the Normative Landscape*.

normative relationships in certain contexts. Second, I argue that Owens's theory lacks explanatory power, in two directions. On the one hand, it is far from clear that Owens's theory of consent actually accounts for the data we think a theory of consent should unify and explain. On the other hand, a consequence of relying on the postulated permissive interest is that it is difficult to use the theory as a starting point from which to address further theoretical and practical questions, in large part because the idea of a permissive interest does not map onto other familiar concepts or intuitions upon which we rely in our practical thinking. Third, I cast doubt on our possession of permissive interests by arguing that even in a paradigmatic case in which consent is taken to be normatively significant, viz., sexual relations, agents need not always rely on consent to make their interaction permissible, at least when consent is understood in the narrow way that both Owens and I understand it. If this is correct, however, it suggests that the interest(s) that explain why consent is usually taken to be important in the sexual context cannot be an interest in its being wrong for others to have sex with us unless we *consent*.

This all suggests, I think, that whilst we cannot move directly from an account of an agents' interests to their possession of the power of consent, it is the interests of agents – standardly understood – that ultimately ground that power. The question, then, is about how we should conceive of the relation between an agent's interests and her moral rights and powers. In Chapter 4 I focus on this issue solely in connection with moral rights, and confront a general problem that is faced by the interest theory. Typically, rights are taken to be of significance in practical thought because of their distinctive structure. Specifically, rights are thought to have a preemptive structure, such that as well as giving other agent's first-order reasons to act (or not act) in a certain way, rights also (i) pre-empt the duty bearers consideration of the right-bearers underlying interests, and (ii) exclude a range of competing considerations from the pool of available reasons for action. For example, A's right that B not touch her gives B a reason not to touch A that (i) cannot be modified by an evaluation of A's underlying interests, (ii) cannot be weighed against certain other reasons, including, for example, B's desire.

Conceptualising rights as having a preemptive structure provides a fruitful way of thinking about many of the difficulties discussed in Chapters 2 and 3. However, we then face the difficult challenge of *justifying* rights with a preemptive structure. What is more, on the assumption that rights protect interests, it might look

as if preemptive rights give those interests an undue and unjustifiable weight in our moral thinking. Having rejected two possible strategies for justifying preemptive rights that can be found in the thought of Joseph Raz, I provide two complementary arguments in support of such rights. First, I argue that agents have *relational interests*, interests in being able to recognise that others recognise them as an individual who has morally significant interests, interests which they give the appropriate role within their practical deliberations. For instance, it does not only matter to A that B drives responsibly so as to diminish the risk of his seriously setting back A's interests by crashing into her, but also because by failing to do so B fails to relate to A as an agent who has morally important interests. I then argue that moral agents stand in an intrinsically valuable relationship with one another – a relation I label *mutual recognition* – when they are able to recognise that they each regard the other as having morally significant interests worthy of protection.

The second argument in favour of preemptive rights derives from the value of *normative assurance*, that is, the assurance agents have if they believe that others recognise certain normative standards – certain reasons, rights, and duties – as determining how they should behave in certain contexts. Here I argue that a mutual recognition of preemptive rights can be particularly valuable in a range of contexts, something that is evidenced in both morality and law. For example, in order for the practice of promising to play its valuable role in structuring interpersonal relations (however exactly we characterise that value), it is plausible to think that a promisor and promisee must both recognise the normative standards of promising, whereby promises give rise to preemptive rights and duties, in order that the promisee has a valuable form of normative assurance.

These claims serve as the basis for the *relational requirement*, which I apply to the justification of rights. According to the relational requirement, we should not conceive of rights as directly protecting the interests of agents. Rather, we must mediate the first-order interests of agents through the relational requirement, such that if these rights are relied upon as a basis for practical thought and action they will allow particular agents to stand in the valuable relation of mutual recognition, and to benefit from the normative assurance this relation brings. That is to say, a full account of the justification of rights must take into consideration not only whether these rights will protect and promote important interests, but whether these rights can serve as the basis for mutual recognition between rights-bearers. I then argue



that rights with a preemptive structure play an important role in allowing for the relation of mutual recognition. Thus, whilst we rely on agent's interests to identify areas that warrant protection, and whilst these interests will be indirectly protected and promoted by such rights, the full justification of rights depends on factoring in the role rights play in facilitating relations of mutual recognition.

These arguments for preemptive rights provide the backdrop against which I articulate and defend a relational theory of consent in Chapter 5. The central idea of the theory is that the power of consent allows agents to interact with one another in a variety of valuable ways whilst continuing to stand in a relation of mutual recognition, in which agents recognise one another as having legitimate control over the central aspects of their own lives. So, according to the relational theory, we start by identifying the range of first-order control interests possessed by agents, and mediate these through the relational requirement in order to yield preemptive control rights. We then note the range of interests agents have in being able to interact in ways precluded by these rights, whilst maintaining control over what happens in these protected domains. We then mediate this second set of interests through the relational requirement and by doing so we are able to explain the normative significance of consent.

To take one example, agents clearly have weighty interests in not having sex with others against their will, yet also clearly have interests in being able to permissibly have sex with others in the right circumstances. Importantly, in line with the relational theory of rights, it does not only matter to A and B that they have a sufficient measure of control over whether the other in fact has sex with them, but also whether they are able to recognise that others give the appropriate role to these control interests in their deliberations. By relying on consent to manage their sexual interaction, A and B do not only maintain a sufficient measure of control over what happens to them, so as to serve their first-order interests, but also relate to one another in an intrinsically valuable way by recognising one another's legitimate control over whether they engage in sexual relations. Moreover, a mutual recognition that only consensual sex is permissible will provide both A and B with a valuable form of normative assurance.

With the relational theory in place I turn finally, in Chapter 6, to consider one way in which that theory can inform debate in the context of sexual consent. Here I turn my attention to the highly contested question of whether sexual consent can

serve as a means to manage morally decent sexual relations in a world marked by entrenched gender injustice, and argue that the relational theory allows us to see something important in the critique of individual sexual consent offered by Catherine MacKinnon. Whilst I agree with those who reject the (possible) implication of MacKinnon's view that, because of the structural conditions that obtain, B will wrong A by having sex with her *even if* she gives fully voluntary and informed consent, I suggest that a sole focus on particular interactions between consenting individuals obscures something important. Specifically, I highlight our need for appropriate social structures in order to fully realise the values that account for consent's normative significance. In particular, in order to maintain a sufficient measure of control over our sexual relations, and recognise one another as having this control, we require appropriate conventions of sexual consent, conventions that, as MacKinnon's work helps to show, we currently lack.

Whilst my focus throughout concerns that justification of moral rights and our power to waive those rights by giving consent, I believe that the present work can also be read as contributing to a more general debate in moral theory concerning the viability of charting a middle course between wholly reductive interest-based moral theories, according to which nothing is of value except the promotion and protection of individual interests, and Kant-inspired status-based views, which, as I have said, offer a non-reductive explanation for central moral rights and powers (upon which they often attempt to build an entire moral system). The central difficulty for such a middle way is, as I suggested above, bridging the gap between an account of morally significant interests and an account of moral rights and wrongs in a way that is consistent with our considered moral judgments. I believe that taking seriously the idea that we are not only concerned with the promotion and protection of our first-order interests, but are also concerned to relate to one another in ways that recognise each other as bearers of morally significant interests, provides the foundations upon which such an account can be built.

## 2

## Consent, Well-Being, and Autonomy

In this chapter I consider and reject four views of consent's normative significance. Two of these views ground the significance of consent in considerations of individual well-being, whilst the other two ground the significance of consent in the value of personal autonomy. Despite important differences, the theories share a common structure. They claim that the normative significance of consent can be explained by the fact that an agent's possession of that power will serve or protect their interests. Consequently, all the theories face the same fundamental objection: they cannot explain what I described in Chapter 1 as the *authority of consent*.

### 2.1 Well-Being

One might think that consent is normatively significant because individuals themselves are in the best position to know their own interests.<sup>1</sup> On this view, which I will call the *simple well-being view*, agents can waive their rights by giving consent because they know when it is in their interests to do so. According to the simple well-being view, the normative force of consent is explained by the privileged epistemic position of agents with regard to their own interests. Such a justification is instrumental: it points to the fact that acting in accordance with the consent of individuals will best serve their interests. Thus, where consent will not serve an individual's interests, their consent (or non-consent) has no normative significance.

There are two main objections to the simple well-being view. First, we clearly think that an individual can give valid consent in cases where the consented to actions will not serve their interests. For instance, consider Victor Tadros's dramatic example.

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<sup>1</sup> For example Joseph Raz, *The Morality of Freedom*, pp. 84-6; Franklin G. Miller and Alan Wertheimer, "Preface to a Theory of Consent Transactions: Beyond Valid Consent," in *The Ethics of Consent*, eds. Franklin G. Miller and Alan Wertheimer (Oxford: Oxford University Press, 2010), p. 83. To be clear, these authors do not suggest that this is the only justification for the normative significance of consent. See also John Stuart Mill, *On Liberty*, p. 164.

Suppose that a child is trapped in a burning building. The child will die unless I pull him from the flames...[S]uppose I can rescue the child only if you push me into the building on a shopping trolley. If you do this, though, a revolving saw will cut off my arm. I ask you to assist me so that I can save the child.<sup>2</sup>

Tadros concludes, and I agree, that whilst it is supererogatory to save the child in such circumstances, “if I consent...it is permissible for you to help me save the child.”<sup>3</sup> I assume, however, that doing so will significantly set back Victor’s interests. Of course, there may be scenarios in which saving the child would not set back Victor’s interests on balance. But assume that it does. We will still think, I believe, that Victor’s consent is valid, and that it is permissible for his assistant to help him save the child. But, on the assumption that Victor’s interests will, on balance, be set back, the simple well-being view cannot explain why Victor’s consent has normative force.

Furthermore, we can give valid consent even where no one’s interests will be served by the consented to actions. Consider, for example, consent to participate in painful medical research that is doomed to failure; consent to a large ugly tattoo that the consenter will quickly come to regret; or A’s consent for B to smoke in a confined space (causing both A and B to inhale toxic fumes). In the other direction, an individual may withhold consent even where doing so will severely set back their interests, as when an agent refuses life-saving medical treatment. Sometimes we may be aware that our consent or dissent will not serve anyone’s interests (as when A consents to B’s smoking), and sometimes we may simply be mistaken about what is in our interests (as when we consent to the ugly tattoo). But in both kinds of case consent can have normative force, and the simple well-being view cannot easily explain why this should be.

The second objection to the simple well-being view is that it renders consent unnecessary for permissible action in contexts where we in fact believe that consent is necessary. I have two kinds of case in mind. First, since we can communicate what we believe to be in our interests in a number of ways, and not just by giving consent, there is no reason why we should only be able to waive some of our rights by giving

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<sup>2</sup> Victor Tadros, “Consent to Harm,” p. 29.

<sup>3</sup> Ibid.

consent. Yet, in a number of contexts, we think that irrespective of B's reasonable beliefs about A's interests, B needs A's consent in order to act permissibly. For instance, A may communicate or imply a desire to engage in sexual relations with B in a number of ways, but (assuming none of those communications amounts to an act of consent) B will still need A's consent. Yet, if A's communication of consent only serves the purpose of providing B with information about A's interests, it is not clear why B would need to acquire that information in *this* way (i.e. via A's consent or non-consent).

In the second kind of case, the consentee, or some third party, may plausibly have a better understanding of an agent's interests than the agent themselves, and in such cases consent would be redundant on the simple well-being view. Imagine, for example, that I am sick, and you, knowing that I want to get better, are talking to Jim, a doctor, on the phone. You describe my symptoms to Jim, and he correctly identifies the source of the problem. In order to recover I need an injection. You have the injection and can give it to me. Should you ask for my consent? Clearly we think that, so long as I am conscious and competent, the answer is yes. Yet it is not clear on the simple well-being view why that should be. After all, I haven't got a clue what is wrong with me. And there is very good reason to believe that following Jim's advice will best serve my interests. Why, then, do you need my consent?

One way of characterising the problem with the simple well-being view is to say that, on this view, the giving of consent amounts to providing information, or giving advice.<sup>4</sup> Since an agent is often best placed to know what is in their interests they can provide information or advice to others about what those interests consist in, and thus provide others with guidance about what reasons for action they have. But this mischaracterises the role we take consent to play, since valid consent can be given even where it will not serve our interests, and because consent is sometimes required even where others already have good information about what is in our interests. Thus, the simple well-being view fails to provide a convincing answer to either of the questions I distinguished in Chapter 1 – of why consent, when given, has normative force, and of why consent has relational significance.

It might be suggested at this point that a more complicated version of the well-being view can do better than the simple well-being view. Specifically, we

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<sup>4</sup> This way of putting the point is suggested by Victor Tadros in an unpublished manuscript.

might adopt a rule-based account, according to which we have reason to adopt a set of rules that requires the consent of agents in certain domains because the acceptance of these rules will best serve the interests of agents overall. The reason for this is that it is true that agents often best know their own interests, and it may be exceedingly difficult to judge whether or not this is so on a case-by-case basis. Moreover, even where agents make a mistake about what is in their interests, their possession of the power of consent over certain domains is, over time, likely to help educate them about what is in their interests, about how they should exercise their judgement, and so on. Call this view the *rule-based well-being view*.

Two problems confront the rule-based well-being view. First, it is an open question whether the rules of consent that would best promote the interests of agents overall will align with the domains in which we take an agent's consent to be normatively significant. And whilst this is ultimately an empirical question, there is good reason to think that in fact the two would not line up. It is, for instance, possible that the interests of agents would be better served overall if doctors did not need to acquire the medical consent of patients. Furthermore, there is a range of very risky activities that we think agents can consent to, such as certain kinds of medical experimentation, or risky sporting activities (e.g. cage fighting, bungee jumping), where rules that precluded efficacious consent would possibly yield better consequences in terms of interest promotion and protection. As I have said, which rules would be best from the standpoint of an overall promotion of interests is an open empirical question. The point is that we do not think that the outcome of this empirical investigation will make a difference to whether or not consent is required. For example, medical interventions, of whatever kind, require patient consent. This suggests that we do not really believe that it is the fact that adopting certain rules will promote the interests of agents overall that explains why consent is normatively significant.

The second problem faced by the rule-based well-being view is that, whilst it might make sense to adopt a set of rules as a guide to practical reasoning given the various complexities and uncertainties with which we are generally faced, the account cannot explain why it would be *morally wrong* to break such rules, if in some particular case we knew that breaking the rule would better serve an agent's interests. After all, the motivation of the view is that adoption of the rules will best promote the interests of agents overall. For instance, if the doctor knows (or is

reasonably sure) that the patient's interests will best be served by disregarding the patient's non-consent, and giving the patient an injection, then the rule-based well-being view has no obvious explanation for why it would be wrong for the doctor to give the patient the injection.

To summarise our discussion of well-being based views, neither the simple or rule-based well-being views can provide an adequate explanation for the authoritative nature of consent. Most significantly, such views cannot explain why an agent's consent (or non-consent) has normative force even when it does not track their underlying interests. But as the examples we have considered suggest, we believe that where an agent has the power of consent, their consent has normative force whether or not the action in question serves or sets back their interests. Furthermore, well-being based views also fail to adequately explain the relational significance of consent. For one, it is unclear why, on these views, a consentee should not make their own judgment about what is in the consenter's interests. Moreover, if the consentee were to correctly judge that the consenter's consent would not serve their interests then they should regard this consent as normatively null. Yet this seems to get things wrong in two respects. First, a consentee should generally respond directly to an agent's consent (or non-consent), without making an independent assessment of the consenter's interests. Second, even if the consentee has good reason to believe they know what is in the consenter's interests (e.g. because they are a doctor) they will still require consent in order to act permissibly.

Before moving on let us consider a possible line of response that we can call the *reductionist response*. A proponent of a well-being based view might argue that to reject the well-being views for the reasons I have suggested is to be guilty of rule worship.<sup>5</sup> Whilst consent is generally a useful guide to an agent's underlying interests, it is no more than that. This is sufficient for us to adopt "rules of thumb,"<sup>6</sup> since we will generally not have the time or epistemic access required to make a better assessment of an agent's interests, but what is really morally significant is the protection and promotion of those interests, and nothing more. This gives us an explanation for why consent is generally a useful moral guide, and why it is a good

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<sup>5</sup> J. J. C. Smart, "An Outline for a System of Utilitarian Ethics," in J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973), p. 10.

<sup>6</sup> *Ibid.*, p. 42.

thing that rule-based practices of consent are widespread, even though these rules have no moral significance in themselves.

Whilst the reductionist position is coherent, I think it is unappealing, for the following three reasons. First, as I have already noted, our actual rule based practices of consent seem quite unlikely to be the best candidates for the promotion and protection of our interests. So as an account of our current practices the reductionist position looks to fail, and it seems more plausible to think that those practices aim to track concerns over and above the mere promotion of interests. Second, accepting the reductionist position would require us to reject a range of what I take to be firmly rooted and considered moral judgements, including the claim that our consent plays a direct role in making some acts permissible or impermissible. Whilst our considered moral judgements should always be seen as potentially revisable, I will later argue, in Chapters 4 and 5, that there is a much more plausible theory of consent that allows us to maintain these intuitions. Third, I believe it is fundamentally misguided to hold that our moral relations are concerned with nothing more than interest promotion. As I will argue in more detail later on, a more plausible approach requires us to consider how we ought to deliberate and act if we wish to relate to one another as bearers of interests worthy of protection.

## **2.2 Autonomy**

So far, however, I have neglected the importance of personal autonomy – the value, roughly, of living a life of one’s own choosing. I have assumed that an agent’s well-being can be characterised without reference to their intentions, choices, and plans. It might be thought that a version of the well-being view that takes the value of autonomy into account can explain the authoritative nature of consent. Indeed, most existing accounts of the normative significance of consent appeal to the value of personal autonomy, and many have gone so far as to claim that the power of consent follows naturally from an account of autonomous agency. For example, Heidi Hurd claims that, “To have the ability to create and dispel rights and duties is what it means to be an autonomous moral agent.” Similarly, Seana Shiffrin states that, “if autonomous moral agency is possible, then [the] power [of consent] must be



possible.”<sup>7</sup> I will endeavour to show, however, that whilst there is much that is intuitive about this idea, autonomy-based accounts cannot provide a satisfactory explanation for consent’s normative significance, at least as they stand.

### 2.2.1 *The Value of Autonomy*

Of course, the nature and value of personal autonomy has been, and continues to be, the subject of intense debate, and different conceptions of autonomy may give rise to a number of distinct accounts of the normative significance of consent. I cannot hope to do justice to that rich and diverse literature here.<sup>8</sup> Instead, I work with a general account of autonomy’s value that I think captures many of the central intuitions about autonomy’s significance, and consider two accounts of the normative significance of consent plausibly grounded in this conception. Let me begin then by saying something about the conception of autonomy I will be working with.

On a popular view, the value of living an autonomous life is thought of as the value of being the author of one’s own life.<sup>9</sup> As Joseph Raz describes it, the ideal of autonomy

holds the free choice of goals and relations as an essential ingredient of individual well-being. The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy

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<sup>7</sup> Heidi M. Hurd, “The Moral Magic of Consent,” p. 124; Seana Valentine Shiffrin, “Promising, Intimate Relationships, and Conventionalism,” p. 517.

<sup>8</sup> One family of theories that I will not discuss here deserve special mention, namely *internal theories of autonomy*. Internal theories of autonomy seek to specify the conditions under which an agent’s choices or actions can be thought of as truly autonomous. Roughly, an agent’s choices or actions are truly autonomous when they are the result of self-government, rather than the product of some deviant force (e.g. manipulation, weakness of will, a failure to reason properly). What internal theories seek to specify is precisely what the conditions for self-government amount to. Thus they seek to identify the conditions for a certain self-relation – between an agent and her choices or actions. Given this focus, internal theories do not provide an obvious foundation for a theory of consent, since consent functions to manage relations *between* agents. Still it might be claimed that only choices or actions that meet these conditions for self-government are valuable, such that only instances of consent that meet these conditions are normatively efficacious. (This is suggested by, for example, Ruth Faden and Tom Beauchamp, in *A History and Theory of Informed Consent* (Oxford: Oxford University Press, 1986), Ch. 7.) However, this is an answer to a distinct further question, and still relies on a general account of consent’s normative significance. Moreover, I doubt that this claim is true. Whilst I often suffer from weakness of will or fail to act in accordance with my second-order desires when I have another beer or another slice of cake, I still author my life in a way that is significant, such that it would be wrong for others to interfere with these actions. (Cf. Shiffrin, “Harm and its Moral Significance,” pp. 380-82.)

<sup>9</sup> See, in particular, Joseph Raz, *The Morality of Freedom*, Ch. 14.

is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.<sup>10</sup>

So, on this *authorship view* of autonomy, an agent lives a more or less autonomous life to the extent that they shape their own life over time by choosing and pursuing different projects, goals, and relationships. That we value personal autonomy so understood is reflected by our belief that individuals should be free to choose, for example, what education and career to pursue, what hobbies to partake in, where to live, which individuals and groups to associate with, what political causes to support, who to form sexual relationships with, and, increasingly, when to end one's own life.

I think the authorship view is a compelling account of the value of personal autonomy. Before moving on, I want to briefly draw attention to two elements of what I take to be the best version of this view, since they will be important as we progress. First, an important dimension of most valuable autonomous lives will be our relationships with others. It will thus matter to us that we are able to shape our lives not only by pursuing various goals and projects, but also by developing those relationships, which includes shaping and moulding their normative elements – the expectations and requirements that obtain between an individual and their friends, colleagues, family, and so on.<sup>11</sup>

Second, on the version of the authorship view I prefer, the value of living an autonomous life is not simply the value of having the world correspond with our choices or preferences, but rather the value of actively shaping one's own life over time through intentional action.<sup>12</sup> Whilst correspondence is no doubt desirable (at least in terms of preference satisfaction), this agency-based view claims that an important component of autonomy's value is located in an agent's actively striving to bring her experience and environment into line with her plans or choices.<sup>13</sup> If this is right then the authorship account of autonomy supports the idea that individuals

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<sup>10</sup> Ibid., p. 369.

<sup>11</sup> Ibid., *The Morality of Freedom*, p. 87.

<sup>12</sup> This view is suggested in Raz's writings, and is clearly expressed by Tom Hurka in "Why Value Autonomy?" *Social Theory and Practice* 13, no. 3 (1987). Recently, Seana Shiffrin has also gestured toward such an understanding in Seana Valentine Shiffrin, "Harm and its Moral Significance," especially pp. 377-82.

<sup>13</sup> Shiffrin, "Harm and its Moral Significance," p. 382.

possess significant autonomy-based *control interests*,<sup>14</sup> since there is a tight connection between the ability to live an autonomous life and the possession of individual control. Indeed, on the agency view, the possession of control is not just instrumental to autonomy but rather the possession and exercise of control is constitutive of living an autonomous life.<sup>15</sup> An agent who has absolutely no control over her environment or her place within it lacks the agential capacities required to be the author of her own life.

### 2.2.2 *The Simple Choice View*

In the literature on consent a connection is often drawn between the normative significance of consent and the value of choice. For example:

- “[I]nformed consent is rooted in concerns about protecting and enabling autonomous or self-determining choice by patients and subjects.”<sup>16</sup>
- “The third reason that consent is important in sexual activity has to do with the fact that sex matters to us, that it is something over which we do want to exercise choice.”<sup>17</sup>
- “A woman ‘factually’ consents to sexual intercourse when, whether in mind or expression, she actually chooses sexual intercourse as that which she unconditionally desires for herself.”<sup>18</sup>
- “Choice or consent can have direct practical significance in contexts of relational normativity, altering or negating directional obligations that would

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<sup>14</sup> Some might object to discussing autonomy in terms of interests, since it implies that living autonomously is an aspect of well-being, and is therefore only instrumentally valuable. I cannot adequately discuss the relationship between autonomy and well-being here, but it is worth noting two points. First, if interests are understood as something the promotion or protection of which makes a life go better, then it seems clear that we have interests in living autonomously. Second, I agree with Raz that we should think of autonomy as constitutive of well-being, such that living autonomously is an essential aspect of living a good life, independently of the effect this will have on our other interests. See Raz, *The Morality of Freedom*, Ch. 14.

<sup>15</sup> Thus, this conception of autonomy has much in common with Charles Taylor’s account of positive freedom according to which freedom is an “exercise-concept,” which “involves essentially the exercising of control over one’s life.” See “What’s Wrong With Negative Liberty?” in *The Idea of Freedom: Essays in Honour of Isaiah Berlin*, ed. Alan Ryan (Oxford: Oxford University Press, 1979), p. 177.

<sup>16</sup> Ruth Faden and Tom Beauchamp, “A History and Theory of Informed Consent,” p. 235.

<sup>17</sup> David Archard, *Sexual Consent*, p. 21.

<sup>18</sup> Peter Westen, “Some Confusions about Consent in Rape Cases,” *Ohio State Journal of Criminal Law* 2, no. 1 (2004), p. 335.

otherwise obtain....Thus, the bearers of moral rights are in a unique position to alter the normative relations at issue through their choices; their consent matters directly for the question of whether otherwise proscribed behaviour may be engaged in.”<sup>19</sup>

- “Having these personal realms [protected by rights] is crucial to our leading lives in the ways that we should like. Fundamentally, this generates duties in other people to respect our wills: they must respect the choices that we make about what shall happen within these realms. If our choices are to maximally determine the permissibility of others’ actions, then the rights we waive [by giving consent] must be the rights that we intend to waive.”<sup>20</sup>

All of these statements share a common theme. They suggest that there is a close connection between our ability to affect our normative relations through choosing and our ability to do so by consenting. This idea resonates with the account of autonomy sketched above. Plausibly, it is important that we consent to what happens within certain domains because it is important that we choose what happens within those domains, in order that we live an autonomous life. Given our underlying interests in being the authors of our own lives, some forms of behaviour or interaction are only likely to be in our interests if we have chosen them. For example, whilst having sex is generally going to be against our interests, it may be in our interests if we have chosen to have sex. Alternatively, it is generally going to be against my interests that others enter and use my house. But if I choose that they do so, whether to have dinner with me or to fix my shower, it will likely be in my interests (or at least not against my interests) that they do so. We might then think that consent is normatively significant because choice is normatively significant. I will call this view the *simple choice view*.

Before evaluating the simple choice view let me refine the central idea. We live autonomously when we live a life that, at least in crucial respects, we choose to live. And autonomy is valuable because it is in our interests to live a life that we choose to live. So, by making choices, we affect what is in our interests. Whilst it is not necessarily in my interests to be a philosopher, who spends his spare time cooking and playing the piano, these activities are likely to be in my interests if I

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<sup>19</sup> R. Jay Wallace, “Reasons, Relations, and Commands: Reflections on Darwall,” p. 29-30.

<sup>20</sup> Tom Dougherty, “Sex, Lies, and Consent,” *Ethics* 123, no. 4 (2013), p. 735.

choose to pursue them. Similarly, if I choose to develop certain relationships and not others, then these relationships are likely to be in my interests in ways that non-chosen relationships will not be. Choice, then, is a mechanism by which we affect what is in our interests.<sup>21</sup>

Now, on the assumption that our rights and the duties they give rise to are justified with reference to our interests, the idea that we can affect what is in our interests by making a choice provides us with a possible account of how it is that consent can affect which rights and duties obtain. Because our consent reflects our choices (in a way to be discussed below), our consent can, by affecting what is in our interests, affect whether or not we have a right. That is, by consenting we make it the case that some act is in our interest (or at least not against our interests), and so make it the case that we no longer have a right against that action.

How should we understand the nature of the relationship between consent and choice on the simple choice view? There are two possibilities.<sup>22</sup> On the first, in giving consent we *communicate* a choice, where choice is defined independently of consent. For example, choice may be a pro-attitude of some kind, or a decision about what to do or what one wants to happen. According to this view, it is as a result of having the pro-attitude or making the decision that we make something previously against our interests in our interests, and by giving consent we merely communicate this fact to others. On a second understanding, the giving of consent itself *constitutes* a form of choice. As a result, just by giving consent we can affect what is in our interests, and thereby affect what it is permissible or impermissible for others to do.

A proponent of the simple choice view should endorse the first understanding of the relationship between choice and consent. The reason is that it is implausible to think that merely by giving consent (e.g. by saying “Yes,” or signing a form) we could affect what is in our interests. This claim is a version of what David Owens

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<sup>21</sup> I have qualified the statements in this paragraph by saying that chosen pursuits or relationships are “likely” to be in my interests because on Raz’s view, to which I am sympathetic, chosen pursuits and relationships have value only if there is some independent value that attaches to them prior to choice. So, whilst I may make it the case that this or that pursuit has *more* value for me by choosing it, this is only if there is some reason to choose this pursuit anyway. See Raz, *The Morality of Freedom*, pp. 380-81.

<sup>22</sup> A third possibility is that the terms choice and consent are being used synonymously, which I suspect is actually fairly common. But if this is true then, without some further account of choice and its value, such as that offered in the text, a proponent of the simple-choice view cannot appeal to the value of choice to explain the power of consent, because they are one and the same.

has called the *problem of normative power*.<sup>23</sup> If I have interests sufficient to hold you under a duty not to  $\phi$ , how could my mere communication of an intention to make it permissible for you to  $\phi$  affect my interests so as to make it the case that the duty no longer applies? Consider the example of pain. Assuming I have significant interests in not experiencing pain, it is plausible that you will have a duty not to cause me (at least most kinds of) pain. But, if you are a doctor and I need surgery I can waive that duty, despite the fact that the surgery will cause me great pain, by giving consent. Yet surely it cannot be the case that just by signing the consent form I make it the case that the pain I will experience does not set back my interests.<sup>24</sup>

So, a proponent of the simple choice view should claim that our consent communicates our choices, defined independently of consent. How, then, should we define choice? Somewhat surprisingly, it is exceedingly hard to come by a definition of choice in the work of those who make a connection between consent and choice. However, we can consider a number of possible definitions of choice together, since ultimately they all suffer from the same defects.<sup>25</sup> I suggested above that a choice might be a pro-attitude of some kind (e.g. a desire), or a decision.<sup>26</sup> Alternatively, we may think of choice as reflecting an intention.<sup>27</sup> I choose to do  $\phi$  if I intend to  $\phi$  or intend to bring it about that you  $\phi$ . Whatever account of choice we rely on, it will not suffice to explain the normative significance of consent, for two main reasons.

First, it is not clear why, from the perspective of the consentee, communicated consent should be regarded as authoritative on the simple choice view. Since on all of the suggested accounts of choice, choices are mental states or acts, we are faced by the following question: if an agent entertains the relevant

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<sup>23</sup> See *Shaping the Normative Landscape*, pp. 127-29, 164. See also, “Does a Promise Transfer a Right?” in *Philosophical Foundations of Contract Law*, eds. Gregory Klass, George Lestas, and Prince Saprai (Oxford: Oxford University Press, 2014), pp. 87-8.

<sup>24</sup> But won't the surgery promote my interests on balance? Perhaps, but this observation cannot rescue this interpretation, for three reasons. First, it does not resolve the central problem, because it does not explain how I can affect my interests by mere declaration. Rather it just highlights that despite having my interests set back in some ways I will be compensated by a net gain in well-being. Second, if it is true that my interests will be served overall, it is unclear how my consent affects this calculation, and so unclear why my consent is even required. Third, the intervention may not serve my, or anyone's, interests (e.g. an ugly tattoo) such that my interests are not even promoted on balance.

<sup>25</sup> It seems plausible that the term “choice” in fact refers to a number of distinct phenomena, especially in light of the wide range of ways in which “choice” is employed in ordinary language. This does not impact on the argument given in the text.

<sup>26</sup> Richard Holton suggests choosing amounts to deciding in his *Willing, Wanting, Waiting* (Oxford: Oxford University Press, 2009), p. 57. He also says that the upshot of a choice is an intention, bringing him closer to Owens's suggestion.

<sup>27</sup> See Owens *Shaping the Normative Landscape*, pp. 173, 164. See also, “Does a Promise Transfer a Right?” p. 86.

mental state or performs the relevant mental act, why should they also need to communicate this fact to others in order to give permission?<sup>28</sup> That is, if it is by entertaining a certain mental state or performing a mental act that an agent affects what is in their interests, why does this not suffice for them to waive their rights? We can call this problem the *problem of correspondence*. For example, if a doctor performs surgery, and her acts happen to correspond with the patient's desire, decision, or intention, then we will still think that the doctor has seriously wronged the patient unless the patient has also given consent. Mere correspondence between the patient's choices and the doctor's actions is insufficient for the doctor's acts to be permissible. But the simple choice view struggles to explain why this should be, since it is choice and not consent that does the relevant normative work.

It might be suggested that whilst it is the subjective mechanism of choice that brings about the relevant change in interests, this change still needs to be communicated to others in order for a consentor to affect her normative relations with them. Thus the doctor will wrong the patient unless they know about the patient's choice. But this move cannot rescue the simple choice view because the patient can plausibly communicate her choices to the doctor in a wide variety of ways, and not only by giving consent. Consent is just one means of communicating a choice, and so, on the simple choice view, one amongst a number of ways in which we can give others permission to act in certain ways. However, as I noted above, we often think that consent *in particular* is a necessary condition of permissible action: consent is authoritative and sometimes plays a direct role in the justification of action. For example, the doctor cannot permissibly operate on the patient without the patient's explicit consent, whatever desires, decisions, or intentions the patient has communicated (assuming none of these constitute tokens of consent).

A proponent of the simple choice view might respond that in certain high stakes cases – such as serious medical interventions – we require a clear and unambiguous channel through which to communicate our choices, and so must rely

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<sup>28</sup> A proponent of a subjective view of consent, according to which consent is constituted by nothing more than a mental state or act, will accept that the presence of the relevant mental state or act is sufficient to waive a right on the part of a consentor. It is worth noting, however, that a plausible version of the subjective view will claim that the relevant mental state or act is in some way distinct from other more general mental states or acts, such that the relevant mental act just is the act of waving one's right (see Larry Alexander, "The Ontology of Consent," *Analytic Philosophy* 55, no. 1 (2014), pp. 107-08). So a subjective theorist may still wish to avoid the implication I consider in the text that consent just is the general mental act of choice. I give independent reasons for rejecting a subjective view of consent in Section 5.3.3.

on communications of consent rather than other ways of communicating choice. However, this move cannot rescue the simple choice view, because however we conceive of choice (as a desire, decision, or intention) reflection on a variety of examples shows that consent and choice can, and often do, diverge. Call this the *problem of divergence*.<sup>29</sup> The problem is that whilst our choices (however understood) can diverge from the consent we give or withhold, we nonetheless think that an agent's *consent* (or lack of consent) has normative significance, independently of their choices. But if the normative significance of consent is explained via the significance of choice, then we cannot maintain, consistently with the simple choice view, that our consent has normative significance where it diverges from our choices.

For example, imagine that Alison is having a party and has sent out invitations.<sup>30</sup> Bert, who Alison did not invite, has found out about the party, and asks Alison whether he can come. Alison may feel awkward and give Bert consent, even though she would really prefer that Bert did not attend. Furthermore, Alison may continue to hope that Bert does not show up. If Alison were somehow able to control Bert's behaviour, she would make it the case that Bert did not come to the party. She may even try and make it clear to Bert when she gives her consent that she would prefer him not to attend, with the intention of putting him off. Still, we believe that if Alison sincerely gives Bert consent then Bert is now permitted to attend the party, whatever else Alison thinks about his attending.

Alternatively, imagine that Cassie is in hospital and requires life saving surgery, and that she refuses to give consent out of a strong religious conviction. Nonetheless, she hopes that the decision will be made to overrule her and give her the surgery anyway. What she most wants is to live, but she believes she has a duty not to permit others to provide her with medical assistance. On the simple choice view, Cassie's lack of consent does not have the normative significance we generally take it to have, since it does not align with her underlying choice about what she wants to happen. Of course, the doctors are in no position to know this, but this is simply an epistemic problem. Yet, whilst Cassie would be secretly relieved, we would surely think that the doctors wrong her by overriding her non-consent, and not

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<sup>29</sup> This objection is developed by David Owens in *Shaping the Normative Landscape*, pp 173-74. See also his, "Does a Promise Transfer a Right?"

<sup>30</sup> This is a variation on an example of Owens, *Shaping the Normative Landscape*, p. 174.



just because they were not aware of her underlying choice, but rather because her consent or lack of consent should be regarded as authoritative.<sup>31</sup>

The problem of correspondence and the problem of divergence both highlight that the simple choice view, like the well-being views considered, cannot explain the authoritative nature of consent.<sup>32</sup> On the simple choice view what has authority is an agent's choices, and not their consent. This fails to reflect our considered judgments about consent and its normative significance, as the preceding examples demonstrate. We believe that an agent can give normatively significant consent without making a corresponding choice, and that others should be responsive to our consent even when this is so.

### 2.2.3 *The Control View*

At this point, someone sympathetic to the thought that we can explain the significance of consent by appeal to the value of autonomy theory may protest. "I never meant to say that our power of consent is directly tied to our interests in having the world correspond with our preferences, or decisions, or intentions. Rather, our power of consent is grounded in our interests in being able to interact with others in ways that would be impermissible if we had no means of waiving our rights. If we could not waive our rights over our bodies or our property we would be unable to permissibly share property, play contact sports, or have sexual relations, and activities such as these are an essential component of a rich and diverse autonomous life."

A view of this kind is suggested by Seana Shiffrin:

One could imagine a conception of autonomy without consent in which an agent exercised complete sovereignty over her body and other personal spaces, such as the home, but had no ability to share or transfer these powers to others....Such a structure is imaginable but so impoverished as to be utterly implausible....Rights of autonomous

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<sup>31</sup> One might think that the value of human life gives the doctors sufficient reasons – all things considered – to override Cassie's non-consent. But even if this is true, and even though Cassie would be secretly relieved, the doctors would still violate a duty they owed Cassie, and thus wrong her, even if they justifiably did so for her own benefit.

<sup>32</sup> A reductionist could once again claim that it *is* really our choices that have normative significance, and not our consent. For reasons discussed in the previous paragraphs, however, I believe that such a move would get things seriously wrong.

control that were inalienable to this degree would render (morally) impossible real forms of meaningful human relationships and the full definition and recognition of the self....To forge meaningful relationships, embodied human beings must have the ability to interact within the same physical space, to share the use of property, and to touch one another.<sup>33</sup>

On this view, which I will call the *control view*, agents would have an insufficient amount of control over their own lives if (i) they did not have rights against certain forms of conduct, which (ii) could be waived by giving consent. This explains why they must have the power of consent. According to this account, the interest that explains our power of consent is not straightforwardly an interest in choosing what happens in the world, but rather an interest in having control over one's life, where this must include an ability to alter one's normative relations with others in order to allow for valuable forms of human contact and interaction. Thus, this account relies on the two features of the authorship view of autonomy that I highlighted earlier: the importance of shaping our relationships with others, and the significance of having control over our own lives, as opposed to the value of simply getting what we choose.

The control view is the most plausible account that we have considered so far, and in Chapter 5 I will rely on some of the central insights of the control view in order to construct a sound theory of consent. However, as it stands, the theory is unsuccessful, for three main reasons.<sup>34</sup> First, the control view does not offer an explanation for why the power of consent is a power to affect *directed duties* in particular, for example, the power that A has to waive a directed duty that B owes to A not to  $\phi$ . That is to say, it is not clear why the idea that we need a sufficient measure of control over the course of our own lives is especially concerned with directed reasons. On the control view it is just the fact that A's individual autonomy – A's ability to live a life of her own shaping – is constrained by the fact that B owes it to her not to act in certain ways that motivates the claim that A must possess the power to waive these duties. To be sure, B's duty will constrain A and B's ability to permissibly engage in certain kinds of relationship unless A can waive that duty. But

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<sup>33</sup> Seana Valentine Shiffrin, "Promising, Intimate Relationships, and Conventionalism," p. 501-02. See also Jeremy Waldron, "Theoretical Foundations of Liberalism," p. 137.

<sup>34</sup> For discussion of the second and third problems see Owens, "Does a Promise Transfer a Right?" pp. 84-8.

the directed duties that others owe to A are not the only source of constraint on A's ability to live a life of her own shaping. For instance, B will have a whole range of reasons and other duties (including directed duties owed to C, D, etc.) to act or not act in certain ways that may constrain A's ability to shape her own life, or to engage in certain kinds of relationship with B.

For example, if B is a lecturer he may not be permitted by the university at which he works to engage in a romantic relationship with A, B's student. Plausibly, however, B does not *owe it to A* not to engage in a fully voluntary romantic relationship with her, but rather B owes it to the institution of which he is a part (even if the requirement is grounded in a concern for the interests of students), such that he cannot continue to work there and permissibly engage in a relationship with B. This places a significant constraint on the relationship that can permissibly obtain between B and A if B wants to continue to pursue another goal of his, that is, his academic career. Why then, on the control view, is A's power of consent only able to manage directed duties that B owes to A, and vice versa?

Second, the theory moves too quickly from the claim that agents require a means of non-wrongfully interacting with one another to the claim that they must possess the power of consent. It starts from the assumption that agents possess certain autonomy rights, and points out that such rights preclude many forms of human interaction that are valuable and that we assume can be engaged in permissibly. From this observation the conclusion is drawn that agents must possess the power of consent so as to be able to waive these rights. But this conclusion does not follow. At most, what follows is that agents must possess *some* means of waiving their rights so that they can interact without wronging one another. But there is no obvious reason why this means should take the form of a power to waive rights by intentional declaration. It could, for example, take the form of making a choice.<sup>35</sup>

Third, even if we assume that the relevant means of affecting one's rights would be through the giving of consent, a proponent of the control view will be faced with the problem of normative power. If our rights to control over our bodies and our property are grounded in our interests, how is it that merely by communicating an intention to waive a right we can affect our underlying interests

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<sup>35</sup> Ibid., p. 85.

so as make it the case that the right no longer applies? Consider David Owens's description of this problem.

Suppose I have a natural right to control what happens to my body. There must be something about me in virtue of which I have that right. For example, I might possess the right to control my body because it is in my interests to control my body, because my life goes better in various ways if I control my body and worse if I do not....Let us call the basis for my natural right to control my own body, whatever it may be, the *Foundation*. I lose much or all of this natural right if the Foundation is altered or disappears....But if the right is indeed a natural right it can't be degraded or lost unless the Foundation is somehow affected. And – here is *Hume's Point* – how could any plausible foundation be affected simply by the fact that someone (anyone) has spoken with the intention of hereby making it the case that I no longer possess some portion of my right to control my body.<sup>36</sup>

Now, it might be objected that we *can* affect the foundation of our right to control over our body, by making a choice. But if that is the case the control view collapses back into the simple choice view. Indeed, one advantage of the simple choice view is that it provides a solution to the problem of normative power. But as we saw, the simple choice view faces serious difficulties of its own. What we require is an explanation for why *consent* and not choice has normative significance. Whilst the control view provides a plausible explanation for why it would be valuable for us to be able to waive our rights (in some way or other), it does not explain how a mere declaration of consent could affect our underlying interests, and thus alter the structure of the rights and duties that obtains. We might say that the control view insists upon, rather than explains, consent's authoritative nature.

## 2.3 Harmless Wronging

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<sup>36</sup> "Does a Promise Transfer a Right?," pp. 87-8. Later on, in Chapter 5, I will argue that Owens's central claim in this passage, that in order to waive a right one must affect the "Foundation" of that right, is false. However, this requires thinking carefully about the precise nature of the connection between interests and rights, a task I undertake in Chapter 4. Without the kind of story I offer there, I take it that Owens's objection stands against the control view, at least as articulated by Shiffrin (Owens's primary target in the quoted passage).

There is one final objection to all of the theories we have so far considered, which we can call the *problem of harmless wrongdoing*.<sup>37</sup> In general, the objection operates by highlighting cases in which we regard consent as a necessary condition for permissible action, whilst also pointing out that it is far from obvious that an agent has any interest in whether or not the act occurs without her consent. Imagine, for example, that B takes a mouth swab from A without causing any harm and without A ever knowing (whilst A is in a deep sleep).<sup>38</sup> Plausibly, B has not undermined any significant interest of A's – he has not caused A pain and has not prevented A from living a life of her own choosing in any important sense. Or, to take another example, imagine that whilst A is away on holiday, B sneaks into A's house and takes a short nap, without causing any damage to A's property, and without A ever finding out.<sup>39</sup> The views we have considered, all grounded in the interests of agents, cannot easily explain why, in these cases, B still requires A's consent in order to act permissibly. Assuming A has no significant interests in whether or not B takes the swab, or sneaks in for a nap without her consent, then why should it only be permissible for B to do these things if A does give her consent?

One possible explanation is that B wrongs A because B is *likely* to set back some significant interest of A's. But I sincerely doubt this can provide a full explanation. Our judgement is unlikely to change even if B could be well assured that he will not set back any interest of A's (because B knows of A's holiday plans, etc.).<sup>40</sup> Alternatively, it might be claimed that such cases are so unlikely to occur that they are irrelevant. But it is the conceptual possibility and not the likelihood of such cases that is problematic. Our theory of consent should be able to explain why, in such a situation, B is required to acquire A's consent. Finally, it is always tempting to try and find some interest of A's that explains why it is important that B acquires A's consent. In general, I doubt that such a case can always be made without begging the question. But I think that this also misses a more important point. Whether or not A has an interest in having control over whether B is permitted to act

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<sup>37</sup> This objection has been advanced in a number of forms and to make a number of distinct, though generally related, points. In the context of consent it is David Owens who has most forcefully developed the objection. See *Shaping the Normative Landscape*, Ch. 7. See also David Archard, "Informed Consent: Autonomy and Self-Ownership," *Journal of Applied Philosophy* 25, no. 1 (2008).

<sup>38</sup> This example is from Archard, "Informed Consent: Autonomy and Self-Ownership."

<sup>39</sup> Arthur Ripstein, "Beyond the Harm Principle," *Philosophy and Public Affairs* 34, no. 3 (2003), p. 218.

<sup>40</sup> On this point, see Dougherty, "Sex, Lies, and Consent," p. 726.

by giving or withholding consent, A has general rights (over her body, and property) that explain why B must acquire her consent. Thus, we require a more robust account of why it is that irrespective of her underlying interests A has such rights, as well as an account of why she can waive these rights by giving her consent.

## 2.4 Conclusion

Let us take stock. I have considered four theories of consent's normative significance, all of which attempt to ground the significance of consent directly in the fact that the power of consent protects or promotes an agent's interests, whether these be their general interests, their interests in choosing what happens, or their interests in living an autonomous life. All of these theories share a common flaw: they cannot explain the authoritative nature of consent. However, whilst each theory fails, their failure is instructive. As we have seen, we believe that our power of consent is normatively significant in certain spheres despite not always tracking our interests, and that an agent's consent often plays a direct role in the justification of action, as opposed to simply serving as a proxy for our interests. Furthermore, we have seen that the commonly drawn connection between choice and consent is, without further development, misguided. Finally, whilst it is plausible that we should want to be able to waive our rights so as to lead a valuable autonomous life, this fact alone cannot explain why we should be able to waive our rights by giving consent.

Our discussion of these four theories also highlights a more general problem confronted by any theory that gives individual interests a central place in the explanation of moral rights and wrongs, which we can call the *bridging problem*.<sup>41</sup> Essentially, the bridging problem asks how it is we move from an account of the morally significant interests of individuals to an account of moral rights and wrongs, in a way that is consistent with our considered intuitions. As the preceding discussion demonstrates, our beliefs about what constitute morally significant interests do not always align with our beliefs about which rights we have, or which actions would constitute wrongs. Ultimately, a convincing account of consent's normative significance will need to bridge this gap.

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<sup>41</sup> I take this terminology from Niko Kolodny, "Rule Over None I: What Justifies Democracy?," *Philosophy and Public Affairs* 42, no. 3 (2014), p. 201, although my usage is slightly modified.

Positively, we can draw two general lessons from our discussion that can serve as desiderata for our on-going investigation. First, as suggested in Chapter 1, our theory of consent needs to be able to account for the authoritative nature of consent: the fact that where an agent has the power of consent, their (voluntary and informed) consent is sufficient to waive a right. Second, we require a solution to the problem of normative power, an explanation for how an agent's mere declaration can alter the structure of rights and duties that obtains without affecting their underlying interests.

## 3

## Normative Interests and Consent

As we have seen, anyone attempting to ground the power of consent directly in the interests of agents faces serious obstacles. I will later argue that this is because of the way in which the theories we have considered so far conceive of the relationship between interests and rights, and, consequently, the way in which we affect the application of those rights by giving consent. But before moving on, we must consider another interest-based theory of consent, which has recently been developed by David Owens. Motivated by the problems faced by standard interest-based theories discussed in Chapter 2, Owens has proposed an innovative alternative. He argues that, in addition to the standard interests that agents possess, they also have specifically *permissive interests*: interests *in* certain acts being wrong unless we consent to them. Owens claims that it is permissive interests that explain the normative significance of consent. In this chapter I argue that, whilst Owens makes a compelling case for the inadequacy of standard interest-based theories, and presents us with an intriguing alternative, we have good reason to reject his theory.

### 3.1 Owens's Theory

In his book *Shaping the Normative Landscape* Owens postulates *normative interests*. “[A] normative interest is an interest that takes normative phenomena as its object, an interest *in* which thoughts, feelings, and actions are obligatory, blameworthy, appropriate, or even intelligible”.<sup>1</sup> For instance, I have a normative interest where I have an interest in  $\phi$ 's constituting a *wronging* against me.<sup>2</sup> Alternatively, I have a normative interest where I have a direct interest in having a *right*, or an interest in someone else being *obligated*. To give one of Owens's examples, he claims that we

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<sup>1</sup> *Shaping the Normative Landscape* (henceforth, *Shaping*), p. vi

<sup>2</sup> Owens uses the terminology of “wronging” to refer to cases in which one agent A wrongs another agent B. For example, when A breaks her promise to B this constitutes a wronging, since she wrongs B (and does not just act wrongly) by breaking the promise. In the cases with which we are concerned (although perhaps in all cases) a wronging constitutes the violation of a directed duty.



have an *authority interest*, an interest in “having the right to oblige others to do certain things,”<sup>3</sup> and relies on this interest to explain the power to promise.

Normative interests, such as the authority interest, stand in contrast to *non-normative interests*. Non-normative interests are simply interests as they are standardly understood: interests in avoiding pain, experiencing pleasure, having a sufficient amount to eat, developing our capacities, partaking in relationships such as friendship, and so on. To be sure, Owens thinks that our non-normative interests are normative for us, in that they give rise to reasons for action, ground rights and obligations, and make sense of desires and emotions. The contrast between normative and non-normative interests is just in the content of those interests. Both normative and non-normative interests share in the fact that when they are served our lives go better, and when they are set back our lives go worse. This explains why normative interests give us reasons of various kinds. So just as the fact that your standing on my toe will cause me pain and therefore set back my non-normative interests gives you a reason not to do so, the fact that without a practice of promising we would lack one significant way in which the authority interest can be served gives us reason to create and maintain a practice of promising.

Owens deploys the idea of a normative interest to provide a unified account of a range of normative phenomena, but our concern here is with Owens’s account of the power of consent. How, then, is the idea of a normative interest used to explain our possession of that power? Like the power to promise, Owens claims that there is a specific normative interest that underpins the power of consent, namely the *permissive interest*. The permissive interest is an interest in being able to “determine by declaration whether something constitutes a wronging.”<sup>4</sup> More specifically, permissive interests are interests in certain acts constituting wrongings unless we consent to them.<sup>5</sup> For example, Owens claims we have a permissive interest with regard to sex, an interest in its being the case that it is wrong for others to have sex with us unless we give our consent.<sup>6</sup> Importantly, this is not an interest in having control over whether others in fact have sex with us. (This would be a non-normative interest.) Rather, it is an interest in its being *wrong* for others to have sex with us unless we give them our consent.

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<sup>3</sup> *Shaping*, p. 146.

<sup>4</sup> *Ibid.*, p. 172.

<sup>5</sup> David Owens, “The Possibility of Consent,” *Ratio* 24, no. 4 (2011), p. 420; *Shaping*, p. 176.

<sup>6</sup> *Ibid.*

Consider another example. Derek is ill in hospital. He has been presented with several treatment options, but doctors think the best thing to do would be to operate. We generally assume that Derek must give consent before it is permissible for the surgeon to operate,<sup>7</sup> and we usually think this has something to do with the fact that individuals should be able to choose or control whether or not the *surgery* goes ahead. But according to Owens's theory this misrepresents the situation. What is actually significant is that Derek has control over whether the surgeon would be *wronging* him by operating, independently of his interests in controlling whether the operation goes ahead.

For Owens, the power of consent gives Derek precisely the kind of direct control over the normative situation that he needs, by making it the case that the surgeon will wrong him by operating unless he consents. Importantly, the wronging that Derek has control over by giving or withholding consent is not a wrong that relates to his non-normative interests in avoiding pain, or having control over his course of treatment. Rather, it is an example of what Owens calls a *bare wronging*: a wronging that does not relate to action against any human interest.<sup>8</sup> What makes it wrong for the surgeon to operate without Derek's consent is simply the fact that it is in his interests that the surgery be recognised as constituting a wronging unless he declares otherwise.

As a result, there are two distinct kinds of wrong that the surgeon might perpetrate by operating upon Derek. First there is the possibility of a bare wronging, if the surgeon operates without Derek's consent. Bare wrongings are one instance of what Owens calls *interested wrongings*, "wrongings whose existence depends, in part, on our interest in their constituting wrongings."<sup>9</sup> Importantly, interested wrongings "require that we are in the habit of recognizing them as such,"<sup>10</sup> and so the surgeon will only be in a position to wrong Derek by operating on him without his consent when it is generally *socially recognised* that it is wrong to operate on patients without their consent. Second, there is the possibility of what Owens calls a *non-interested wronging*, a wronging that is related to Derek's non-normative interests, for example, his interests in not experiencing pain, having control over his course of treatment, and so on. I will call these non-interested wrongings *standard*

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<sup>7</sup> Specifically, on the assumption that Derek is conscious and competent.

<sup>8</sup> *Shaping*, pp. 8, 180.

<sup>9</sup> *Ibid.*, p. 65.

<sup>10</sup> *Ibid.*

*wrongings* or *standard wrongs*. As opposed to bare wrongings, standard wrongings can constitute wrongs regardless of whether anyone is in the habit of recognising them as such.<sup>11</sup>

With regard to standard wrongings, Owens claims that it is the *normative significance of choice* rather than the *power of consent* that does the normative work. Owens thinks that standard accounts of the normative significance of consent go wrong in conflating these two distinct phenomena,<sup>12</sup> and Owens provides compelling reasons for distinguishing between the two, many of which I relied upon in the previous chapter in order to reject the simple choice view of consent. On Owens's view, to consent to  $\phi$  is to intentionally communicate the intention of hereby making it the case that  $\phi$  does not wrong you.<sup>13</sup> To choose, by contrast, is to intend some non-normative state of affairs, such as playing football, having sex, or undergoing an operation.<sup>14</sup> Owens thinks this distinction is important, in part, because of the distinct wrongs consent and choice attach to – bare wrongings and standard wrongings respectively. Furthermore, by consenting and choosing we affect our normative relations with others in different ways. By giving consent we directly alter our normative relations by intentionally communicating a choice of that very relation, e.g., communicating that the surgeon would not *wrong* us by operating. By choosing, on the other hand, we indirectly shape our normative relations with others by choosing something non-normative, e.g. *surgery*, because by doing so we affect what is in our interests, and so what it would be wrong for others to do to us.

Before moving on, it is worth briefly dwelling on Owens's account of choice. As I noted in the previous chapter, Owens conceives of choice (at least for the most part) as an intention.<sup>15</sup> So, for Derek to have chosen surgery, he must intend to have the surgery, or intend to make it the case that the surgeon goes ahead with the operation. Furthermore, Owens claims that choices do not need to be communicated in order for them to have normative significance. As he says, "it is the choice and not the communication of the choice that matters."<sup>16</sup>

According to Owens's theory then, consent is normatively significant because we have permissive interests in certain acts constituting wrongings unless

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid., p. 166.

<sup>13</sup> Ibid., p. 165.

<sup>14</sup> Ibid., p. 173; Owens, "Does a Promise Transfer a Right?" p. 86.

<sup>15</sup> *Shaping*, p.173; "Does a Promise Transfer a Right?" p. 86.

<sup>16</sup> *Shaping*, p 168.

we consent to them. I will call this the *permissive interest view*. Owens focuses his discussion around the familiar examples of sex and surgery, and so we might say we have particular permissive interests in its being the case that it is wrong for others to have sex with us, or operate upon us, without our consent (although I assume there are a range of other permissive interests). On the permissive interest view, the wrongings that will be perpetrated against us if others behave in these ways without our consent are bare wrongings – wrongings not connected to the setting back of any of our non-normative interests.

By grounding the power of consent in normative interests, Owens's theory avoids many of the objections faced by the interest-based theories we considered in Chapter 2. Moreover, the permissive interest view can meet the desiderata for a theory of consent that I set out above. First, it can explain what I called the authoritative nature of consent. Consent is authoritative in the sense that where an agent possesses the power of consent, a mere declaration of consent (which meets the relevant conditions of voluntariness and information) is sufficient to waive a right. Moreover, in many contexts, consent will be a necessary condition for permissible action on the part of others. Owens's theory can explain the authoritative nature of consent in both senses because it does not connect the power of consent to an agent's non-normative interests. Rather, an agent's consent is sufficient to waive certain rights because those rights are grounded directly in the fact that they have an interest in having this right (or in its being wrong for other's to act) *unless they consent*. Since it is only in an agent's interest that these acts to constitute wrongings unless consent is given, consent can ensure that these rights no longer apply. Similarly, consent is a necessary condition for the permissibility of other's actions because the permissive interest is precisely an interest in certain acts *being wrong* unless an agent consents.

Second, Owens's theory provides a solution to the problem of normative power, that is, the question of how it is we could affect our underlying interests by a mere declaration of consent. Owens's solution is simply to say that declarations of consent *do not* affect our *non-normative* interests. Rather, by giving consent we simply control whether some act will constitute a bare wrongdoing, a wrongdoing in no way related to any non-normative interest of ours. And, since these wrongings are

bare wrongings, “[i]t is perfectly intelligible to suppose that [they] are created and abolished by declaration.”<sup>17</sup>

## 3.2 Objections to the Permissive Interest View

We might then be tempted to endorse the permissive interest view. It provides us with an account of consent’s normative significance that does not face the objections faced by the theories considered in Chapter 2, and explains both why consent is authoritative, and how it is that we are able to waive a right just communicating an intention to do so. However, the permissive interest view has problems of its own, and in what follows I will outline three reasons to think that the permissive interest view is unsatisfactory.

### 3.2.1 *The Value of Consent*

In Chapter 1 I suggested that status-based views of the power of consent, whilst they seem to account for some of our central intuitions, do not provide much in the way of explanation. I relied on this observation to motivate the interest-based approach I have adopted. The basic idea of the interest-based approach is that by demonstrating that something is in our interests – that it will make our life go better – we can explain and justify a range of normative phenomena. For example, one way moral rights can be justified is with reference to the fact that the lives of agents go better in various ways if they possess certain rights.

As we have seen, Owens also adopts the interest-based model. However, Owens position differs significantly from standard interest-based approaches in two respects. First, he *postulates* the existence of certain interests, including the permissive interest, rather than relying on widely recognised (non-normative) interests in, for example, autonomy, special relationships, knowledge, nutrition, and so on. Second, he claims that the postulated normative interests are *irreducible*. By this Owens means that the normative phenomena in which he claims we have interests (rights, obligations) do not just matter to us as a means to non-normative

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<sup>17</sup> Ibid., p. 165.

ends (autonomy, control, nutrition, etc.).<sup>18</sup> If this were the case then normative interests would be reducible and, “the notion of a normative interest would be of little theoretical importance.”<sup>19</sup>

Whilst providing the basis for a unique perspective on a range of issues, these differences also threaten to undercut the appeal of the interest-based approach. Generally, when we formulate claims about the interests of agents in order to defend normative arguments, the interests that are identified are recognisable to us, such that the idea that our lives should go better when these interests are served or protected is an intuitive one. Think, for example, of our interests in adequate nutrition, intimate relationships, intellectual development, and so on. By contrast, the claim that our lives will go better just because some acts constitute wrongs unless we consent to them is far less intuitive. What is more, Owens has little to say directly in support of this claim. To be sure, this is no oversight on Owens part:

[N]ormative interests are not *explananda* either. I’m not seeking to allay these misgivings by accounting for our possession of normative interests in other terms...Rather I establish the existence and content of our normative interests by describing how they hang together with other elements of a theory that has a certain overall explanatory power. This involves specifying a range of normative interests, showing how they relate to one another and then describing how our possession of these interests helps to explain the existence and character of a whole range of normative phenomena.<sup>20</sup>

I will return to the issue of explanatory power in the following section. For the moment I want to focus directly on the question of whether our lives go better if some acts are socially recognised as wrong unless we consent to them; or rather, the question of what reason we have to think we possess permissive interests in the first place. If we do not have good grounds for accepting the existence of permissive interests, then we are no better off with Owens’s theory than with a status-based view. The explanation will have been secured by fiat.

According to the permissive interest view, it is not wrong to have sex with others, operate upon them, or use their private information without their consent

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<sup>18</sup> *Shaping*, p. 65.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, p. 7.

because of their (non-normative) interests in choosing or having control over these aspects of their own lives, maintaining certain relationships with others, and so forth, but rather because of their permissive interests. Thus, acting without an agent's consent is primarily wrong because it is the perpetration of a bare wronging. The primary wrong of having sex with someone, operating upon them, or reading their private information without consent is grounded in an interest they have in these acts being wrong unless they give consent, independently of the way in which these acts will (or might) impact upon their non-normative interests.<sup>21</sup> So, on Owens's view, we care (or should care) about acquiring the consent of others because, ultimately, we are concerned to avoid bare wrongings, wrongings that do not relate to any (non-normative) interest.

Why, though, should this be? Clearly, it will not always be good for us if certain things are socially recognised as wrong unless we consent to them. Imagine that, for some reason, it is socially recognised to be wrong to look at a certain star constellation without your consent. Obviously enough, you have no non-normative interests in whether other people look at this constellation or not, but, nonetheless, it is thought to be seriously wrongful to do so without your consent. Now imagine that an avid group of stargazers is secretly meeting and looking at the constellation in question without your consent, and that a concerned third party informs you of this fact. Should you care? The fact that it is generally socially recognised to be wrongful might mean it is likely that you *will* care, since, psychologically speaking, it is difficult not to internalise norms that are widely recognised. But we clearly think there is no reason why you *should* care, and, moreover, that it would be a good idea to revise the social norms that exist within your community. The point being that the mere fact something is recognised as a wronging unless you consent to it has no obvious value whatsoever.

Of course, Owens will protest that in this case you have no permissive interest, and claim that it is *this* fact that explains why there is no value in its being recognised as wrongful to look at the constellation without your consent. In cases

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<sup>21</sup> Whilst Owens grounds these wrongs in the postulated permissive interest, it is worth noting the resemblance between Owens's view and a Kantian view. Cf. Arthur Ripstein: "[I]ntentional touching is objectionable even if harmless or undetected... Your person – your body – is yours to use for your own purposes, and if I take it upon myself to touch you without your permission, I use it for a purpose you haven't authorized. The problem is not that I interfere with your use of your person or powers, but that I violate your independence by using your powers for my purposes. The trespass against your body is primary, and any consequent injury second to it." *Force and Freedom*, pp. 45-6.

where we do have a permissive interest – cases of sex and surgery for example – he will say that things are quite different. How, though, do we identify the cases in which we have permissive interests? Essentially, we rely on our conviction that consent is normatively significant in certain contexts and postulate an interest to explain this fact. Thus, the claim that our lives go better when our permissive interests are served is just a restatement of our initial conviction that consent is valuable.

Yet, I think our initial judgement that consent is valuable in certain contexts is likely to lose much or all of its force when we realise that the non-normative interests that we usually take consent to protect are not at stake. For example, our judgment that it is valuable that doctors acquire the consent of patients before subjecting them to medical interventions cannot support the existence of permissive interests if, as is generally the case, that judgement is underpinned by a belief that autonomous agents have interests in shaping their own lives. On the permissive interest view, these interests are accounted for via the significance of choice. But insofar as Owens relies on examples of consent in which we do, in the vast majority of cases, have significant non-normative interests at stake (sex, surgery), it is hard not to suspect that it is our concern with the various non-normative interests and their protection, rather than with permissive interests, that motivates our concern for consent.

Furthermore, according to the permissive interest view, what it is that makes our lives go better is the fact that it is *socially recognised* that it is wrong to have sex with us, or operate upon us, without our consent, and not the fact that, for example, *A* recognises that it is wrong to have sex with *B*, or operate upon *B*, without *B*'s consent.<sup>22</sup> So we might wonder why, from the point of view of *A*, they should be concerned to acquire *B*'s consent at all. If there is sufficient *social* recognition that *A* will have wronged *B* by acting without her consent, *B*'s permissive interest will have been served. To be sure, the fact that it is socially recognised as a wrong will place an important motivational pressure on most agents. But either way, Owens suggests, our lives will go better in virtue of the broader social recognition that some acts are

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<sup>22</sup> *Shaping*, pp. 150-51 (in the context of promising).



wrong if not consensual, and not because of the ways in which individuals deliberate and act in light of this fact.<sup>23</sup>

What further resources does Owens have at his disposal to try and convince us of our possession of permissive interests? As I noted above, Owens provides no direct argument for the claim that we have such interests. However, I think Owens has four avenues of response open to him at this point. First, he can point to the overall explanatory power of his theory, an issue I will return to in the next section. Second, he can suggest that the inadequacy of other interest-based theories gives us reason to accept the existence of permissive interests. In particular, Owens will say, we are otherwise unable to account for bare wrongings. Third, Owens might claim that double standards are being applied. I am asking for an argument for our possession of permissive interests, without asking for a similar argument to justify the claim that we have, for example, interests in avoiding pain, or living autonomously. It may simply be that no direct argument for our possession of interests of any kind can be given. Fourth, he will point to his suggestion that there is some relationship between permissive interests and non-normative interests, even if the former are not reducible to the latter. Let us consider these ideas in turn.

Bare wrongings are acts that constitute wrongings despite setting back none of our non-normative interests. In chapter 2 I mentioned two examples of bare wrongdoing. In the first, B harmlessly takes a mouth swab from A without A's knowledge. In the second, B sneaks into A's house and takes a nap without causing any damage to A's property and without A ever finding out. In his own discussion, Owens, drawing on Gardner and Shute, focuses on an imagined case in which a rape is committed without any harm being caused to the victim.<sup>24</sup> Since these wrongs do not, *ex hypothesi*, set back our non-normative interests, Owens maintains that they support the idea that we have normative interests in these acts constituting wrongs.<sup>25</sup>

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<sup>23</sup> In *Shaping* Owens develops a complex account of habitual agency that he relies upon (in part) to show why it will make sense for the promisor or consentee to act in accordance with their promises or another's consent. This account deserves much more attention than I can give it here, but I am unsure whether, even accepting that account, the mere fact it would make sense for an agent to act in a certain way is sufficient here. Whilst the social recognition of certain wrongs may make sense of A's acting in certain ways, it hardly follows that it is the social recognition, rather than the ways in which A acts in relation to B that matters to B.

<sup>24</sup> See Gardner and Shute, "The Wrongness of Rape," in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007).

<sup>25</sup> I am somewhat suspicious of whether all the cases discussed under this label are really cases in which no non-normative interests are set back. For instance, on the not implausible assumption that we possess non-instrumental interests in having control over our sexual relations, cases of "bare rape"

That is, Owens takes these cases to support the existence of permissive interests, and to bring out the way in which it is valuable for us to possess the power of consent independently of the way in which our non-normative interests are implicated.

As I suggested above, the suggestion that the primary wrong of assault, trespass, or rape is a bare wronging will strike many as odd. Still, the mere fact that this idea does not cohere with our pre-reflective view does not count against its being true, and Owens will maintain that we have to accept this seemingly counterintuitive result if we are to be able to explain the considered intuition that cases of bare wronging are in fact wrongs. Yet this is too quick. The existence of bare wrongings is not sufficient on its own to establish that we have permissive interests, since there are competing explanations for those wrongs. For one, cases of bare wronging might be thought to help establish a case against interest-based moral theories altogether.<sup>26</sup> More importantly for my own purposes, I will later rely on an interest-based account according to which the relationship between interests and wrongs is indirect. To foreshadow that later discussion, I believe that we relate to one another in a morally decent and valuable way when we recognise one another as bearers of interests worthy of protection, and think this fact can explain why we ought not to perpetrate bare wrongings.

What is particularly noteworthy here is that the need to postulate permissive interests (and normative interests more generally) in order to explain bare wrongings derives from an assumption Owens makes about the connection that obtains between non-normative interests and wrongings. Owens claims that on a popular view about wrongdoing, represented by what he calls the *Injury Hypothesis*, it is a necessary condition of wronging that an agent must set back or injure some non-normative interest of another agent.<sup>27</sup> Since this view cannot accommodate bare wrongings, this undermines the idea that all wrongings are grounded in our non-normative interests. Yet, the injury hypothesis is a significant assumption, and one that I am not sure is justified. As an interpretive matter, I am unconvinced that some of those to whom

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would set back such interests. Still, I assume that other cases of bare wronging are at least conceptual possibilities, and so may be able to play the role in Owens's argument that he takes them to play.

<sup>26</sup> See, e.g., Arthur Ripstein, *Force and Freedom*, pp. 45-7, who takes such cases as grist for the Kantian's mill.

<sup>27</sup> *Shaping*, p. 61.

Owens attributes this position (notably, Scanlon and Raz) really hold it.<sup>28</sup> But either way, we need not accept the injury hypothesis, and, as I will argue later, upon reflection it does not seem well grounded. The point, for present purposes, is that unless the injury hypothesis is the only way of conceiving of the relation between non-normative interests and wrongs it is not *necessary* to postulate permissive interests in order to explain bare wrongings in a way that is consistent with an interest-based view, and so this claim cannot be relied upon to support the idea that it is valuable for us that certain acts constitute (bare) wrongings unless we declare otherwise. This means that we should want some independent reason for conceptualising matters as Owens does, especially in light of the fact that, as I have said, it is quite unintuitive to hold that our lives go better purely in light of the fact that certain acts constitute bare wrongings unless we give our consent.

Consider next the idea that I am asking for something that cannot be given: a direct argument for the claim that we possess certain interests. In response to some who have pressed some similar worries against Owens's view,<sup>29</sup> Owens makes the following remarks:

*Shaping* is a sustained argument for the proposition that we do have a serious interest in obligation as such. I doubt one can prove this directly (how could you prove that human beings have a serious interest in knowledge or pleasure *as such*?)...[I]n *Shaping* I sought to establish the existence of normative interests by arguing that their postulation is the best way of making sense of our social practices and of our views about what is valuable in human life.<sup>30</sup>

Now, I agree with Owens that it may be difficult to give a direct argument for any interest, or at least any foundational or basic interest. But, as Owens is well aware, this does not vindicate our postulation of any interest whatsoever. Rather, that postulation has to be able to make sense of “our social practices and of our views about what is valuable in human life.” Moreover, I assume that, where possible, we

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<sup>28</sup> Rahul Kumar has suggested that it is part of the appeal of Scanlon's position that nothing like the injury hypothesis holds on his view. See Rahul Kumar, “Who Can Be Wronged?” *Philosophy and Public Affairs* 31, no. 2 (2003).

<sup>29</sup> In particular, Christopher Bennett, “A Review of David Owens' *Shaping the Normative Landscape*,” *Jurisprudence* 6, no. 2 (2015); and Daniel Markovits, “Authority, Recognition, and the Grounds of Promise,” *Jurisprudence* 6, no. 2 (2015).

<sup>30</sup> David Owens, “Reply to Commentators,” *Jurisprudence* 6, no. 2 (2015), pp. 386-87.

have reason to avoid the postulation of new interests. That is to say, I assume it will be preferable to explain consent's normative significance in terms of widely recognised (non-normative) interests if that can be done in a way that is consistent with other considered intuitions we have about the power of consent. As I suggested above, part of the appeal of standard interest-based views is that they can provide an explanation in terms of something that is widely recognised to contribute to how well our life goes. If this is correct, whilst it may be true that direct arguments cannot be given for any basic interest, we will have reason to prefer relying on widely recognised and intuitive interests to postulated interests in our explanations. Whether we can do so remains to be seen, but I will argue in Chapters 4 and 5 that such an explanation is in fact available.

Finally, consider the relationship between our permissive interests and our non-normative interests. Owens briefly suggests that there are four possible relations that might hold between normative and non-normative interests without normative interests being reducible to non-normative interests.<sup>31</sup> Of particular interest here is Owens's suggestion that our permissive interests may be *embedded* with various non-normative interests. A normative interest in  $\phi$  is embedded with a non-normative interest in  $\varphi$  "when we couldn't have one without the other, when our interest in  $\phi$  depends (directly or indirectly) upon our interest in  $\varphi$  and vice versa."<sup>32</sup> To try and clarify this idea, let's take an example. Suppose I have a permissive interest in whether others touch me. If this interest is embedded it follows that my permissive interest depends upon my possession of non-normative interests in whether others touch me (concerning, for example, the fact that others touching me might harm me in various ways), and, furthermore, that I would not have these non-normative interests without also having the permissive interest in its being wrong for others to touch me without permission.

Speaking later on Owens suggests that understanding our permissive interests as embedded might explain why we should be particularly concerned with consent in cases where we have significant non-normative interests at stake.

It may be no coincidence that normative interests cluster around the body, i.e. around the very thing that is also the object of numerous non-

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<sup>31</sup> Ibid., p. 65-6.

<sup>32</sup> Ibid., p. 66.

normative concerns, without it being the case that these normative interests are grounded in these non-normative concerns. Rather each may be embedded in the other. The whole set of bodily interests – normative and non-normative – may come in a package whose elements can't either be pulled apart or arranged in order of explanatory priority.<sup>33</sup>

Whilst this relationship between permissive interests and non-normative interests is coherent, however, we have no positive reason to think that this relationship in fact obtains, and, therefore, no positive reason to think that we possess permissive interests. Assuming that I have various non-normative interests regarding whether others touch me, it does not follow that I possess permissive interests in this, or that I must possess permissive interests in order to make sense of my non-normative interests. So we still require some independent motivation for this central claim.

Here Owens must return, I think, to cases of bare wrongdoing, in order to try and show that we do in fact recognise this value. Thus, a lot of weight in Owens's argument is placed upon the significance of bare wrongings. Methodologically speaking, I am unconvinced that this reliance on cases of bare wrongdoing is well motivated. The mere fact that we should want an explanation of these cases does not support our treating them as the central *explanandum*, especially when the resulting theory does not obviously cohere with our intuitions about the statistically common cases of consent in which significant non-normative interests are at stake. Moreover, these cases are so uncommon that our intuitions about them are less likely to serve as a reliable guide. And, as I have said, cases of bare wrongdoing are particularly problematic in light of the injury hypothesis. We might be better to challenge this assumption before rejecting our prior intuitions about consent's significance out of hand.

### 3.2.2 Explanatory Power

As I noted above, Owens claims that he will “establish the existence and content of our normative interests by describing how they hang together with other elements of

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<sup>33</sup> Ibid., p. 182.

a theory that has a certain overall explanatory power.”<sup>34</sup> Perhaps, then, we can be led to accept the existence of permissive interests through recognition of the explanatory purchase that is to be gained from the postulation of normative interests.

In fact, I do not think that the explanatory power of the permissive interest view is sufficient to justify the postulation of permissive interests, and actually believe that relying on postulated normative interests limits the explanatory power of the theory in important respects. I will discuss my reasons for thinking this is the case under two headings, *downstream reasons* and *upstream reasons*.

The downstream reason for thinking that the explanatory power of the permissive interest view is limited is that it is not clear that the theory actually provides an explanation for the phenomena that we are trying to account for. To see why this should be, let us think briefly about exactly what it is that we are trying to account for. In Chapter 1 I set out two central questions to which we should want an answer when trying to explain consent’s normative significance. First, why does consent have normative force when given by agent? Second, why does consent play such an important role in the management of directed duties?

Now we will not be happy with just any answer to these questions. Rather, we are motivated to pursue this investigation because we notice the prevalence of consent in moral and legal theory and practice, but do not find a convincing theoretical account of why consent should have the normative significance attributed to it. Importantly, however, these practices provide us with data that we then rely on as the basis for thinking about the issue in question. For example, we see that there are certain spheres where consent is seen to be particularly important; that we can give consent in different ways in different contexts; that there are explicit rationales for acquiring consent presented in particular settings (e.g. medical settings), and so on. Thus, we see that it is generally considered to be wrong to act in certain ways or in certain contexts without consent. Furthermore, our understanding of these practices is generally coupled with some (perhaps vague) intuitions about the normative significance of those practices,<sup>35</sup> for example, the importance of being able to make certain choices oneself.

In all likelihood we will not be able to account for all of the data with which we are faced. Nevertheless, the data given to us by existing practices of consent play

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<sup>34</sup> *Shaping*, p. 7.

<sup>35</sup> Cf. T. M. Scanlon, “The Aims and Authority of Moral Theory,” p. 9.

an important role in assessing different answers to the two questions from which we started. Generally, a theory that answers those questions in a way that is consistent with more of the data of our practices and the intuitions related to them, and which draws out the connections between and thus unifies the data, will be better placed than a theory that does this less well. Of course, upon reflection we may have reason to significantly revise our existing practices, and the intuitions that support them, since we are ultimately interested in sound moral principles, and not just interpreting existing moral practices. But it does not follow from this that existing moral practices are irrelevant. Where revision is necessary it will generally be motivated by our recognition of the inconsistency of these practices with other firmly held moral commitments, which themselves play an important role in the construction of any moral theory.

As we have seen, Owens's answer to the two questions from which we started is that we have permissive interests, which ensure that our lives go better if it is socially recognised to be wrong to act in certain contexts without an agent's consent. Importantly, according to the permissive interest view, the wrong that A will perpetrate against B by acting without B's consent is a bare wronging – a wrong unrelated to any of B's non-normative interests. It is this fact, I want to suggest, that gives rise to the question of how well the permissive interest view responds to the data of our existing practices. Specifically, I suspect that when we are concerned (either theoretically or practically) with whether A acquires B's consent, it is because we are concerned with the *standard wrongs* A may perpetrate against B, those wrongs grounded in B's non-normative interests.<sup>36</sup> Indeed, the idea that consent matters because it is simply in our interests that certain things are socially recognised as wrong, in isolation from our interests in being able to choose or control what happens to us within certain spheres of our lives, does not fit well with our existing practices at all. We might even conclude that on Owens's theory it is really the significance of choice, and not the power of consent, that does the majority of the important normative work. That is, we might accept Owens's theory of consent, and conclude that consent is simply much less important than we previously thought.

Owens is likely to respond by saying that a significant revision in our thought about consent is justified by our need to be able to account for bare wrongings. But

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<sup>36</sup> See, for example, Tom Beauchamp, "Autonomy and Consent," pp. 58-61, and Nir Eyal, "Informed Consent."

let me recap on two points made at the end of the last section. First, since cases of bare wronging lie at the statistical margins it is unclear whether we are right to treat these as the central *explanandum*, as Owens suggests we should.<sup>37</sup> If we think in terms of the data we want to account for in our theory, cases of bare wronging are certainly relevant. Yet by focusing on these cases we disregard the majority of our existing practices of consent. Moreover, it is not the case that by doing so we come to a theory that can easily accommodate and explain those practices. Whilst ultimately this may be a price we have to pay, it still constitutes a limit to the theory's explanatory power. A theory that could account for bare wrongings whilst simultaneously accounting for existing practices of consent would have greater explanatory force, and I believe the theory I outline in Chapters 4 and 5 can do just this. Second, the need to postulate normative interests to explain bare wrongings derives from Owens's acceptance of the injury hypothesis. Thus, a radical revision of our understanding of consent is unnecessary. As I will later argue, I think we do better to reject the injury hypothesis instead.<sup>38</sup>

Turn now to the upstream reasons that the permissive interest view has limited explanatory power. Even assuming that Owens is right to tie consent's normative significance to bare wrongings, we should hope that the postulation of permissive interests provides a basis for answering further questions connected to the power of consent, such as when consent is necessary, how consent should be given in different contexts, or what form of voluntariness standard we should adopt. However, I do not think the permissive interest view offers us such a basis.

To see why, note that the most common ways in which a theory will be able to play such a role is if the explanation offered is in terms of concepts or ideas with which we are familiar and rely upon in other contexts, or if some connection is drawn between a new concept and more familiar concepts. Since the idea of the permissive interest is a new one, and is largely unconnected by Owens to anything with which we are familiar in our practical thinking or moral theorising, it cannot connect the significance of consent to anything that we already have some intuitive

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<sup>37</sup> *Shaping*, p. 177.

<sup>38</sup> Owens might suggest that if we accept the claim that permissive interests are embedded with non-normative interests, the permissive interest view will be able to account for existing practices of consent just as well, if not better, than views that just focus on non-normative interests. For this strategy to work, however, I think more needs to be said about the specifics of the embedded relationship that is supposed to obtain (e.g. which non-normative interests permissive interests are embedded with).



grip on or understanding of. This fact makes it difficult to rely on the theory in order to defend further claims about consent.

Consider an analogy. I am curious about how it is that your Jack in the Box pops up when you take the lid off, and ask you how it is done. Imagine that you give me one of two responses. The first response is that the Jack is connected to a *spring* that is tightly coiled when the lid is on, but can uncoil when the lid is taken off, thus causing the Jack to jump up. Since I have at least a rudimentary understanding of springs and how they work this response is somewhat enlightening. Moreover, the way in which springs operate can be explicated in terms of more fundamental ideas commonly used in physics (such as “energy” and “motion”), and I could thus find out more about springs if the desire should take me, so as to have a more detailed understanding of how the Jack in the Box works.

The second response is that the Jack is connected to a *twozit*. Since you yourself were wondering how the Jack pops out of the box, but wanted some explanation without having to leave your armchair, you postulated the idea of a twozit, the function of which, you tell me, is precisely to make the Jack leap up when the lid is removed. In comparison to the first response, the second is not particularly helpful. I now know the name of the mechanism by which the Jack jumps up (at least according to you). But since I have no idea of what a twozit actually is – other than the thing that makes a Jack pop out of the box – I am in no better position to understand how the Jack in the Box works. In particular, since the concept of a twozit bears no relation to other more familiar ideas (e.g. springs), the twozit-based explanation has limited explanatory power, given that I cannot situate your explanation of the Jack in the Box within my more general understanding of objects, movement, energy, and the like.

Now clearly this is an oversimplified picture of what the permissive interest view provides us with, especially in light of the connections that Owens draws out between normative interests and the explanation of different aspects of the normative domain (an issue I will return to below). Moreover, the objection might seem to ignore the fact that the permissive interest view relies, at root, upon the concept of an *interest*, understood as an aspect of individual well-being, a concept that my investigation of consent’s significance is premised upon.

However, the fact that Owens relies upon the concept of an interest is insufficient on its own to increase the explanatory power of the permissive interest

view. That is because the content of the interest – in certain things being wrong unless we consent to them – has been posited precisely to fill the explanatory gap in question. One way to put this point is in terms of the methodology of reflective equilibrium. To engage in the process of reflective equilibrium we must formulate principles and test these principles against our considered moral judgements, working back and forth between the principles and our judgements until (hopefully) we achieve equilibrium between the two. Now imagine we aim to use this method to assess two different theories of consent: the permissive interest view, and a theory that grounds consent's normative significance in the value of autonomy. In fact, we can only use the method to assess the autonomy theory because, on the permissive interest view, the considered judgments against which we would judge the relevant principles are the very same judgements that we rely on in order to construct those principles. That is, since we postulate a permissive interest in every case in which we take consent to be normatively significant there is no possibility that the principle and our considered judgements will not be in equilibrium. Any variation in the case presented directly leads to a variation in whether the principle is thought to apply. Thus we have no independent means of assessing whether the postulation is justified, in terms of its ability to make sense of our considered intuitions across a range of cases.

As a consequence the theory also struggles to do further explanatory work. If, upon reflection, we thought that the autonomy theory of consent cohered with a sufficient number of our considered judgements, we might begin to use the theory to make further claims. For example, we might say that consent is normatively significant where autonomous choice is valuable, that the standards for valid consent are the same as the standards for truly autonomous choices, and so on. Since we can then plug in our favourite theory of autonomy, these claims will have a sufficiently determinate content. By contrast, we could not rely on the permissive interest view to make further claims such as these because, since we have not explained consent in terms of other concepts or ideas, we have no grounds from which to make these claims. We are left with nothing more than the intuitions we had to begin with.

Owens is likely to respond by saying that the kind of explanation I am looking for is only possible if there *is* some way of explaining consent's normative significance in terms of concepts or ideas with which we are already familiar or already rely upon in our moral theorising. Yet sometimes, he might continue, we do

not have the conceptual resources that we require in order to explain particular phenomena, and here we must postulate new concepts in order to render those phenomena intelligible. In light of the objections raised against the interest-based theories considered in Chapter 2 (many of which were initially developed by Owens), the power of consent may look like one case where this is necessary. Whilst it is true that we do not have a grip on permissive interests now, they may come to have an intuitive place within our conceptual repertoire as we develop and rely on the notion in our theorising and practical thinking.

As a general matter, this response is perfectly legitimate. I do not mean to claim that it is never acceptable to postulate concepts as part of the construction of a theory that aims to explain various phenomena.<sup>39</sup> The point I am making is that such an account is necessarily limited in its explanatory power, since the explanation is given in terms of a concept with which we are unfamiliar, and which is unrelated to more familiar concepts or ideas. A theory that can situate consent's normative significance within a familiar framework of concepts and ideas is, at least in this regard, more desirable for this reason. Of course, a theory of consent of this kind may be unavailable. But I will later articulate a theory that I think can meet these demands.

At this point, Owens is likely to point out that the postulation of normative interests provides us with a unified way of explaining a whole range of normative phenomena, including forgiveness, friendship, and promising, and urge that an assessment of the explanatory power of the permissive interest view must take these broader theoretical ambitions into account.

I would not deny that a full evaluation of the permissive interest view would have to take Owens's broader theory of normative interests into account, although this is not a task I can undertake here. However, two things are worth noting. First, the fact that the overall theory has a certain explanatory power does not mean that

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<sup>39</sup> Indeed, the history of the natural sciences is built upon such postulations. But it is worth comparing the justification of these postulations in the sciences. For a postulation to count as defensible we will need to be able to test the hypothesis it gives rise to. For instance, consider our postulation of a force – gravity – that attracts two objects in proportion to their mass. With this hypothesis on the table, we can begin to conduct experiments to see whether this postulated force has explanatory power. If the hypothesis can make sense of the test results then we have good reason to accept the existence of the force in question, and might use it as a basis to make further predictions, and then see whether these predictions are correct, and so on. But if the hypothesis cannot explain the data, we should reject it. Of course, we cannot rely on any such methodology when engaged in moral philosophy. But we might still hope for some independent means – such as that offered by the process of reflective equilibrium – by which to assess the justifiability of such postulations.

the permissive interest view has explanatory power. Since our primary concern is with the normative significance of consent, I do not think we have reason to accept the postulation of permissive interests on grounds of explanatory power, especially if a theory with a greater explanatory power is available. Second, I suspect that the need to postulate normative interests across the board arises from assumptions made by Owens that I think we have good reason to reject. For instance, Owens partly motivates his own account of promising by pointing to the need to explain cases of bare wronging (broken promises that will not set back any one's interests). As I have already said, the need to postulate normative interests to explain cases of bare wronging arises from Owens's acceptance of the injury hypothesis, a thesis I think we do well to reject. Furthermore, as I outline my positive theory of consent in Chapters 4 and 5 I also outline an alternative understanding of the relationship between interests and wrongs, which I believe can serve as the basis of a view that could be relied upon to provide the kind of wide reaching explanation that Owens is looking for, without relying on the postulation of normative interests.

### *3.2.3 The Relationship Between Communicated Choice and Consent*

In Chapter 2, I followed Owens in rejecting the simple choice view of consent, in part because, on a plausible understanding of what choice consists in, our choices can diverge from the consent we give or withhold. For Owens, the possibility of divergence serves to highlight that choice and consent are entirely distinct phenomena that have a distinct normative significance, explained in each case by the fact that they serve different interests. Whilst the power of consent is grounded in our permissive interests, the significance of choice is grounded, roughly, in our non-normative interests in having control over what happens.<sup>40</sup>

As I have said, these distinct bases for consent and choice correspond to different ways of affecting one's normative relations with others. To give consent to S's dentistry, for example, is "to intentionally communicate the intention of hereby making it the case that S does not wrong you by whitening your teeth."<sup>41</sup> To choose, by contrast, is to intend, decide, or desire some non-normative object, e.g., intending to have one's teeth whitened, or deciding to play football. These forms of choice are

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<sup>40</sup> Ibid., p. 168.

<sup>41</sup> Ibid., p. 165.

all constituted by mental states or mental acts. As we have seen, Owens maintains that one need not communicate these choices in order for them to make a normative difference, although, as he points out, we often do communicate our choices to others, both intentionally and non-intentionally.<sup>42</sup>

Now, whilst I agree with Owens that there is an important distinction to be drawn between choice and consent, Owens ignores the normative significance of a third category: objectively communicated choices. Objectively communicated choices can be characterised as intentional actions performed in contexts that allow others to discern (or reasonably believe they can discern) some aspect of the actor's mental contents (their intentions, desires, decisions), although these actions need not be performed with the intention of communicating a choice. I want to suggest that our objectively communicated choices often render the actions of others permissible in a way that purely subjective choices cannot, but without constituting consent (i.e., an act performed with the intention of waiving of a right).<sup>43</sup> I believe this possibility gives rise to a difficult question for the permissive interest view, because we can sometimes waive our rights through objective choices even in cases where we supposedly have permissive interests. Yet if the permissive interest is an interest in something's being wrong unless we intentionally declare otherwise (by giving consent), how could an objective choice have this effect? Ultimately, I think this casts doubt on the claim that we possess permissive interests.

Consider, first, the example of playing football. Usually others would wrong me if they tackled me, but this not so if I am voluntarily playing football with them. How, though, do I make it the case that the other players will not wrong me? I assume that simply by running onto the field in my kit, or shouting for someone to pass the ball, I make it clear to others that I am playing, in full knowledge of how the game is played and the risks this entails, and thus make it permissible for them to tackle me if I have the ball. In other words, by joining in with the game I communicate a choice to play. I take it that there is no further need for me to give the

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<sup>42</sup> *Ibid.*, p. 169.

<sup>43</sup> Our objectively communicated choices can sometimes come apart from our subjective choices, at least in that our actions may sometimes reasonably lead others to believe we have intentions (etc.) that we do not have. For example, others may reasonably believe that we intend to play football when we do not. I leave open whether in these cases others are excused for wronging us, or whether they do not in fact wrong us, since we should have known that acting in these ways would lead others to believe that we are, for example, playing the game. I suspect that in many cases something closer to the latter is true.

other players my explicit consent, i.e., intentionally communicate the intention of hereby making it non-wrongful for them to tackle me in the course of the game.<sup>44</sup> I also assume that unless I partake in some actions that communicate my choice to play, the other players would wrong me by tackling me if, standing on the side lines, the ball should happen to roll to my feet.<sup>45</sup>

It is worth noting at this point that many of the non-normative interests that presumably make tackling me outside the game wrongful (e.g. my interests in not being subject to pain, and in having control over my own body), are often at stake in cases where we believe consent *is* necessary. Thus, if permissive interests are embedded with these non-normative interests, as Owens suggests, we might wonder why consent is not necessary in the footballing context also. Still, so long as the non-normative interests that are embedded with permissive interests are sufficiently fine grained, there is no inconsistency on Owens's part in claiming that we have no permissive interest in the football case, and that all that is required to make tackling me non-wrongful is choice, because only my non-normative interests are implicated.<sup>46</sup>

However, Owens's theory requires that there must be some cases in which consent is *always* a necessary condition for permissible action. This follows from the fact that we have permissive interests, since the wrongs connected to consent are grounded in interests in certain acts being wrong unless we intentionally permit them. A plausible example of this is the example of sex, and Owens relies on this example as the basis for much of his discussion. As he notes, the sexual context represents a paradigm example of a sphere in which consent is normatively

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<sup>44</sup> Of course, in common parlance it would not be strange to say that by joining in the game the footballer consented to being tackled. But Owens and I are both operating on the assumption that to consent is to intend to waive a right.

<sup>45</sup> Here I disagree with Owens, since he claims that choices need not be communicated in order to be normatively significant. Indeed, I think the football example helps to bring out the fact that such an analysis is incorrect. We can easily imagine that I have chosen to play football (i.e. I intend to play), but have not yet motivated myself to join in, such that the other players are completely unaware of my choice. Were the ball to find its way to my feet, and if I were about to take this opportunity to join in the game (passing it to a member of my preferred team), it would, to my mind, still be wrongful for the other players to tackle me despite my intentions, since they have no idea about what I intend to do, and believe that I am merely observing the game. Owens does add the qualifier "provided they [i.e. the other players] know of my choice" (p. 168) but this just suggests that uncommunicated choices are *not* sufficient to effect the relevant normative change. Of course, we then face the question of what exactly the connection must be between my choice and others' knowledge of my choice (whether I must communicate the choice directly, or deliberately, via a third party, etc.), but it certainly does not follow that what the other players require is my consent.

<sup>46</sup> Although, as I suggest in the previous footnote, I believe this choice will have to be communicated in some way.

significant.<sup>47</sup> Indeed, Owens maintains that this is because rape is a bare wronging,<sup>48</sup> over and above the grave wrongs that will be perpetrated as a result of the serious harms suffered by the victim. Thus, according to the permissive interest view, in order to engage in non-wrongful sexual relations we must do two things. First, we must choose to have sex, so as to avoid those wrongs grounded in our non-normative interests. Second, we must consent, meaning that we must intentionally communicate the intention of hereby making it the case that we will not be wronged by certain sexual acts.

Yet, I contend that sexual consent of this sort is relatively rare. No doubt, when we have sex we give off all kinds of verbal and physical cues, generally indicating that we wish to have sex, or that we wish to go no further. What is more, having sex with someone when these cues are absent, or cues to the contrary are present, is certainly a grave wrong. My claim is simply that there are a significant number of sexual interactions in which sexual intimates do not *intentionally communicate the intention of hereby making it the case that their sexual partner does not wrong them by having sex with them*, and that we take many of these interactions to be quite permissible instances of sexual relations.

In support of this claim I can mostly offer only anecdotal evidence, and ask the reader to reflect upon personal experience. It will perhaps help to emphasise the claim that I am making. I am *not* saying that when we engage in sexual relations we do not, and need not demonstrate signs of positive willingness. Indeed, I agree with the strong intuition shared by most people that sex must be consensual, where “consensual” refers to something more general than Owens’s technical definition of consent (e.g. a mutual willingness to engage in sexual activities). What I am claiming is that the kind of consent we do give in sexual interactions (if consent is what we should call it) does not usually (or at least always) take the form of consent as defined by Owens. Rather, it looks as if we choose to have sex, and communicate these choices by partaking in a range of both verbal and non-verbal communications. For example, we kiss, touch, talk, and so on; but none of these acts is aimed at giving our consent. Where this is clearly the case, and where there is no evidence to the contrary, and no coercive pressure has been levied, I would suggest that such forms of sexual interaction are generally permissible.

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<sup>47</sup> *Shaping*, p. 177.

<sup>48</sup> *Ibid.*, p. 179.

I am not claiming that consent as Owens describes it is never given, nor that it might not be desirable if consent of this kind was given more regularly, or even seen as a necessary condition for permissible sexual interaction. My claim is simply that consent, as defined by Owens, it is not at the heart of our current sexual practice and that, given our current practice, I am assuming in a great number of cases individuals are able to have sex without wronging one another, even though they do not give the kind of consent Owens describes. Yet the implication of Owens's view is that sexual relations that occur absent consent of this kind will amount to rape.<sup>49</sup>

One may worry this objection is misguided on the grounds that I am taking Owens's definition of consent to require something like a verbal standard of consent, e.g., explicitly saying "I consent". If this were the case my contention could be shown to be mistaken on the grounds that we do give consent of the kind Owens describes, only, in the sexual case, we often give it by partaking in certain actions, or even by remaining silent.<sup>50</sup> However, I accept that one may give consent in a variety of ways, including through non-verbal acts, and even, in some contexts, by remaining silent.<sup>51</sup> What I deny is that in the present case such actions or silences represent a *communication of an intention to hereby change the normative situation*. In order to give consent one would have to say or do something in order to intentionally communicate an intention of hereby making it the case that sex is non-wrongful; one would have to deliberately and directly alter the normative status of the wrong that would otherwise obtain. It seems more likely, however, that our various actions indicate a choice to have sex, without representing an intention to change the normative status of sexual acts.

Another response would be to say that I am focusing too closely on the philosophical language Owens employs, and that we need not think about consent-giving in these terms. When I give you consent to borrow a book from my office, for example, I do not usually entertain the thought "I am hereby communicating an intention to make it non-wrongful for you to borrow the book." Similarly, it might be said, we need not conceive of our actions or verbal communications in *that* way in order give sexual consent. However, whilst it is certainly true that we very rarely form and communicate intentions of the kind just described, this is not the target of

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<sup>49</sup> Ibid., p. 181.

<sup>50</sup> Ibid., p. 165.

<sup>51</sup> On silence as tacit consent see A. J. Simmons, *Moral Principles and Political Obligations*, pp. 75-83. In the sexual sphere I doubt that we should ever think of silence as constituting consent.



my argument. In order to maintain the distinction between consent and choice that Owens relies upon it must be the case that consent is communicated intentionally; that is, a token of consent must be performed with the intention of giving consent. My contention is just that in many cases of what we take to be permissible sexual interaction, sexual intimates will not perform a specific token of consent (whether verbal or non-verbal) with the intention of giving consent (however this intention might be represented in an agent's mental contents).

Recall that Owens cannot rely on the objective communications of choice that I am claiming occur, and which I am suggesting, in at least some contexts, will allow for permissible sexual relations. Indeed, he is explicit about the fact that mere choice alone cannot ensure the permissibility of sexual relations: “[C]an sex that has been chosen constitute rape? It must be so if the interest that generates the wrong of rape is an interest in being wronged by sex unless you *declare* otherwise.”<sup>52</sup> Yet it is somewhat revealing that the contrast Owens draws in this passage is between consent and explicit refusal, claiming that, “Someone chooses to be raped where they intend that the rapist have sex with them after they have explicitly refused their consent.”<sup>53</sup> He thus implies that chosen but non-consensual sex occurs only where there is explicit refusal. As Owens himself is at pains to point out, however, you can make and communicate a choice, and even do so deliberately, without giving consent, and I take it, without denying consent either.<sup>54</sup> Moreover, as feminist writers have repeatedly pointed out, mere non-refusal does not amount to the giving of consent.<sup>55</sup> Thus, Owens cannot rely upon either communicated choices, or a lack of refusal, in order to show that most of the sexual relations to which I am referring are consensual in the narrow sense.

At this stage Owens has three strategies open to him. First, he can continue to deny that sexual relations of the kind I am describing are in any way common, and claim instead that in fact most sexual partners do in fact give explicit consent. Whilst I cannot disprove this claim, however, I believe there is good reason to think that it does not accurately reflect the phenomenology of our sexual lives. We often communicate with one another in subtle and nuanced ways, avoiding direct forms of

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<sup>52</sup> *Shaping*, p. 181. Emphasis in original.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, p. 169.

<sup>55</sup> See, for example, Michelle J. Anderson, “Negotiating Sex,” *Southern California Law Review* 78 (2005), and David Archard, *Sexual Consent*, p. 85.

communication akin to the giving consent, and this is no less true in the sexual sphere than in any other. Second, Owens can agree with me that explicit consent is at least often lacking, but claim that in all such cases, sexual partners seriously wrong one another.<sup>56</sup> But again, I do not think this move will accurately reflect our sexual lives, nor our beliefs about sexual wrongdoing, especially rape. Whilst sexual wrongdoing is all too common, and we may have very good reason to revise our sexual practices in various ways,<sup>57</sup> the kinds of sexual relations I have been describing are both fully voluntary and actively engaged in by sexual partners. All that is missing is consent understood as an intentional communication of an intention to waive a right, and I doubt that this alone is always good reason for claiming that a serious wrongdoing has occurred. Finally, Owens could weaken the intention requirement built into his account of consent in some way, so as to allow that the kinds of objective communications of choice to which I have been referring do in fact constitute tokens of consent. But to do this would be to collapse the distinction between choice and consent that Owens takes to be central to a compelling explanation of the nature and significance of the power of consent.<sup>58</sup>

Yet, whilst none of these options are attractive, if I am right to claim that consent is not always required to make interaction permissible in the paradigm case of sexual relations, it casts serious doubt on our possession of permissive interests. Owens postulates permissive interests to explain why consent should be necessary in certain contexts, and why our consent should have normative force, but in doing so

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<sup>56</sup> This would have the somewhat strange implication that sexual partners can simultaneously rape one another.

<sup>57</sup> Moreover, where we do have reason to revise our current sexual practices, I suspect our motivation is rooted in our desire to better protect the non-normative interests of agents, e.g., interests in having control over sexual relations. No one is campaigning for revised consent standards in the law, or on college campuses, because of the need to serve the permissive interest, but rather because of the very significant harms to an agent's non-normative interests that are occasioned by rape. So whilst there may be, for example, good grounds for insisting upon a verbal standard of sexual consent, those grounds are likely to consist in the way in which such a standard would better protect non-normative interests as opposed to permissive interests.

<sup>58</sup> Owens could reformulate his view such that the primary distinction is between subjective choices on the one hand, and objectively communicated choices *and* the power of consent on the other. But this would have significant implications for his view. Owens would then either have to postulate a further normative interest to account for the way in which we can affect the normative status of acts through our objectively communicated choices, which would appear ad-hoc, or accept that the permissive interest can be served by objective choices. The latter option would force Owens to revise his conception of the permissive interest to include both intentional right-waiving (i.e. consent), and rights waived indirectly through objective choices. But Owens would then struggle to account for the important distinction between, and normative significance of, rights waived by communicating an intention to do so, and rights waived indirectly by engaging in certain actions. In Section 5.3.2 I provide an account of how we can better accommodate these different ways of affecting the application of our rights and duties within a unified framework.

he precludes the possibility that the wrongs addressed by consent can be addressed in any other way, since they are specifically interests in certain acts being wrong *unless we consent*. In a wide range of cases this seems implausible – often the same normative consequences can be reached via a different route.<sup>59</sup> For instance, whilst I can consent to your touching me, I can also make it permissible for you to touch me (in certain ways at least) by standing next to you on a busy train, or playing a contact sport with you. In cases such as these, it seems plausible to think that my objectively manifested behaviours make it permissible for you to act in certain ways, independently of whether I intend to waive any rights by acting in these ways.

In my view, Owens goes wrong in claiming that there are two distinct forms of wrong to be addressed in contexts where our consent is at issue: the standard wrongs grounded in our non-normative interests, and the bare wrongings grounded in our permissive interests. We can maintain the distinction between consent and different forms of choice without assuming that they are connected to different forms of wrongdoing.<sup>60</sup> In the sexual context, for instance, I suggest that there is one kind of wrong with which we should be particularly concerned – what we might call the wrong of unwilling sex – and that this wrong can be addressed either by consent or, at least sometimes, by objectively communicated choices. This is not to say that there are no contexts in which consent is a necessary condition for permissible action on the part of others. But, as I will later argue in more detail, where this is so it is because of the various non-normative interests we seek to protect.<sup>61</sup>

A unified account of these wrongs would also avoid the somewhat strange implication that, if an agent does give consent to surgery or to sex, for example, then they will *also* need to choose these activities to forestall wrongs grounded in their

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<sup>59</sup> Raz, *The Morality of Freedom*, p. 85.

<sup>60</sup> To be clear, as I suggested above, I doubt that subjective choices ever make a difference to the application of rights and duties. On my view, we can distinguish between subjective choice, objectively communicated choice, and consent, and further hold that only the latter two can affect our normative relations. Indeed, assuming that our rights and duties play an important role in structuring interpersonal relations in large part because they can play a role in the practical deliberations of agents, it is not clear how our purely subjective choices could make a difference to these relations. By contrast, it is obvious how our intentional actions could have such an effect (since others can have good reason to believe that I have certain intentions, or made certain decisions, which may affect the application of my rights, on the basis of my actions). Here again I am in disagreement with Owens since he appears to claim that subjective choices can directly affect the structure of rights and duties that obtains. For some related discussion see Section 5.3.3.

<sup>61</sup> See Section 5.3.2.

non-normative interests.<sup>62</sup> Upon reflection, I think it quite odd to claim that there are two distinct kinds of wrong that need to be addressed in situations of this kind. Imagine, for example, that Derek complains that the surgeon has wronged him because, despite giving voluntary and informed consent to undergo an operation, he did not in fact choose the surgery (i.e. intend for the surgery to go ahead). Whilst this case strikes us as odd, the possibility must be a live one, since Owens is otherwise at risk of conceding that consent always coincides with choice, thus undermining the motivation for his view. Yet, allowing that the case is possible, we should not conclude that the surgeon wrongs Derek. It is true that if Derek consents without choosing then the surgery is likely to set back his interests in a way it would not if he had chosen the surgery. But it does not follow from this he will be *wronged* by the surgery. This result is forced upon Owens, however, because he claims that the wrong addressed by our consent is a bare wronging, thus leaving any wrongs grounded in our non-normative interests to be addressed by choice. And whilst Owens plausibly claims that consent often represents a communication of choice,<sup>63</sup> it need not do so, as we have just seen.<sup>64</sup>

This all suggests that Owens's claim that there are two distinct forms of wrong connected to choice and to consent is misleading. At the very least, a theory of consent that could provide a unified explanation for the wrongs that attach to consent and objectively communicated choices would seem to better reflect our judgements of the cases just discussed. Moreover, recognising that in at least some contexts an objective communication of choice can address the same wrong as would be addressed by the giving of consent coincides with the intuitive idea that the significance of "choice" and consent are in some way connected. As we saw in Chapter 2, the form of choice in question cannot be our subjective choices, since

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<sup>62</sup> I do not mean to say that if we have consented to sex or surgery we cannot be wronged in any other way. For example, a doctor can wrong a patient who has consented by acting negligently, or by failing to act on a reasonable judgment about what is in the patient's best interests. The point is that, if a patient has given sincere consent, there is no wrong grounded in their interests in choosing or having control over what happens to them, as Owens suggests. This possible wrong is addressed by their consent.

<sup>63</sup> *Shaping*, p. 180.

<sup>64</sup> Owens might try to claim that the surgeon is not blameworthy in the example described because he reasonably took Derek's consent to mean that Derek had also chosen the surgery. Three things are worth noting about this possibility. First, we can clearly communicate consent without communicating choice, as Owens himself points out (p. 174). Second, this response once again fails to capture the phenomenology of such interactions. If the surgeon believes she has Derek's sincere consent then she will not believe there are further wrongs connected to Derek's choices that she must be alive to. Moreover, and this is the third point, it is not that we just think the surgeon is not *culpable* in this example, but rather that they are not responsible for having *wronged* Derek in the first place.

these may diverge from the consent we give or withhold. But this still leaves room for the idea that there is a connection between the normative significance of our objectively communicated choices and the power of consent.<sup>65</sup>

In any case, the foregoing discussion casts serious doubt on the idea that we possess permissive interests. Owens claims that we have an “interest in its being the case that one is wronged by [sex] *unless one consents to it.*”<sup>66</sup> But, where consent is understood as an intentional communication of an intention to waive a right, this seems doubtful. Since sexual relations are a paradigm case in which consent – of some sort – is normatively significant, if I am right to claim that narrow consent is not always necessary in this case, such that we do not have a permissive interest in the case of our sexual relations, this would seem to put the whole idea in jeopardy.

### 3.3 Conclusion

Owens offers an original account of consent’s normative significance that avoids the problems associated with the standard interest-based views that we considered in Chapter 2. However, I believe that his account, whilst rich in insight and ideas, should be rejected. In this chapter I have offered three reasons for this rejection. First, the theory fails to account for our pre-theoretical understanding of why consent is valuable, and the explanation that is offered in its place – that our lives go better simply as a result of certain acts being socially recognised as wrong unless we consent to them – is far from intuitive. Second, as a consequence of relying upon the postulated concept of permissive interests, the explanatory power of the theory is limited. Third, an examination of the paradigm case of sexual consent casts doubt on the idea that we possess permissive interests, and the further idea that choice and consent always address distinct wrongs. The strength of the first and second objection depends in part upon whether an alternative theory is available. I will seek to develop one such alternative over the next two chapters. The third objection, by contrast, would need to be addressed by Owens in order to maintain a coherent view.

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<sup>65</sup> Couldn’t our objective choices come apart from our consent or dissent, thus once again giving rise to the problem of divergence? Not easily. We would think that someone who ran onto the football pitch shouting, “I do not consent to being tackled,” was either making a strange joke, or was seriously confused about the game being played. (Others might respond, “Either play or get off the pitch.”)

<sup>66</sup> “The Possibility of Consent,” p. 420, emphasis in original.

By postulating permissive interests that attach to distinct wrongs, Owens is able to avoid many of the problems faced by standard interest-based theories of consent. But he does so at the cost of failing to reflect our intuitions about consent's significance, and our existing practice of consent. Whilst a theory of consent need not account for every aspect of existing practice, I take it that it is a desirable feature of the theory that it map onto the practice and our considered intuitions about that practice, since these give rise to the data which the theory seeks to explain. Whilst ultimately no such theory may be available, we should in the first instance want to explain, for example, the intuitive connection between the normative significance of (communicated) choice, and consent, as well as to explain why philosophers have so regularly assumed the significance of consent is explained by the value of autonomy. We can regard this as a third desideratum for a theory of consent. As well as being able to explain the authoritative nature of consent, and account for the problem of normative power, the theory should, so far as possible, cohere with our pre-theoretical understanding of consent as normatively significant because of our interests in shaping our own lives.

## 4

# Interests, Rights, and Mutual Recognition

I have been assuming that by giving consent we waive a right. But so far, I have said little about rights themselves, other than to set out Hohfeld's conceptual schema. However, I believe that in order to understand consent's normative significance we first require a more detailed understanding of the role rights play in structuring our moral relations with one another. Only then are we in a position to see why our ability to waive those rights by giving consent should have the kind of significance it does.

In accordance with the confines I set out in Chapter 1, I am assuming an interest-based theory of rights. Yet how exactly we conceive of our interest-based theory is crucial. The main purpose of this chapter is to argue that the relationship between interests and rights should not be thought of as direct. Rather, rights protect interests indirectly by providing a normative framework that sets the terms for our interactions with one another. Importantly, the value of this framework is not exhausted by the fact that rights generally protect our significant interests. I argue that by recognising one another as rights-holders we also relate to each other in an intrinsically valuable way, by recognising one another as bearers of interests worthy of protection. This observation provides the basis for an attractive solution to the bridging problem, and establishes a framework within which we can better understand the normative significance of consent.

## 4.1 Interests and Rights

According to Joseph Raz's influential version of the interest theory of rights

‘X has a right’ if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.<sup>1</sup>

Faced with this definition we might reasonably ask two questions. First, when will X’s interests be sufficient to hold some other (Y) under a duty? Second, what is the precise nature of the duty that flows from a right?

For our purposes, we can assume an answer to the first question. More specifically, we can assume some account of why it is that Y will *owe it to X* to act or not act in certain ways, such that Y owes X a directed duty, when X and Y’s interests stack up in a certain way.<sup>2</sup> There are many clear examples in which we believe this relation to hold between X and Y, and it is plausible enough that the justification is grounded in X and Y’s interests.<sup>3</sup> For example, X’s interests in not being harmed will generally be such that Y has a directed duty to X not to assault her. There are a variety of possible accounts that might be relied on to give an account of why, in certain cases, this normative relation will obtain. We might, for instance, rely on T. M. Scanlon’s contractualist theory, according to which “an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced, general agreement.”<sup>4</sup> Alternatively, we might rely on a non-contractualist non-consequentialist account that considers the implications of adopting certain principles.<sup>5</sup> Finally, we might adopt some form of sophisticated consequentialism.<sup>6</sup> All that is ruled out are those forms of utilitarianism and consequentialism, according to which right and wrong is simply a matter of promoting the agent-neutral good. This is no significant restriction since, on these

<sup>1</sup> *The Morality of Freedom*, p. 166.

<sup>2</sup> It is unclear whether Raz himself conceives of the duties in question as directed duties. Frances Kamm suggests that he does not. See her *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (Oxford: Oxford University Press, 2007), pp. 244-45.

<sup>3</sup> See Gopal Sreenivasan, “Duties and Their Direction.”

<sup>4</sup> *What We Owe To Each Other*, p. 153. This formulation leaves open the precise explanation for why Y will owe a directed duty to X, rather than simply act wrongly by acting on a principle that could have been reasonably rejected by others. I assume that the explanation will centre on the idea that in certain circumstances, given the various considerations in play, X is the agent who could reasonably reject a principle that licensed Y to act in a certain manner. Cf. Rahul Kumar, “Contractualism,” in *The Routledge Companion to Ethics*, ed. John Skorupski (London: Routledge, 2010).

<sup>5</sup> For some suggestive remarks see Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 4-5.

<sup>6</sup> See, e.g., Philip Pettit and Michael Smith, “The Truth in Deontology,” in *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, eds. R. Jay Wallace et al. (Oxford: Oxford University Press, 2004).



forms of utilitarianism and consequentialism, there is no interesting sense in which Y has directed duties to X that X may waive by giving consent.

Even assuming this much, we still lack an account of why X's interests will yield duties of a particular kind. On Raz's view, duties are marked out by their distinctive structure.

The connection between rights and duties establishes that rights are special considerations, since duties are. [...] Duties are special in the role they assume in practical reasoning. Their role cannot be captured by the usual weighing metaphor which applies to the evaluation of ordinary reasons. They have pre-emptive force. The point is seen clearly when we consider again the duty to obey a legitimate authority. It is special since being pre-emptive it replaces rather than competes with (some of) the other reasons which apply in the circumstances.<sup>7</sup>

The idea that duties are preemptive has two features that are worth drawing attention to. First, as Raz says, a duty is preemptive because it “replaces rather than competes with (some of) the other reasons”. To see this idea, consider an arbitrator A who is making a judgment on a dispute between X and Y about whether they should take Route 1 or Route 2.<sup>8</sup> If X and Y agree to regard A's judgement as binding then A's judgement will have preemptive force for both X and Y, in that it should replace the reasons that bear on the question of which route to take in their practical deliberations. That is, when A makes the decision that they should take Route 1, Y can no longer appeal to the reasons in favour of taking Route 2 because the whole point of asking A to arbitrate was to have him consider the various reasons and make an authoritative judgement. Thus, when A has made a judgement, the reasons for and against taking each route have been replaced by the judgement made by A about which is the best way to go.

Rights play a similar preemptive role. To see what this means, consider the fact that the interests of agents often give other agents first-order reasons for action even where they do not ground a right. For example, the fact that it would be in your interest to succeed in your project gives me a reason to help you, even though you will not usually have a right that I help. Or, the fact that you are running late for a

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<sup>7</sup> *The Morality of Freedom*, p. 186.

<sup>8</sup> This is a variation of Raz's example, *ibid.*, pp. 41-2.

meeting gives me a reason to let you go before me in the queue, but again, that interest presumably grounds no right on your part. However, where your interests are sufficient to ground a right, your right pre-empts or replaces the reasons given to me by the interests that justify your right. Consider, for example, X's right against Y's touching her body. Most likely, X has a range of interests (e.g. in not experiencing pain, in having control, etc.) that coalesce to justify this right. Assuming the right is justified, X's right gives Y a reason not to touch X's body. Yet this reason is not to be added to the reasons Y already has for touching or not touching X's body that are grounded in X's various interests. Rather, X's right replaces those reasons, and so Y's reason for not touching X derives from X's possession of this right. Moreover, once we have established that X's right is justified (by her various interests), Y will be precluded from appealing to X's underlying interests as a justification for his course of action. Instead he can only appeal to the reasons given to him by X's right. To continue the analogy from above, just as Y can no longer appeal to the reasons in favour of Route 2 once the arbitrator has made a judgement on the best route, Y can no longer appeal to the first-order reasons that would otherwise be given to him by X's interests if it has been concluded that those interests are protected by X's possession of a right.

The second feature of rights and duties is that they do not only give us first-order reasons for acting or not acting (e.g., a reason not to touch your body), but also second-order *exclusionary reasons* to disregard some of the competing first-order reasons. According to Raz, an exclusionary reason is, "a second-order reason to refrain from acting for some reason."<sup>9</sup> This is most easily seen by way of an example. If X has a right against Y touching her body, such that Y has a correlative duty, this means that Y has a first-order reason not to touch X's body *and* a second-order reason not to act for some of the competing reasons, such as Y's great desire to touch X, the medical knowledge that might be gained by allowing Y access to X's rare biological material, or the usefulness of using X's body to bridge a gap over a small river.<sup>10</sup>

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<sup>9</sup> Joseph Raz, *Practical Reason and Norms*, p. 39.

<sup>10</sup> I cannot settle the question here of how we are to draw the exclusionary scope of rights and duties, nor what the exclusionary zone will consist in in any particular case. I rely instead on what I take to be intuitive examples. For some related discussion see David Owens, "Rationalism about Obligation," *European Journal of Philosophy* 16, no. 3 (2008) pp. 426-27.

We can refine the idea that rights and duties have preemptive force by saying that they are *protected reasons*.<sup>11</sup> Protected reasons are first-order reasons to act (or not act) in some way, coupled with a second-order exclusionary reason to disregard a number of competing first-order reasons. If X has a duty to help Y then, then this gives X a protected reason for action: a first-order reason for providing assistance coupled with an exclusionary reason to disregard some competing considerations, e.g., the fact that X's favourite TV programme is on, or his desire to take a walk rather than help Y.<sup>12</sup> So, on Raz's view, to say that X has a right means that X's interests are sufficient to hold some other person (Y) under a duty, where Y's duty amounts to Y having a protected reason.

I find this view of rights and duties compelling. Whilst there is some question about how exactly we should understand the exclusionary nature of rights and duties,<sup>13</sup> Raz's analysis nicely captures a common view about rights. On most theories, rights are not only first-order considerations for or against some action, to be weighed equally along with all other considerations that could sensibly bear on the issue. Rather, rights are significant precisely because they serve to pre-empt consideration of some first-order reasons by replacing them with a single reason to act or not act in some way, whilst also excluding a range of competing considerations, so that those considerations are no longer relevant in determining whether a course of action is permissible or impermissible.<sup>14</sup> Moreover, one need not be an interest-theorist in order to accept this account of rights' structure.<sup>15</sup>

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<sup>11</sup> On protected reasons in general see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), pp. 17-19; Joseph Raz, *Practical Reason and Norms*, p. 191; John Gardner, "Justifications and Reasons," in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007), p. 105; Owens, "Rationalism about Obligation," pp. 411-12.

<sup>12</sup> A may also have a *positive* second-reason for providing assistance, i.e. a reason to act on his first-order reason, insofar as this is what required of friends. This complication need not detain us here.

<sup>13</sup> In particular, whether duties should be thought of as giving us second-order exclusionary *reasons*, or whether they should be thought of as shaping deliberation without themselves constituting reasons. See Owens, "Rationalism about Obligation."

<sup>14</sup> See, e.g., Jeremy Waldron's "Introduction," in his edited collection *Theories of Rights* (Oxford: Oxford University Press, 1984), p. 14; Leif Wenar, "Rights." It is worth noting that, whilst there are different vocabularies available for talking about the structure of rights and duties, I believe that most adherents to the view that rights and duties are robust moral considerations which play an independent role in moral thought will agree with the broad outlines of Raz's conceptual schema even if they would disagree with some of the details. Thus I will continue to use the Razian language of exclusionary and protected reasons to capture a broader family of views, whilst acknowledging that some theorists may prefer to employ different terms or concepts to capture the same fundamental ideas.

<sup>15</sup> See, e.g., Frances Kamm, *Intricate Ethics*, p. 237. Of course, if one is not an interest-theorist then one will not conceive of rights as replacing reasons grounded in interests (or, at the least, one would

Furthermore, understanding rights as having this preemptive structure also provides a way of thinking about one of the central problems we came across in Chapter 2, concerning the relationship between our individual interests and the normative relations that hold between us. As we saw in the discussion of harmless or bare wrongings, X can be wronged by Y even if none of X's interests are in fact set back by Y's actions. For example, if Y takes a mouth swab from X without X's consent, but without setting back any interest of X's, then Y will still wrong X. More important for our present purposes, it is also the case that X can forestall this wrong by giving Y consent, even though her consent will not necessarily communicate or affect her underlying interests. This is why we were unable to adopt any direct theory of consent according to which X's consent has normative significance because it either communicates or affects what is in her interests such that Y no longer wrongs her by taking the swab. However, if we conceive of rights as protected reasons, we can say that the fact X has a preemptive right against being touched by Y means that Y wrongs X by violating X's right by acting without X's consent. Since X's right constitutes a protected reason this right pre-empts the reasons otherwise grounded in X's interests, and so Y is unable to claim that he has not done anything wrong since he did not set back (nor, let us assume, seriously risk setting back) any of X's underlying interests. Yet if X gives consent then, even though she will not directly affect what is in her interests, she will cancel the protected reasons constituted by her right, thereby making it permissible for Y to take the swab.<sup>16</sup>

The question, then, is whether preemptive rights of this kind can be justified in a manner consistent with an interest-based view, and, furthermore, whether we can justify a power to (at least sometimes) cancel these protected reasons by giving consent. Notice that our assumption that there is some account that explains why Y will owe X directed duties when their interests stack up in a certain way does not take us all the way to account of why those duties will take on the structure of protected reasons. For all that has been said, we could think that Y will only wrong X by violating a directed duty when X and Y's interests have a certain weight in

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need to say more about why rights would do so). Nonetheless, it is plausible to think that on an alternative account, rights will still replace some of the first-order reasons that flow from whatever is supposed to ground rights.

<sup>16</sup> I give a detailed account of the way in which consent affects rights and reasons for action in Section 5.3.4.

relation to one another. But this will leave us unable to provide an interest-based account of harmless wrongings and of the power of consent. So we need an argument for why rights and their correlative duties will have the structure of protected reasons, reasons that can be cancelled through the giving of consent. In the remainder of this chapter I take up the first challenge, turning to the second challenge in Chapter 5.

## 4.2 Two Unsuccessful Strategies

How then are we to justify rights with a preemptive structure? Whilst Raz's account appears to map onto our understanding of rights in important ways, we now need to account for the fact that (i) rights replace some of the other reasons for action agents might have had (i.e. those grounded in the interests that justify rights), and (ii) rights exclude what otherwise appear to be relevant considerations from the pool of available reasons for action. Such an account is necessary, because the proposed understanding of rights may otherwise seem to give interests more weight than they deserve. After all, if the interests of agents already give rise to first-order reasons for action, why should rights and duties supplant those reasons, and exclude other reasons from consideration?

Raz himself offers two possible responses to this challenge. First, Raz suggests an instrumental strategy.<sup>17</sup> Assuming that rights tend to protect significant interests of the right-bearer, it might be that if agents treat one another's rights as protected reasons they will better comply with the first-order reasons given to them by one another's interests. Take my right against being assaulted. An instrumental justification for treating this right as a protected reason would point to the fact that, in general, I will be harmed in significant ways if I am punched or hit by others, such that my life will go worse for me if they do so. As a result, other agents are likely to better comply with the reasons they have (those reasons grounded in my interests) if they simply deliberate about how to act by replacing the need to consider my

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<sup>17</sup> This line of thought is suggested by Raz in a number of places. See, generally, *Practical Reason and Norms*. See also Gardner, "Justifications and Reasons," pp. 105-06. It may be that, in the contexts it is most frequently invoked by Raz (e.g. practical authority), this instrumental strategy is sufficient, despite what I go on to say about rights in the text. That may be because, unlike most moral rights, the value of political authority is plausibly purely instrumental.

underlying interests with a first-order reason not to punch me, and a further second-order reason not to include a number of other considerations (e.g. the enjoyment they might get from punching me). Whilst my interests may not be seriously set back in all the cases in which someone might assault me, other agents will better comply with the reasons they have if they *never* consider my underlying interests against being hit, or weigh certain reasons in favour of hitting me, in their deliberations. That is to say, we will maximize compliance with certain reasons, such as those grounded in the interests of agents, if we treat rights as protected reasons, and this justifies regarding them as such.

Whilst this instrumental justification might be able to explain why it generally makes sense to treat rights as protected reasons in our practical deliberations, since doing so is more likely to lead agents to comply with the reasons they have, it fails to explain something more important, namely, why another agent would *wrong me* by assaulting me *if* they correctly reasoned that doing so would not set back any significant interest of mine, or would in fact better serve my interests. After all, if the justification for seeing rights as protected reasons is that this better serves my interests, then what cause for complaint could I have in such a case? Moreover, on this account, whether we are justified in regarding certain reasons as protected reasons is a purely epistemic matter, turning on whether the epistemic position of an agent means that they are sufficiently more likely to serve or protect the interests of others if they regard some reasons as protected. Yet it is hard to see how the outcome of this epistemic investigation bears directly on the question of moral rights and wrongs. I may, for instance, better serve all of your interests by always doing as you say, but this hardly means that you have a right that I do what you say. Thus, the instrumental justification will not succeed as an account of moral rights because it is both under- and over-inclusive. It is under-inclusive because it cannot explain why an agent is not permitted to consider and weigh your first-order interests when they are in a good epistemic position to do so. It is over-inclusive because it wrongly implies that in any case that another agent would better serve your interests by treating certain reasons as protected you have a moral right that they do so.

The second strategy suggested by Raz is somewhat more complicated. He argues that often the full justification of a right will not only depend on the interests

of the individual right-holder, but also the interests of others.<sup>18</sup> For this to be the case the interests of others must coincide with the interests of the right-holder. For example, a parent may have a right to a payment of child benefit from the government, even though the payment is justified in large part by the fact that it will serve the interests of the child and not the parent (although the right will contribute to the parent's well-being since it supports a valuable caring relationship between parent and child).<sup>19</sup> Raz also argues that many important civil and political rights are partly justified by their contribution to the *common good*, "goods which, in a certain community, serve the interest of people generally in a conflict-free, non-exclusive, and non-excludable way."<sup>20</sup> Raz claims that freedom of contract, freedom of marriage, freedom of occupation, and freedom of speech are all such examples. For instance, whilst protecting an individual's right to freedom of speech may come at significant cost, and the interests of the speaker alone in being able to speak freely may not obviously have sufficient weight to justify holding others under a duty not to interfere, protecting rights to free speech in general will support a common liberal culture in which agents can share opinions, learn, acquire information, and so on, and this culture constitutes a common good that will benefit all of those within a community. Raz elaborates:

This explains why civil and political rights which are the prize of the official culture of liberal democracies do not enjoy a similar place in the estimation of most ordinary people. Many people judge them by their contribution to their well-being, and it is not much. Their real value is in their contribution to a common liberal culture. That culture serves the interests of members of the community. Given the great contribution that observance of the civil and political rights of individuals makes to the preservation of the common good, it would be irrational not to let that fact be reflected in the value of rights.<sup>21</sup>

Raz's argument does not take us all the way to an account of why it is that rights should have preemptive force, but the gaps might be filled in by claiming that it is only by regarding rights as having a preemptive character that they are able to

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<sup>18</sup> See Raz, "Rights and Individual Well-Being," in *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Rev. Ed. (Oxford: Clarendon Press, 1994).

<sup>19</sup> *Ibid.*, pp. 50-1.

<sup>20</sup> *Ibid.*, p. 52.

<sup>21</sup> *Ibid.*, p. 55.

support a valuable common culture. For instance, only by regarding the right to free speech as something that cannot be weighed against some possible reasons for interference (e.g. offensiveness) can free speech rights support and facilitate an open liberal culture.<sup>22</sup> On this view, the justification for regarding (at least some) rights as protected reasons as opposed to a simple reflection of the weight of agents' interests, is that this is necessary in order to foster and protect a shared liberal ethos.

I find this idea somewhat appealing, and think that, as an account of political rights such as freedom of speech, there may be something important in the idea. I certainly agree that it is far from obvious that an individual's interests in free speech alone can justify a right with the degree of stringency that we take that right to have, but that the community at large will benefit from a culture that supports free speech.<sup>23</sup> However, whatever the ultimate success of this strategy, I do not think that this account can establish a satisfactory justification for the preemptive structure of rights in the cases we are most interested in. Think back to examples such as the harmless mouth swab or the harmless trespass. It is perhaps not implausible to say that the community at large will benefit from living in a culture within which agents are not permitted to take mouth swabs or use other's property without permission, and it might be suggested that we can rely on this idea to account for the preemptive nature of X's rights over her body or property even where she has no significant interests at stake. Yet this account cannot obviously explain something important about the nature of the duties that Y owes to X in these examples, namely, the fact that they are *directed duties*.<sup>24</sup>

As I noted in Chapter 1, claim-rights ground directed duties, such that the right-holder (X) stands to be wronged by the duty-bearer (Y) where Y violates X's right. Moreover, this fact seems important in accounting for how it is that X could waive her right and therefore release Y from her duty by giving consent, since unless

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<sup>22</sup> It is important to note that on one reading, Raz is simply presupposing the preemptive character of the rights in question, and arguing for the conclusion that the interests of others, where they coincide with the interests of the right-holder, can affect the *stringency* of the right. Thus, while I am relying on the common culture argument as a possible tool for solving our puzzle, it may not have been designed to play anything like this role, which would help to explain why it is ultimately unsuccessful. If this reading is correct then it simply leaves us back where we started: without an adequate justification for the preemptive structure of rights.

<sup>23</sup> Although it may be possible to support such a culture, or at least a culture in which those with useful or important things to say have their speech protected, without extending stringent rights of free speech to everyone, in which case Raz's approach may be subject to a significant challenge. On this point see Kamm, *Intricate Ethics*, p. 246.

<sup>24</sup> I leave it open whether we think of rights such as the right to free speech in the same way. If so, the following objection may represent a wholesale rejection of Raz's position.



the duty is owed to X it is not clear how she (or her representative) could have any standing to release Y from that duty. Thus, we want to retain the idea in the cases with which we are concerned that Y owes X a directed duty. However, justifying the preemptive nature of rights partly by appeal to the interests of others or to the common good seems to distort this directional element. If the preemptive structure of X's right somehow depends on the interests of others in X's community (A, B, C...), such that X's interests are not sufficient to ground Y's duty, it is unclear why we should think of Y's duty as a directed duty (even if X figures in the content of Y's duty).<sup>25</sup> Indeed, where X has no interests in whether Y takes the swab or uses her house we might describe Y as having a duty to the *community* not to act in these ways, and not to X herself. But we then lack an explanation of the kind we require, an explanation for why the *directed duty* Y owes to X constitutes a protected reason, since Y's duty does not seem to be a directed duty at all.<sup>26</sup>

### 4.3 A Relational Theory of Rights

We are assuming that rights are grounded in interests, and trying to account for the preemptive structure of rights in a way that is consistent with that assumption. In what follows, I offer an account of the preemptive structure of rights that is motivated by the following observation. In our interactions with others we do not only value whether others act in ways that, as it happens, serve or set back our morally significant interests,<sup>27</sup> but are also concerned with the way in which others relate to us. That is, we are also concerned with the ways in which others take our interests into consideration when deliberating about what to do. Moreover, we further value others' ability to understand that we recognise them as bearers of

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<sup>25</sup> See Kamm, *Intricate Ethics*, pp. 244-45.

<sup>26</sup> This mirrors a criticism of conventionalist accounts of promising. Some have sought to explain promissory obligations by pointing out that the practice of promising is socially beneficial, and that, were we to rely on this practice without in fact keeping our promises, we would free-riding on a useful convention, and damaging or undermining a practice which is beneficial for the community at large. But this explanation cannot obviously explain why X will wrong Y in particular when X breaks a promise he made to Y. That is, this conventionalist strategy cannot obviously explain why X owes Y a directed duty.

<sup>27</sup> I shall use the term "morally significant interests" to refer to those interests that agents have a claim to be taken into consideration by others. I doubt there is any principled line to be drawn between interests that are and interests that are not morally significant in this sense, and suspect that whether an interest is morally significant will depend partly upon the context.

interests worthy of protection. I suggest that these observations render plausible the idea that agents possess a set of *relational interests*: interests in being able to recognise the ways in which they relate to one another. These interests are, I will argue, crucial in explaining why interest-based rights constitute protected reasons. Moreover, justifying protected reasons in this way will allow us to capture one of the central animating ideas of status-based views, according to which the possession of rights is, in Nagel's words, "seen as the expression of a status whose value for individuals cannot be reduced to the value of what actually happens to them."<sup>28</sup>

#### 4.3.1 *Relational Interests*

I am assuming that moral agents owe one another at least some consideration of their interests, and that in some instances those interests will be such that Y owes it to X to act (or not act) in a certain way, and will wrong X by not acting (or acting). The question is: why are moral agents unable to rely on the first-order moral considerations (including one another's interests) that obtain, and *weigh* these against one another in order to decide what, morally speaking, they ought to do? Indeed, it might be suggested that what is really at stake in our general moral relations is the fact that all agents have a set of basic interests that we ought to promote and protect, and that moral rights have no significance over and above articulating those interests, and guiding us towards their promotion and protection. Why then must we introduce protected reasons into the picture?

We can make progress by first noticing that we are not only concerned with whether others act in ways that, as it happens, serve or set back our morally significant interests.<sup>29</sup> We further care about the way in which others relate to us; that is, with the way in which they take our interests into consideration when deliberating, and, more generally, the question of whether they treat us with the appropriate level of concern, respect, or regard. For instance, we are likely to seriously resent someone who pushes us off a cliff, even if, as it happens, a large bed of feathers breaks our fall; or someone who drives recklessly whilst drunk, although,

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<sup>28</sup> Thomas Nagel, "Personal Rights and Public Space," *Philosophy and Public Affairs* 24, no. 2 (1995), p. 92.

<sup>29</sup> I focus here on the concern others have for our own morally significant interests, but I assume we are also concerned with the way in which others relate to third-parties, including both loved ones (children, friends), as well as complete strangers (e.g. the disregard a dictator shows for his subjects).

as it happens, they do not cause anyone harm.<sup>30</sup> As Niko Kolodny has said, “It matters to us not only that...people and things fare well in nature: that they escape harm, flourish, and so on. It matters to us also that they are properly regarded by others.”<sup>31</sup>

More positively, it does not seem far-fetched or unfamiliar to claim that we relate to others in a morally decent and valuable way when we recognise that they are bearers of interests worthy of protection; that they, like us, are agents who have lives that can go more or less well, and that we have reason (within limits) to protect and promote their well-being. Indeed, the idea that we relate to others in a particularly valuable way when we recognise them as having moral claims is a popular one amongst moral philosophers. For instance, Scanlon claims that when we deliberate and act in accordance with principles that others could not reasonably reject, we stand in a relation of “mutual recognition” with them, a relation that is “appealing in itself – worth seeking for its own sake.”<sup>32</sup> What is more, Scanlon thinks the appeal of standing in this kind of relationship with others is crucial to a proper understanding of moral motivation.<sup>33</sup> More concretely, many recent discussions of social justice and democratic institutions have focused on the importance and value of citizens standing in a certain kind of relationship with one another – a relationship of equality.<sup>34</sup> For instance, David Miller discusses “the ideal of a society in which people regard and treat one another as equals,”<sup>35</sup> and Elizabeth Anderson argues for a theory of democratic equality that “views equality as a social relationship.”<sup>36</sup> Clearly, these authors are not only concerned with the way in which our actions affect one another’s interests, but also with our attitudes toward one another, with whether (in this case) we regard others as having an equal claim to

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<sup>30</sup> Kumar, “Who Can Be Wronged?” p. 103.

<sup>31</sup> Niko Kolodny, “Which Relationships Justify Partiality? The Case of Parents and Children,” *Philosophy and Public Affairs* 38, no. 1 (2010), pp. 43-4. See also Raz, *The Morality of Freedom*, p. 188.

<sup>32</sup> Scanlon, *What We Owe To Each Other*, p. 163. See also his *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, Mass.: Harvard University Press, 2008), esp. pp. 139-41; and R. Jay Wallace, “The Deontic Structure of Morality,” in *Thinking about Reasons: Themes from the Philosophy of Jonathan Dancy*, eds. David Bakhurst, Brad Hooker, and Margaret Olivia Little (Oxford: Oxford University Press, 2013), p. 161.

<sup>33</sup> See *What We Owe To Each Other*, pp. 153-58.

<sup>34</sup> Elizabeth S. Anderson, “What is the Point of Equality?” *Ethics* 109, no. 2 (1999); David Miller, “Equality and Justice,” *Ratio* 10 (1997); Daniel Viehoff, “Democratic Equality and Political Authority,” *Philosophy and Public Affairs* 42, no. 4 (2014); Niko Kolodny, “Rule Over None II: Social Equality and the Justification of Democracy,” *Philosophy and Public Affairs* 42, no. 4 (2014).

<sup>35</sup> Miller, “Equality and Justice,” p. 224.

<sup>36</sup> Anderson, “What is the Point of Equality?” p. 313.

shaping the social world within which we live, and to the products of social cooperation, and whether they, in turn, recognise us as having an identical claim.

So far, however, it might appear as if the relevant form of recognition or regard can be guaranteed by appropriately *weighing* certain considerations in one's practical deliberations. For instance, I relate to others as a democratic equal when I recognise their various interests in autonomy, democratic participation, and so on, and regard them as therefore having a claim to participate. None of this, it may seem, requires the invocation of protected reasons. Yet something important is still missing from this picture. To appreciate this we need first to see that we are not only concerned with how others relate to us in the abstract, but with *actually being able to recognise* whether others treat us with the appropriate level of concern; so that we may understand, in our concrete social relations with others, how they relate to us. Rousseau draws our attention to this aspect of interpersonal interactions when he says:

As soon as men had begun to appreciate one another and the idea of consideration had taken shape in their mind, everyone claimed a right to it, and one could no longer deprive anyone of it with impunity. From here arose the first duties of civility even among Savages, and from it any intentional wrong became an affront because, together with the harm resulting from the injury, *the offended party saw in it contempt for his person, often more unbearable than the harm itself.*<sup>37</sup>

More recently, Philippa Foot makes a similar point:

It is...important for the question of the needs of human beings that there is second-order evil in human life, meaning for instance the misery that comes from the consciousness of being disregarded, lonely or oppressed.<sup>38</sup>

A central aspect of the idea that both Rousseau and Foot are articulating is that we are not only concerned with whether others' actions impact upon our

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<sup>37</sup> Jean-Jacques Rousseau, "Discourse on the Origin and Foundations of Inequality Among Men," in *The Discourses and Other Early Political Writings*, ed. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), p. 166, emphasis added.

<sup>38</sup> Philippa Foot, "Rationality and Virtue," in *Norms, Values, and Society*, ed. Herlinde Pauer-Studer (Netherlands: Springer, 1994), pp. 210-11.

interests, but are also concerned with the reasons for which others act, and so the manner in which they take our interests into consideration when deliberating about how to act. To use Foot's example, my ability to understand that my suffering derives from my membership of an oppressed group, such that when others harm me or disregard me they do so because they see "my kind" as inferior, will mean that my understanding of these attitudes constitutes a harm independently of the ways in which their actions set back other interests of mine. More mundanely, if Y treads on X's toe by complete accident then, at the most, X has reason to resent Y for being clumsy, and if it is clear to X that it was an accident then this is how X is likely to respond. Alternatively, if Y treads on X's toe so as to deliberately inflict pain upon X, then even if this causes X exactly the same degree of pain, the significance of Y's action will be quite different, since in this case Y disregards X's interests and acts with the positive intention of causing X pain. Following Scanlon, we can say that the reasons for which an agent acts affects the *meaning* of their action, and that the meaning of the actions agents perform has important effects on the value of interpersonal interactions and relationships.<sup>39</sup>

This idea – that we value having an understanding of the reasons for which others act, so as to understand the meaning of their actions and the way in which they relate to us – should, I think, strike most as familiar. I believe, in light of this, that we can conceive of human beings as having what I will call *relational interests*.<sup>40</sup> In general, I will define relational interests as interests in understanding how others relate to us, where I mean by this the consideration others give to our interests in their practical thought and action.<sup>41</sup> More specifically, we can identify two relational interests.<sup>42</sup> First there is what might be thought of as a second-order interest in being able to recognise that others give appropriate consideration to our first-order interests (in avoiding pain, adequate nutrition, intellectual stimulation, and so on). Second, there is what might be described as a third-order interest in having

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<sup>39</sup> See Scanlon, *Moral Dimensions*.

<sup>40</sup> More specifically, those human beings who are capable of understanding and making judgments about the reasons for which others act have relational interests. This may have important implications for the rights of young children and non-human animals (among others). See note 70 below.

<sup>41</sup> For further suggestive remarks about the importance of this kind of mutual understanding between agents, with a particular emphasis on Scanlon's account of moral reasoning, see Rahul Kumar, "Who Can Be Wronged?" and also his, "Contractualism on the Shoal of Aggregation," in *Reasons and Recognition: Essays on the Philosophy of T. M. Scanlon*, eds. R. Jay Wallace, Rahul Kumar, and Samuel Freeman (Oxford: Oxford University Press, 2011), esp. pp. 131-38.

<sup>42</sup> The following list is not supposed to be exhaustive. There may be further instances of relational interests that I do not discuss here.

others recognise our second-order relational interest, that is, an interest in having others recognise and respond to the value for us of being able to understand how they relate to us. As I will now go on to argue, I believe that relational interests play a much more important role in structuring our moral relations with one another than has previously been recognised.

#### *4.3.2 Mutual Recognition and Normative Assurance*

*Mutual Recognition.* So far I have discussed the value for an individual agent of being able to comprehend the reasons for which others act, and so to understand the ways in which others relate to them. In some cases this may matter to us quite independently of any mutual understanding of the reasons for which we each act. For example, it may be unclear to a doctor or loved one who cares for someone suffering from locked-in syndrome that the patient understands their reasons for acting in various ways (partly because they may be unaware that they are suffering from locked-in syndrome), but it might still matter greatly to the patient that they can recognise the fact that others relate to them in a caring or loving manner. However, since those agents who have relational interests have them in virtue of the capacity to understand and make judgements about the reasons for which others act, in the majority of cases it will also be true that others will be able to appreciate the reasons for which they themselves act. Thus, if X has relational interests with regard to Y, then Y will also have relational interests with regard to X.

I now want to suggest that our mutual possession of relational interests makes an important difference to the value of many forms of interaction and relationship. Most, generally, I believe that we interact with one another in an intrinsically valuable way when we have a mutual understanding that we give one another's interests the appropriate role within our practical deliberations. To help see this, consider the case of friendship. If Alison and Bert are friends they will have a variety of friendship-based reasons for action. For example, they ought to keep one another's confidences, to provide emotional encouragement and support, to help in the pursuit of one another's projects, and so on. Being a good friend requires Alison and Bert to recognise these reasons and give them the appropriate role within their practical deliberations. And in order to develop and maintain a friendship Alison and Bert must develop a mutual understanding that they each recognise these reasons,

and treat them accordingly. Moreover, Alison and Bert will each need to believe that the other believes that they recognise these reasons. For instance, if Alison believes that Bert believes that Alison does not really relate to Bert as a friend, because (she believes that he believes that) she does not respond to the friendship-based reasons for action she has, then this fact in itself will threaten, and potentially undermine, the relationship.<sup>43</sup>

Thus, in order to engage in the valuable relationship of friendship, two agents will need to develop a *mutual recognition*<sup>44</sup> of their relationship, that is, a common understanding of how they relate to one another. More specifically we can say that two agents achieve mutual recognition of a relationship where they have a common belief that they stand in that relationship, such that they are each bound by certain normative standards, where the idea of common belief can be characterised as follows:

A and B have a common belief that p where:

- (i) A and B believe that p
- (ii) A and B both believe that the other believes that p
- (iii) A and B both believe that the other believes that they believe that p.<sup>45</sup>

I take the claim that mutual recognition is partly constitutive of friendships value to be *prima facie* plausible, and see no obvious reason to reject it. I now want to suggest something that might appear to have less *prima facie* plausibility, namely,

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<sup>43</sup> We can imagine that Alison is quite wrong about this, and that Bert actually believes that Alison is a friend to him. But if Alison continues to have the contrary belief then this will still threaten the relationship, since it is very difficult to be friends with someone who you believe thinks that you are not truly a friend to them.

<sup>44</sup> Note that my usage of the term “mutual recognition” differs in an important respect from the use made of it by Scanlon mentioned above. Whilst Scanlon suggests that *individuals* stand in a relation of mutual recognition with others when they act on principles that others could not reasonably reject (*What We Owe To Each Other*, p. 162), I am suggesting that *two* (or more) agents stand in a relation of mutual recognition when there is a *common understanding* that they each recognise certain normative standards as governing appropriate behaviour between them. Whilst I think these two uses are ultimately compatible, and believe that Scanlon still requires the idea that what might be called *hypothetical mutual recognition* is also valuable, I suspect that the appeal of Scanlon’s position partly derives from the value we recognise in concrete relations of mutual recognition such as those I am referring to in the text. For instance, it seems plausible that the value of standing “in unity with our fellow creatures” (p. 163) must extend beyond the hypothetical unity we might acquire by acting only on principles that we alone believe that others cannot reasonably reject, into our actually standing in social relations with others in which we jointly recognise the validity of certain principles.

<sup>45</sup> Tom Dougherty, “Yes Means Yes: Consent as Communication,” *Philosophy and Public Affairs* 43, no. 3 (2015), pp. 236-37.

that moral agents in general relate to one another in an intrinsically valuable way when they engage in relations of mutual recognition. Whilst this claim is more controversial, if I am correct to claim that, *qua* moral agents, we have relational interests, I think this suggests that the value of mutual recognition will extend to relations between moral agents in general. To be sure, these relations will be of quite a different nature to relations of friendship. But that does not imply that our ability to mutually recognise the fact that we give one another's interests an appropriate role within our practical deliberations will not partly constitute a valuable form of interaction. Rather, it just suggests that the ways in which we are required to give one another's interests a role in our deliberations, and so the moral reasons we each recognise, will be quite different. In according the interests of others an appropriate role in my deliberations I relate to them in a morally decent and valuable way by recognising them as bearers of interests worthy of protection. But given that in many cases they are capable of recognising whether or not I adopt this attitude, and that I in turn am capable of understanding whether they adopt a similar attitude toward me, it does not seem implausible to think that this mutual understanding can partly constitute a valuable form of relation between us.

This may be, I think, somewhat hard to see, in part because these sorts of moral beliefs and structures are built into the fabric of our social world, and implicated throughout our social interactions, such that this form of recognition is perhaps surprisingly commonplace. I generally assume that others recognise me as having, at the very least, a set of basic moral rights, just as I recognise them as having the very same rights. This is valuable, at least in part, because we each understand one another as owing certain forms of moral treatment to each other, whatever further consequences this brings. In the same way that friends stand in a valuable relationship partly because they understand one another as friends, and therefore as recognising the friendship-based reasons for action they each have, we can see moral agents in general as interacting with one another in intrinsically valuable ways partly because they each recognise that they give one another's interests an appropriate role within their deliberations.

This may be easier to see in the negative. Imagine that I arrive in country C on a business trip. A local guide informs me that the inhabitants of C do not regard me as having the same moral rights as them, or indeed as having any moral standing whatsoever. They believe that since I am not from C I fall outside of the moral



community, and so am not worthy of (moral) concern. This discovery would significantly affect me and my thoughts about the relations I am able to have with the inhabitants of C.<sup>46</sup> This would be true even if I could be guaranteed that my basic rights would be respected for other (say, financial) reasons, and even if I achieve exactly the same ends as I otherwise would have (e.g. signing the contract). The fact that the inhabitants of C do not regard me as having morally significant interests will impair the value of my relations with them because we cannot stand in a relation of mutual recognition.

As this example helps to demonstrate, relations of mutual recognition, as I am using the term, only exist where particular individuals actually come into contact with one another, and understand one another as giving the other's interests the morally appropriate role in their deliberations. Thus, I am not suggesting that moral agents "relate" to others in a morally decent way simply in virtue of an abstract commitment to give those others interests the appropriate role in one's practical deliberations, or because they, unilaterally, act on what they take to be the correct moral principles. This is important because, as we will see below, the fact that the shared social conditions under which we actually live determine our ability to engage in relations of mutual recognition plays an important role in justifying the claim that rights constitute protected reasons.

*Normative Assurance.* Before turning to this argument, however, I want to highlight another value attached to relations of mutual recognition. So far I have emphasised the intrinsic value of standing in relations of mutual recognition with others. But an understanding that others recognise certain reasons in their deliberations, and act in accordance with these reasons, can have a further instrumental value by providing agents with what I will call *normative assurance*.<sup>47</sup> the assurance that derives from believing that another agent (or agents) recognises certain normative standards – certain reasons, requirements, duties, and rights – as governing appropriate behaviour within a certain context.<sup>48</sup>

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<sup>46</sup> Scanlon, *What We Owe To Each Other*, p. 76.

<sup>47</sup> I take the phrase "normative assurance" from Joseph Raz, "Is There a Reason to Keep a Promise?" in *Philosophical Foundations of Contract Law*, eds. Gregory Klass, George Letsas, and Prince Saprai (Oxford: Oxford University Press, 2014). Raz claims that the point of promises is to provide promisees with normative assurance (p. 75), but does not develop this idea in the general way in which I do here.

<sup>48</sup> It should be noted that normative assurance need not be mutual, since A can believe B recognises certain reasons without B believing that A also recognises those reasons. However, insofar as normative assurance facilitates valuable forms of relationship and interaction both parties will need to

To see why normative assurance is important, consider again the case of friendship. If Alison confides in Bert then Bert has a duty to keep her confidences. This means that even if Bert loves to gossip, or if, because Alison is a celebrity, he could sell Alison's story to a newspaper, he must refrain from doing so. Now obviously enough, being able to confide in one's friends is an important aspect of friendship. Discussing various delicate matters can be cathartic, or open up a space in which to tackle and resolve difficult issues, as well as deepening our understanding of one another. Crucially, however, our ability to confide in someone generally depends upon our believing that we can trust him or her.<sup>49</sup> Thus, the fact that Alison is aware that Bert has a duty to keep her confidences, and also believes that Bert recognises this duty, is an essential part of the explanation for why she feels she can confide in him. Mutual recognition between Alison and Bert of Bert's duty provides Alison with normative assurance. And without this assurance, Alison would be reluctant to communicate openly with Bert, thus forestalling Alison and Bert's ability to realise this valuable aspect of friendship. As this example shows, normative assurance need not be purely negative, that is, assurance that others will *refrain* from acting in certain ways. Normative assurance also has an important positive dimension insofar as it opens up a space within which two (or more) agents are able to engage in valuable activities, such as confiding in one another.

We can develop the idea of normative assurance further by recognising that friends are in a distinct position to hold each other to certain expectations and requirements, and, furthermore, can reasonably blame the other if they fail to meet these expectations and requirements. For instance, we can easily imagine Alison saying, "I know I can count on Bert," or Bert thinking "I ought not to tell anyone about Alison's secret," and these statements make perfect sense of Alison's blaming Bert if he fails to keep her confidences. As R. Jay Wallace has put it, friends stand in a nexus of relational normativity, such that one's friend has "a kind of *claim* on you to attend to their interests and crises, and a special vulnerability to being injured or wronged if you should fail to take these considerations into proper account in deliberating about what to do."<sup>50</sup> Wallace elaborates:

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have such beliefs. Importantly, normative assurance can facilitate valuable forms of interaction where two agents have, and recognise one another as having, quite different reasons, e.g., a doctor and a patient; a manager and an employee; a parent and child.

<sup>49</sup> Scanlon, *Moral Dimensions*, p. 133.

<sup>50</sup> Wallace, "The Deontic Structure of Morality," p. 156, emphasis added.

The implication of your reason in a structure of this kind helps to give it the character of an obligation....It means that, quite independently from considerations of systematic importance, there is a definite sense in which you lack discretion to ignore or discount the reasons at the core of friendship.<sup>51</sup>

Wallace claims, as do I, that the basis for this relational nexus of reasons is the value of the relationship in question,<sup>52</sup> although he says little to explain how the value of such relationships connects to their particular normative structures. Plausibly, one important element in the explanation is that our understanding of ourselves and of others as implicated in these relational normative structures provides us with normative assurance. That Alison not only expects Bert to keep her confidences, but also understands herself as having standing to blame Bert if he fails to do so, partially constitutes a normative structure that facilitates and supports the valuable forms of interaction that friends usually engage in, by grounding expectations and requirements to which friends can hold one another accountable.

As is true of the intrinsic value of mutual recognition, I want to suggest that normative assurance is just as valuable, if not more valuable, in the context of our general moral and social relations. If I can be reasonably assured that most of the members of my community will refrain from acting in certain undesirable ways (e.g. physically assaulting me, stealing my property, manipulating me toward their ends) because they recognise certain normative standards as governing appropriate conduct, then I am able to engage in the various activities that make up my life without fear or anxiety. Furthermore, if I have normative assurance with regard to those with whom I share a community then this provides an important basis for positive interactions with others, who may be perfect strangers, whether this is in the economic marketplace, the political arena, at the local chess club, or at the football ground.

Of course, we do not believe that all others recognise exactly the same standards as we do, or that every single individual recognises even some basic claims (e.g. “Do not murder innocent people”). We are all too familiar with cases in which people disregard what we might think of as the most basic moral standards.

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<sup>51</sup> Ibid., p. 157.

<sup>52</sup> Ibid.

But these cases, if anything, demonstrate just how important normative assurance is. For example, if we believe, correctly or incorrectly, that our city is likely to be the target of a terrorist attack, then this will significantly impact upon our ability to go about our business in a way we should like, and is likely to affect the nature of our relations with others in important ways. It may, for instance, forestall the possibility of friendly or mutually beneficial interactions with others, since the threat of the attack may give rise to widespread feelings of distrust and suspicion. Indeed, without some significant degree of normative assurance between the members of a community nothing like the form of social life with which we are familiar would be possible.<sup>53</sup> Thus, normative assurance is something we should value highly, insofar as it supports and facilitates the various valuable modes of action and interaction that are central to living a valuable life.

#### *4.3.3 The Relational Requirement*

Let us take stock. So far I have argued that agents have relational interests – interests in being able to understand whether others give their interests the appropriate role in their practical deliberations – and that, in light of these interests, agents engage in an intrinsically valuable relationship when they mutually recognise one another as giving each other's interests the appropriate role in their deliberations. Moreover, mutual recognition between agents also provides those agents with normative assurance, assurance that others recognise the authority of certain reasons, and thus will act in accordance with them.

How do these claims help to justify the claim that rights constitute protected reasons? The central idea is this: in order to relate to others in a morally decent way we need not only to give their interests the appropriate weight within our practical deliberations, but also to act in ways that allow them to recognise that we give their interests the appropriate role within our deliberations, and thus recognise that we

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<sup>53</sup> Cf. Raz, *The Morality of Freedom*, p. 181. Consider, for example, the on-going social tensions in the United States concerning the relationship between the police and people of colour that have recently been brought to international attention through a number of high profile cases in which police shot and killed African Americans without good grounds. I take it that one reason why these cases have triggered a number of popular mass movements is because they imply that the police do not recognise the appropriate normative standards in their interactions with people of colour. Not only does this suggest a failure of appropriate recognition, but also undermines the normative assurance that many agents should have, with serious ramifications for their ability to live a flourishing life.

relate to them in a morally decent way, as bearers of interests worthy of protection. Relating to one another in this way serves our relational interests, provides a basis for valuable relations of mutual recognition, and further provides a basis for normative assurance, thereby enabling agents to act and interact in a wide variety of valuable ways. However, in order to recognise that we give one another's interests the appropriate role within our practical deliberations, we must rely on commonly recognised fixed-points that establish a shared normative framework. Without such fixed-points agents would lack a measure against which to interpret and understand one another's behaviour and form expectations that serve as the basis for normative assurance. Because a sole reliance on first-order moral considerations (including the interests of agents) will provide no such fixed-points, we must instead rely on (more or less) general normative standards that are commonly understood to govern behaviour in different spheres. Moral rights, understood as protected reasons, are one such fixed-point. Thus, on the view I am suggesting, protected reasons can be seen as playing an important role in establishing the social conditions necessary for the realisation of valuable relations of mutual recognition between moral agents.

The idea, then, is that we cannot rely on the weight of one another's interests (as well as other first-order moral considerations) as a sole guide to how we ought to relate to one another, because by doing so we undermine the possibility of mutual recognition between agents. In particular, I want to suggest that an interest-based theory of rights should understand the interests of agents as mediated through a *relational requirement*.

*Relational Requirement*: moral requirements justified by the interests of agents must allow for mutual recognition between agents.

There are two main reasons for thinking that the relational requirement would yield protected reasons.<sup>54</sup> First, since we do not, at least in general, have direct

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<sup>54</sup> It is plausible to think that there are a number of further reasons that I do not discuss in the text which further support a reliance on shared fixed-points. For example, Stephen Darwall claims that "Moral obligations entail moral accountability conceptually, and agents can be held accountable only if there exist general rules and principles that are accessible to all who are morally bound as a matter of common public knowledge" ("Morality and Principle," in *Thinking about Reasons: Themes from the Philosophy of Jonathan Dancy*, eds. David Bakhurst, Brad Hooker, and Margaret Olivia Little (Oxford: Oxford University Press, 2013), p. 187). Alternatively, Erin Taylor has argued that, insofar as moral norms are mediated by social conventions, they must meet certain conditions, including a publicity condition, so as to coordinate the activities of the conventions participants. See Erin Taylor,

access to one another's mental contents, interpreting and understanding the meaning of others' actions requires making judgements about those actions in light of publicly available facts about which we can have common beliefs. Moreover, since agents themselves will generally intend their actions to be understood as having a particular meaning, they will need to rely on aspects of the situation that are accessible to all parties in order to portray the intended meaning of their acts. Thus, agents must rely on some form of shared framework through which they can represent their intentions, and interpret the intentions of others. Raz makes a similar point in a discussion about the importance of "social forms," – that is, "the public perception of common social forms of action,"<sup>55</sup> – in the pursuit of one's goals.

[O]ften when the goal concerns interaction between people, its very possibility depends on the partners having correct expectations about the meaning of other people's behaviour. The significance of a thousand tiny clues of what is known as body language contribute, indeed are often essential, to the success of the developing relationship. All these are derived from the common culture, form the shared social forms, and though they receive the individual stamp of each person, their foundation in shared social forms is continuing and lasting.<sup>56</sup>

The thought is that, because the interests of agents are not generally the subject of common beliefs between agents, they cannot straightforwardly serve as a basis for interpreting the meaning of one another's actions, and so cannot serve as a basis for understanding how it is that we relate to one another.<sup>57</sup> Even if we assume that X has full knowledge of Y's interests, Y will be unlikely to know that X has this knowledge, such that Y would be unable to gauge the meaning of X's actions with reference to whether or not X responded appropriately to her interests. Moreover, even if Y did know that X had this knowledge, Y would also need to be aware of all

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"A New Conventionalist Theory of Promising," *Australasian Journal of Philosophy* 91, no. 4 (2013). Finally, there may be a number of relevant epistemic considerations.

<sup>55</sup> *The Morality of Freedom*, pp. 309-10.

<sup>56</sup> *Ibid.*, p. 312.

<sup>57</sup> Clearly, there are some interests that we are likely to have common beliefs about, e.g., interests in adequate nutrition. However, two points should be borne in mind. First, as I go on to say in the text, unless we have common beliefs about all of the relevant considerations then our common beliefs about some basic interests will (at least generally) be insufficient to serve as a basis for mutual recognition. Second, whilst there is plausibly a number of general interests that all agents have, I assume that an agent's particular interests at any given time are much more fine-grained, depending, for example, on her intentions, plans, relationships, tastes, and desires, such that they are much less likely to be the subject of common belief.

of the other first-order considerations relevant to X's practical deliberations in order to know whether her interests were given the appropriate weight relative to those other considerations. And even in the far-fetched scenario where X has this knowledge, and Y reasonably believes X to have this knowledge, unless X also knows that Y believes he has it (that is, unless X and Y have common beliefs about all of the relevant first-order considerations) then X will still need to rely on publicly available considerations in order to make clear to Y that he is relating to her in the appropriate manner.

By contrast, if we rely on a framework of rights about which we can much more readily have common beliefs, we are in a much better position to interpret the meaning of one another's actions, and so to stand in relations of mutual recognition. The idea would be that in order to justify rights we would consider a range of interests (as well, perhaps, as other relevant moral considerations) across a range of possible circumstances, in order to make a judgement about the relative weights of these considerations in the usual cases. We would then mediate these interests through the relational requirement so that the judgements we have made could be relied upon to facilitate relations of mutual recognition. In those cases in which individuals tend to have morally significant interests that outweigh other possible considerations, we ascribe them a general right, which can be the subject of common knowledge.<sup>58</sup> This would mean "protecting" the first-order reason to act or not to act in certain ways in light of the interests usually at stake by yoking a number of the relevant first-order moral considerations, and excluding a range of other considerations from the reasons for action that are admissible within an agent's practical deliberations. For example, whilst our weighty interests in bodily integrity may occasionally be outweighed, their general significance justifies a general right to control over one's own body. This is partly because a common belief in such a right will provide agents with a means of recognising one another as relating in a morally decent fashion and thus of standing in a relation of mutual recognition. If others violate this right we assume that they do not relate to us in a morally decent way, and they in turn know that we have this belief. On the other hand, if others respect our right we assume they relate to us in a morally decent fashion, by giving our interests the appropriate role within their deliberations.

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<sup>58</sup> Cf. Jeremy Waldron, "A Right to Do Wrong" *Ethics* 92, no. 1 (1981), pp. 31-2.

The second reason for relying on a shared normative framework established by a set of commonly recognised rights is that such a framework can provide agents with a valuable kind of normative assurance that a reliance on first-order moral considerations alone could not. Even if we believed that all other moral agents did their utmost to understand and weigh all of the pertinent first-order considerations that applied in any given situation, the fact that we would be very unlikely to have a common belief about all of the relevant considerations would (even assuming a perfect ability to weight the considerations in question) prevent us from forming reliable expectations about the ways in which others will act.<sup>59</sup>

Moreover, our mutual understanding that rights function to *exclude* a number of considerations from the pool of reasons for action can itself establish normative assurance and facilitate valuable forms of interaction between agents. To help see this, consider the example of promising. A valid promise gives rise to a duty on the part of the promisor. Thus, a promise gives rise to a protected reason, such that a conscientious promisor will, when it comes to the time of fulfilling the promise, recognise that at least some conflicting reasons (such as laziness or mild inconvenience) must be excluded from their practical deliberations. As Seana Shiffrin has argued, if agents lacked the ability to generate obligations by promising, but could only state present intentions, this would often leave others in a vulnerable position, a fact that would threaten to undermine the health of their relationship.<sup>60</sup>

Shiffrin gives the example of A and B, who are considering whether or not to move to a new city.<sup>61</sup> A is keen to move, but B, whilst open to the prospect, is less sure. Whilst moving may be good for B, B also has some alternative options elsewhere that she may be better off pursuing, options that A does not have. A is aware that B has these options and so does not want to invest in the move unless B is committed to moving. However, whilst B can state her intention to move, this intention is (*ex hypothesi*) not binding, and so B is free to change her mind. Given this, there is an imbalance of power between A and B with regard to the move, and

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<sup>59</sup> For related discussion of the importance of assurance in assessing moral principles see Scanlon, *What We Owe To Each Other*, pp. 202-03. In the context of the law, John Gardner argues that criminal offences constitute protected reasons that thereby exclude all reasons against conformance with the law (unless the law also offers justificatory defences). See *Offences and Defences*, pp. 147-48. Assuming this to be correct, I take it that a plausible motivation for the creation of criminal offences is precisely the fact that a common understanding of legally enforceable protected reasons provides a basis for normative assurance between co-citizens.

<sup>60</sup> Seana Valentine Shiffrin, "Promising, Intimate Relationships, and Conventionalism."

<sup>61</sup> *Ibid.*, pp. 502-10.



this may damage their relationship: A may very well feel vulnerable and powerless, or she may decide not to invest because she cannot be sure B will go through with it, something that may set back both A's and B's interests.<sup>62</sup> But, if B has the power to promise A she is able undercut this vulnerability, by committing to the move *and* committing herself to exclude some of the otherwise relevant considerations (e.g. B's prospects in other cities), that may have led her to reconsider.<sup>63</sup> Thus, the promise serves to neutralise the imbalance of power between A and B, something likely to help sustain a healthy relationship between them.

Plausibly then, whatever the ultimate justification for this power – whether because it allows agents to provide others with reliable expectations,<sup>64</sup> because it supports valuable relationships,<sup>65</sup> or because it serves the promisee's authority interest<sup>66</sup> – it depends for its efficacy on our common belief that promises have the effect of excluding certain reasons for action, something that provides promisees with normative assurance.<sup>67</sup> As Scanlon notes, “Anyone who understands the point of promising – what it is supposed to ensure and what it is to protect us against – will see that certain reasons for going back on a promise could not be allowed without rendering promises pointless.”<sup>68</sup>

#### 4.3.4 *Rights as Protected Reasons*

Let me summarise the argument I have made so far before drawing out several implications of the view that I am defending, and considering some possible objections.

Agents who have the capacity to recognise and assess the reasons for which others act possess relational interests, interests in being able to recognise whether others give their interests an appropriate role within their practical reasoning. In light of these interests, agents engage in a valuable form of interaction when they

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<sup>62</sup> Ibid., p. 504.

<sup>63</sup> Shiffrin does not discuss the matter in terms of excluding some of the relevant considerations, but I think this is both compatible with and implied by what she does say.

<sup>64</sup> Scanlon, *What We Owe To Each Other*, Ch. 7.

<sup>65</sup> Joseph Raz, “Promises and Obligations,” in *Law, Morality, and Society: Essays in Honour of H. L. A. Hart*, eds. P. M. S. Hacker and J. Raz (Oxford: Clarendon Press, 1977); Shiffrin, “Promises, Intimate Relationships, and Conventionalism.”

<sup>66</sup> Owens, *Shaping*, Ch. 6.

<sup>67</sup> Raz, “Is There a Reason to Keep a Promise?” p. 75.

<sup>68</sup> Scanlon, *What We Owe To Each Other*, p. 200.

mutually recognise one another as giving the other's interests the appropriate practical significance. However, in order to assess and interpret the meaning of other's actions, and to gain the full benefits of normative assurance, we must rely on socially recognised fixed-points to structure our moral relations.<sup>69</sup> Thus, we must mediate the interests of agents through a "relational requirement," in order to establish rights that simultaneously protect the morally significant interests of agents and provide a basis for mutual recognition between them. This requires protecting some first-order reasons for action, thereby excluding a range of possibly conflicting considerations. Thus, partly in virtue of constituting protected reasons, moral (and legal) rights can be thought of as establishing a shared normative framework that allows agents to stand in concrete relations of mutual recognition.<sup>70</sup>

Note that this is importantly different from Raz's instrumental justification for protected reasons considered above. On that account, the preemptive structure of rights is justified by the fact that by deliberating in this way an agent is more likely to comply with the first-order reasons they have. This opens the door to considering an agent's first-order interests on any occasion where doing so would better promote compliance with those first-order reasons. On the relational theory, by contrast,

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<sup>69</sup> An interesting implication of this view is that social practices and conventions play an important role in allowing for decent and valuable moral relations between agents. I discuss some of these issues in Chapter 6. For some related discussion see Raz, *The Morality of Freedom*, pp. 307-13; Raz "Individual Rights and Well-Being," p. 42; Andrei Marmor, *Social Conventions: From Language to Law* (Princeton: Princeton University Press, 2009), Ch. 6; Taylor, "A New Conventionalist Theory of Promising." This further suggests that the social conditions required to instantiate rights and make possible morally decent forms of interaction are an important common good. Cf. John Finnis: "The fact is that human rights can only be secured in certain sorts of human milieu – a context or framework of mutual respect and trust and common understanding." *Natural Law and Natural Rights*, 2<sup>nd</sup> Ed. (Oxford: Oxford University Press, 2011), p. 216.

<sup>70</sup> Another implication of this view is that those individuals unable to understand and assess the reasons for which others act (e.g. young children and non-human animals) do not have rights that amount to protected reasons. This may strike some as an unsatisfactory result, but I think it is less problematic than it might at first appear. For one, I am not claiming that the only way we can wrong others is by violating rights that amount to protected reasons. As I noted at the beginning of the chapter, I am assuming some underlying theory of morally right and wrong action, and I assume that the correct theory does not regard the capacity to recognise and assess reasons as a pre-condition for being morally wronged. All that my theory implies is that these wrongs are to be characterised in terms of the *weight* of various considerations. Thus, there is an important sense in which these agents' interests are protected, because their weight ensures that they will be wronged if others act (or do not act) in certain ways. The upshot is that whilst we can wrong rational agents by violating their rights even when we have very good reason to believe that the interests that justify the right will not be set back, we would not (necessarily) wrong non-rational agents by acting under the same circumstances. Furthermore, for all that has been said there may be further reasons (moral, epistemic, and pragmatic) for regarding non-rational agents as having rights that amount to protected reasons in the stronger sense. Finally, in the case of young children it seems plausible to think that they develop the capacity for some form of recognition at a very young age, and that it is further important to demonstrate to children that their interests play an important role in our motivations in order to ensure that they understand that we love and care for them.

relating to others in a morally decent way requires us not only to give others interests an appropriate role in our practical reasoning, but to act in ways that will enable them to recognise that this is how we relate to them, and for us, in turn, to understand that they do recognise this. This means that in order to relate to one another in a morally decent way we must rely on socially recognised fixed-points, including rights, as imposing constraints upon the considerations we can take into account in our practical deliberations. To be clear, I do not mean to imply that we are never permitted to *reflect* upon the range of first-order moral considerations that are at stake in any particular occasion. What is crucial is that, where others have rights, we cannot rely on the first-order considerations as a guide to our *practical reasoning*. That is to say, our reasoning about *how to act* should be constrained by protected reasons so that others are better able to understand that we relate to them in a morally decent way.

An important implication of the relational theory is that the injury hypothesis – the claim that setting back some interest of an agent is a necessary condition for wronging them – is false. We wrong an agent when we violate some right of theirs, and their possession of a right is not directly tied to whether they have sufficient interests on any particular occasion.<sup>71</sup> Rather, a preemptive right is justified when an agent's interests, mediated through the relational requirement, justify a protected reason. Thus, according to the relational theory, the relationship between interests and rights is indirect. Whilst we establish which rights agents have with reference to a conception of their interests, the role of rights is not to directly promote and protect an agent's morally significant interests, but to provide a basis for mutual recognition between agents.

Thus, the relational theory I have outlined provides a solution to the problem of bare wronging without postulating normative interests. We can still wrong an agent by acting in a way that does not set back their interests because, in doing so, they will often be unable to recognise that we gave their interests the appropriate role within our deliberations. Consider, for example, the case in which Y takes a secret nap in X's house. Imagine that X later finds out and asks Y for an explanation. If Y responds by saying, "You have no standing to blame me since, as I correctly judged

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<sup>71</sup> For an interesting discussion of whether we can wrong agents even where they do not have a right, see Nicolas Cornell, "Wrongs, Rights, and Third Parties," *Philosophy and Public Affairs* 32, no.2 (2015).

beforehand, I did not set back any of your interests by sneaking in and taking the nap” then X may well respond by saying, “That is besides the point. I have a right over my house and that right precludes you from considering my underlying interests, and also requires you to exclude certain considerations, such as your tiredness, from your deliberations. You are required to recognise this protected reason because we each have interests in standing a relation of mutual recognition. By failing to recognise my right, and treat it accordingly within your deliberations, you wronged me because I was unable to recognise whether you gave my interests the appropriate role within your deliberations. If you had asked me beforehand then I would have been able to see that you regard me as an agent who has morally significant interests.”

More generally, we now have (partial) solution to the bridging problem.<sup>72</sup> As I noted at the end of Chapter 1, the bridging problem asks how it is we move from an account of the morally significant interests of individuals to an account of moral rights and wrongs in a way that is consistent with our considered intuitions. One of the central intuitions that I assume we need to account for when advocating an interest-based view is the idea that moral rights (and our ability to waive those rights by giving consent) are not directly tied to an agent’s interests on a particular occasion. By breaking into my house, having sex with me without consent, or stealing my property you will wrong me whether or not you happen to set back my interests. According to the relational theory of rights, the explanation for this is that the interests of individuals must be mediated through the relational requirement: the need for moral agents to interact with one another whilst engaging in relations of mutual recognition. The idea, then, is that we can bridge the gap between interests and rights by mediating the interests of agents through the relational requirement. By doing so, the relational theory retains the idea that X’s rights against Y ground *directed* duties. Y owes it to X to act (or not act) in certain ways because a combination of X’s first-order interests and second-order relational interests suffice to hold Y under a duty to X.

It is worth briefly contrasting this account of rights with a suggestion made by Owens about the role of obligations within relationships. Focusing on cases such

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<sup>72</sup> The solution is partial because we still require an underlying theory about when an agent’s interests will be sufficient to hold others under a duty. As I noted toward the beginning of this chapter, I am simply assuming that such a theory is running in parallel, and think the account I am offering is compatible with a number of the most popular contemporary theories.

as friendship Owens argues that, “what underlies the obligation-entailing character of all such involvements is the fact that they serve our deontic interests, our interests in being bound to one another.”<sup>73</sup> Thus, for Owens, special relationships such as friendship are partly good for us, and make our lives go better, simply in virtue of the fact that they involve obligations. Given Owens’s claims about other normative interests (e.g. the permissive interest and authority interest), we might extend this idea to moral rights in general: moral rights are partly in our interests because it is in our interests to be bound to one another. On the view I have just described this gets things wrong. My view might be characterised as claiming that we have an interest in engaging in a variety of relationships with others, from minimal kinds of decent moral interaction to friendships and romantic relationships, and that a valuable aspect of many such relationships consists in a mutual recognition that we relate to one another in the appropriate manner (where what is appropriate will partly depend upon the relationship in question). Since rights and duties facilitate mutual recognition, many such relationships involve rights and duties as part of their normative structure.

The difference may seem subtle, but I believe it is important. In particular, the order of explanation is reversed. Whilst Owens claims that special relationships are partly valuable because they involve obligations, I claim that obligations are partly valuable because they allow for special relationships that involve mutual recognition. As Gerald Lang remarks, “The specific normative vulnerabilities and powers I accumulate as I get into these different involvements may be an essential by-product of those involvements, but they do not explain why the involvements matter to me.”<sup>74</sup> Moreover, even if Owens were to claim that this accepts his main contention that our lives go better when we engage in relationships that entail obligations, and so, have interests in the existence of those obligation-entailing relationships, the account I have offered gives us a further explanation of how it is that our normative interests connect to our non-normative interests.<sup>75</sup> We are thus able to explain *why* we should have deontic interests, and, furthermore, provide an explanation for why only some obligation-entailing relationships should be good for us and others not (e.g. friendship as compared to slavery). This all suggests that in

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<sup>73</sup> Ibid., p. 96.

<sup>74</sup> Gerald Lang, “Book Review: Shaping the Normative Landscape,” p. 177.

<sup>75</sup> Indeed, if I am on the right lines then it is quite unclear how important an explanatory role deontic interests really play. For related discussion see Section 3.2.2 and 5.4.

order to explain rights and duties understood as protected reasons we need not conceive of ourselves as having irreducible normative interests.

The relational view also captures what I think is a central intuition that motivates proponents of status-based views of rights, namely that moral rights cannot be considered as merely instrumental to the promotion and protection of interests. Consider, for example, Frances Kamm's claim that fundamental human rights "are not concerned with protecting a person's interests, but with expressing his nature as a being of a certain sort, *one whose interests are worth protecting*. They express the worth of the person rather than the worth of the interests of that person."<sup>76</sup> According to the relational theory this is half-right. Moral rights do express the idea that agents have a certain status, that they are bearers of interests worth protecting, and that these rights cannot be reduced to the ways in which they happen to protect or promote those interests on any given occasion. Rather, relating to others in a morally decent way requires recognising these rights in our practical deliberations, whether or not our actions would, as it happens, set back the morally significant interests of others, so that they can understand us as relating to them in a morally decent way. However, the relational view retains the intuitive connection between an agent's rights and their first-order interests. It simply claims that a full justification of rights grounded in these interests requires us to mediate those interests through the relational requirement.

Moreover, this account of rights is also able to explain why rights are widely regarded as inviolable, as establishing a sphere over which an individual is authoritative, despite the common association of this idea with status-based views.<sup>77</sup> For one, the preemptive character of rights explains why rights are not just one further consideration to be weighed against others. Their exclusionary structure entails that many considerations are irrelevant, and this reflects the idea that an individual agent has a form of authority over the sphere protected by her right. Furthermore, the relational view claims that in order to relate to one another in a morally decent way we must reason in accordance with rights of this nature. Thus, rights ground demands that we do not have leeway to disregard or ignore.

One possible objection to the relational view is that it wrongly implies that moral agents stand in some kind "relationship" with all other (rational) moral

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<sup>76</sup> *Intricate Ethics*, p. 271. Emphasis added.

<sup>77</sup> See, e.g., Nagel, "Personal Rights and Public Space."

agents.<sup>78</sup> But this misunderstands the view. All the relational view claims is that when moral agents come into contact with one another it is valuable for them to engage in a relation of mutual recognition. Thus, I am not suggesting that the grounds for moral rights partly involve the fact that we already stand in some kind of personal relationship, but rather that the value of a certain form of interaction can justify preemptive rights so as to structure moral relations in such a way as to facilitate this valuable form of interaction.

Alternatively, it might be objected that the relational view implies that the content of moral rights is determined by existing social practices, because I have claimed we must rely on socially recognised fixed-points in order to stand in a relation of mutual recognition. But again this is false. Whilst it is true on the relational theory that the social structures within which agents live will make a significant difference to their ability to relate to one another in morally decent ways, and achieve the relation of mutual recognition, it does not imply that the social structures that are *justified* are just those that already happen to exist. Rather, the set of moral rights that is justified are those that would serve to protect the morally significant interests of agents whilst allowing for valuable relations of mutual recognition and thereby also supporting valuable forms of normative assurance.

## 4.4 Conclusion

The central claim that I have advanced in this chapter is that we relate to one another in an intrinsically valuable way when we recognise one another as possessing (justified) rights. This is because recognition of such rights reflects the fact that we recognise each other bearers of interests worthy of protection, thereby allowing for the relation of mutual recognition. This fact can account for the preemptive structure of rights and duties, thus providing an explanation for harmless wrongings, and a more general response to the bridging problem. On the relational view I have outlined, whilst rights are grounded in the interests of agents, the connection

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<sup>78</sup> For a discussion of a similar problem as applied to Scanlon's moral theory, see R. Jay Wallace, "Dispassionate Opprobrium: On Blame and the Reactive Sentiments," in *Reasons and Recognition: Essays on the Philosophy of T. M. Scanlon*, eds. R. Jay Wallace, Rahul Kumar, and Samuel Freeman (Oxford: Oxford University Press, 2011), pp. 358-60.

between interests and rights is indirect. In order to establish which rights agents have, interests must be mediated through the relational requirement.

If the relational theory of rights is on the right track, what implications does this have for a theory of consent's normative significance? Plausibly, if our rights are partly justified by our second-order relational interests in being able to recognise that we relate to one another in a morally decent way, our power of consent is also partly justified by these relational interests. That is to say, consent may be normatively significant not only because it promotes or protects our first-order interests, but also because it allows agents to interact with one another whilst recognising that they give one another's interests the appropriate role within their deliberations. It is this possibility that I articulate and defend in the following chapter.



## 5

# A Relational Theory of Consent

In this chapter I present a positive theory of consent's normative significance. In Chapter 2 I suggested that we could rely on a central insight of the control theory, according to which the power of consent is connected to our need for a sufficient measure of control over our own lives, to help construct a sound theory of consent. With the account of rights outlined in the previous chapter now in place we are in a position to do this. Whilst there are many reasons why agents should want control over their own lives, many interests that will be served by their possession of this control, the power of consent is not normatively significant because it directly serves these interests. Rather, our control interests must be mediated through the relational requirement. I argue that this process yields preemptive control rights against interference in certain spheres, and also grounds an ability to waive (at least many of) these rights by giving consent. According to the *relational theory of consent*, consent is normatively significant because it allows agents to interact in useful and valuable ways whilst standing in a relation of mutual recognition. More specifically, the power of consent allows agents to interact whilst recognising one another as having legitimate control over the central aspects of their own lives.

## 5.1 Preliminaries

Before proceeding, it may be helpful to briefly recap on what exactly I take consent to consist in, and what I take to be the central desiderata for a theory of consent's normative significance.

A gives consent to B when A acts with the intention of waiving a right he has against B.<sup>1</sup> When A's consent is valid B is no longer under the directed duty to act or refrain from acting in a certain way that is correlative with A's right. That is to say, A gives B consent when A performs an act specifically with the intention of waiving B's duty. In many cases, A's consent will mean that B is now morally permitted to act in some way that was previously impermissible. By this I mean that A's consent will often mean that some action of B's is morally permissible *all things considered*. For example, if A gives B consent to borrow his car this will generally make it permissible for B to borrow A's car. However, A's consent does not ensure this all things considered conclusion. B may owe further duties to A, or to third parties, or have other decisive reasons, that mean B still ought not – all things considered – to borrow A's car. So, whilst it is sometimes said that A's valid consent provides B with a moral permission, this moral permission must be understood in the weaker sense that A's valid consent ensures that B is no longer under a (specific) directed duty she previously owed to A.

As I noted in Chapter 1, there are two central questions that a theory of consent's normative significance should answer. First, there is the question of consent's normative force. That is, why (when the relevant conditions are met) does an agent succeed in waiving a right of theirs when they perform an action with the intention of doing so? Why, for example, should A have the power to waive her property right over her car just by saying to B, "Sure, go ahead," when B asks if she can borrow the car? Second, there is the question of consent's relational significance. Why does the power of consent extend over directed, but not non-directed reasons, and why should we rely on the power of consent to manage the application of these directed reasons?

With these two central questions in mind, we can list four desiderata for a plausible theory of consent's normative significance. First, we need to be able to account for the *authoritative nature* of consent. Consent is authoritative in the sense that where an agent has the power to give or revoke consent then their giving or revoking consent will be sufficient to waive or reinstate their right and its correlative

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<sup>1</sup> For the moment I leave open what constitutes an act of consent. I argue in Section 5.3.2 that my account of consent's normative significance gives us reason to prefer a particular answer to this question.

duty.<sup>2</sup> This means that, although the theory I advance is an interest-based theory, an agent's consent is (if voluntary and suitably informed)<sup>3</sup> sufficient to waive her right whether or not the consented to action will serve or track her underlying interests.

A second desideratum is related. We are working on the assumption that consent is a normative power, such that an agent is able to affect the reasons for action that other agents have (in this case, via the rights and duties that obtain) just by performing an act with the intention of doing so. Since I aim to defend an interest-based theory of consent, we need a viable response to what Owens calls *the problem of normative power*, viz., how it is that an agent is able to affect the reasons for action that others have *by declaration*, without acting in any way so as to first affect her underlying interests. To better see the nature of this problem consider an example. If A has interests sufficient to ground a property right in her car, how is she able to affect the application of this right by mere declaration, since her declaration alone will be insufficient to affect what is in her interests. We have already seen that one plausible answer to this problem, which makes reference to the affect A's choices will have on his interests, is inconsistent with consent's authoritative nature, since A may consent to B's taking his car without also choosing that she does so.

Third, the theory should, if possible, track our pre-theoretical understanding of why consent is valuable. Philosophers and non-philosophers alike have often assumed that consent's normative significance is explained by the fact that it is necessary to possess this power in order to live autonomously, or to ensure that an individual has the ability to choose what happens in important spheres of his or her own life. However, in Chapter 2 we saw that some common versions of this theory cannot satisfy the first two desiderata. In Chapter 3, we saw that David Owens's theory of consent can satisfy the first two desiderata, but only at the cost of denying the connection between the power of consent and our interests in living lives that are, by and large, under our own control. I think that a preferable theory would meet the first two desiderata, whilst retaining the intuitive connection between the power of consent and the value for agents of having control over their own lives.

Finally, we should assess the plausibility of our theory of consent partly in terms of its overall explanatory power. Two points are worth drawing explicit

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<sup>2</sup> For ease of exposition I will mostly talk only of giving consent, and not also of revoking consent, since the same considerations apply in both cases.

<sup>3</sup> As before, I will assume that an agent's consent meets these conditions unless otherwise stated.

attention to here. First, it will count in favour of the theory if it is clear how the explanation of consent's normative significance offered relates to other familiar concepts in our moral thought and moral practices. This will allow us to better integrate the theory into an overall moral framework. Second, it will count in favour of the theory if the explanation offered provides a foundation for addressing further theoretical and practical questions about consent, e.g., what constitutes an act of consent, when we should rely upon consent to manage our interactions, what degree of voluntariness or information is required to ensure consent's validity, and so on. In Chapter 3 I argued that we have reason to reject Owens's theory partly in virtue of the fact that the explanatory power of the view is limited in both respects. If the relational theory to be articulated does better on these two fronts, and meets the other desiderata, then I believe this will give us decisive reasons to prefer the relational theory.

## 5.2 The Value of Control

We have many reasons for wanting to have control over our mind, body, and environment. By this I mean that we have many reasons for wanting to have control over these things in relation to other agents.<sup>4</sup> Whilst living in a world with others means that we are very likely not to have full control, we highly value the boundaries that distinguish our sphere of legitimate control from the spheres of others. In what follows, I separate out some of the reasons as to why our possession of control in relation to others is valuable; why it is that we have significant interests in maintaining control over certain aspects of our own lives. I then suggest that one way in which personal control is ensured is through the distribution of rights.

### 5.2.1 Control Interests

I suggested in Chapter 2 that a plausible account of personal autonomy's value would take the exercise of agency to be necessary for the living of an autonomous life. An agent who completely lacks the ability to exercise her agential capacities and

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<sup>4</sup> Presumably, we also have reason to want control over these things in relation to non-agents, e.g., rocks, or weather patterns, but that is of no consequence here.

bring about different states of affairs – to cause X or Y instead of Z, for example – cannot be thought of as autonomous. If this is correct it follows that agents with the capacity for autonomy will have significant non-instrumental control interests, since their ability to live an autonomous life will depend on their ability to exercise their agential powers in the pursuit of their own goals, projects, and relationships.<sup>5</sup> For example, if I do not have control over whether or not I go on holiday, or read the entire works of Plato, or practice the piano, or form a friendship with Ted, then I do not live autonomously in these aspects of my life.<sup>6</sup> To live autonomously in these respects, these choices must be open to me, such that their occurrence or non-occurrence is (some relevant sense to be defined) traceable to the exercise of my agency.

These autonomy-based control interests play an important role in the justification of many of the most familiar moral rights. However, there is good reason to doubt that the only control interests agents possess are also autonomy interests; that our possession of control is only valuable to the extent that it promotes or protects our ability to live an autonomous life. For example, Andrei Marmor argues that we have a right to privacy grounded in an interest in having a reasonable amount of control over how we present ourselves to others, an interest that he maintains is not reducible to any interest in autonomy.<sup>7</sup> For Marmor, this interest reflects the fact that, without some significant degree of control over how we present ourselves to others and the information they have about us, we would (i) find it difficult to form and maintain a variety of personal relationships, which depend for their very existence on the different kinds of information we share in different contexts and with different people, (ii) be subject to an undesirable degree of honesty and intimacy that will have undesirable personal and social costs, and (iii) be subject to an objectionable degree of personal scrutiny and criticism.<sup>8</sup> As Marmor explains,

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<sup>5</sup> Raz might suggest that this claim is too strong since, on his view, the degree to which personal autonomy is valuable depends not only on facts about individual agents and their capacities, but also on further facts about the social conditions within which agents live. I think that, whilst we require a variety of social structures in order to facilitate the living of a valuable autonomous life, we have reason to prefer autonomy-enhancing societies to societies that do not support the living of autonomous lives. However, I cannot argue for this view here.

<sup>6</sup> Of course, this is not to say that these activities will be entirely devoid of value if they are not optional. For instance, I will learn a great deal reading Plato, whether or not I read Plato because I choose to.

<sup>7</sup> Andrei Marmor, "What is the Right to Privacy?" *Philosophy and Public Affairs* 43, no. 1 (2015), p. 25.

<sup>8</sup> *Ibid.*, pp. 7-11.

[H]aving a reasonable measure of control over ways in which we present ourselves to others is an important aspect of our well-being. It enables a whole range of choices about the constitution of one's social environment, without which life would be either too stifling or too alienated. People need to be able to determine, at least to some extent, the amount and the kind of personal distance they maintain with others.<sup>9</sup>

For Marmor, then, having a reasonable amount of control over the way in which we present ourselves to others is necessary in order to allow for a range of valuable relationships (e.g. friendships, romantic relationships, professional relationships, etc.).<sup>10</sup> It is crucial that we have control in certain contexts – over what is public and what is private, or what is inner and what is outer – so as to be able to develop and maintain these relationships, something that, as Marmor is surely right to point out, is central to our well-being.

It has also been persuasively argued, by Andrea Sangiovanni, that without a sufficient measure of control over how we present ourselves to others we cannot maintain an integrated sense of self.<sup>11</sup> Indeed, on Sangiovanni's account, many of the most egregious forms of social cruelty – torture, rape, genocide – aim at causing the disintegration of an agent's sense of self, something achieved in large part by undermining her control over how she presents herself to others, both communicatively and physically.

So we can see from even this brief survey that we have a family of significant non-instrumental control interests. We cannot live autonomous lives, develop and maintain a variety of personal relationships, or maintain a unified sense of self, without a sufficient measure of control over certain aspects of our minds, bodies, and

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<sup>9</sup> Ibid., pp. 10-1.

<sup>10</sup> I confess to being uncertain about whether Marmor's identified interest in privacy cannot be thought of as part of a more general interest in living autonomously. As the above passage indicates, central to Marmor's understanding of the interest in privacy is the extent to which some degree of privacy allows us to shape and develop the kinds of relationships we have with others. As I suggested in Chapter 2, however, shaping and developing our own relationships might reasonably be thought of as an important part of living an autonomous life. Having said this, privacy may still be thought to be in our interests even in contexts where we cannot choose the nature of our own relationships (e.g. arranged marriages). It is also unclear whether our interests in avoiding complete honesty, and public scrutiny, can be understood as part of a more general interest in autonomy. In any event, even if the interest in privacy can be understood as a component of a broader interest in autonomy, Marmor convincingly documents a discrete way in which we require control over our relationships and our social environment if we are to live flourishing lives.

<sup>11</sup> Andrea Sangiovanni, "Moral Equality, Respect, and Cruelty," in *Humanity Without Dignity: Moral Equality, Respect, and Human Rights* (Harvard University Press, forthcoming).

social environment.<sup>12</sup> But of course, our possession of control will often have instrumental importance as well. Generally, I will be much more likely to get what I want if I have control, since I am in the best position to know what it is that I want. Furthermore, as the well-being based accounts of consent we examined in Chapter 2 rightly pointed out, I will often be in the best position to know what is in my own interests, such that equipping me with control in relation to others will often be a good way of serving or protecting my interests.

This list of our control interests is unlikely to be exhaustive, and there will be room for significant debate about the contours of the interests I have outlined as well as those I have not. What I hope to have made plausible, however, is the claim that we have a variety of significant and weighty control interests, such that our possession of control in certain spheres of life is integral to our well-being.

### 5.2.2 *Negative Control*

A moment's reflection suggests that there are many ways in which agents can have control in relation to one another. For example, an agent A has a form of control in relation to another agent B with regard to some sphere (e.g. A's house), if A can exercise his agential powers in order to, for instance, keep B off his property. We are concerned, however, with the normative questions of what level of control agents should possess – independently of their physical and mental capacities or abilities – in relation to one another, and what this form of interpersonal control should consist in.

One important way in which we can provide A with control over his own life is by recognising that A has claim-rights against interference within certain spheres. This form of normative control can be called *negative control*. An agent has negative control just when they have a claim-right against another agent(s) interfering in a certain sphere. More precisely, A has negative control in relation to B over some sphere S if A has a claim-right against B such that B is under a duty not to interfere

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<sup>12</sup> It is worth comparing the much thinner account of control interests that runs throughout Owens's discussion. See *Shaping*, pp. 165-68.

in S. For example, A has negative control over his body in relation to B if A has a claim right against B interfering with his body.<sup>13</sup>

Importantly, A's possessing negative control in relation to B is a form of *normative* control. That is, A's claim-right establishes a normative relationship between A and B, such that B would be wronging A by violating his right.<sup>14</sup> (A's claim-right gives B a directed duty which she owes to A.) To be sure, A's right may not in fact secure him control over the spheres protected by his rights; B may be much stronger than A, and generally disinclined to recognise A's rights. As a result, she may easily be able to wrestle physical control over some piece of A's property, for example. Nonetheless, the normative relationship between A and B will remain intact, and in such cases B wrongs A by violating his rights. However, on the assumption that agents will generally be inclined to respect one another's rights, A's normative control will translate into A's having actual control over important aspects of his own life.

To help see the importance of negative control, let's focus on the example of autonomy. Negative control is incredibly important in allowing individuals to live autonomous lives. If an agent has negative control over the central aspects of his life then he, rather than other agents, can largely determine the shape of his life in these

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<sup>13</sup> To be clear, the idea of negative control is a purely *interpersonal* form of control. That is, what it means to say that an agent has negative control is that they have control *in relation to* another specific agent or agents. This follows from the nature of the claim-rights that demarcate spheres of negative control: the claim-rights of an individual serve to place particular agents under correlative (directed) duties. Thus, A's claim right does not serve as an absolute restriction on interference, or imply that A is at complete liberty to act as he wishes within sphere S. On the one hand, A may have no claim-right in relation to other agents (C, D), such that they have no duty not to interfere. Therefore, whilst A has negative control over S in relation to B, he does not have negative control in relation to C and D. On the other hand, even if A has negative control in relation to B, C, and D, etc., this does not imply that, morally speaking, he has complete control with regard to S. A may, for example, be morally compelled to act in certain ways within S, whether because he owes another agent a duty (e.g. he promised E she would X), or because there is some general moral demand not owed to any agent in particular (e.g. not to eat meat). For a useful discussion of this issue see Gopal Sreenivasan, "Duties and Their Direction," pp. 475-82. Of course, in many of the cases with which we are currently dealing, the claim-rights agents possess are held against all other agents, such that A has an expansive form of negative control over certain spheres, e.g., over A's body. This contributes to the idea that, with regard to a range of spheres, A has general control and exclusive authority. But this general form of control is constructed from the claims A has against, and the correlative duties owed to A by, many individual agents.

<sup>14</sup> It should be noted that even in the case of a general right such as the right over one's body, there will nonetheless be occasions on which it is justifiable for another agent to act in a way forbidden by the right. For one, most such rights will have a limited (even if very extensive) range of application. If A is unconscious and requires medical assistance I do not believe that he has a right against being touched by B, although he does have a right that B only touch him in ways necessary to save his life. In other cases, A may have a right that B is permitted to infringe because she acts for a non-excluded reason. For example, whilst B is usually required to respect A's property rights, B may break into A's mountain cabin for shelter if she is stuck in a life threatening blizzard.



spheres.<sup>15</sup> He is provided with an environment in which it is his action, as well as his inaction, that primarily determines the shape of his life in that domain. Whilst living an autonomous life requires an agent to actively shape his own life, it would be a mistake to think that only the positive exercise of agential capacities aimed at pursuing some goal or relationship merit protection from interference. In order to live an autonomous life agents require some space within which they, and they alone, can exercise their authorship. That is to say, in certain spheres agents require a form of counterfactual control. Whether or not A goes running, or paints his bedroom red, or eats pizza, or reads Plato, or practices the piano, depends entirely on A and his decisions about what to do, and B has no standing to interfere, whatever A decides. Seana Shiffrin captures this idea well when she says:

At their core, what autonomy rights protect is an agent's ability to exert control over her mind, her body, and some aspect of her environment. The central idea is one of an individual's having a domain that is understood to be hers and subject to her unique, exclusive authority. This permits her the opportunity to construct (or heavily contribute to) the environment she inhabits so that it bears her distinctive mark, is flush with her underlying will, and is the product of her authorship.<sup>16</sup>

Similar claims can be made about the importance of control in relation to our interest in developing and maintaining relationships with others, and our interest in maintaining an integrated sense of self. Moreover, our instrumental interests in the possession of control will also play into the justification of the claim-rights that will provide an individual with a sphere of negative control. For ease, let us call the claim-rights that are justified, at least in part, by the fact that they provide agents with negative control over some sphere *control rights*.<sup>17</sup>

As I argued in the previous chapter, however, rights are not directly justified by the fact that they serve or protect an agent's interests. In order to justify rights we have to mediate the interests of agents through the relational requirement, meaning we must consider a range of considerations that apply in a variety of possible

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<sup>15</sup> Assuming, that is, that his rights are generally recognised.

<sup>16</sup> Shiffrin, "Harm and its Moral Significance," p. 382.

<sup>17</sup> The fact that rights provide agents with a valuable form of control and discretion plays an important role in T. M. Scanlon's account of rights. See his, "Rights, Goals, and Fairness," in *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984).

scenarios and rely on these in order establish rights that can serve as the basis for relations of mutual recognition between agents.

So, in thinking about which control rights A and B have in relation to one another, we must consider (amongst other things) the strength of their control interests in different spheres, including their interests in having spheres of counterfactual control, the relative interests of the other in being able to act in the same spheres, the benefits or risks that would flow from making judgements about one another's interests on a case-by-case basis or reasoning in line with preemptive rights, and the value of normative assurance. This final consideration merits special attention, since our belief that others recognise general prohibitions on interfering with certain aspects of our lives (our body, house, etc.) seems to be of central importance in supporting and facilitating our ability to live flourishing lives.<sup>18</sup> By drawing a set of general conclusions about the weight of the various considerations that will likely apply in different circumstances, and then yoking these considerations into a single first-order reason that is protected by a second-order reason to exclude a number of possibly competing considerations, we are able to protect the morally significant interests of agents whilst facilitating relations of mutual recognition between them.

As I argued in Chapter 4, preemptive rights partly constitute a normative framework that we can rely on to interact with one another in various valuable ways, whilst allowing others to recognise that we give their interests the appropriate role within our deliberations. In the case of control rights, then, we relate to one another in an intrinsically valuable way when we recognise one another as having legitimate control over certain aspects or spheres of our lives. Relating to one another in this way will require us to recognise the preemptive structure of control rights in our practical deliberations; the fact that control rights give us a first-order reason not to interfere within certain spheres, as well as an exclusionary reason to disregard some competing considerations. For example, A's rights over his body or his property will mean that B's desires to use A's body or property are excluded from B's pool of available reasons for action. When A and B rely on A's rights as a fixed-point in

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<sup>18</sup> Cf. Hobbes's claim that individuals in a state of nature would be motivated to consent to an *all-powerful sovereign* out of fear of the way in which others might behave. One way of reading this claim is that inhabitants of the state of nature would be motivated to compact with others precisely so as to secure a greater degree of normative assurance. See Thomas Hobbes, *Leviathan*, Rev. Ed., ed. Richard Tuck (Cambridge: Cambridge University Press, 1996).

their interactions they will both be able to understand whether or not B relates to A in a morally decent fashion.

Which control rights do agents possess? I cannot provide a detailed answer to this question here since attempting to do so would take us too far afield. All I require for my argument, however, is agreement that there are some such rights. Most obvious are rights against physical assault, coercion, or manipulation of one's mind and body, but it is also plausible to extend this to rights over property.<sup>19</sup> And of course, there will be a significant overlap in the control interests protected or promoted by such rights, which may help to explain our conviction that certain control rights are particularly stringent. Whilst the specification of these rights is very general, they will give rise to many more specific rights and duties: for example, a right against having a swab taken or being injected, or a right against others using one's computer. We can continue to work with intuitive examples such as these. If someone were to argue that there are no spheres or actions that are protected by something similar to control rights, then I would take their theory to be wholly implausible.<sup>20</sup>

Notice that, taken together, control rights can be understood as establishing a sphere in which individual agents have legitimate control. This idea is familiar from status-based moral theories. However, the way in which this sphere is constructed is quite different on my view. According to status-based views, an agent's sphere of control flows directly from the fact that they have a certain status – the status of a person, or rational agent, for example. According to the interest-based view I have been developing, whilst human agents have moral status – that is, they are morally considerable – their sphere of legitimate control must be constructed from the various rights they have, rights that are ultimately grounded in their interests, but mediated by the relational requirement. We might then think of an agent's various rights as each representing a brick to be used in the construction of the protected environment in which an agent lives.

### 5.3 Consent

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<sup>19</sup> Here, instrumental considerations are likely to play a more important role.

<sup>20</sup> Of course, they may wish to reject the language of rights. But they will, I assume, have to replace the notion of rights with some other concept that plays a similar functional role.

### 5.3.1 *The Power of Consent*

Clearly, a world in which agents had negative control rights that they were unable to waive would be so restrictive as to be alienating. Agents would be unable to permissibly engage in the many valuable and necessary forms of activity and interaction that we think of as central to the living of a rich and diverse life: having sex, playing contact sports, lending a book to a colleague, undergoing a medical examination or surgery, and so on. As we saw in Chapter 2, some philosophers, such as Seana Shiffrin, have taken this fact to indicate that agents must possess the power of consent.<sup>21</sup> Yet, as I noted there, the very most this shows is that agents must have some means to allow for permissible interaction between them. It does not explain why that means should take the form of consent.

It will help here to distinguish between the question of consent's normative force, which is concerned with the reasons there are for wanting to be able to waive our control rights, and the question of consent's relational significance, which is concerned with why we should rely on consent to manage the directed duties that hold between us in virtue of our various claim-rights. As to the first, Shiffrin is surely on the right track. Without the ability to waive our control rights we could not engage in valuable human relationships with others.<sup>22</sup> Most obviously, this is because we could not permissibly engage in the valuable forms of interaction that make up different relationships (e.g., touching, sharing, etc.). Moreover, the fact that we have waived certain rights may also play a constitutive role in shaping some relationships, by marking out particular relationships as the kind in which another can, for example, borrow one's property without asking, or in which we agree to have shared control over certain matters, as when we establish a joint bank account.<sup>23</sup>

However, a sole focus on our need to waive rights in order to engage in valuable relationships is somewhat misleading. Sometimes I will simply require

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<sup>21</sup> Shiffrin, "Promising, Intimate Relationships, and Conventionalism," pp. 500-02.

<sup>22</sup> This may be too strong. For example, we could engage in a valuable relationship built wholly around conversation in public spaces, something that we could permissibly engage in without needing to first waive control rights. The central point, however, is that most (if not all) familiar forms of valuable relationship would be impossible. Indeed, the conversational relationship would plausibly lack certain valuable elements (found, for example, within friendship) in virtue of our inability to waive control rights.

<sup>23</sup> Raz, *The Morality of Freedom*, pp. 87-8.

assistance from others in ways that would usually be precluded by my control rights. If my plumbing brakes, for example, I need to be able to allow a plumber into my house in order to fix it. Or, I may wish to get a massage to help with my back pain. In these cases, I do not intend to develop or maintain a relationship. I simply require assistance. Alternatively, I may sometimes wish to waive my right so that you are no longer under a duty to me, such that you are free to deliberate about what to do without having to factor in the duty, and this may be so even if I have a preference for which choice you make. Imagine that you ask if you can borrow my car with the intention of skipping class. I may prefer that you come to class with me, but give you permission to borrow the car because I think that you ought to make the decision about whether or not to attend yourself.<sup>24</sup>

There are then a number of reasons why agents may wish to temporarily relinquish the negative control provided by their control rights. Indeed, many of the reasons we have for wanting negative control, especially our interests in being able to shape our own lives, also explain why we should want to be able to waive our control rights. For this reason, it is unsurprising that many have assumed that the power of consent must be grounded in the value of personal autonomy. By enabling agents to waive their rights we enhance their autonomy by promoting their ability to shape their own lives through the pursuit of projects and relationships that would otherwise be impermissible. But, as I have said, I may have legitimate control over things that matter little from the point of view of my autonomous life (e.g. plumbing, private information). Furthermore, we can see clearly now that not all of an agent's reasons for waiving their rights will tie to their desire to bring about their choices, at least when one's choice is understood as one's preferred state of affairs. I may prefer you to come to class, or not to spend our money on Cliff Richard CDs, but the fact I gave consent to your borrowing the car, or sharing a bank account, means that you will not wrong me by doing so.

Whilst this provides us with a number of positive reasons as to why we should want to be able to waive (at least some of) our control rights, these considerations will often also apply to the full range of reasons, rights, and duties that both I and others have. As I noted in Chapter 2, for example, my ability to shape my own life is not only constrained by the directed duties others owe to me. So, the

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<sup>24</sup> This example is from an unpublished manuscript by Victor Tadros.

positive reasons we have for wanting to be able to waive our rights do not yet explain why our power of consent is connected to the management of directed duties in particular.

The explanation proceeds in two stages. To begin, notice that where control rights provide agents with negative control over certain spheres, the power of consent provides them with a form of positive control.<sup>25</sup> Control rights ensure negative control by holding other agents under a directed duty not to interfere within certain spheres. Consent provides positive control by allowing agents to waive these duties, thereby making permissible forms of interaction previously impermissible. Importantly, however, the power of consent does not provide agents with just any means of waiving their rights. Rather, the power of consent equips individuals with the highest possible level of normative control by giving them intentional control over the duties others owe to them.

Why should this be? Plausibly, because if agents are to be able to waive rights that generally secure them negative control over the most important aspects of their lives, then their ability to do so equally needs to provide them with a suitable measure of control. If it were easy to give consent accidentally, or if consent could be given just by briefly entertaining a preference or desire, it would not equip agents with a sufficient measure of control over their own lives. For instance, the mere fact that I desire something will not suffice to give me sufficient control, in part because my desires may be “brute” desires, with which I do not fully identify.<sup>26</sup> Thus, if I could consent by entertaining a desire it would be too easy for the private spheres protected by control rights to become public spheres. In order to avoid this, particularly in those contexts in which agents have weighty control interests (e.g. the sexual context, or medical context), we often rely upon explicit intentionally given consent, so as to ensure that agents maintain a sufficient measure of control over what happens to them. The point is not that B should never be permitted to enter A’s house, or to give A an injection, but that A should have a sufficient measure of control over whether or not B does so.

Consent provides this high level of control by providing A with counterfactual control over what is permissible within certain spheres which he can

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<sup>25</sup> Franklin G. Miller and Alan Wertheimer, “Preface to a Theory of Consent Transactions: Beyond Valid Consent,” p.84.

<sup>26</sup> See Charles Taylor, “What’s Wrong With Negative Liberty?”

exercise by performing an intentional action, viz., an act of consent.<sup>27</sup> Assuming that B is sufficiently responsive to the relevant moral reasons, she will not act in certain contexts (e.g. in sexual or medical contexts) without A's consent. Whilst negative control rights provide agents with counterfactual control *within* certain spheres, the power of consent allows agents to maintain this valuable form of control whilst interacting with others. Since consent can be given or revoked by performing an intentional act, this counterfactual normative control can be exercised directly, without having to first manipulate the non-normative state of affairs in some way.

However, A's power of consent cannot be explained solely on the grounds that it maximises or increases his control over what happens in the spheres protected by control rights. Indeed, there may be a number of ways that A could ensure that he has a sufficient measure of control over these spheres. For instance, if A was very physically strong he could easily prevent others from interfering with him should he so wish. In order to establish A's power of consent, his first-order interests (i.e. the reasons he has for wanting to be able to waive his rights, whilst retaining a sufficient measure of control) must be mediated through the relational requirement. This means thinking not just about how we can promote A's interests by allowing him to waive his rights, but further considering how A is able to waive his rights against B in such a way as to allow for a continuing relation of mutual recognition to obtain between them.

That is to say, we are not only concerned with A's ability to waive his rights so as to make it permissible for B to act in certain ways, but also for B to be able to interact with A whilst continuing to recognise A's legitimate control within certain spheres, and for A to be able to recognise that B relates to him in this manner. This is central to understanding why A should waive his rights by giving B consent and not by some other means. If A and B rely on A's consent in order to manage their normative relationship, then not only is A able to permit B to act in certain ways (to touch him, or use his property), but B is able to recognise this permission, and thus to interact with A whilst continuing to recognise A's legitimate control. Moreover, if B relies on A's consent, A will be able to recognise that B relates to him in a morally decent way, by giving his interests in having control over the central aspects of his life the appropriate role in her deliberations, thereby serving A's relational interests.

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<sup>27</sup> See Section 5.3.3.

Finally, B will also believe that A can recognise that she relates to him appropriately, such that A and B will have a common belief about the role consent plays in managing their normative relationship, thereby allowing them to stand in a valuable relation of mutual recognition.

So, like rights, the power of consent partly constitutes a normative framework that provides a means through which agents can interact whilst all the time recognising that they relate to one another in a morally decent way. This is because A's consent provides A and B with a fixed point in their interactions through which they can manage their normative relationship in a way that is consistent with their standing in a relationship of mutual recognition. If A and B have a common belief that A has a right against B that B not  $\Phi$  unless A consents, and B refrains from  $\Phi$ -ing unless he has acquired A's consent, A and B can continue to stand in a relation of mutual recognition. However, if B  $\Phi$ 's without A's consent, A will have reason to believe that B does not give his interests the appropriate role in her deliberations, and B will further be aware that A has this belief. This explains why B should be responsive to A's consent (or non-consent): by doing so, she recognises A's legitimate control over certain aspects of his life, and allows A to recognise that she relates to him in this way. As we saw in Chapter 4, we are not only concerned with whether other agents act in such a way as to serve or set back our interests; we are further concerned with how they relate to us, and whether they deliberate about our interests in the appropriate manner. Consider a case in which a doctor or prospective sexual partner interferes with us without our consent. We are not, first and foremost, concerned with the fact that they (may) have set back our interests. Rather we are concerned with the fact that they did not relate to us in the appropriate way, by recognising that we should have control over whether or not we engage in such interactions.

We are now in a position to formulate the relational theory of consent's normative significance.

*The Relational Theory:* Consent has normative significance because it provides agents with a means of interacting with one another in valuable ways whilst recognising one another's legitimate control over those spheres protected by control rights, thereby allowing agents to interact whilst standing in a relationship of mutual recognition.



According to the relational theory, then, the power of consent plays a special role in managing the directed duties generated by our control rights because it enables agents to interact whilst maintaining a sufficient measure of control over their own lives, at the same time as recognising that we each have legitimate control over the spheres protected by our control rights. Our power of consent does not just provide a means through which to achieve our autonomous choices, or even to maximise our control over what happens to us, but rather provides a means through which we can relate to one another in a morally decent way in light of our significant control interests. If we understand our control interests as mediated by the relational requirement, then recognising the fact that you cannot enter my house, touch my body, or use my private information without my consent, and giving this fact the appropriate role within your deliberations, is part of what it means for you to relate to me in a morally decent fashion, in order that I be capable of understanding that you give my interests the appropriate role within your deliberations. Moreover, unless I have given you consent, then other considerations – such as your desires, or the greater utility that might be achieved – must be excluded from your practical deliberations, since my preemptive control rights will still be in force.

We can now see why the control view considered in Chapter 2, whilst on the right track, only provided us with half of the story. By tying an individual's power of consent exclusively to their interests in having control over their own life the control view was unable to explain why the power of consent should play such an important role in managing the application of directed duties, or explain how an agent could affect her normative relations with others just by intentionally performing the relevant action, since her consent would not directly affect her underlying interests. The relational theory, by contrast, explains the power of consent by appealing to its role in facilitating morally valuable relations between agents who recognise one another as possessing morally significant interests in maintaining control over the central aspects of their own lives. On this account, consent is normatively significant precisely because it allows us to manage directed reasons whilst standing in a relation of mutual recognition. Moreover, according to the relational theory, consent is not a mechanism for the direct promotion of A's control interests. Rather, the power of consent, like rights, allows A and B to manage their normative relationship whilst recognising one another as bearers of morally significant interests. Thus,

because neither rights nor the power of consent are directly justified by the fact that they will serve individual interests, the fact that consent does not affect those interests does not stand in need of explanation. The relational requirement ensures that the appropriate response on the part of B when faced with A's consent or non-consent is not to reason in terms of A's first-order interests, but to recognise A's rights, and his consent, as determining which reasons for action she has. (I discuss the precise affect A's consent will have on B's reasons for action in Section 5.3.4 below.)

The relational theory also explains why our recognition of one another's consent is constitutive of valuable modes of interaction. For example, it does not only matter to Y that she has wishes to have sex with X, but also that X recognises that Y has control over whether he is permitted to engage in sexual relations with her, and, therefore, it matters to Y that X be responsive to her consent or dissent. Where X is responsive to Y's consent, and Y is similarly responsive to X's consent, X and Y engage in valuable sexual relations partly in virtue of the fact that they mutually recognise one another's legitimate control over whether they have sex.<sup>28</sup>

### *5.3.2 Consent and Degrees of Control*

As I have said, the power of consent is partly valuable because it provides agents with a high level of control over what happens to them and within their environment, by giving them direct control over the duties others owe to them. However, we clearly do not believe that the only way in which we can permissibly interact in ways that would otherwise violate control rights is if we give one another explicit consent. If, for instance, I run onto a football field in full kit, or step onto a crowded subway train, I make it permissible for others to touch me, within certain limits (e.g. tackle me, jostle awkwardly against my shoulder). But it would be a stretch to describe me as consenting to these behaviours. I simply act in these ways because I want to play football, or get to my intended destination, and in doing so I temporarily waive some of my rights over my body.

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<sup>28</sup> I take it that X's responsiveness to Y's consent will always partly constitute a valuable form of interaction whatever the nature of the particular interaction between X and Y, in virtue of X's recognition of Y's legitimate control. Plausibly, however, we recognise this more readily in cases like medical and sexual consent because of the stakes involved.

The explanation for this is that agents require different levels of control depending on the underlying interests that are at stake. The power of consent, by giving agents direct control over the duties others owe them, equips individuals with the highest possible level of normative control. But in many of the more everyday interactions we engage in we do not require such a high degree of control, and more informal or implicit forms of interaction are sufficient.

In fact, we can distinguish four ways in which our actions affect the application of our control rights.<sup>29</sup> First, we can give *explicit consent*, as we do when we sign a consent form, or say “Sure, go ahead,” in response to a colleague who asks to borrow a book. As I will argue in the next section, in order to give explicit consent we must communicate a conventionally recognisable token of consent with the intention of waiving a claim-right of ours. Second, we can give *tacit consent*. Tacit consent works in much the same way as explicit consent, but one gives tacit consent through silence or inaction as opposed to a positive communication of consent.<sup>30</sup> Importantly, as with explicit consent, in order for one’s silence or inaction to constitute consent one must undertake these behaviours with the intention of giving permission.<sup>31</sup> Third, we can *explicitly dissent*. Explicit dissent, like explicit consent, gives agents direct control over the duties others owe them, but it serves to re-establish or reaffirm those duties rather than waive them. I draw attention to dissent here since, in many contexts, an agent’s ability to dissent provides them with an additional degree of normative control, over and above positive requirements for consent. For example, in the sexual context, and in some forms of medical treatment, we retain the ability to re-establish our control right by dissenting at any time.

Finally, we can waive some aspects of our control rights by manifesting what I will call *objective choice*. Significantly, unlike the three previous categories, an

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<sup>29</sup> In this taxonomy I ignore two further possible forms of consent: (1) hypothetical consent, and (2) implied consent. The normative significance of hypothetical consent raises difficult questions that I cannot adequately address here, but in general I assume that whatever normative force hypothetical consent has must be explained in a different way to my explanation of actual consent, since hypothetical consent cannot serve to provide agents with normative control in relation to one another. With regard to implied consent, two things should be said. First, implied consent may be confused with either tacit consent or what I call objective choice. Insofar as this is true, then implied consent represents no further category. Second, agents will often imply that they will give consent if asked, but this does not have the same normative consequences as actual consent. If consent is required then genuine consent must be given. I am also disregarding other ways in which our actions may indirectly affect the application of our control rights, e.g., a culpable attacker who forfeits his rights not to be assaulted (in self-defence).

<sup>30</sup> Here I follow A. J. Simmons in *Moral Principles and Political Obligations*, pp. 79-83.

<sup>31</sup> There are a number of other conditions we might think necessary for tacit consent. See *ibid.*

agent need not act with the intention of waiving a right in order to do so by manifesting an objective choice. Rather, one must simply perform an intentional action (e.g. running onto a football field, getting onto a crowded subway train), where it is reasonable to believe that the agent understands that this will make some forms of bodily contact permissible. Notice, however, that what does the normative work in cases of objective choice is the fact that an agent acts in a way recognisable to others, with the belief that acting in this way will have certain consequences,<sup>32</sup> whilst maintaining control over whether or not she performs the relevant action. That is to say, objective choices are normatively significant *not* because an agent has subjectively chosen a particular outcome, but because she has, by performing a certain action that she has control over performing, indicated to others that it is permissible to behave in certain ways. This is so whether she performs the action with the intention of making these behaviours permissible or not.

What kind of control is appropriate will depend on the underlying interests at stake, interests that will be, primarily, of two kinds. First, there will be, as I have already said, more or less significant control interests. For example, I have much more significant interests in having control over whether I undergo an operation, or engage in sexual relations, than I do in controlling whether I am tackled playing football, or whether someone gently brushes against me on the subway. Thus, objective choice is likely to suffice in the latter cases, but not the former.

Second, agents engage in a variety of more or less intimate relationships with one another, and the nature of the relationship can also impact upon the kind of control that is necessary. In a medical context, where patients and doctors are generally strangers, and there is a limited amount of trust between them, more formal requirements for consent will be desirable, even with regard to relatively straightforward procedures (e.g. standard examinations, vaccinations). In the other direction, within intimate relationships more subtle and implicit forms of

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<sup>32</sup> Whilst the issue bears further consideration, I leave open what the precise degree of knowledge or understanding, if any, that an agent must have in order for her objective choices to have normative significance. It may be that an agent can waive many of her rights by acting in certain ways despite not knowing that “this is how we do things around here.” Alternatively, it may be the case that an agent will always waive her rights by acting voluntarily if she could easily have found out that this is the social norm. Or, perhaps, an agent can be wronged by others because she did not believe acting in a certain way (e.g. running onto the football pitch) would have any normative consequences, even if others have a full excuse for wronging her given their reasonable beliefs about the agent’s intentions in light of the circumstances. For some related discussion see Joseph Raz, “Promises in Morality and Law,” *Harvard Law Review* 95 (1982), pp. 929-932.

communication and understanding will often suffice, and, indeed, indicate the health of a relationship.<sup>33</sup> For instance, friendships and romantic relationships would not be the kind of valuable relationships they are if partners and friends were required to get explicit consent before every hug.<sup>34</sup> If nothing else, the formality of explicit consent requirements would be cumbersome, and potentially damaging within a number of close and trusting relationships.<sup>35</sup>

The general idea then is that in some contexts, given the vulnerability of those involved and the significance of the interests at stake, we have good reason to crystallise the privileges, claims, and responsibilities, and rely upon more formal declarations of consent in order to affect our normative relations. In other kinds of interaction, where less is at stake, and/or the parties know each other well, then we may wish to rely on less formal kinds of consent or objective choice. This helps to make sense of the variability in requirements for consent. In some cases we should require a positive token of consent to be given in a clear and obvious manner. In others, tacit consent, or the possibility to dissent, may suffice to give agents a suitable measure of control. Alternatively, in some contexts, there may be no requirement for consent whatsoever, and the fact that an agent undertakes some form of intentional action will be sufficient to waive some aspect of their control rights.

Note, however, that whether or not explicit consent is appropriate or required will still depend upon mediating the various interests of agents through the relational requirement. That is to say, the reason that our fellow football players or fellow subway passengers are not required to get our explicit consent before tackling us or brushing against us is not because this is how it makes sense to respond to our first-order interests, but rather because, in light of these interests, it is appropriate to interact with one another in different ways in different contexts. Since explicit consent requirements will be demanding, and because our interests in the possession of control vary, as well as our interests in developing and maintaining special relationships, we have reason to rely on different modes of interaction in different contexts. Nevertheless, these different requirements are all generated by the same set

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<sup>33</sup> *Ibid.*, p. 931.

<sup>34</sup> This is reflected in many accounts of sexual consent, where it is usually assumed that initial sexual relations require explicit mutual consent, but where these requirements may move toward tacit consent or objective choice over time. See, e.g., Archard *Sexual Consent*, p. 38; Michelle Anderson, "Negotiating Sex," p. 1426.

<sup>35</sup> Shiffrin, "Promising, Intimate Relationships, and Conventionalism," p. 514.

of underlying interests, and it will still be important that principles that apply in different contexts allow for mutual recognition between agents.

According to the relational theory, then, the power of consent is one important part of a broader range of ways in which we manage our normative relations with one another. By providing agents with direct control over the duties others owe to them, the power of consent equips agents with a sufficient measure of control over the most important aspects of their own lives. Sometimes, however, this high degree of control is unnecessary, and this explains why there is a range of more or less formal ways in which we can alter the application of rights and duties through intentional actions. Sometimes, manifesting a choice in action (e.g. running onto a football field), will have the same normative effect as consent, even though the footballer did not run onto the pitch with the intention of waving some of his rights by doing so. Often, some combination of the forms of control I have identified will be in play. For instance, some forms of sexual interaction may be permissible on the basis of objective choices (e.g. foreplay), whilst individuals retain control by being able to explicitly dissent at any time.<sup>36</sup>

Thus, we can identify a scale of formality, a range of more or less formal ways in which we can waive control rights, with consent at the high end. Importantly, however, it is the same set of interests that explain the whole scale. Agents should be able to recognise that others relate to them in a morally decent fashion, but, depending upon what is at stake, they can do this in different ways – in some cases by responding to their intentional actions, in others by directly responding to their consent or dissent.

### 5.3.3 *The Ontology of Consent*

An important implication of the relational theory is that it gives us good reason to prefer a particular view of what constitutes an act of consent, of what is sometimes referred to as the “ontology” of consent.<sup>37</sup> I will argue that, if the claims I have made so far are correct, they support a hybrid view of consent’s ontology, according to

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<sup>36</sup> Ultimately, this may not be an appropriate standard sexual consent, especially given the social world within which we live. I postpone discussion of some of these issues until Chapter 6.

<sup>37</sup> In this section I draw on material from my “The Ontology of Consent: A Reply to Alexander,” *Analytic Philosophy* 56, no. 4 (2015).

which for an action to qualify as a token of consent it must be performed (i) with the intention of waiving a right, and (ii) objectively communicated.

We can start by distinguishing three views of what constitutes consent. On the first *objective view*, consent is nothing more than a performative act: a *communication* of consent through speech or action, such as a “Yes” or thumbs up. On the objective view, it does not matter whether the consenter believes herself to be consenting when she says “Yes” or gives the thumbs up. What matters is that she has communicated consent. Thus, on the objective view, consent is constituted by nothing more than these kinds of communicative acts. On a second *hybrid view*, both a communication of consent *and* the existence of a certain mental state are required in order for an agent to consent. So, in order for an agent to give consent she must both say “Yes” and believe that by doing so she is waiving some claim right of hers. On the hybrid view, then, consent is constituted by both a communicative token and a subjective mental state. On the final *subjective view*, consent is constituted by nothing more than a mental state, such as an intention to waive one’s right, and requires no communication. Whilst an agent will need to communicate her consent in order to alert other agents to the fact that they have consented, this communication is purely informative, alerting other agents to a normative change that has already occurred.

Most philosophers agree that consent must be given intentionally. That is to say, in order for a purported token of consent to constitute consent (e.g. saying “Yes,” or giving a thumbs up), an agent must intend to waive a claim right of theirs by performing the token. If an agent does not have this intention then, whilst others may reasonably believe that consent has been given (and therefore be excused if they act on what they took to be consent), consent has not in fact been given.

Call this the *intention requirement*. I agree with the intention requirement for the following reason. If consent is normatively significant because it provides agents with a high degree of control over the most important aspects of their own lives, as I have argued, then it is plausible to think that consent must be given intentionally. Indeed, it is the intentional nature of consent-giving that gives agents such a high level of control over the duties others owe them. If consent could be given accidentally (e.g. by saying “Yes” when permission has been sought without realising that this request has been made) then agents would lack a sufficient measure of control over the central aspects of their lives.

The intention requirement rules out the objective view of consent's ontology. It might be suggested, however, that given the role I have argued consent plays in managing the normative relationship between two agents, this is too quick, because it privileges the position of the consentor. It might instead be suggested that whether A gives consent to B depends upon whether B could *reasonably believe* that A intended to waive a right of his by performing a certain action. However, there are two reasons for rejecting this position. First, it seems unintuitive to hold that whether A has consented depends on B's epistemic position. To help see this, imagine that B says to A "Can I use your car?" but that A believes B to have said "Would you like to go the bar?" When A says, "Yes!" B can reasonably believe that A has given his consent to borrow his car. Imagine that, after A has left, B goes to use A's car and that C, who was party to A and B's initial conversation, intervenes. Further imagine that C correctly understood that A took himself to be agreeing to go to the bar, and not intending to waive his right over his car, and that C also knows that A would be very unlikely to lend B his car, since A believes B is a terrible driver. If C explains all of this to B, B can no longer reasonably believe that A intended to waive his right over his car. If the question of whether A has consented turns on B's reasonable belief, this would imply that, whilst initially A had consented, C's intervention transforms the situation such that A has no longer given consent.<sup>38</sup>

Second, this view of consent's ontology is not supported by the relational theory I have developed. I have argued that the normative significance of consent is partly explained by the fact that we have reason to want to be able to shape our own lives by managing our normative relations with others in such a way that still secures us a sufficient measure of control over those spheres protected by control rights. If this is correct then the fact that A has, for example, intentionally consented to have sex with B provides us with a positive reason for holding that A has waived his right against B's having sex with him, because A had a sufficient degree of control over whether it would be permissible for B to have sex with him, and by making it permissible A means to shape his own life. In contrast to this, the reasonable belief principle holds that B is permitted to have sex with A because *she* reasonably believes that A intended to give consent (something I assume A could reasonably have known his behaviour would suggest). However, the fact that B reasonably has

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<sup>38</sup> The use of the third-party perspective in assessing such cases is due to Alexander, "The Ontology of Consent."



this belief is not, on the account I have offered, a positive reason for holding that A has waived his right.<sup>39</sup> If anything, it plays a negative justificatory role by suggesting that A cannot complain against B's acting since he should have known that B could reasonably believe that he intended to waive a right. But whilst B may have an excuse for having sex with A if she reasonably believes that A consented, since the positive reason I have alluded to plays an important role in justifying the power of consent, I think we have good reason to reject the objective conception of consent's ontology.<sup>40</sup>

In the opposite direction, a number of theorists have been tempted by the subjective view of consent, arguing that consent is constituted by nothing more than a subjective mental state.<sup>41</sup> For example, Larry Alexander claims that consent is constituted by the mental act "of waiving one's right to object – or...that of mentally accepting without objection another's crossing one's moral or legal boundary (the boundary that defines one's rights)."<sup>42</sup> Since this mental act is intentional this view meets the intention requirement.<sup>43</sup>

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<sup>39</sup> On the role of positive and negative justifications in accounting for the normative significance of voluntary obligations see Raz, "Promises in Morality and Law," pp. 929-30.

<sup>40</sup> One possibility is that the ontology of consent and the normative significance of consent come apart. That is to say, I could be correct to maintain that an agent only *gives* consent if they intentionally waive a right by performing the relevant action, but wrong to deny that B is morally permitted to have sex with A if she reasonably believes that A has given consent. Franklin Miller and Alan Wertheimer argue that, in at least some cases, this is correct. They discuss a case in which a department chair (A) says, "I'm going to appoint C to the position unless anyone objects," and B, who is daydreaming, says nothing, leading A to believe that B has authorised him to appoint C ("Preface to a Theory of Consent Transactions," p. 85). But I suspect that what does the normative work in this case is not that A reasonably believes that B has consented, but that B should have been paying attention in the meeting. If this is the case then B's non-consent does not have the normative significance that it otherwise would have had. This is consistent with maintaining that if consent is normatively relevant the consentor's intention to waive a right plays a necessary role in making it permissible for the consentee to act in a certain way, even if the consentee's reasonable beliefs might give them an excuse for so acting without having acquired *bona fide* consent.

<sup>41</sup> There are a number of views concerning what exactly this mental state consists in. See Larry Alexander, "The Ontology of Consent," for a good summary and discussion.

<sup>42</sup> Alexander, "The Ontology of Consent," p. 108.

<sup>43</sup> I suspect that the appeal of the subjective view derives from two sources, neither of which provides adequate motivation for the view. First, in line with simple-choice view discussed in Chapter 2, it might seem as if by subjectively consenting we affect what is in our interests. If our interests determine how it is permissible for others to treat us, then the fact that we have affected those interests by giving consent surely affects how others are permitted to treat us. However, as we saw from our earlier discussion, it is far from obvious that the intentional giving of permission necessarily affects what is in our interests. And whilst some forms of subjective choice may affect what is in our interests, choice and consent can diverge, as we saw in discussion the simple-choice view. More importantly, as I argued in Chapter 4, it is anyway implausible to think that our rights will directly supervene on our underlying interests. The second source of appeal suggests that, insofar as consent is understood as an act of will, and an act of will is understood as a subjective mental state or action, then it necessarily follows that consent is, first and foremost, a subjective mental state or action (see, for an example of this view, Heidi Hurd, "The Moral Magic of Consent," pp. 124-25). But the first

However, whilst the subjective view meets the intention requirement, it fails to meet another requirement I think necessary in light of the role consent plays in allowing for relations of mutual recognition, namely, the *publicity condition*.

*Publicity condition*: both the consentor and consentee must, in principle, have access to the information that determines whether consent has been given or revoked.<sup>44</sup>

There are two main reasons for endorsing the publicity condition. First, in order for X and Y mutually recognise the authoritative nature of one another's consent in certain spheres, they will need to be able to form a common belief about whether consent has been given or revoked, and thus they will each need access to the information that determines whether consent has been given or revoked. Recall that X and Y have a common belief in p where:

- (i) X and Y believe that p
- (ii) X and Y both believe that the other believes that p
- (iii) X and Y both believe that the other believes that they believe that p.

Returning to the case in which X and Y are sexual partners, and focusing for a moment on the consent Y gives to X, for X and Y to have a common belief in Y's consent it must be the case that

- (i) X and Y both believe that Y has given consent
- (ii) X and Y both believe that the other believes that Y has given consent, and
- (iii) X and Y both believe that the other believes that they believe that Y has given consent.

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premise in this argument – that consent is an act of will – requires further defence, and without further defence comes close to begging the question.

<sup>44</sup> See Erin Taylor, "A New Conventionalist Theory of Promising," pp. 670-73. Taylor develops a similar idea to the publicity condition, but for different reasons. Whereas I ground the publicity condition in the normative function of consent, Taylor argues for a similar condition on the basis of certain necessary features of norms that are mediated by conventions.

Since we are supposing that Y must give consent intentionally, Y will always believe that she has given consent when she has given consent. However, if X has no access to the information that determines whether or not Y has given consent, X has no grounds on which to form a (reasonable) belief regarding whether Y has consented (violating (i)). As a result, the presence or absence of Y's consent cannot play any role whatsoever in X's practical deliberations, and X cannot rely on Y's consent as a means to interact with Y whilst recognising her legitimate control. Moreover, unless Y's consent is public between X and Y, X will have no basis for believing that Y believes she has given consent, and Y will have no basis for believing that X believes that Y has given consent (violating (ii)). And finally, if Y's consent is not public, neither X nor Y will have grounds for believing that the other believes that they believe that Y has given consent (violating (iii)).

This is important because, as I have argued, it matters to us in our relations with others that we are able to recognise the reasons for which others act, and our ability to do so determines the kinds of relationship we are able to have with them. Thus, it is important that the consenter is able to know that the consentee is (or at least can be) responsive to her consent. In this case it matters to Y, independently of her sexual desires or choices, that X is responsive to her consent or dissent, because it matters to Y that X recognise that she has legitimate control over whether he is permitted to have sex with her.<sup>45</sup> Moreover, it will matter to X that Y is able to recognise that he is responsive to her consent or dissent. X therefore needs to access to the information that determines whether Y has given consent, and Y needs to be able to recognise that X gives her consent the appropriate role within his deliberations. For this to be the case the information that determines whether Y has given consent needs to be public between them.<sup>46</sup>

Second, since the value of mutual recognition derives from the value of X and Y each believing that they relate to one another in a morally decent way, by giving one another's interests the appropriate role in their practical deliberations, it seems reasonable to think that X and Y should be symmetrically situated with regard

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<sup>45</sup> This is not to say that Y's sexual desires or choices are irrelevant from X's perspective, only to say that whether X recognises Y's consent will matter to Y independently of whether she desires to have sex with X.

<sup>46</sup> Tom Dougherty argues for the claim that consenter and consentee require a common belief in consent in, "*Yes Means Yes: Consent as Communication.*" Whilst our two lines of argument are, I think, complementary, Dougherty focuses on the importance of common belief in relationships of accountability. See pp. 244-45.

to the normative requirements that obtain between them. Once again, the example of friendship is instructive. It matters that friends live up to the normative ideal of friendship, but for them to do so they not only need to know what this ideal requires of them, but also when these requirements apply. It would be unreasonable to blame a friend for failing to provide assistance or support if they were completely unaware that support was required, and had no reason to believe that it would be, because their failure to provide assistance does not reflect the fact that they did not give one's interests the appropriate role in their deliberations. Similarly, it would seem unreasonable to hold that agents could make it the case that another will wrong them by revoking their consent if the consentee were unable to have knowledge of this normative change, in part because the consentee would be guilty of wronging the consenter despite always relating to the consenter in a morally decent way, by giving their consent the appropriate role within their deliberations. If Y could revoke her consent mid-way through having sex with X without X knowing, then X would be in an unreasonable position of normative vulnerability.<sup>47</sup>

To be clear, the requirement for common belief is not grounded in purely epistemic considerations. Rather, the idea is that in order for consent to be able to play its normative role, of allowing X and Y to interact whilst standing in a relation of mutual recognition, it must be possible for X and Y to have a common belief about whether consent has been given or revoked. If this is correct then consent must meet the publicity condition, according to which both the consenter and consentee must, in principle, have access to the information that determines whether consent has been given or revoked.

The subjective view of consent's ontology, which claims that consent is constituted by nothing more than a subjective mental state, fails to meet the publicity condition. This is because, in many instances, the mental states of agents are opaque to others. Only an agent themselves generally has direct access to their own mental states. Given this, a consentee will usually not have knowledge of the consenter's mental states.<sup>48</sup> Furthermore, even if a consentee does have a reasonable belief about a consenter's mental states, it is even less likely that the consenter will be able to

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<sup>47</sup> Following Dougherty, this idea might be case in terms of holding X accountable. See *ibid.*

<sup>48</sup> I do not mean to suggest that agents *always* have direct access to their own mental states, or that other agent's *never* have access to the mental states of others ("It was written all over his face," we might say). I just mean to say that, by and large, it is an agent themselves who has direct access to their own mental states.

know that the consentee has this belief, or that the consentee is aware that the consenter reasonably believes they have a reasonable belief about their mental state.

Since the mental states of agents are commonly opaque to others, information about these mental states is not in principle available to others. Thus the publicity condition holds that consent must be objectively communicated in some way by the consenter to the consentee(s).<sup>49</sup> This is necessary to allow for a common belief about whether consent has been given, and enable consent to play its role of managing the normative relations between agents in a way that supports a relation of mutual recognition between them. Thus, if the relational theory of consent's normative significance is correct, the most plausible view of consent's ontology is the hybrid view, according to which an agent gives consent when they communicate a conventionally recognisable token of consent with the intention of waiving a claim-right.<sup>50</sup>

#### 5.3.4 Consent, Rights, and Reasons for Action

I have said that A's power of consent regarding B's duty not to  $\phi$  gives A normative control in relation to B by giving A direct control over B's duty. This helps to make sense of the familiar idea that an agent possesses a certain kind of authority over his or her own life.<sup>51</sup> With regard to certain matters an agent's consent should be regarded as decisive: if an agent has refused consent to  $\phi$  then it is impermissible to  $\phi$ .<sup>52</sup> But they also have the power to make it permissible for others to  $\phi$ , by waiving these duties. This counterfactual control is an important characteristic of authority. A

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<sup>49</sup> What if we had access to brain scanners that could inform us that others have the relevant mental state? I am willing to concede that if this were so it is at least in principle possible that consent could be given without communication. However, there is something important to note about this possibility. An individual brain scanner that could give us information about others mental states would not be sufficient for consent, since this would run afoul of the need for common belief that motivates the publicity condition. Rather, we would need a machine that (i) allowed A to know that they were giving consent to B by entertaining a certain mental state, (ii) informed B that A were entertaining this mental state, and (iii) allowed A to know whether B was in fact using the brain scanner or not, such that B is in fact responsive or non-responsive to A's consent. That is to say, in order for a mental state to constitute consent we would need to be able to have a common belief about the mental state in question.

<sup>50</sup> I discuss the importance of conventions in establishing mutually recognisable tokens of consent in Section 6.2.

<sup>51</sup> Cf. Raz: "A normative power is tantamount to having an authority when it is a power over others." *Practical Reason and Norms*, p. 101.

<sup>52</sup> I say that an agent has "refused consent" rather than just "not consented" to try and capture the fact that some rights can be waived in ways other than by consent (e.g. via objective choice).

practical authority has the power, by their mere say-so, to make it the case that there is reason to  $\phi$  or  $\psi$ , independently of the reasons that normally count in favour of either  $\phi$ -ing or  $\psi$ -ing.<sup>53</sup> Similarly, an agent has the power, by their mere say-so, to make  $\phi$  permissible (or impermissible).<sup>54</sup> Significantly, however, on the account that I am offering, it is not the case that agent's simply possess this authority in virtue of having a certain status. Rather, the recognition of this authority by others is constitutive of an intrinsically valuable form of relationship.<sup>55</sup>

In this sense consent can be usefully contrasted with an order given by a practical authority (such as a military officer). If an authority gives an order then this gives those under her command a first-order reason to do as commanded, and an exclusionary reason not to act on a range of countervailing considerations. For example, a commander's order to clean the barracks should be taken as a first-order reason to clean the barracks, as well as an exclusionary reason not to weigh the order against other reasons such as the troops laziness, or their preference for drinking tea. Consent shares the same features, but operates in the opposite direction. That B has *not* given A consent to enter her house gives A a first-order reason not to enter B's house, which is protected by an exclusionary reason not to weigh this lack of consent against a range of other reasons. In other words, if B has not given consent then A simply has to recognise the exclusionary structure of B's control right.<sup>56</sup>

The authoritative nature of consent, then, is connected to the exclusionary structure of control rights. That an agent has not given consent generally means that her control right continues to operate as a protected reason: a first-order reason not to interfere coupled with an exclusionary reason not to weigh this first-order reason against a number of competing considerations. By giving consent she can waive this right, and therefore prevent it from operating as a protected reason. Yet it remains

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<sup>53</sup> See, generally, Raz, *The Morality of Freedom*, Chs. 2 and 3.

<sup>54</sup> This is something of a simplification. See below.

<sup>55</sup> By comparison, it seems likely that many standard forms of authority relation (e.g. the military, the state) are only instrumentally valuable: recognising the authority of the state, for example, and thereby seeing the states directives as exclusionary reasons as well as first-order reasons, allows us to achieve certain valuable ends otherwise impossible (or at least very difficult) to achieve, such as large scale social coordination. In such cases, were we better able to secure the end by ignoring the protected reasons, it seems that this is what we should do.

<sup>56</sup> We must be somewhat careful about how far we carry this analogy with practical authority however, since authorities usually have the power to impose *new* duties on agent's by their say-so, whereas the power of consent only gives agents the power to manage existing duties. This is not to say that the power of consent should not be thought of as a form of authority, only that it differs from other familiar kinds of authority. On this point see John Gardner, "Justifications under Authority," p. 11.

unclear exactly what effect A's consent will have on B's reasons for action. It will, we assume, make B's  $\phi$ -ing justifiable (all things being equal). But is not clear exactly how this is so.<sup>57</sup>

Before continuing, it is worth clarifying that B may have many reasons regarding  $\phi$ , including further duties, not grounded in the particular duty she has to A not to  $\phi$ . Imagine, for example, that  $\phi$  is engaging in sexual relations. Clearly, B has a duty not to have sexual relations with A without A's consent. But if B is married to C she may well have a duty *to C* (or at least strong reasons) not to have sexual relations with A. So, even if A consents, B may still be required not to have sex with A, because by doing so she wrongs C, and A's consent can do nothing to change this fact. Thus, A's consent does not entail an all things considered permission on B's part. However, we are not currently concerned with these all things considered judgements. Rather, we wish to know how A's consent affects B's directed reasons regarding  $\phi$  *with respect to A*. That is, we are concerned with the normative relation that obtains between A and B (with regard to  $\phi$ ), and not with the more general question of what reasons B has to  $\phi$  or not  $\phi$ . Of course, an overall moral assessment of B's action will require asking this broader question, but in order to carry out this assessment we will need to know how A's consent makes a difference to the reasons B has.

Michelle Dempsey considers three ways in which A's consent may affect B's reasons for action.<sup>58</sup> First, consent might *cancel* some of the reasons B has for not X-ing. To use Dempsey's example, imagine that X-ing is punching A. If A's consent cancels some of B's reasons then she cancels some of the reasons that normally ground a requirement not to punch A, e.g., A's interests in not experiencing pain. Second, consent might *exclude* some of the reasons B has to refrain from X-ing. So, whilst A's pain still constitutes a reason against B's punching A, B is required to

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<sup>57</sup> One complication concerns whether or not a consentee acts permissibly if they act without reasonably believing they have the consentor's consent. Imagine, for example, that A waives her right over her car by giving B consent, but that, even though B does not hear A, she goes ahead and takes the car anyway. Whilst I think that it is clear that A has *given* consent in such an example (that is, we do not require uptake for a token of consent to actually constitute consent), it is a further question whether B wrongs A, and if so, what the nature of this wrong is. This question is connected to the issue of whether an agent's intentions can bear on the permissibility of their actions. For a widely cited argument that intentions do not bear on permissibility directly, see Scanlon, *Moral Dimensions*. For a contrary view see Victor Tadros, *The Ends of Harm*, Ch. 7. For present purposes, I remain agnostic on this issue.

<sup>58</sup> Michelle Dempsey, "Victimless Conduct and the *Volenti* Maxim: How Consent Works," *Criminal Law and Philosophy* 7 (2013), pp. 18-22.

exclude these reasons from her deliberations.<sup>59</sup> Third, A's consent may make it permissible for B to exclude some of the reasons that bear on punching A, although B is not *required* to exclude these reasons (as is the case on the second option). Following Raz, Dempsey labels this third option an *exclusionary permission*.<sup>60</sup> If A's consent functions as an exclusionary permission, then when deliberating about whether or not to punch A, B can *either* exclude or include the reasons grounded in A's interests in avoiding pain.

Dempsey rejects the first two views in favour of the third. I agree that we should reject the first two views, but I do not believe we should accept the third as a general account of consent's effect on reasons. That is because whilst consent *may* operate as an exclusionary permission, it need not do so. To see this, we need to introduce a fourth possibility not discussed by Dempsey, according to which consent functions as a *cancelling permission*. A cancelling permission serves to cancel a protected reason. In the case of A's right not to be punched by B, if consent functions as a cancelling permission then A's consent cancels the protected reason constituted by A's right. That is to say, if A consents to B's punching her she cancels both the first-order reason against punching her and the exclusionary reason not to weigh this reason against other considerations, such as B's sadistic pleasure. So, a cancelling permission does not cancel any of the first-order reasons for or against some action, but rather cancels a right or duty. Thus, if A consents it does not follow that there are no longer any reasons against punching A. It is only to say that there are no reasons against punching A grounded in A's right. Thus, A's interests, in not experiencing pain etc., still serve as reasons for B, but she is now able to consider and weigh these first-order reasons directly, something A's right prevented her from doing. In other words, where A's right previously pre-empts B's ability to consider and weigh A's first-order interests, A's consent makes it permissible for B to weigh these interests in her deliberations. Assume, for example, that the pleasure

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<sup>59</sup> Whilst I agree with Dempsey in rejecting this permission, I also have sympathy with the fact that she is drawn to the position (p. 20), since it chimes with anti-paternalist intuitions. Since, on this view, a consentee is essentially under a duty not to consider some of the consenter's interests, she cannot weigh the agent's own good in deliberating about what to do, and thus she cannot treat her paternalistically. In the end, however, I believe that paternalism is only morally impermissible when an agent has a right against some form of conduct that is being overridden by judgements about their good. It *may* sometimes be morally undesirable not to act because of such judgements, when the agent has requested some action, but the requestee is under no obligation to so act, and can reasonably weigh the requester's good in her decision about what to do.

<sup>60</sup> See Raz, *Practical Reason and Norms*, pp. 89-91.



B will feel when she punches A constitutes a reason in favour of punching her. If A consents, B can now weigh these positive reasons for punching A against the reasons not to punch A grounded in A's interests.

Whilst this is not the end of the story, I think that consent functions, first and foremost, as a cancelling permission and not an exclusionary permission.<sup>61</sup> This is because if A's consent only functions as an exclusionary permission, and not a cancelling permission, then A's consent to B  $\phi$ -ing will generally be unable to make B's  $\phi$ -ing permissible. Return to the example of A's consenting to B's punching her. A's right against being punched usually serves to provide B with a first-order reason not to punch A, and an exclusionary reason not to weigh this reason against some considerations *in favour* of punching A (e.g. B's pleasure). If A's consent is an exclusionary permission, as Dempsey maintains, then A essentially allows B to disregard some of the reasons *against* punching her. But what good will this do? The reasons against B's punching A are indirectly protected by A's right, and that right is still in place. That is to say, B would now be confronted by the following reasons: a first-order reason not to punch A coupled with an exclusionary reason not to weigh this against some competing considerations, *and* a permission to exclude some first-order reasons against punching A. So, even with the exclusionary permission in place, B is still faced with A's right, and so she still has a first-order reason not to punch A, and a reason not to consider certain competing reasons for punching A. Simply put, even if B now has permission to exclude some of the reasons against punching A, she still also has a reason to exclude some of the reasons in favour of punching A.<sup>62</sup> Indeed, if the function of A's right is to protect her interests by preempting B's deliberations, and it does this by silencing some of the reasons *in favour* of punching A, then A's interests are still indirectly protected by her right even if A gives B an exclusionary permission. Thus, A's consent is unlikely to render B's punching A permissible, since B cannot justify her action with reference to reasons in favour of punching A such as her desire.

This is because an exclusionary permission does not entail a cancelling permission. That is, an exclusionary permission does not entail the cancellation of a protected reason. To see this we need only consider the case of medical consent. If a

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<sup>61</sup> Cf. John Gardner, "Justifications under Authority," pp. 15-16.

<sup>62</sup> This is so even if we assume that A's consent somehow weakens her right, by removing some of the interests that justify its strength by allowing B to exclude them.

patient gives consent, they do not give the doctor the option of excluding their interests from their deliberations about what to do. Instead, the doctor is required to think carefully about what would, on balance, be best for the patient. This just goes to show that, whilst the patient's right pre-empts the considerations that can inform the doctor's practical deliberations, her consent can make it permissible to include these considerations, without giving the doctor the further option to *exclude* some of the patient's interests.<sup>63</sup>

Dempsey is misled, I believe, by a failure to consider the way in which rights operate as protected reasons, and the fact that consent serves, in the first instance, to manage these protected reasons, rather than to add a new kind of second-order reason – an exclusionary permission – into the mix. Thus, she is wrong to say that, “absent [A's] consent, [B] is required to keep in play on [her] rational horizons reasons grounded in [A's] well-being”.<sup>64</sup> Rather, A's right is precisely supposed to pre-empt B's consideration of these interests. A can make it permissible for B to deliberate about her interests, as well as other reasons that might bear on her punching A, but in order to do that A needs to cancel the protected reason constituted by her right. In order for consent to play this role, consent must function as a cancelling permission.

However, I think there is something right in what Dempsey says, and this is because whilst consent should be thought of as a cancelling permission, I believe that in some cases consent does function as an exclusionary permission also. If consent were only a cancelling permission then, when consent was given to  $\phi$ , agents would have to consider all of the first-order reasons relevant to whether or not to  $\phi$ . In many cases of consent this would still render a course of action impermissible since it would be against the balance of reasons. B's punching A is a case in point. It seems reasonable to think that the reasons grounded in A's interests in not experiencing pain are of greater weight than the reasons grounded in B's pleasure in punching A. (We can assume that they are.) Nonetheless, we think A can make it permissible for B to punch her.<sup>65</sup> Plausibly, this is because by giving consent A can,

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<sup>63</sup> The counter-example might be thought unable to make the point since the doctor only has to continue to consider the patient's interests because he has a fiduciary duty to her. However, whatever the reason for considering the patient's interests, the example makes the conceptual point that a cancelling permission need not entail an exclusionary permission.

<sup>64</sup> Dempsey, “Victimless Conduct and the *Volenti Maxim*,” p. 21.

<sup>65</sup> There is a question looming here about the extent to which an agent can consent to actions harmful to her interests. For the moment, I simply rely on the thought that, even if there is some limit to the

as well as cancelling her right, also give B permission to further exclude some of the first-order reasons she has, including those interests grounded in A's well-being. The point is that this exclusionary permission is only likely to serve much use if the right has already been cancelled, in other words, if consent operates primarily as a cancelling permission. As the doctor-patient example demonstrates, consent need not always operate as an exclusionary permission also.<sup>66</sup>

So far I have said that consent primarily functions as a cancelling permission, whilst sometimes also as an exclusionary permission. Things are further complicated by the fact that in giving consent an agent will often communicate a preference or choice. For example, A might consent to B's coming to her party because she wants B to attend (she had simply forgotten to invite B before she asked). In such cases, A's consent does not only cancel her right, but indirectly contributes to B's first-order reasons for action as well. Notice that A's consent, on its own, does not give B any first-order reasons to attend.<sup>67</sup> Why should she attend just because she has permission to attend? The answer is that she should not, but rather that she should attend because A wants her to attend, B wants to see A and other people at the party, there will be good music, etc. Whilst consent often serves to indicate the presence of one of these reasons, i.e., A's desire or preference that B attends, it need not.<sup>68</sup> A may simply consent to B's coming out of politeness, even whilst making it perfectly

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kinds of harms agents can consent to, they can certainly give valid consent to *some* actions that will constitute harms to them. For discussion see Victor Tadros, "Consent to Harm," and Seana Shiffrin, "Harm and its Moral Significance."

<sup>66</sup> Can consent operate as an exclusionary permission without also operating as a cancelling permission? I am somewhat uncertain on this point, for the following reason. As I suggest in the text, an exclusionary permission is generally going to be useless unless coupled with a cancelling permission. But there is a question about whether this uselessness is a purely practical matter, or renders the possibility conceptually incoherent. Like I said, A's interests – the very interests that an exclusionary permission would allow B to exclude – continue to be indirectly protected by her right. So, we might think that an exclusionary permission could *never* make a difference to B without also constituting a cancelling permission. However, above (note 62) I highlighted the possibility that an exclusionary permission may *weaken* A's right, by excluding some of the interests that justify that right from playing that justificatory role. If this is correct then, even if some considerations are still excluded from B's deliberations (e.g. B's pleasure), there may be further non-excluded considerations that can now defeat the right, but only because the right is less weighty in light of the exclusionary permission. The resolution of this issue will, I suspect, depend on issues (such as how to draw the exclusionary scope of a right) that I cannot deal with here.

<sup>67</sup> Gardner, "Justifications under Authority," p. 14.

<sup>68</sup> Owens, *Shaping*, p. 180. Notice that B would have the reason grounded in A's preference whether or not it was communicated to her by A. If a third-party C reassured B that A wanted her to come, then this would indicate the existence of the reason to B in just the same way. (Indeed, B would have this reason whether or not anyone communicated it to her, as long as A had the relevant preference.) But of course C cannot consent to B's attending; only A can do that.

clear to B that she would rather she did not come.<sup>69</sup> In such cases B has permission to attend the party, but at least one first-order reason for doing so – A’s desire for B to attend – is lacking. Still, if she decides to go anyway (to see other friends etc.) she will not wrong A in so doing. Of course, in the majority of cases agents only consent to something they want to happen, and this explains why consent usually serves to make another’s action permissible: because consent cancels the right *and* alerts the consentee to a positive reason to act.<sup>70</sup>

The precise way in which consent functions will depend heavily on the context, and I doubt anything general can be said about when consent constitutes an exclusionary permission or choice (or both), as well as a cancelling permission. However, with this conceptual framework in place, we are now in a position to see why the power of consent is a normative power. By giving consent we can, to use Owens words, “change what someone is obliged to by intentionally communicating the intention of hereby so doing”.<sup>71</sup> We do so by cancelling a protected reason, and thereby waiving a right, meaning that the consentee no longer owes us a duty.<sup>72</sup> This is the way in which consent gives agents normative control over the duties others owe to them. There will still be many first-order reasons bearing on whether or not they should perform the consented to action – and nothing about our consent can directly affect those reasons (even if it can indicate their existence) – but the consentee is now free to consider the matter on its own merits.

## 5.4 Desiderata

We now have a working theory of consent. According to the relational theory, consent has normative significance because it provides agents with a means of interacting with one another in valuable ways whilst recognising one another’s legitimate control over those spheres protected by control rights, thereby allowing agents to interact whilst standing in a relationship of mutual recognition. Thus,

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<sup>69</sup> Ibid., p. 174.

<sup>70</sup> The consentee will also generally want to perform the consented to action also (why would she otherwise seek consent), giving her another positive reason, but again this need not be so. A doctor may dislike carrying out a particular procedure, but nonetheless have other positive reasons for doing so (e.g. the patient’s health) if she has the patient’s consent.

<sup>71</sup> Owens, *Shaping*, p. 4.

<sup>72</sup> See Raz, *The Authority of Law*, p. 18 who defines a normative power as the ability to change protected reasons.

according to the relational theory, the answers to the two questions concerning consent's normative significance from which we started – the question of consent's normative force, and the question of consent's relational significance – are closely related: both A and B have reasons to want to be able to interact with one another whilst recognising each other as giving the other's control interests the appropriate role within their deliberations. On the relational theory, then, consent's purpose is precisely to allow A and B to manage *their* normative relationship whilst standing in a concrete relation of mutual recognition.

With this picture in place we can now turn to assess how well the relational theory satisfies the desiderata I set out at the beginning of the chapter. Consider first the question of consent's authoritative nature; the fact that where an agent has the power to give or revoke consent, their giving or revoking consent will be sufficient to waive or reinstate their right. Of particular concern for an interest-based theory is whether it can explain why consent should be authoritative even in those cases where consent (or non-consent) does not track the underlying interests of the consenter.

It is worth first noting that, as I argued at the beginning of the chapter, many of our significant control interests are non-instrumental, such that often what is of significance is just that we have control over the ways others relate to and interact with us. Since the power of consent provides us with this control, it will at least very often be the case that our consent tracks our underlying interests. But the more important point is that, according to the relational theory, the normative significance of consent is not justified directly by the fact that it serves or protects our interests. If it were so justified then it is true that in any case where our consent (or non-consent) and interests diverged consent would not have normative force. But on the relational view, in order to justify both control rights and the power of consent, agents' control interests must be mediated through the relational requirement, the requirement that the moral requirements that obtain between us must allow for a relation of mutual recognition. So, according to the relational theory, our consent is normatively significant because it provides agents with a means of managing their normative relationships whilst relating to one another in a particularly valuable way, by recognising one another as bearers of interests worthy of protection. This explains why consent is authoritative. Only by regarding one another's consent as authoritative can we relate to one another in this valuable way.

Furthermore, since consent is often required before other agents can act permissibly, the power of consent has a further kind of authority, which, as I suggested in the previous section, is tied to the preemptive structure of control rights. Since an agent's control rights give others reason not to act in certain ways (by interfering in certain spheres), as well as giving them reasons to exclude a range of other considerations, then consenters have counterfactual normative control over whether others are permitted to act in certain ways. This ability to affect others reasons for action in one or other direction is a hallmark of practical authority.

Next, consider the problem of normative power: how is it possible for an agent to affect the application of her rights and their correlative duties simply by communicating an intention to do so, despite the fact that this declaration will not affect what is in her interests? In my view, this problem rests on the mistaken claim that the connection between an agent's interests and her rights is direct; that the rights an agent possesses at time *T* supervene on the interests she has at *T*. If this were correct then it would be true that an agent's consent could not affect which rights she has unless her consent somehow also affected her interests, something that seems implausible. However, as I argued in Chapter 4, we should not conceive of the relationship between interests and rights in this way. Whilst thinking about the rights that agents have, and their ability to waive these rights by giving consent, requires thinking about the interests that agents have in different scenarios, these interests must be mediated through the relational requirement so as to allow for mutual recognition between agents. The outcome will be a set of general principles concerning which rights agents' have, and when they are able to waive these rights by giving consent.

Third, does the relational theory track our pre-theoretical understanding of why consent is valuable? As we saw in Chapter 3, Owens's theory of consent satisfied the first two desiderata, but disconnected the power of consent from an intuitive sense of why consent has value for us, by claiming that the wrong of acting without consent is a bare wronging grounded in a non-reducible permissive interest. In contrast, the relational theory maintains the intuitive connection between the power of consent and the importance for agents of being able to determine, by their say so, what happens to them and within their environment. Moreover, whilst denying that the power of consent is exclusively explained by the value of autonomy, the relational theory can make sense of why it has seemed to so many that

the power of consent must be explained in this way, since many of the interests central to justifying both control rights and the power of consent are autonomy interests, and our ability to give and revoke consent clearly plays a crucial role in allowing agents to shape their own lives whilst relating to one another in a morally decent fashion.

At this point it is worth considering a response that might be suggested by Owens: since the relational theory rests on the idea that normative phenomena such as rights and duties play some non-instrumental role in structuring a valuable form of relationship, he might suggest that the relational theory is actually a version of his own view. For instance, it might be suggested that my claim that two agents stand in an intrinsically valuable relationship when they recognise one another as having legitimate control over certain domains is essentially the claim that agents have permissive interests, that it is valuable for them that certain things are socially recognised as wrongs unless they consent to them.

Two things should be noted at this juncture. First, as I understand Owens, he is suggesting that the fact that it is socially recognised that B wrongs A by  $\phi$ -ing unless she has A's consent is good for A *in itself*, independently of the nature of the relationship that obtain between A and B. That is, A has an interest in its being generally recognised within his community that others cannot  $\phi$  without his permission, and the general recognition of that fact will serve A's well-being. This is importantly distinct from the idea that B relates to A in an intrinsically valuable way when she recognises that she cannot  $\phi$  without A's consent, because in doing so she recognises A as a bearer of morally significant interests worthy of protection. At the centre of the relational theory is the claim that certain forms of relationships are valuable, including relationships in which we are able to recognise that we relate to one another in a morally decent way, and that we thus have reason to engage in these forms of relationship, where this requires us to recognise and deliberate about one another's interests in a certain manner. On Owens' theory, by contrast, the recognition of various normative phenomena is good in itself, independently of its contribution to structuring valuable relationships of this kind, since agents have interests in these phenomena.

Another way to put this is in terms of the bridging problem. Whilst Owens bridges the gap between interests and an intuitive account of wrongs by postulating normative interests, the relational theory bridges the gap by highlighting the value of

our relating to one another in a certain way in light of familiar non-normative interests, in autonomy, special relationships, and so on. So, whilst the moral significance of our deliberations and actions is not reducible to the protection of our interests on the latter view, we need not invoke the idea of permissive interests in order to explain the power of consent.

Owens might respond to this by saying that there was always supposed to be some connection between normative and non-normative interests, and, since the relational view doesn't make normative phenomena entirely instrumental, this is one possible version of exactly the kind of connection he had envisaged.<sup>73</sup> For instance, it is valuable that  $\phi$  count as a wrongdoing unless A consents because of his underlying control interests, but A's interest in  $\phi$  constituting a wrongdoing is not reducible to his interests in having control over  $\phi$ , and is, thus, a permissive interest. However, and this is the second point, even if we were to accept this formulation, notice that the relational theory does two things that permissive interest view does not. First, the relational theory provides us with a deeper explanation of why it should matter to us that certain things in particular are socially recognised as wrongs, viz., because we have significant interests in having control over the central aspects of our own lives. Second, the relational theory provides a deeper explanation of why the moral significance of our actions is not reducible to the protection and promotion of those interests: because, in light of these interests, it matters to us that we relate to one another in a way that allows us to recognise that we each give one another's interests the appropriate role in our deliberations. If this is on the right track then claiming, as Owens does, that consent is normatively significant because it is in our interests that certain acts constitute wrongings unless we consent to them does not only fail to provide us with a full explanation, but is, in fact, somewhat misleading, since it essentially provides only half the story whilst claiming to give a full explanation of the power of consent. The mere fact that the explanation for the power of consent is not reducible to our control interests does not show that they do not play a central role in the proper explanation, as the permissive interest view suggests.

The deeper explanation offered by the relational theory is also important when it comes to the final desideratum of explanatory power. Earlier I claimed that the explanatory power of the theory had two particularly important aspects, first,

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<sup>73</sup> Cf. *Shaping*, p. 182.



whether it was clear how the theory might be integrated into a more general moral theory, and second, the extent to which the theory provided a foundation for addressing further theoretical and practical questions. As to the first, it is clear enough how the relational theory fits into a more general moral outlook, since it is grounded in a familiar account of morally significant interests, and is compatible with a number of prominent theories about how these interests ground moral claims. It simply introduces the relational requirement as a further relevant consideration when thinking about the justification of moral rights and powers. Regarding the second, we have already seen one important way in which the relational theory can elucidate further issues in our discussion of the ontology of consent. In the next chapter I will further draw on the relational theory in order to assess existing practices of sexual consent.

## **5.5 Conclusion**

I have argued that the normative significance of consent is explained by the fact it provides agents with a means of interacting with one another in valuable ways whilst recognising one another's legitimate control over those spheres protected by control rights, thereby allowing agents to interact whilst standing in a relationship of mutual recognition. On the relational theory, consent is not justified by the fact that it serves or protects our control interests directly, but by the fact that it protects these interests indirectly whilst allowing for relations of mutual recognition. Ultimately, the power of consent provides a tool through which agents can manage their normative relationships, such that they can interact in useful and valuable ways whilst recognising one another's legitimate control over the central aspects of their own lives. When they do so they relate in an intrinsically valuable way, by recognising one another as bearer's of interests worthy of protection. This provides us with an explanation of consent's normative significance that avoids the pitfalls of the direct theories considered in Chapter 2, but without the need to postulate permissive interests. Moreover, it supports our considered intuition that agents have a sphere of control or authority, within which their consent or dissent is decisive, without having to appeal to the idea that this is simply a fitting response to their status as free or rational beings.

## 6

## Consent, Gender, and Social Justice

Consent is widely regarded as a necessary condition for permissible sexual relations. But some theorists have argued that consent cannot provide a means to manage morally decent sexual relations under conditions of patriarchy and gender injustice. Most prominent in this regard has been the work of Catherine MacKinnon. “Never is it asked,” Mackinnon writes, “whether, under conditions of male supremacy, the notion of consent has any real meaning for women.”<sup>1</sup> However, many have responded to MacKinnon by arguing that her focus on social structures is misplaced when applied to the issue of sexual consent. According to these critics, MacKinnon conflates two distinct forms of coercion – social coercion and interpersonal coercion – and wrongly implies that women cannot give normatively significant consent to sex under conditions of pervasive gender inequality.<sup>2</sup>

In this chapter I draw upon the positive theory of consent developed in Chapter 5 to highlight an important connection between the social conditions within which consent operates and the extent to which consent can realise the values that underpin its normative significance. Whilst I agree with those who maintain that sexual consent does allow for non-wrongful sexual relations between individuals under non-ideal social conditions, I also agree with MacKinnon that structural inequalities make an important difference to the way in which sexual consent can facilitate morally decent and valuable sexual relationships.

I begin, in Section 6.1, by setting out the nature of the dispute between MacKinnon and her opponents. In Section 6.2 I suggest that in order to fully realise

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<sup>1</sup> Catherine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979), p. 298. n. 8. MacKinnon is certainly not the only feminist theorist to have made such claims. I focus on her work here because it is, I think, the most developed and powerful articulation of the set of concerns that I wish to consider.

<sup>2</sup> See, generally, David Archard, *Sexual Consent*, Ch. 6; Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003), Ch. 8; Robin West, “Sex, Law, and Consent,” in *The Ethics of Consent: Theory and Practice*, ed. Franklin G. Miller and Alan Wertheimer (Oxford: Oxford University Press, 2010).

the values of individual control and mutual recognition we require appropriate conventions of sexual consent. Next, in Section 6.3, I argue for the *control thesis*, according to which existing social conventions of sexual consent, and the background conditions against which those conventions operate, fail to provide many (mostly women) with a sufficient measure of control over the sexual relations they engage in, thus failing to adequately serve and protect their first-order control interests. In Section 6.4 I argue for the *mutual recognition thesis*, which claims that the combination of existing conventions and background conditions threatens the extent to which sexual consent can be relied upon to ensure relations of mutual recognition between agents, in which there is a common understanding that they each have legitimate control over whether or not they engage in sexual relations. Finally, in Section 6.5, I consider some implications that my argument has for current debates concerning legal and moral standards of sexual consent, and argue that we have a duty of justice to create appropriate conventions.

## 6.1 Structural Injustice and Sexual Consent

As a starting point, consider what I take to be a relatively common pre-reflective view about the ability of sexual consent to govern morally decent sexual relationships, which I will call the *standard view*. According to the standard view, voluntary consent marks the borderline between permissible and impermissible sexual relations, so as to protect the sexual autonomy of individuals. So long as all the parties engaged in a sexual interaction ensure that they acquire one another's consent, and are sufficiently attentive to the possible revocation of consent, they engage in permissible sexual relations. This is true (at least for the most part) independently of shared understandings about what constitutes sexual consent, and independently of the social circumstances within which sexual relationships occur, including the common understandings about the nature of relationships or the individuals who make up those relationships (e.g. norms or expectations about men and women, marriage, etc.).<sup>3</sup> On the standard view, whilst there may be some need

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<sup>3</sup> There may be some exceptions. For example, it might be thought that where there is a significant power asymmetry (e.g. relationships between academics and university students, or between doctors and patients), the more powerful party will (or at least can) wrong the less powerful party by engaging

to reform sexual consent laws, or practices connected to the prosecution of sexual offenders, and whilst we should engage in activities such as educating children about the importance of acquiring sexual consent, there is no reason to believe that consent cannot serve as a basis for decent sexual relations between individuals. Ultimately, the relevant level for scrutiny and criticism is at the individual level, and concerns whether or not particular individuals are careful to ensure that they have the consent of their sexual partners.

In the eyes of MacKinnon, the standard view is fundamentally flawed. The reason is simple. The standard view fails to take into consideration the significant *structural inequalities* that continue to exist between men and women. This omission is problematic for at least two reasons. First, the standard view implies that the prevalence of avowedly non-consensual sexual violence is the result of a widespread failure on the part of *individuals* to act in accordance with acceptable moral and legal standards, rather than a consequence of a social system of gender inequality, violence, and domination. To be clear, the claim is not that individuals bear no responsibility for perpetrating sexual violence. Rather, the problem is that the standard view allows a community to view acts of sexual violence as aberrant cases for which particular individuals are solely responsible. But, for MacKinnon, in order to undermine the prevalence of sexual violence we need to challenge the social system of inequality that underpins and facilitates high levels of sexual violence in the first place.

Second, the standard view is mistaken in claiming that sexual consent can protect or promote the sexual autonomy of women *even when it is given*. For MacKinnon, pervasive gender inequalities give rise to a variety of coercive conditions – including power asymmetries, economic inequalities, constrained alternatives, social expectations – that undermine the validity or usefulness of “voluntary sexual consent.” Indeed, whilst much sex may look “consensual,” it is not, in fact, “wanted”.<sup>4</sup>

Consent is supposed to be women’s form of control over intercourse,  
different from but equal to the custom of male initiative. Man proposes,

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in sexual relations with them, even when they acquire what would otherwise be considered to be voluntary consent.

<sup>4</sup> Catherine A. MacKinnon, *Women Lives, Men’s Laws* (Cambridge, Mass.: Harvard University Press, 2005), pp. 246-47.

woman disposes. Even the ideal is not mutual. Apart from the disparate consequences of refusal, this model does not envision a situation the woman controls being placed in, or choices she frames. Yet the consequences are attributed to her as if the sexes began at arm's length, on equal terrain, as in the contract fiction.<sup>5</sup>

So, as Robin West has suggested, MacKinnon claims that, “the sharp line drawn by liberals between consensual and non-consensual sex falsifies the degree of coercion imposed upon women by men in our ordinary sexual lives.”<sup>6</sup> And until these broader coercive conditions are recognised as relevant, sexual consent cannot provide an adequate means to manage sexual relationships in the way envisaged by a proponent of the standard view.

[U]ntil inequality is directly addressed by the law of sexual assault, nothing adequate will be done about it. You cannot solve a problem you do not name. For the same reason, legal reform through consent alone or force alone, while improvements, will intrinsically fall short unless the concepts are fundamentally recast in terms of inequality.<sup>7</sup>

On MacKinnon's view then, at their best current standards of sexual consent fail to adequately promote or protect the sexual autonomy of women because they do not take into account the pervasive gender inequalities entrenched within society; at their worst, they serve to conceal the reality of force that further entrenches the political system of injustice and domination which gives rise to those inequalities in the first place.<sup>8</sup> What would need to change before we could adopt the standard view? For MacKinnon, we would need to realise substantive gender equality: “If the sexes were equal, women would not be sexually subjected. Sexual force would be exceptional, *consent to sex could be commonly real*, and sexually violated women would be believed.”<sup>9</sup>

Note that MacKinnon is unclear about the precise nature of the effect that structural conditions of inequality are supposed to have upon sexual consent. In

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<sup>5</sup> Catherine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989), p. 174.

<sup>6</sup> Robin West, “Sex, Law, and Consent,” p. 225.

<sup>7</sup> MacKinnon, *Women Lives, Men's Laws*, p. 246.

<sup>8</sup> Catherine A. MacKinnon, “Sexuality, Pornography, and Method: ‘Pleasure Under Patriarchy,’” *Ethics* 99, no. 2 (1989), pp. 329-30.

<sup>9</sup> MacKinnon, *Toward a Feminist Theory of the State*, p. 215. Italics added.

particular, it remains unclear what degree of normative efficacy (if any) sexual consent can have within the non-ideal conditions that MacKinnon so vividly describes. In fact, this is an ambiguity that runs throughout MacKinnon's writings on the topic, and one that is probably deliberate on her part. MacKinnon's central point is that a view like the standard view is inadequate because it fails to take into consideration the broader conditions of gender injustice in which consent operates, and that, in order to fundamentally remould the nature of relations between men and women, it is *here* that our attention should be focused. As will become clear as we go on, however, clarifying this ambiguity is important if we are to benefit from MacKinnon's insights.

MacKinnon's view has met with much opposition. One dominant strand of criticism maintains that, by focusing upon structural conditions of inequality, MacKinnon fails to pay sufficient attention to the agency of individuals (both women and men). In so doing, it is argued, MacKinnon wrongly implies that (i) women are unable to give any kind of meaningful consent to sex under conditions of gender inequality;<sup>10</sup> (ii) that there are no significant differences between the experiences of those who take themselves to be having consensual rather than non-consensual sex;<sup>11</sup> and (iii) that individual men who acquire sexual consent from their partners are still likely to be culpable for serious wrongdoing because of the social and economic structures within which they act.<sup>12</sup> Moreover, in his book *Consent to Sexual Relations*, Alan Wertheimer argues that principles of valid consent must be applicable to the non-ideal circumstances in which people live, including those of injustice:

I do not doubt that women sometimes agree to sexual relations that they would reject under different or more just or equal background conditions. But we do not enhance their welfare or their autonomy by denying the transformative power of their consent.<sup>13</sup>

Let us call this cluster of responses the *liberal response*. They are tied together by the common idea that sexual consent can, when given, allow for non-

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<sup>10</sup> Archard, *Sexual Consent*, Ch. 6.

<sup>11</sup> West, "Sex, Law, and Consent."

<sup>12</sup> Wertheimer, *Consent to Sexual Relations*, p. 188.

<sup>13</sup> *Ibid.*, pp. 191-92.

wrongful sexual relationships even under non-ideal social conditions. This is not to say that we should have no concerns regarding the nature of sexual relationships in patriarchal conditions. But it is to say that when B gives voluntary consent to sex with A then A does not *wrong* B by engaging in sexual acts, irrespective of the background social conditions. To claim that A wrongs B conflates two importantly different forms of coercion: interpersonal coercion, on the one hand, and what we might call structural or social coercion, on the other.<sup>14</sup>

I take it that, so understood, this claim is correct. There is surely an important difference between non-consensual sexual assault, and consensual sexual interaction, even where the latter occurs against the backdrop of pervasive and problematic gender norms and inequalities.<sup>15</sup> MacKinnon may be right to insist that we should subscribe to a more expansive view about the kinds of coercive pressure an *individual* can bring to bear, for example, in the form of psychological abuse, or via their occupation of positions of power, and thus allow that A will wrong B in more contexts than is currently recognised, because by acting in these ways they vitiate any consent they receive. But what is not true is that A can wrong B *just because* B consent's to sex takes place against the background of structural inequalities for which A is, at best, only indirectly and partially responsible for. We might say, then, that where A subjects B to his will (something he may do through a variety of means) he undermines the voluntariness of any consent B might give, and thus seriously wrongs her by engaging in sexual acts. But where A does not subject B to his will, B's consent, if given, will be voluntary in the relevant sense, and thus present A with a genuine moral permission.

Yet, as we saw in Chapter 5, the normative significance of consent is not exhausted by the fact that it provides agents with a means of non-wrongfully interacting with one another. Beyond this, consent plays an important role in managing the directed duties that obtain in virtue of our control rights. Specifically, it allows agents to interact in valuable ways by ensuring that they have a sufficient measure of control over the central aspects of their lives, whilst also enabling them to stand in relations of mutual recognition with one another. With these underlying

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<sup>14</sup> See West "Sex, Law, and Consent."

<sup>15</sup> It is worth noting that MacKinnon is often misrepresented by her critics. Whilst MacKinnon certainly claims that current practices of sexual consent are inadequate in light of pervasive gender inequality, she does not explicitly claim that sexual consent is in no way normatively significant – that there is no normative difference between consensual and non-consensual sexual relations.

values in mind, MacKinnon's claims retain an intuitive force. Surely the structural conditions of gender injustice *do* make a difference to the degree of control possessed by individuals, and the extent to which agents can mutually recognise one another as possessing legitimate control over their sexual lives. In what follows I will argue that this is indeed the case.

## 6.2 Consent and Conventions

In what follows, I take MacKinnon's claims about the significance of social structures seriously by assessing one way in which those structures – in particular, conventions of sexual consent and the background conditions against which those conventions operate – affect the way in which sexual consent is able to realise the values that underpin its normative significance. Before turning to defend the control thesis and the mutual recognition thesis, let me first say something about the relationship between conventions and consent. I think that in order for consent to play the role in managing interpersonal relations that I have argued it plays we need appropriate conventions of consent.<sup>16</sup> The reason for this, simply put, is that we rely on conventions of consent in order to establish the shared normative framework that allows for relations of mutual recognition, and the valuable form of normative assurance that derives from these relations. As I argued in Chapter 5, agents require fixed-points in their interactions at which they can understand one another as consenting or dissenting, so as to be capable of forming common beliefs about consent's authority within certain domains, and thus relate to one another as bearers of morally significant control interests.

Moreover, conventions are necessary in order to resolve linguistic and normative indeterminacies that would otherwise undermine the role consent can play in managing our moral relations. Linguistic indeterminacy amounts to the fact that, as Larry Alexander notes, “there is no canonical form of words or actions that count as consent.”<sup>17</sup> So whilst a “Sure,” a nod of the head, or a signature on a consent form, might all constitute consent, there is no reason why these forms of

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<sup>16</sup> I employ the term convention here in a way that I hope is familiar and intuitive.

<sup>17</sup> Larry Alexander, “The Ontology of Consent,” p. 103.



communication, and not others, should *necessarily* represent instances of consent.<sup>18</sup> This is so even if agents have the general idea that some forms of action are only permissible if another has given them permission. Without some further understanding of the way in which permission is given, both consentor and consentee will struggle to navigate their interaction in the way in which they believe they should.

Normative indeterminacy has somewhat deeper roots. There are two kinds of case I have in mind. First, there are cases in which it is indeterminate whether an agent possesses the power of consent or not. For example, what is the appropriate age for an individual to come to have the power of sexual consent? In the UK it is currently 16 by law. This seems more appropriate than 12 (which was the case historically), but it is less obvious why it should be 16, and not 15, or 17. Second, there is indeterminacy about how consent should be given (and revoked) in particular circumstances; that is, indeterminacy regarding what would count as a *good* way of giving consent in a certain context. For example, what is the appropriate standard of sexual consent: a wink, a nod, a verbal declaration, a signature, or none of the above? In both kinds of case I assume that there are reasons that count for and against various possible resolutions to these indeterminacies, without there being any single correct solution. For instance, as I argued in Chapter 5, it is plausible to think that consent should be more or less formal depending on the first-order control interests at stake, and the nature of the relationship between consentor and consentee. However, whilst these considerations give us reasons in favour of more or less formal consent requirements, they will not provide definite or precise answers to the question of how consent should be given.

Social and legal conventions can resolve linguistic and normative indeterminacies, and institute a shared normative framework, by establishing fixed points: junctures within interactions at which it is widely understood that an agent must give consent in order for it to be permissible to proceed (e.g. prior to a medical examination), and, furthermore, specify actions or forms of words that will constitute consent in particular contexts (e.g. a thumbs up, a “Yes,” a signature). Socialisation into the practice equips individuals with knowledge of these fixed points, and how to traverse them. It is an open question whether a particular set of conventions will

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<sup>18</sup> Of course, given the permission granting role played by consent, the linguistic tokens that play this role are likely to relate to other parts of a language that concern permission.

represent a good solution to the problems I have identified. Whether those conventions are good or bad solutions will depend on whether they resolve linguistic and normative indeterminacies, and establish commonly recognised fixed-points, in a way that is sufficiently responsive both to agents' control interests and relational interests. I assume that where these conventions represent good solutions to the underlying problems they can provide us with new reasons for action, because they mediate between "abstract moral ideals and their concrete realization in our social interactions."<sup>19</sup>

Some might object to the idea that conventions of consent are in fact necessary in the way I am suggesting. For example, Judith Jarvis Thomson writes that "there is no more reason to think that a background of social understandings is required if consent is to be given than there is to think that a background of social understandings is required if a word is to be given [a promise made]."<sup>20</sup> Moreover, to many, the suggestion that sexual consent is conventional may strike as odd. Surely it is simply wrong to have sex with someone unless we have his or her consent.

I suspect that these responses conflate the moral value of consensual interactions with the preconditions for the realisation of that value. I am not claiming that the moral wrong of non-consensual sex is "merely conventional" in the sense that it is just something people around here happen to think is morally wrong. Rather, I doubt that agents could rely on consent in order to provide them with a sufficient measure of control, and allow for relations of mutual recognition, absent a fairly rich framework of linguistic and normative conventions.<sup>21</sup> The idea that human beings could always have understood one another as bearers of certain rights that could be waived through the giving of consent seems patently false. Whilst I assume that, from the point at which human beings could be considered to be moral agents, our relations with one another have always been normatively laden – in that there are reasons for us to act or not act in certain ways with regard to one another – we have not always been equipped to deal with the imprecise normative boundaries that exist. It is precisely through developing conventions and practices, including conventions

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<sup>19</sup> Marmor, *Social Conventions*, p. 149.

<sup>20</sup> *The Realm of Rights*, p. 350.

<sup>21</sup> Cf. Owens, *Shaping*, p. 152. Note that this does not imply that if, absent general conventions, A were to understand herself as giving consent to B by  $\Phi$ -ing, and if B also understood that A means to give consent by  $\Phi$ -ing (and so on and so forth), that A's consent would not have normative force.

of consent, that we have been able to resolve indeterminacies and realise a wide range of moral values.

### 6.3 The Control Thesis

I now wish to argue that our existing conventions of sexual consent, and the background conditions against which they operate, fail to provide many individuals (especially women) with a sufficient measure of control over their sexual relations with others (the control thesis); and that these conventions also fail to facilitate relations of mutual recognition between agents (the mutual recognition thesis). I begin in this next section by arguing for the control thesis.

According to the control thesis, under current social conditions our conventions of sexual consent do not provide women with a sufficient measure of control over their sexual relationships and interactions, thus failing to protect and promote the first-order control interests that partly explain consent's normative significance.<sup>22</sup> Whilst there are a number of ways in which the control thesis might be true, here I will simply focus on two such ways.<sup>23</sup> First, I will argue that women lack a sufficient measure of control over their sexual interactions because the *conventions themselves* are inadequate. In particular, the conventions are such that a consenter (or dissenter) is often unable to secure uptake from the consentee. Second, I will argue that the background *social and political conditions* under which we live

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<sup>22</sup> Whilst I focus on the way in which existing social conditions undermine the degree of control women have over their sexual relations, I do not mean to suggest that this situation will not have detrimental effects on men, whether as consenter's or consentee's. Furthermore, whilst I focus on sexual relations between men and women, I do not intend to suggest that these are the only sexual relationships that have value. Moreover, I suspect that the problems I identify will also exist within many non-heterosexual relationships, but I cannot adequately address this broader set of issues here.

<sup>23</sup> Further evidence for the control thesis, though I cannot explore this in any detail here, can be found in the ways in which existing social conditions lead women to consent to sex that is not truly desired or wanted. Assuming that one reason for thinking individuals have control interests is because they have interests in being able to maintain a sufficient degree of conformity between their evaluative attitudes and what happens to their bodies and within their environment, if it is true that social conditions consistently compel women to consent to sex that is not wanted then this suggests the possibility of significant consensual harms. This is another theme that runs through MacKinnon's writing. (See, e.g., Catherine A. MacKinnon, *Women's Lives, Men's Laws* (Cambridge, Mass.: Harvard University Press, 2005), pp. 244-47.) Taking up this issue in a fascinating paper, Robin West argues that whilst we should be much more attentive to the harms that are caused by this kind of sex, and the background conditions that produce them, consent still serves as an appropriate marker between criminal and non-criminal sex, and that MacKinnon and other radical feminists are wrong to conflate these forms of sexual interaction with coercive rape. See her "Sex, Law, and Consent."

undermine the efficacy of our conventions in providing individuals with a sufficient measure of control.

### 6.3.1 *Ambiguity and Uptake*

Conventions of sexual consent, in order to be adequate, should require that every individual only engage in sexual acts with the consent of their sexual partner(s), where consent is understood as a clear sign of positive willingness to engage in particular sexual acts.<sup>24</sup> Until very recently, conventions of sexual consent were clearly insufficient, as was manifest in the law. For example, the marital rape exemption was only formally removed from the law in the UK in 1991. So, until this point, the legal conventions of consent in the UK held that a wife did not have the power of sexual dissent. Fairly obviously, this fails to provide married women with a sufficient degree of control over their sexual lives. Other legal examples include the idea that in order to be understood as dissenting a woman had to “resist to the utmost.”

To be sure, current legal and non-legal conventions of sexual consent are a significant improvement on what they once were. However, I wish to argue that those conventions are still problematic because the consenter will often struggle to secure uptake of their consent or, more importantly, dissent, from the consentee. As Carolyn Shafer and Marilyn Frye note,

Because of the conventional nature of the act of consent, one can effectively consent or withhold consent only where others are prone to consider one’s wishes – that is, where one’s act of giving consent can secure uptake. [...] Obviously, the range of one’s actual, effective power of consent may or may not coincide with the range within which, morally, one ought to have the power of consent, for one’s effective power of consent depends upon the acknowledgement of others.<sup>25</sup>

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<sup>24</sup> I am then, for the moment, relying on a weaker understanding of consent than the one I have been using up until now, according to which consent constitutes the intentional waiving of a right. I have more to say about this below.

<sup>25</sup> Marilyn Frye and Carolyn M. Shafer, “Rape and Respect,” in *Feminism and Philosophy*, ed. Mary Vetterling-Braggin, Frederick A. Elliston, and Jane English (Totowa, New Jersey: Rowman and Littlefield, 1977), pp. 335-36.

What reasons are there for holding that acts of giving and withholding sexual consent do not secure uptake? To begin, current conventions of sexual consent still allow for a significant degree of ambiguity, ambiguity that disproportionately affects women because, according to the standard pattern of sexual interaction (or the “sexual script”) men initiate sexual interactions and women either consent or dissent to them.<sup>26</sup> I will say that a convention is ambiguous when participants to the convention could regularly come to different judgements about when conventional norms apply. In the case of consent, a convention of consent is ambiguous when the participants of the convention could regularly come to different judgements about when consent has been given or revoked. If a convention of consent is ambiguous then it cannot serve its purpose. Consent functions by providing agents with a fixed point in their interactions at which they all understand that  $\phi$ -ing or  $\psi$ -ing constitutes the giving or revocation of consent. If it is ambiguous to A and B whether the other has or has not given consent, they cannot rely on one another’s consent to (i) maintain sufficient control, and (ii) recognise one another’s legitimate control.

Are there reasons for thinking that existing conventions of sexual consent are ambiguous? Alan Wertheimer “suspect[s] that there are *very* few cases in which there is genuine ambiguity whether [an individual] has tokened consent”.<sup>27</sup> However, the empirical evidence suggests otherwise. For example, a survey of recent college students by *The Washington Post* found that at least 40 percent of the sample agreed that undressing, getting a condom, or nodding in agreement constituted consent to further sexual activity, whilst another 40 percent disagreed,<sup>28</sup> implying serious divergence in beliefs about what constitutes sexual consent.<sup>29</sup> Furthermore, there is a significant difference between men and women regarding how they give or interpret

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<sup>26</sup> Kristen N. Jozcowski et al., “Gender Differences in Heterosexual College Students’ Conceptualizations and Indicators of Sexual Consent,” *The Journal of Sex Research* 51, no. 8 (2014), pp. 905-06.

<sup>27</sup> Wertheimer, *Consent to Sexual Relations*, p. 153, emphasis in original.

<sup>28</sup> Nick Anderson and Peyton M. Craighill, “College students remain deeply divided about what consent actually means,” *Washington Post*, June 14, 2015, accessed November 28, 2015, [www.washingtonpost.com/local/education/americas-students-are-deeply-divided-on-the-meaning-of-consent-during-sex/2015/06/11/bbd303e0-04ba-11e5-a428-c984eb077d4e\\_story.html](http://www.washingtonpost.com/local/education/americas-students-are-deeply-divided-on-the-meaning-of-consent-during-sex/2015/06/11/bbd303e0-04ba-11e5-a428-c984eb077d4e_story.html).

<sup>29</sup> See also the BBC study of 16-18 year olds, “Do people understand what rape is?” November 4, 2015, accessed November 28, 2015, <http://www.bbc.com/news/magazine-34470205>. Participants were shown a specially designed drama concerning a sexual interaction and asked to judge whether it was consensual. Despite the fact that one of the drama’s protagonists communicated no obvious signs of consent or willingness, there was significant disagreement, and confusion, about whether consent had been given.

sexual consent.<sup>30</sup> According to a recent study, “men were more likely than women to rely on nonverbal cues to communicate and interpret consent and nonconsent, and women were more likely than men to rely on verbal cues to communicate and interpret consent.”<sup>31</sup> As the studies authors note, this raises the possibility of miscommunication and ambiguity.<sup>32</sup> Moreover, there is a lot of evidence that men frequently misperceive the behaviour of women. Michelle Anderson summarises recent findings in social psychology by saying,

Men are more likely to misinterpret a woman's consumption of alcohol as conveying sexual intent. Men misinterpret women's friendly body language as indicative of sexual intent. When assessing interpersonal distance, eye contact, and casual touch, men rate women as more seductive and more promiscuous than women rate other women and themselves. Men are more prone to interpret flirting as indicative of sexual intent, whereas women tend to view flirting as "relational development." *In short, the literature documents the male tendency to see female sexual consent where there is none.*<sup>33</sup>

This evidence suggests that there is a significant degree of ambiguity within our existing conventions of sexual consent. Furthermore, there is also misunderstanding (or under appreciation) of the legal standards that obtain. Indeed, in response to the degree of sexual violence on college campuses, a number of American universities have recently adopted codes of conduct that specifically define sexual consent as something that must be communicated “unambiguously,” implying a need to remould sexual conventions, and to move away from more ambiguous modes of sexual communication.<sup>34</sup>

A further reason for holding that current conventions of sexual consent are potentially ambiguous is that many acts that are taken to communicate sexual consent are not strictly speaking acts of consent at all. I have been working on the assumption that to consent one must perform a token of consent with the intention of

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<sup>30</sup> I do not mean that this difference is natural or necessary, only that this is what empirical research has found.

<sup>31</sup> Kristen N. Jozcowski et al., “Gender Differences in Heterosexual College Students’ Conceptualizations and Indicators of Sexual Consent,” p. 913.

<sup>32</sup> *Ibid.*

<sup>33</sup> Michelle J. Anderson, “Negotiating Sex,” p. 1417, emphasis added. See also Archard, *Sexual Consent*, p. 156, n. 20, and accompanying text; and Jozcowski et al., “Gender Differences,” p. 913.

<sup>34</sup> Quoted in Tom Dougherty, “*Yes Means Yes: Consent as Communication*,” p. 225.

waiving a right. But it seems fairly obvious that many of the acts that are cited as indicators of non-verbal consent (e.g. enthusiastic undressing, getting a condom, foreplay), are not undertaken with the intention of waiving a right.<sup>35</sup> This does not imply that all such sexual relations are impermissible. In accordance with the typology I outlined in Chapter 5, agents can make a series of objective choices that ensure the permissibility of their sexual interaction (assuming there is a possibility for explicit dissent). However, one reason for relying on explicit consent rather than on objective choice is precisely because it will be less ambiguous.

So there is good reason to think that existing conventions of sexual consent are ambiguous, such that there is an insufficient degree of shared understanding regarding which acts constitute sexual consent (or, perhaps, which acts constitute objective choices that can reasonably be taken to give permission to some sexual acts). If this is correct there is good reason to think that existing conventions of sexual consent fail to provide women with a sufficient measure of control over their sexual interactions, both because acts not aimed at giving consent are taken to do so, and acts of dissent are not understood as such. In order to provide a sufficient measure of control, acts of sexual consent (or objective choice) must be unambiguous: it must be transparent between the parties whether they intend to make it permissible to engage in sexual relations.<sup>36</sup>

There are, moreover, a number of more pernicious factors that plausibly undermine a women's ability to secure uptake when she consents or dissents. For one, it is often still expected that women will initially dissent to sexual relations, because they are being "coy," and that men should continue to pursue a sexual encounter even in the face of explicit refusal.<sup>37</sup> Furthermore, Rae Langton has argued in her influential article, "Speech Acts and Unspeakable Acts," that the widespread use of pornography has influenced the felicity conditions for acts of consent and dissent in the sexual sphere, such that attempted acts of dissent are not even recognised as such.<sup>38</sup>

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<sup>35</sup> See also my discussion in Section 3.2.3.

<sup>36</sup> See also, Dougherty, "*Yes Means Yes: Consent as Communication.*"

<sup>37</sup> Jozcowski et al., "Gender Differences," p. 905.

<sup>38</sup> Here Langton is drawing on J. L. Austin's famous Speech Act Theory. All that matters for our purposes is the idea that "felicity conditions" are just those conditions that must hold for an utterance to constitute an act of consent or dissent.

Pornography might legitimate rape, and thus silence refusal, by doing something other than eroticizing refusal itself. It may simply leave no space for the refusal move in its depictions of sex...Here the refusal move is not itself eroticized as in the pornography considered earlier: it is absent altogether. Consent is the *only* thing a woman can do with her words in this game. Someone learning the rules of the game from this kind of pornography might not even recognize an attempted refusal.<sup>39</sup>

If Langton is right,<sup>40</sup> this draws our attention to an important problem with conventions of sexual consent: acts of non-consent or refusal will not be merely ambiguous, but cannot be recognised as acts of dissent at all. Clearly, where that is the case, women will not have a sufficient measure of control over their sexual relations.

### 6.3.2 Background Social Conditions and the Legitimation of Force

So far I have argued that existing conventions of sexual consent are insufficient because women consenters cannot always secure uptake from male consentees. This fact, I have suggested, gives us reason to accept the control thesis. I now turn to the way in which background social and political conditions further undermine the efficacy of our conventions of sexual consent.

To begin, let me clarify what I mean by “background social and political conditions.” These conditions are constituted by many different elements and might be thought of, in the most general terms, as the social, political, and moral environment in which we live. To list some (but by no means all) of these elements, they include: laws, political institutions, political practices, social norms, economic prosperity, employment trends, news media, social media, professional standards, artwork (e.g. music, films, novels, and jokes), fashion, and academic writing.

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<sup>39</sup> Rae Langton, “Speech Acts and Unspeakable Acts,” *Philosophy and Public Affairs* 22, no. 4 (1993), p. 324.

<sup>40</sup> Alexander Bird persuasively argues that Langton’s claims about refusal rest on an incorrect premise: that uptake is required for the speech act of refusal (in “Illocutionary Silencing,” *Pacific Philosophical Quarterly* 83 (2002)). Bird argues that in fact refusal can occur even if it is not recognised as such. However, as Bird notes, this is a matter of speech act theory. Whether or not uptake is required for refusal or not, the important point is that some forms of pornography support an environment in which non-consent is not recognised as such, and that this undermines the degree of control women have over their sexual interactions.



It is the fact that these background conditions support and constitute a system in which men and women are socially, economically, and politically unequal, that motivates MacKinnon's claims that sexual consent, considered in isolation, cannot succeed as a means of managing sexual relations. Whilst it is unclear what the upshot of this is for MacKinnon, I am working with the assumption that consent (of a certain kind) can, at least in the majority of cases, make sexual relations permissible. But I want to argue that one way of understanding the idea that background conditions nonetheless threaten or undermine the usefulness of sexual consent is through the claim that background conditions prevent women from having a sufficient measure of control over their sexual interactions. Here I will focus on the way in which the background conditions within which we live eroticise and legitimatise the use of force and coercion in the sexual sphere.

The idea that relations of force and coercion are constitutive of the sexual sphere is a theme that runs throughout MacKinnon's work. Indeed, MacKinnon claims that, "forced sex as sexuality is not exceptional in relations between the sexes but constitutes the social meaning of gender."<sup>41</sup> Whether this general claim can be vindicated is not a question I can address here. But it is not implausible to claim that sexual force is, at least currently, both eroticised and legitimatised by dominant social and political norms. One way in which this is so is through the widespread use of forms of pornography that, in MacKinnon's words, "sexualizes rape, battery, sexual harassment, prostitution...[and]...thereby celebrates, promotes, authorizes, and legitimizes them."<sup>42</sup> Indeed, Langton argues that, as well as silencing women by making it impossible for their dissent to secure uptake, pornography legitimates rape "by sexualizing the use of force in response to refusal that is recognized as refusal. Such pornography eroticizes refusal itself, presenting the overpowering of a woman's will as exciting."<sup>43</sup>

To be sure, it is very hard to establish causal connections between the widespread use of pornography and the high incidence of sexual assault and rape.<sup>44</sup> But whatever the precise combination of social forces that explain them, there certainly exist widespread attitudes and beliefs, in both men and women, that imply

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<sup>41</sup> *Towards a Feminist Theory of the State*, p. 178.

<sup>42</sup> "Frances Biddle's Sister: Pornography, Civil Rights, and Speech," in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987), p.171.

<sup>43</sup> Langton, "Speech Acts and Unspeakable Acts," p. 323.

<sup>44</sup> Although see *ibid.*, p. 306.

the permissibility of the use of sexual force. For example, in a 2014 study, “Denying Rape but Endorsing Forceful Intercourse,” the authors found that whilst 31.7% of survey respondents claimed to have some intentions to force women to have sexual intercourse, only 13.6% claimed to have any intentions to rape a woman, suggesting that 18.1% of respondents did not believe that their force would vitiate consent.<sup>45</sup> In 2009, an Ipsos Mori poll found that 36 percent of respondents thought women should be held partly or wholly responsible if she is sexually assaulted or raped whilst drunk, and that 43 percent thought she should be held wholly or partly responsible if she was flirting heavily with a man beforehand.<sup>46</sup> Furthermore, as I noted above, it is commonly believed that women will “token” resistance, and that men should continue to pursue sex in the face of such resistance.<sup>47</sup> Finally, it is widely believed that only “certain kinds” of women are raped, that rapes are most likely to be perpetrated by strangers in alien environments, and that men are naturally sexually aggressive and cannot help themselves.<sup>48</sup>

What unifies these beliefs is the thought that it is sometimes permissible to use sexual force even when women dissent. Moreover, evidence suggests that this belief is not only held by men. In one study of college-aged women, 45.69% of female participants (from a sample of 302) were classed as “unacknowledged victims,” who “endorsed experiencing a sexual assault but did not label it as such, instead choosing some other descriptor (i.e., a “serious miscommunication,” “not victimized,” or a victim of a crime other than sexual assault).”<sup>49</sup>

It is surely no coincidence that against this backdrop, it is still the case that only 6 percent of reported rapes end in conviction in the UK,<sup>50</sup> and only 2 out of every 100 rapes that occur in the US (including unreported rapes) lead to a

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<sup>45</sup> Sarah R. Edwards, Kathryn Bradshaw, and Verlin Hinsz “Denying Rape But Endorsing Forceful Intercourse: Exploring Differences Among Responders,” *Violence and Gender* 1, no. 4 (2014), p. 190.

<sup>46</sup> Ipsos Mori, “Violence against women opinion polling,” February 2009, accessed November 28, 2015, [http://www.huiselijkgeweld.nl/doc/english/violence-against-women-poll\\_2009.pdf](http://www.huiselijkgeweld.nl/doc/english/violence-against-women-poll_2009.pdf).

<sup>47</sup> See Jozkowski et al., “Gender Differences,” for comment and further references.

<sup>48</sup> See Susan Griffin, “Rape: The All American Crime,” in *Feminism and Philosophy*, ed. Mary Vetterling-Braggin, Frederick A. Elliston, and Jane English (Totowa, New Jersey: Rowman and Littlefield, 1977).

<sup>49</sup> Colleen Cleere and Steven Jay Lynn, “Acknowledge Versus Unacknowledged Sexual Assault Among College Women,” *Journal of Interpersonal Violence* 28, no. 12 (2013), pp. 2597, 2598.

<sup>50</sup> Statistic from “Facts and Statistics on Gender Inequality,” UK Feminista, accessed November 29, 2015, <http://ukfeminista.org.uk/take-action/facts-and-statistics-on-gender-inequality/>.

conviction;<sup>51</sup> that 26 percent of sexual offences that are reported are not recorded as crimes;<sup>52</sup> and that whilst the number of reported rapes has increased in recent years, the conviction rate has remained relatively static.<sup>53</sup> What matters for present purposes is that these institutional failures affect the degree of control women have over their sexual relations, in part because they reaffirm problematic beliefs, and in part because they foster an environment in which men can rape with impunity. As Claudia Card observes, “One reason men rape is they can. They usually get away with it. That could change with less peer tolerance.”<sup>54</sup> This has led some to claim, not unreasonably I think, that the state functions as a male protection racket for sexual violence.<sup>55</sup>

I do not think, in the face of the empirical evidence I have offered, that one can easily deny the connection between the prevalence of sexual violence and the social and political environment within which we live. If this is correct, then the control thesis is true twice over: first, because of the ambiguity that exists within existing conventions of sexual consent, and second, because the background conditions against which those conventions operate further undermine their efficacy by failing to ensure that “No Means No.” What is more, the first problem will be compounded by the second. So even assuming that the liberal response is right to maintain that consent can allow for non-wrongful sexual relations in non-ideal social conditions, it does not follow that the requirement for sexual consent alone can adequately protect and promote women’s interests in having control over the sexual relations they engage in.

## 6.4 The Mutual Recognition Thesis

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<sup>51</sup> Statistic from “Reporting Rates,” Rape, Abuse, and Incest National Network, accessed November 29, 2015, <https://rainn.org/get-information/statistics/reporting-rates>.

<sup>52</sup> HMIC, “Crime Recording: Making the Victim Count,” November, 2014, access on November 29, 2015, [www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/crime-recording-making-the-victim-count.pdf](http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/crime-recording-making-the-victim-count.pdf).

<sup>53</sup> Liz Kelly, Jo Lovett, and Linda Regan, “A Gap or a Chasm? Attrition in Reported Rape Cases,” Home Office Research Study 293, November 2005, p. x, accessed November 29, 2015, <http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs05/hors293.pdf>.

<sup>54</sup> Claudia Card, “Recognizing Terrorism,” *The Journal of Ethics* 11, no. 1 (2007), p. 15.

<sup>55</sup> Susan Rae Peterson, “Coercion and Rape: The State As a Male Protection Racket,” in *Feminism and Philosophy*, ed. Mary Vetterling-Braggin, Frederick A. Elliston, and Jane English (Totowa, New Jersey: Rowman and Littlefield, 1977).

I now turn to the mutual recognition thesis. According to this thesis, existing conventions of sexual consent and the background conditions against which they operate, fail to serve our relational interests. Specifically, under current conditions agents will struggle to stand in relations of mutual recognition, in which there is a common understanding that we relate to one another as having legitimate control over whether or not we engage in sexual relations. Note, that whilst the control thesis predominantly extends to women, the mutual recognition thesis will hold for all agents. I want to suggest that the mutual recognition thesis is true in two related, but distinguishable, ways. First, existing conventions and background conditions threaten concrete relations of mutual recognition between particular agents. Second, existing conventions and background social conditions threaten general social relations of mutual recognition within a community.

Many of the reasons why existing conventions of sexual consent threaten the possibility of relations of mutual recognition between particular individuals flow directly from the reasons that support the truth of the control thesis. For example, if I am right to claim that existing conventions of consent are ambiguous, such that agents regularly come to different judgements regarding whether consent has been given or revoked, this ambiguity will forestall the possibility of the common beliefs between two agents that are necessary for them to stand in a relationship of mutual recognition.

Problems of ambiguity and misunderstanding are likely to be mitigated in ongoing sexual relationships in which individuals come to know one another, and so are better able to communicate with one another, both explicitly, and through other more subtle and nuanced means of communication (e.g. indirect verbal cues, physical cues, regularities in behaviour, etc.). Yet I think it would be a mistake to conclude that under these circumstances those who are party to an established relationship face no difficulties in standing in a relationship of mutual recognition. After all, relations of what we might call, somewhat artificially, “sexual mutual recognition,” do not only require that agents have common beliefs about whether sexual consent has in fact been given or revoked on any particular occasion. It also requires a continuing common belief about the fact that the parties each regard one another’s sexual consent as authoritative, that it is impermissible to have sex with one another unless we have mutual consent. Here, the background social

conditions within which we live are likely to threaten the possibility of this common belief.

Whilst I suspect many might wish to deny this, it is easy to idealise the nature of romantic sexual relationships. The reality is that “64 percent of the women who reported being raped, physically assaulted, and/or stalked since age 18 were victimized by a current or former husband, cohabiting partner, boyfriend, or date.”<sup>56</sup> Women (and to a lesser degree men) are well aware of these facts, often through personal experience or the experiences of friends and family. So, even within a relationship in which we can assume each party regards the other’s sexual consent as authoritative, these external social realities may well make a difference to the degree of confidence that each of the parties has concerning whether this is the case, or their confidence in whether the other believes that they regard their sexual consent as authoritative. The effects of the social backdrop upon our beliefs may be subtle and inarticulable, but that does not prevent them from determining the nature of the relationships we are able to have.

I do not mean to say that men and women cannot develop decent and valuable sexual and romantic relationships in spite of the social and political world within which they live. The point is rather that the parties to a relationship can never fully insulate themselves against the background conditions within which they live. Individuals within particular relationships cannot escape the fact that they live in a social world where women do not have a sufficient measure of control over their sexual relations with others, are often not regarded as having legitimate control over their sexual relationships, and in which political and social institutions do not provide adequate protection or redress in the face of these problems.

Turn now to the broader issue of relations of mutual recognition between the members of a community. As I have already suggested, women and men both understand the social reality of unequal and insufficient sexual control. As Susan Griffin notes, “I have never been free of the fear of rape. From a very early age I, like most women, have thought of rape as part of my natural environment – something to be feared and prayed against like fire or lightning.”<sup>57</sup> So, even if we

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<sup>56</sup> P. Tjaden, and N. Thoennes, “Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey,” U.S. Department of Justice Research Report, November 2000, accessed November 28, 2015, <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

<sup>57</sup> Griffin, “Rape: The All-American Crime,” p. 313.

believe that our partner regards our sexual consent as authoritative, it does not follow that we believe that all of the members of our community regard our sexual consent as authoritative. Not only will this undermine agents' ability to stand in relations of mutual recognition with those who they do not know, and with whom they may wish to develop special relationships, but it also undercuts the value of the normative assurance that derives from believing that others (or at least the vast majority of others) recognise one's sexual consent as authoritative.

With regard to normative assurance, coercively backed legal institutions obviously play an important role, and it might be suggested that I am overemphasising the lack of assurance that individuals have. However, even disregarding the institutional failures that I have already alluded to, coercive laws alone are not able to provide the kind of assurance necessary to foster the valuable relationships and interactions that the power of consent facilitates. If, for instance, we rightly believed that the *only* reason the members of our society generally respect our rights is because of the routinely enforced coercive laws of the state, then we would struggle, I would suggest, to engage in valuable relationships with them. We would not be so much "relating as equal autonomous agents" as "begrudgingly acting in accordance with others' legally protected rights." So, whilst the law can play an important role, it will also be of great significance that members of a society internalise the right norms about how they ought to relate to one another.<sup>58</sup> An on-going commitment to recognise one another's legitimate control over certain spheres on the part of the majority of societies members will translate into a wide, if implicit, understanding that this is how we do in fact relate to one another, thereby providing the necessary assurance required to further foster valuable relations of mutual recognition.

## 6.5 New Conventions, New Standards

If the control thesis and the mutual recognition thesis are true, should we continue to rely on sexual consent as a marker for permissible and impermissible sexual relations? I am inclined to think that we should, although much more needs to be said about the relevant standard of sexual consent. However, I am prepared to cede

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<sup>58</sup> Cf. Daniel Viehoff, "Democratic Equality and Political Authority," p. 359.

that there may be other models of sexual interaction that better serve the values of individual control and mutual recognition. For example, in “Negotiating Sex” Michelle Anderson contrasts two consent-based models of rape law reform (the “No” and “Yes” models) with her own preferred “negotiation model,” according to which individuals must engage in “consultation, reciprocal communication, and the exchange of views before a person initiates sexual penetration.”<sup>59</sup>

Whilst I cannot consider the details of Anderson’s view here, it is, however, worth noting that even accepting the negotiation model, consent is still likely to play a central role within the overall framework. For one, as Anderson notes, once sexual penetration has occurred there must remain the live option of dissent. Furthermore, we might think that even if we agree with Anderson that some form of negotiation is necessary, we should see this as a precondition for valid consent as opposed to a straightforward replacement for consent. Compare medical consent. We generally believe that before a patient can give valid consent a doctor and patient need to have a discussion about the kind of treatment that will be given, how this will be delivered, alternative treatment options, and so on, at least in cases of serious and invasive medical treatment.

Rather than making any particular prescriptions, however, I want to make three general points that I think should be borne in mind when approaching this debate. First, it is important to remember that our practice of sexual consent is conventional; that it exists and is transmitted over time because we accept and rely on these conventions. As such, the way in which we rely on consent to manage our sexual relations is ultimately up to us, and depends on the political, legal, and individual decisions we make. Of course, no one individual can transform the conventions alone. But collectively we can shape and remould the conventions as we judge appropriate. This matters because, through socialisation into the conventions, they often come to seem natural to us – as fixed and necessary. Moreover, there still exists a widespread belief that sexual assault and rape are the result of men’s “natural” inclination toward sexual aggression. Yet we *can* control how we manage our sexual relationships, and we should not be put off straight away because proposed revisions to our conventions appear strange or unrealistic.

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<sup>59</sup> “Negotiating Sex,” p. 1421.

Second, when thinking about which conventions of consent we should institute, we must think about what kinds of conventions would best promote the values in question under the non-ideal conditions within which we live. These may be quite different from the conventions of consent that would be desirable under conditions of equality and justice. Indeed, it is not inconceivable that existing conventions would not, with some moderations, be sufficient in ideal conditions. For example, the relatively informal nature of consent giving in many sexual interactions – or the fact that what often does the normative work is objective choice – may be desirable, given the intimate nature of the relations and relationships in question. But that does not give us reason only to tinker at the margins given our social reality. Indeed, we may have to institute more formalistic conventions of consent than would otherwise be desirable or necessary, in order to ensure that women have a sufficient measure of control over their sexual interactions, and that we are able to stand in relations of mutual recognition.

Finally, as I have attempted to demonstrate in this chapter, conventions of consent will only be able to fully realise the underlying values at stake when they exist within appropriate social and political conditions. This is both because those conditions inevitably influence the conventions themselves, and because, even where they do not, they affect the efficacy of those conventions. So, whilst there is good reason to think about the conventions of consent we should institute, in order for sexual consent to allow agents to relate as equal autonomous agents we will need to tackle the background conditions of inequality and injustice. This is, I think, one reason why MacKinnon focuses on the importance of structural conditions of inequality in the context of sexual consent, and, furthermore, a reason why those who disregard the importance of those conditions, such as Wertheimer and Archard, do so too quickly. Whilst they are right that we can engage in non-wrongful sexual relations under non-ideal conditions, it does not follow that we can properly achieve the valuable form of relationship that consent allows for under just any social conditions. In MacKinnon's words, "Autonomy in sex cannot exist without equality of the sexes."<sup>60</sup>

Whatever they turn out to be, creating and maintaining appropriate conventions of sexual consent, and background conditions that enable those

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<sup>60</sup> *Women's Lives, Men's Laws*, p. 247.



conventions to operate properly, is, I believe, a duty of social justice. On what grounds should we think this is a duty of justice? It cannot be assumed that the fact it would be morally desirable to have better conventions operating under conditions of equality entails that we have a duty of justice to institute such conventions. However, such an argument is not hard to come by. To start with, whether or not women have a sufficient measure of control over their sexual relations is clearly a matter of social justice, at least on many prominent understandings. For instance, according to John Rawls's influential account, "the subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties."<sup>61</sup> Or, according to Iris Marion Young, the institutional context which is relevant to judgements of justice, includes

any structures or practices, the rules and norms that guide them, and the language and symbols that mediate social interactions within them, in institutions of state, family, and civil society, as well as the workplace. These are relevant to judgments of justice and injustice insofar as they condition people's ability to participate in determining their actions and their ability to develop and exercise their capacities.<sup>62</sup>

I think rights of sexual control clearly qualify as a matter of justice on both Rawls's and Young's account. First off, a right to sexual control is clearly a "fundamental right" in Rawls's terms. Moreover, the conventional nature of requirements of consent, the fact that these conventions are shaped in significant ways by political and legal institutions, and the further fact that those institutions also support and determine relations of social, economic, and political inequality that impair the efficacy of those conventions all support the claim that the existence and efficacy of those conventions is a matter of social justice. If we conceive of as a just state as one in which citizens' stand in relations of fairness and equality, with an equal ability to live a flourishing autonomous life, then unequal and insufficient control over one's sexual relations constitutes a serious injustice.

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<sup>61</sup> *A Theory of Justice*, p. 6.

<sup>62</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), p. 22.

The next premise is simple: where possible, agents have a duty to create and maintain just institutions (or, more generally, just social conditions).<sup>63</sup> There are a number of possible grounds for this duty, but I assume here that it is uncontroversial. Taken together with the claim that the failure of existing conventions of sexual consent amounts to an injustice, this give us the following conclusion: we have a duty of justice to create and maintain conventions of sexual consent, as well as the background conditions that can support them, that equip all agents with a sufficient measure of control over their sexual interactions, and allow them to recognise one another as possessing this control, so as to stand in relations of mutual recognition.

## 6.6 Conclusion

In this chapter I have argued the structural conditions of gender injustice undermine the ability of sexual consent to fully realise the values that underpin its normative significance. In particular, I have argued that existing conventions of sexual consent, operating against existing social and political background conditions, do not provide women with a sufficient measure of control over their sexual relations, and threaten the possibility of valuable relations of mutual recognition between agents. Thus, whilst consent can allow for permissible sexual relationships under non-ideal social conditions, MacKinnon is right to maintain that unequal structural conditions make an important difference to the nature of the relationships that can obtain under those conditions. I finished by arguing that we have a duty of justice to institute appropriate conventions of consent as well as the background conditions that will support them. In recent years progress has certainly been made on both fronts, but there is still a long way to go.

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<sup>63</sup> See Rawls, *A Theory of Justice*, pp. 293-94.

## 7

# Conclusion

In Chapter 1 I set out two questions to which a theory of consent's normative significance should provide an answer. First, the question of consent's normative force asks why an agent's consent has normative force, such that when they give valid consent they waive a right of theirs? Second, the question of consent's relational significance asks why the power of consent plays such an important role in the management of directed duties?

Throughout the thesis I have attempted to answer these questions in a way that is consistent with an interest-based account of moral rights. I began, in Chapters 2 and 3, by rejecting a number of possible answers. In Chapter 2 I rejected four theories of consent according to which the power of consent is justified by the fact that it directly serves or protects our interests. I argued that these theories all faced a common objection: they were unable to account for what I have described as the authoritative nature of consent, the fact that an agent's consent often has normative significance independently of whether their consent (or lack of consent) will serve or set back their interests.

In Chapter 3 I considered one of the few detailed philosophical accounts of consent's normative significance to have been developed, David Owens's permissive interests view. According to Owens, our power of consent is grounded in our possession of permissive interests, interests in certain acts being wrong unless we consent to them. Whilst Owens provides an intriguing alternative to the simple interest-based theories considered in Chapter 2, I argued that we have good reason to reject Owens's position. Specifically, I argued that Owens does not give us a convincing account of why the power of consent has value for us, that his theory has limited explanatory power, and that reflection on a paradigm case of consent – sexual consent – suggests that we do not in fact have permissive interests.

Having rejected these accounts I began the task of constructing an alternative theory of consent. In Chapter 4 I suggested that in order to think about the normative

significance of consent it would help to first think about the role played by rights, that we then waive by giving consent, in structuring our moral relations with one another. I argued that rights should not be thought of as significant only insofar as they serve and protect our first-order interests (in friendship, shelter, intellectual stimulation, adequate nutrition, and so on), but also because they serve our relational interests, by establishing a normative framework that allows agents to recognise that others give their interest the appropriate role within their practical deliberations. I further argued that two agents stand in a distinctly valuable relationship with one another when they each understand that they relate to one another in a morally decent way, a relation that I called mutual recognition. Moreover, I claimed that standing in relations of mutual recognition provides agents with a valuable form of normative assurance, an assurance that derives from the role that the framework of rights plays in allowing for relations of mutual expectation and accountability. I relied on these claims to support the proposal that the first-order interests that justify rights must be mediated through the “relational requirement,” according to which the moral requirements justified by interests must allow for relations of mutual recognition between agents.

I then argued, in Chapter 5, for the relational theory of consent. I began by arguing that in light of a variety of significant control interests we have control rights over the central aspects of our own lives, such that others are under duties not to interfere in these spheres (principally our minds, bodies, and property). Importantly, in line with the account of rights developed in Chapter 4, these rights have a preemptive structure, so as to help facilitate relations of mutual recognition between agents. I then argued that we have a variety of reasons to want to be able to waive these rights, so as to be able to interact with others in a range of valuable ways. Importantly, however, we want to be able to waive these rights whilst (i) maintaining a sufficient measure of control over the central aspects of our own lives, and (ii) continuing to stand in relations of mutual recognition with one another. I claimed that the power of consent plays this role, because tokens of consent, like rights, serves as a fixed-point in our interactions that we can rely on to manage our normative relations whilst recognising that we relate to one another in a morally decent way, thereby indirectly protecting our first-order control interests. According to the relational theory, then, the answers to the two questions from which we began are intimately connected. Consent has normative force because it allows agents to

interact in valuable ways; and it has relational significance because it allows agents to interact in these ways whilst maintaining a sufficient measure of control over their own lives, and mutually recognising that they each have legitimate control over these domains.

The example of sexual consent illustrates the relational theory of consent nicely. Agents have weighty interests in having control over whom they engage in sexual relationships with. They also have relational interests in being able to recognise that others give their first-order interests the appropriate role within their practical deliberations. These interests ground negative control rights that hold others under a duty not to have sex with them. Clearly, however, individuals also have interests in being able to engage in sexual relations with one another. By relying on consent to manage the permissibility of their sexual relations, two agents are able to maintain a sufficient measure of control over the sexual relationships they engage in, whilst also recognising one another as having legitimate control over whether or not they have sex, and thus standing in the valuable relationship of mutual recognition.

Finally, in Chapter 6, I considered some implications the relational theory has for an on-going debate about the role sexual consent can play in managing decent sexual relations in a world still marked by pervasive gender inequality and gender injustice. Here I claimed that in order to serve both our first-order control interests and our second-order relational interests we require appropriate conventions of consent. I then argued that existing conventions of sexual consent, operating against background conditions of inequality, are inadequate. Specifically I argued for the control thesis, according to which existing conventions of sexual consent prevent women from having a sufficient measure of control over their sexual relations; and the mutual recognition thesis, according to which current conventions of sexual consent, and the broader social background against those conventions operate, undermine the ability of agents to stand in relations of mutual recognition in the sexual sphere.

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