1. **What is consent?**

Consent is an *inherently* *normative* act.

* It’s a normative power, and as such it is inherently something that is at least an attempt to change rights, duties and obligations
* In this respect, if something counts as consent, it is thereby an instance of *valid* consent.

So we have to turn very quickly to questions of validity. What makes consent valid?

Consent is often understood to be a three-part relation: A consents to B Φ-ing.

Each of the three elements raises questions of validity

A – the consenter:

* Must be a person (though not necessarily a human)
* Must be capable of understanding what they consent to
* Must have relevant knowledge such that consent is informed (see below)
* Must communicate their consent to B? (see below)

B – the person to whom consent is granted

* Must be a person, much like A
* Must they have requested the consent?
	+ Intuitively, yes, consent is a response to a request for permission
	+ But does e.g. consensual sex always require an explicit request?

Φ – the action permitted by consent

* Must be an action that would be wrong for B to perform without permission
* Must be an action that is made prima facie right, but not necessarily all things considered right, if permission is granted

(For more see John Kleinig’s ‘The Nature of Consent’ in *The Ethics of Consent* eds F Miller and A Wertheimer, Oxford University Press, 2009):

1. **The communication of consent**

Consent occurs when A consents to B Φ-ing. But can it occur without A communicating that consent to B?

*Mental views:* consent requires only the (non-coerced and non-deceived) formation of a certain mental attitude

What kind of mental attitude?

* Heidi Hurd: the intention that B Φs

(see: Heidi Hurd, “The Moral Magic of Consent,” *Legal Theory* 2 (1996): 121–46, at p. 131)

* Larry Alexander: the intention to forgo moral complaint if B Φs

(see: Larry Alexander,“The Moral Magic of Consent II,” *Legal Theory* 2 (1996):165–74, at p. 166)

In either case: mental attitudes are sufficient for consent. Why? Consider the possibility that expressions can communicate consent when a person does not mean to consent e.g. a person with poor English trying to communicate non-consent to a doctor in the UK

*Behavioural views*: consent requires both a mental attitude and a communication of that attitude.

Consider: if A has sex with B, and B was faking or playacting protest, A did not have reasonable grounds to believe the sex was consensual, despite B’s intentions

The debate matters not just for philosophical reasons. It has ramifications for whether we agree with affirmative consent policies and related law

*Affirmative consent policies* generally stipulate that consent requires communication. For example

Harvard University consent policy: “willingness and permission must be communicated clearly and unambiguously”

University of Michigan consent policy: consent is defined as “clear and unambiguous agreement, expressed in mutually understandable words or actions”

(University of Cambridge? Consent features in the definition of sexual misconduct, but there is no definition of consent)

1. **A normative powers defence of behavioural consent**

Argument from analogy with the normative power of promising

1. Both promising and consent are normative powers i.e. the exercise of an ability to alter interpersonal moral rights, duties, obligations etc.
2. The normative power of promising requires the formation of a “common belief”
	1. Promising enables e.g. the development of trusting relationship. Such a function requires mutual understanding
3. The only reliable way of reaching that common belief is through communication of the promise and uptake
4. The various roles that the normative power of consent plays in our lives also requires the formation of common belief
	1. Consent enables e.g. intimacy, and mutual use of property. These functions also require mutual understanding
5. Like the common belief required by promising, the only reliable way to achieve the same for consent is by communication and uptake

(The argument is adapted from Tom Dougherty ‘Affirmative Consent and Due Diligence’ *Philosophy and Public Affairs* 46(1), pp.90-112, (2018))

The behavioural view seems to give unqualified endorsement to affirmative consent policies. But would that be too quick?

*Objection to NP defence:* not all normative powers require communication. Perhaps consent is one of them

* Consider abandonment: If I leave my bike outside the lecture theatre, and someone takes it, my property right is violated. If I leave it there, and choose to abandon it, I relinquish that property right.
* Is consent more like promising or abandoning? Abandoning is an exercise of autonomy and thereby cannot be dependent on uptake. Consent too is an exercise of autonomy, and also should not depend on uptake.

*Objection to affirmative consent policies*: the ends do not justify the means

* Sexual partners that are mutually willing but who have not explicitly expressed this, or have only ambiguously expressed this, could be considered guilty of wrongdoing
* Thus the policy risks condemning the innocent in pursuit of greater protections against non-consensual sex. Though the goal is laudable, the means are questionable

Both problems are identified by Kimberly Kessler Ferzan ‘Consent, Culpability, and the Law of Rape’ (2016). Ohio State Journal of Criminal Law, Vol. 13, 2016.

*Reply to Problem for ACP*

Accept that there is a clear difference between

1. sex where all parties are willing, but that willingness is not successfully expressed
2. unwilling sex i.e. rape

And accept that (b) is much more morally wrong than (a)

But that doesn’t mean that (a) is wholly innocent – both (a) and (b) fail to meet a duty of due diligence

Argument for duty of due diligence (Also in Dougherty, 2018)

If A plans to PHI, and PHI-ing is permissible only with consent from B, then A must ascertain whether B consents

If A did not do this, they would be willing as if they were happy to PHI without B’s consent, and this willingness is itself a wrong

1. **When is consent informed?**

Start with a basic attempt. A’s consent is appropriately informed only if

1. A is relevantly competent or capacitated to consent, and
2. full disclosures have been made to A, and
3. A understands fully all that has been disclosed

All 3 elements bear further analysis. Start with 2. What disclosures are relevant?

Deceit seems appealing as a way of explaining what knowledge matters:

* If B solicits A’s consent, and A does not know X because B misled them to believe something other than X, then A’s consent is valid only if A knows X

But perhaps B misled A on something totally independent of the consent e.g. the existence of Santa Claus. So more accurately:

* If B solicits A’s consent, and A does not know X because B misled them to believe something other than X, and **B misled A wrt X in order solicit consent**, then A’s consent is valid only if A knows X

But perhaps this isn’t right either. People exaggerate or hide the truth on dating websites and first dates. And this isnt always a serious wrong – right?

Lenient thesis: It is only a minor wrong to deceive another person into sex by misleading her or him about certain personal features such as natural hair colour, occupation, or romantic intentions

Two arguments against this come, again, from Tom Dougherty, this time ‘Sex, Lies, and Consent’ *Ethics* 123(4) pp.717-744 (2013)

Argument 1 – sexual moralism

The Lenient thesis relies on a moral distinction between core and peripheral features of the decision to consent to sex

OK: complaints about being deceived about the identity of the person

Not OK: complaints about being deceived about their profession or income

The objection: this is retrograde moralising about what a woman should or should not consider important for their decision to have sex with someone

Argument 2 – intentions argument (normative powers redux)

1. Consent is a normative power
2. Normative powers create and waive obligations that the wielder of the power intends to create and waive (e.g. cannot promise something I don’t intend)
3. This means that consent must be consent to what the consenter intends
4. This means that what is core and peripheral to the *object of consent* is set by the intentions of the consenter, not some objective categories

The alternative – deal breakers account

* Relevant knowledge is whatever the consenter considers a “deal breaker”

i.e. a fact that, if the person were deceived about it, and they knew they were deceived about it, would lead them to retract their consent

* Determined counterfactually, and therefore the consenter need not know every detail
* The upshot: **deception about ostensibly trivial matters when soliciting consent can constitute a serious moral wrong**

Problem – the duty of due diligence, plus the deal breaker theory, seems to generate an infinite demand when soliciting consent

(see Danielle Bromwhich and Joseph Millum, ‘Lies, Control, and Consent: A Response to Dougherty and Manson’ *Ethics* 128(2) pp.446-461, (2018))

**5. When is consent understood?**

Perhaps someone who consents has been told everything that is relevant. But how well must they *understand* what they have been told?

Next lecture: consent and mental capacity

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