Of Moral Wizardry and Experiential Transformation
A Case for Consent as a Mental State

Om Moralisk Trolldom Och Erfarenhetstransformation
Ett Mål För Samtycke Som Ett Mentalt Tillstånd

Philip Södermark

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Supervisor: Lars Lindblom
Examiner: Karsten Klint Jensen
Abstract

In ethics, a highly relevant and divisive topic is that of consent. Many moral dilemmas and ethical forks in the road turn on the question of consent. But how do we differentiate between the consensual and the non-consensual? There is no simple answer to this question and philosophers are quite divided, as they tend to be. Some believe that consent is a mental state whereas others maintain that it is a behavioral expression of some kind. There are others still who argue that consent is some combination of mental states and communication. In this paper, I shall defend the view that consent is a mental state and that it does not depend on any type of behavior. My central thesis is that only this view accounts for the ethical importance of consent in a liberal moral framework where consent matters due to its connection to our intrinsic right to personal autonomy. Additionally, views that make consent dependent on behavior have counterintuitive, and sometimes morally unacceptable, consequences for what is and isn’t consensual. I argue that only the view that I defend can account for the moral significance that consent should have.

Sammanfattning

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1. Introduction

It has long been recognized in liberal democracies that many of the biggest problems in political philosophy and ethics turn on the question of consent. It makes otherwise unacceptable acts completely innocuous and transforms perfectly commendable enterprises into something grotesque, i.e. it draws the line between permissible and impermissible behavior. Consider the problem of political authority and issues concerning the social contract, many would say that the justification of the state is determined by the consent of its citizens. Here, consent literally has the power to undermine civilization. This is not to say that consent is confined to abstract philosophical debates, in everyday life consent has a huge bearing on how we conduct ourselves. Consent is what differentiates theft from buying produce at the supermarket and rape from a good time in the bedroom. Given this reality, isn’t it strange that we don’t have a firm grasp of what exactly consent is?

This paper tries to make consent easier to understand on a conceptual level. In investigating consent, it makes sense to start with the most generic, and perhaps most crucial, philosophical question of all: what is phenomena in question? What kind of thing is consent? Is it a subjective mental state? Is it some kind of behavioral expression? What form does valid consent take, ontologically speaking? There are three main schools of thought about consent. One is subjectivism (also referred to as the subjective view), which claims that consent is a matter of having a particular subjective mental state. In its most generic form, it would be something like thinking “I consent to this”. The second is performativism (also referred to as the performative view). According to the performativist, consent involves evincing certain kinds of behavior, so it’s a matter of performing a particular set of actions. Generically, this could be something like saying “I consent to this”. Another option is to combine the two theories into what is known as a hybrid theory (also referred to as the hybrid view). A hybrid theorist claims that consent is a mental state as well as a performative act. What are the practical differences between the performative, subjective and hybrid views of consent? Let’s consider a case that might make the differences more easily identifiable.
Case: After an accident, Sally has become completely paralyzed. She has lost all ability to move, speak or in any way communicate with other people. Sally also happens to have a deep yearning to have sex with Harry but she is unable to convey this due to her paralysis. It comes as a pleasant surprise when Harry decides to have sex with her anyway. Again, she is perfectly happy for this to happen, she just hasn’t told Harry this. The question becomes: has Sally consented to what Harry is doing to her? The subjectivist would say yes. Sally had the right mental state, whether Harry was aware of this is irrelevant for her consent. This doesn’t necessarily mean that Harry hasn’t done anything wrong since he had no idea that she consented. He is therefore morally and arguably even legally culpable for wrongdoing since he fully intended to rape her. The performativist would disagree with the subjectivist and say that Sally hasn’t consented. In order for her to consent, she needs to evince the requisite behaviors and since she hasn’t done that, Harry has committed rape. A hybrid theorist would give the same answer. Although Sally has the necessary mental requirements for consent, this isn’t sufficient for consent to obtain since she is unable to perform the necessary behaviors.

In this paper, I will defend the subjectivist account of consent. It is my thesis that consent is a mental state and throughout this paper I will attempt to characterize what my form of subjectivism entails about our intuitions about consent and give reasons to favor subjectivism over performativism and hybrid theories (Another thing to note is that terminology across the literature is somewhat inconsistent but these are the terms that I will be using). Before examining performativism and hybrid theories more closely, I will focus on fleshing out subjectivism and its various implications.

2. Moral Scaffolding

The topic at hand is the ontology of consent and as such there is some degree of separation from the normative questions surrounding consent. However, judging the ontology of consent without appealing to its moral implications would be negligent to say the least. Consent is a thick ethical concept, meaning that it consists of both evaluative and non-evaluative components. In other words, it is both normative and descriptive. The concept of selfishness has both the descriptive component of caring significantly more about oneself than others but
also a normative component of being immoral. However, being selfish is not identical to being immoral since you can be immoral without being selfish. Similarly, consent contains the evaluative component of goodness. To say that some act X is consensual is to lend X some positive ethical credibility. On the other hand, it also entails a descriptive claim about the consenter giving the consentee some kind of permission to do X. This paper mainly evaluates the descriptive component of consent. Any analysis of what we mean when we use the term consent partially needs to be evaluated in terms of its ethical implications but the descriptive aspect of consent is not inherently normative. Furthermore, other consent-related topics in ethics such as the requirements of informed consent won’t be touched upon.

However, we need a moral framework to judge the normative consequences of these different theories. I shall therefore consult the work of Robert Nozick to evaluate coercive acts and see how the theories do on his view. According to Nozick, P coerces Q if and only if:

1. P aims to keep Q from choosing to perform action A;
2. P communicates a claim to Q;
3. P's claim indicates that if Q performs A, then P will bring about some consequence that would make Q's A-ing less desirable to Q than Q's not A-ing;
4. P's claim is credible to Q;
5. Q does not do A;
6. Part of Q's reason for not doing A is to lessen the likelihood that P will bring about the consequence announced in (3) (Nozick, 1969, p. 441–445).

This definition excludes uses of force and violence as being coercive but I will also assume that such means are immoral and that they undermine consent. Another problem that is relevant to consent is incapacitation. When I refer to incapacitation, I mean being unconscious or not having the presence of mind to understand the proposition you are consenting to. I will assume that doing things to an incapacitated person that would normally require consent is morally wrong. When I refer to deception, I mean consciously misleading someone to believe something that is not true. I will assume that deceiving someone about the necessary details of the thing you are consenting to is morally wrong. If a theory of consent
fails to account for these, then that counts as a point against the theory. It doesn’t mean that
the theory is necessarily false but it does serve as an indicator that the theory might be false.

It is also worthwhile to dwell on why consent is so important. It tends to be a central feature
of many liberal ethicist’s moral philosophies and each of them have given similar, yet
distinct, reasons for why it matters. All of these reasons tend to link back to the value of
personal autonomy and how consent is what makes the individual the final arbiter of the
permissibility of what happens to her. Joseph Raz has suggested that its importance derives
from the fact that being autonomous is an essential element of the good life (Raz, 1986, p.
408). Along similar lines, J. S. Mill argued that consent is valuable because the individual is
the best judge of what is in her own best interest (Mill, 1859, p. 70). Both of these theories
link back to how personal autonomy is in our self-interest. While these are powerful and valid
reasons to favor autonomy, I believe that the most potent argument for the importance of
consent comes from Joel Feinberg. He argued that the value of consent derives from the
individual’s intrinsic right to autonomy based on her personal sovereignty (Feinberg, 1986, p
59-61). It is through this lens that I will approach the ontology of consent, based on the
notion that everyone has a right to self-governance. More specifically, it is the autonomy of
the individual who is the consenter that is the most relevant seeing as the consent is the
manifestation of her will. The central question of this paper is what theory of consent makes
the most sense given this liberal account of what makes consent valuable.

3. Fleshing out Subjectivism

Before delving into why someone should be a subjectivist, we should have a firm grasp of
what mental state, exactly, I consider consent to be. There are many different types of mental
states such as sensations, desires, intentions, beliefs, emotions and so on. Any of these will
have implications for what it means to give consent, so narrowing down which one it is
should prove useful. If consent is a belief, for instance, then consent will be a truth-apt
propositional attitude whereas if consent is a sensation, it will be a reaction to stimuli. The
following basic description of consent is largely taken from Heidi Hurd’s article, The Moral
Magic of Consent (I) (Hurd, 1996). Consent can be characterized as a mental state that has
intentionality. Intentional mental states represent or are about a certain state of affairs. These states have propositional content. You need to desire something in order to desire. As such, consent involves consenting to a particular act and various surrounding details about said act. The propositional content of consent to sex might involve consent to vaginal sex with your significant other. In this case, the consenter is consenting to a particular sex act with a particular person. The propositional details relevant to consent are debatable, and also beyond the scope of this paper, but for the purposes of this paper it is sufficient to establish that consent requires consent to something. Unlike an attitude like sadness, it is something that cannot exist in a propositional vacuum.

Thus far my description of consent as a mental state is fairly uncontroversial among those who accept the subjective view of consent. There is much more disagreement about what specific kind of intentional mental state consent is. There are three different accounts that I found in the litterature. Heidi Hurd (Hurd, 1996) posits that consent means intending the other person to perform the consented-to act. Larry Alexander (Alexander, 1996) thinks that consent involves waiving one’s right that the act not occur. Finally, Peter Westen (Westen, 2004) has suggested that consenting requires one to acquiesce to the act in question.

Alexander’s account of consent involves waiving one’s right that the act not occur. A different way of putting it is “mentally accepting without objection another’s crossing one’s moral or legal boundary (the boundary that defines one’s rights)” (Alexander, 2014, p. 108). He also refers to it in this way; “The mental state of waiving a right is that of being disposed not to object to another’s conduct based on that right” (Alexander, 2014, p. 107). He also refers to this as revoking one’s moral objection to another person’s conduct (Alexander, 1996, p. 171). He motivates his view by arguing that we need an inherently moralized conception of consent and that consent could not exist without our moral notions (Alexander, 1996, p. 166).

While this is a decent definition, I think we should strive for a better one. Is this definition not dependent on what laws are in place and what conception you have of your own moral rights? In regard to legal boundaries, these change from society to society. In some societies marital rape is legal, so crossing one’s legal boundary would not include marital rape in those
societies. I do not think that our definition of consent should be this context-sensitive since there are many societies where there are laws about consent that we would consider repugnant. We should therefore resist tying consent to the law because it will have unacceptable moral implications.

As for one’s moral boundary, would this not be dependent on the subject being aware of what moral boundaries she has a claim upon? In order to waive your rights, you need to be aware of what your rights are. Returning to marital rape, women in societies where marital rape is socially acceptable would not be aware of the moral rights that they need to waive on Alexander’s account. As far as they are concerned, their right to sexual autonomy ended when they married their husbands. Furthermore, it is my intuition that even a moral nihilist has the ability to consent or not consent, even though the nihilist presumably wouldn’t have any real moral objections to a coerced act. Despite his meta-ethical views, there is no doubt in my mind as to John Mackie’s ability to consent as any other mentally capable adult. On Alexander’s account, he wouldn’t be able to consent since he needs to mentally accept the crossing of his moral boundary but since he ultimately doesn’t recognize such a boundary, how would he consent? (Mackie, 1977) In defining consent, we need to find a mental state or a set of mental states that are more universally applicable.

Hurd’s account involves intending the actions of the consentee. (Hurd, 1996, p. 128-130). Larry Alexander has objected to her account by suggesting that, while one can welcome or object to someone else’s act, one cannot intend someone else’s act. One can only intend one’s own acts (Alexander, 1996, p. 166). Hurd may have picked a poor choice of words since she offers an alternate formulation of her view that is more plausible; “Just as an accomplice must intend to aid another’s actions (by act or omission) with the intent of bringing about some legally prohibited state of affairs, so a plaintiff or victim must intend to aid (to allow or enable by act or omission) a defendant’s actions with the intent that those actions will be of the sort that must be intended by the defendant for prima facie liability” (Hurd, 1996, p. 131). In this case, the consenter really isn’t intending the act of someone else but rather intending to allow the other person’s act.
The problem with this formulation is that someone seems to be able to intend to allow someone else’s actions without consenting. Consider a woman cornered by a thug in an alley. At knifepoint, he tells her to have sex with him or die. If she agrees, she could be said to have intended to allow his act but their sex can hardly be considered consensual. This is a clearcut case of coercion on Nozick’s view since the assailant wants to keep the woman from refraining to have sex with him. He then communicates a claim to her, his claim indicates that if she does not have sex with him, then he will bring about some consequence that would make her not having sex with him less than desirable than her not having sex with him. His claim is credible to her, she has sex with him and part of her reason for having sex with him is to lessen the likelihood that he will bring about the consequence he announced earlier (killing her). Coercion is one of the main violators of consent so this doesn’t appear to be consensual. Hurd seems to allow consent in this scenario but she maintains that it isn’t morally transformative consent. For it to be morally transformative, the consenter needs the capacity for meaningful choice (Hurd, 1996, p. 138-140). Despite her submission, it seems strange to say that the woman in the alley consented, even if it isn’t morally transformative. If we want to maintain that consent itself is morally transformative then agreeing to this is a big bullet to bite since it doesn’t seem to change the ethics at all. Just because the woman submitted rather than resisted doesn’t make the act more morally valid than if she had resisted.

The final account is that of Peter Westen. He has suggested that consent involves acquiescing to the act. In his own words; “A state of mind of acquiescence, in turn, is a felt willingness to agree with - or to choose - what another person seeks or proposes.” (Westen, 2004, p. 4) It’s a kind of willed submission. (Westen, 2004, p. 21) Acquiescence is a good account in some ways since it is an intentional mental state with propositional content. You cannot acquiesce without acquiescing to something and you acquiesce to specific behaviors and situational details. Much like consent, you acquiesce to certain acts involving certain people. These are characteristics shared by the other theories but there are advantages that are unique to Westen’s account. It is not too strong since acquiescence does not require you to have any sort of positive attitude to the thing you acquiesce to. It also avoids the problem of being too context-dependent like Alexander’s account since the nature of acquiescence does not require the consenter to have any special knowledge of rights or a wider social context that
acknowledges these rights. In a culture that does not acknowledge marital rape, a wife can still be said to have the ability to acquiesce or not acquiesce to her husband’s advances. A wife who is physically forced into having sex or one who is perfectly willing to have sex will be treated in an intuitive way on Westen’s account. She would not be able to waive her right that the act not occur, however, since she would not be aware that she had such a right.

Westen’s account has been criticized for being too weak since it seems to be possible to acquiesce to something without consenting. Let’s return to the woman cornered by a thug in an alley. Acquiescence has the problem of allowing for too many unwelcome intrusions (Alexander, 2014, p. 108). Westen defends his view by separating legal consent from factual consent (i.e. mental acquiescence) (Westen, 2004, p. 16). On Westen’s account, the woman and her assailant would be a case of factual consent but not legal consent. So the assailant is guilty of rape but the woman still factually consented. He runs into the same problem as Hurd, he cannot explain why consent itself is morally transformative. While I do consider this to be a valid criticism of Westen’s view, I do not think that his account is entirely wrong. Instead, I would suggest that his account is merely incomplete.

I think it is likely that the core of consent consists of several mental states. Acquiescence might be a necessary mental state in order to consent but it is not the only mental state required for consent to obtain, factual or otherwise. In addition to acquiescence, the consenter also needs to have a certain motive behind their consent. The consenter needs to acquiesce solely out of a genuine desire to acquiesce. By genuine desire I mean a desire that is formed without duress or fear of duress. Stated differently, the consenter needs a second-order desire to intend to acquiesce. Notice that in the case of the knife-wielding assailant, the woman only acquiesced to prevent herself from coming to harm. She cannot be said to have desired to acquiesce. That desire is the sole reason for her acquiescence is also important. If she for some reason feels a faint desire to acquiesce to the assailant, it would still be coercive since part of the reason for her acquiescence is the threat to her life and that is all it takes for coercion to obtain for Nozick. It is important to differentiate a desire to acquiesce from desiring the act to occur. As we have seen, it is possible to consent to something without desiring it. I may hate to give someone else my copy of Jacob’s Ladder but I can still consent to let them borrow it. The line of separation between desiring an act and desiring to acquiesce
to an act is sharply drawn because it is possible to desire to acquiesce without desiring the thing you are acquiescing to. Acquiescence is attitude-neutral so it does not require the one who acquiesces to feel one way or the other about the act in question. Consent is similarly attitude-neutral because it does not require the person who consents to want the act in question. There is some uncertainty in the debate about whether it is also possible to not consent to something that you do desire (Alexander, 2014, p. 108). I think it is possible since, even though one might desire another person’s conduct, one might have separate motives for not consenting. I might desire to have sex with someone but choose not to consent because I had a religious upbringing that prohibits sex outside of wedlock. Clearly, the desire was not strong enough. However, if the desire is strong enough to motivate me to act on it, then I would say that consent does obtain since acting upon certain desires necessitates consent. If I desire to sell my car to the degree that I am compelled to act on that desire, then I have to consent in order to realize that desire.

Returning to acquiescence, I do think that the attitude that the one who acquiesces has toward the acquiescence is important for the matter of consent. In this way, we capture all the positive aspects of Westen’s account while avoiding the downside of making it too easy to consent. As far as I can tell, having consent be this cluster of mental states does the best job of accounting for our intuitions about consent since it does not imply any overly demanding criteria while avoiding being too permissive about factors like coercion. This account also necessarily ties consent to the will; to say that someone mentally acquiesced and did so solely out of a desire to acquiesce without giving their willed permission doesn’t seem coherent.

Are there any other mental states necessary for consent? Since consent involves consenting to a certain proposition, the person who consents needs to have certain beliefs about the thing they are consenting to. You have to know what the conduct is in order to consent to it and that involves a need to have beliefs about the particulars of the conduct. In order to consent to vaginal sex with your significant other, you need to have the belief that the conduct being considered is vaginal sex with your significant other. Furthermore, as I will explain in more detail later on in this paper, the beliefs that pertain to your consent have to be true in order for consent to obtain. This is to account for the role that deception and fraud plays in invalidating consent.
Please note that you don’t have to actively consider the consent itself in order to consent. When you buy a cup of coffee, consent might not be on your mind. Perhaps you are in a hurry and you just want your coffee. However, when you hand over your money in exchange for the coffee, these mental states are present dispositionally. You might not be directly aware these mental states in a phenomenal sense, but they are present nonetheless. If they weren’t present, then you wouldn’t have handed over your money. It is sufficient that the person who consents would consent, were they to consider it. Keep in mind that I am defining “mental state” quite broadly. It is not just neurons firing in your brain, it’s the totality of your psychology. Much like there are occurent and dispositional beliefs, there is occurent and dispositional consent. My belief that La La Land is an overrated film might not be at the forefront of my mind constantly but it doesn’t go away when it isn’t. When it is at the forefront, it’s an occurent belief. When it isn’t, it’s a dispositional belief (Schwitzgebel, 2015). Similarly, when my consent is at the forefront of my mind, it’s occurent consent. When it isn’t, it’s dispositional consent. Depending on circumstance, my occurent consent comes and goes, whereas my dispositional consent endures until I no longer consent.

Using the principle that the theory that accounts for most of our intuitions is the best one, I am attempting to formulate a theory of consent that doesn’t allow consent to obtain if the three main violators of consent are present. These are coercion, deception and incapacitation. By adding a desire to acquiesce to acquiescence, we can account for coercion since someone who is being coerced wouldn’t have a desire to acquiesce. Recall Nozick’s final criterion: part of the consenter’s reason for not doing the act is to lessen the likelihood that the consentee will bring about the announced consequence. If the consenter is solely motivated by a desire to acquiesce, then he wouldn’t have performed the act with or without the accounced consequence of doing otherwise. By making it necessary that the consenter’s beliefs about the act that they are consenting to, to be true, we can account for deception cases. Consent wouldn’t obtain for someone who is being deceived because some of the necessary beliefs that they hold about the consented-to act would be false. As for incapacitation, the incapacitated consenter would still have dispositions but the victim would most likely not consent to being date raped, were she to consider it. If we were to construct a case where the consenter would consent to being drugged and taken advantage of in her
incapacitated state, then I would simply bite the bullet and say that she is consenting. That being said, if the consentee finds himself in a similar situation as Harry and is not aware of the consenter’s consent, then he would be morally and legally culpable for rape.

In review, I have established necessary and sufficient conditions for consent to obtain. P consents (or gives consent) to act Q if and only if:

1. P has the requisite true beliefs about Q.
2. P mentally acquiesces to Q.
3. P is solely motivated to acquiesce to Q by a genuine desire to acquiesce to Q.

In order to have these mental states, the person needs to have sufficient command of their mental faculties to form beliefs and desires. These need not be actively considered but merely be present in a dispositional sense, i.e. occurrent consent need not obtain but the person who consents would consent, were they to consider it. It is also sufficient that the desire to acquiesce be present dispositionally.

4. Considerations Against Subjectivism

4.1. The Objection from Law

I would like to differentiate ontological consent from legal consent. The two of them are certainly connected but they should not be conflated. A rather obvious point that favors the performativist is that the only way to judge someone’s consent is by looking at their behavior. Behavior is what is assessed in a courtroom, for example. We have no way of actually looking into people’s minds so performativism seems to be better at capturing how we tend to appeal to consent. This is true of some court cases, but certainly not all of them. As Westen points out, English courts have ruled that consent is not something that is communicated but a state of mind. Similar rules apply in Louisiana, Michigan, California and Hawaii (Westen, 2004, p. 26). Various legal systems have characterized consent differently, which isn’t
surprising seeing as there isn’t much of a coherent concept behind our folk use of the term. It is due to this fact that any conceptual analysis of consent won’t actually be a matter of conceptual analysis as much as it will be conceptual revision. We are trying to offer a better way of understanding consent.

Something that is true of more or less all legal systems is that mental states make a huge difference in how courts make their rulings. Consider a factor like deliberation. This matters in a courtroom as well, it’s the difference between manslaughter and murder. If you plan to kill someone you are committing a more serious crime than if you kill someone by accident. I take it as a fairly uncontroversial fact that deliberation is a mental state, it’s something that takes place inside your mind. Mens rea, the intention to commit a crime, is a recurring element in just about every legal system. It is true that we have to examine behaviors in order to decide whether certain mental states are present since we cannot look into other people’s minds, but that doesn’t mean that deliberation just is a certain set of behaviors. The same thing might be true of consent, our only way of accessing someone’s consent is by examining that person’s behavior but it doesn’t follow that consent just is a species of behavior. As we have seen, this certainly wouldn’t be incompatible with how societies normally think about other mental states.

It is also important to not conflate philosophy of law with the topic that I am discussing. There are those who share my view on consent who still recognize that treating consent as purely performative in a courtroom might be necessary. Heidi Hurd has suggested that such an approach could be prudent for consequentialist reasons (Hurd, 1996, p. 137). There might be greater utility to formulating a system of laws around consent along these lines because of the difficulty of properly evaluating the mental states of other people. Whether this is wise or not is not the topic of this paper but going forward, it is worthwhile to note that what I write about ontological consent won’t necessarily have straightforward implications for what the law should be. There is also not a necessary connection between legal culpability and moral culpability. Someone can be morally culpable for something without being legally culpable. This could be because the morally questionable act isn’t illegal, there are many acts like this. Cheating on your significant other might be immoral but the cheater certainly isn’t culpable for any legal offense. Finally, please note that deferring to the law as an argument against
subjectivism is not very effective since there is just as much disagreement about consent among legal experts as there is among philosophers. Furthermore, even if mental states played no role in court rulings, this wouldn’t mean that the subjectivist is wrong since lawmakers can fail to accurately describe consent.

An argument that relates to how we tend to appeal to consent is about the notion of implied or tacit consent. H. M. Malm has argued that only a theory of consent that incorporates action can properly account for a concept like tacit consent. Malm writes; “In short, our notion of tacit consent is defined in terms of acts, and omissions thereof, that signify the presence of a particular mental state. It is not defined in terms of the mental state itself. The interests of clarity and parity thus suggest that “active consent” (or, rather, just “consent”) should be understood in a similar way.” (Malm, 1996, p. 149) While these types of consent are defined in terms of action, this can be accounted for from a subjectivist viewpoint. Consider a mental state like anger. We talk about concepts like quiet anger and direct anger. These are clearly notions of anger that we use to refer to the ways in which we express our anger but it does not follow that anger itself is behavior rather than a mental state. Anger is clearly a mental state, it is an emotion that need not be expressed in order to be present. Similarly, the subjectivist can simply call tacit consent and affirmative consent ways in which we express our consent without denying that consent itself is fundamentally a mental state. We can use these categories of expressed consent to determine culpability and to judge other people’s consent without getting rid of the subjective view.

4.2. The Objection from Moral Wizardry

An objection to subjectivism that is related to the legal question is how consent changes the behavior of other people. Consent is morally transformative, it’s the difference between acceptable and unacceptable behavior. This is true of many types of actions. If Tyler is hitting Jack, and maybe even seriously injuring Jack, then it’s a clear case of assault if the punching is non-consensual. However, if Jack consented to the punching, they are just having a boxing match. Similarly, if Christian is spanking Anastasia, then he is also engaging in a species of assault if he doesn’t have her consent. If Anastasia is consenting to the spanking, then they are simply having an exciting date night. Of course, there are other contingent factors that
might change the morality of the act but consent is certainly necessary for many acts to be permissible. To borrow a phrase from Heidi Hurd, it works a kind of “moral magic” (Hurd, 1996, p. 124). We evaluate all of these behaviors in terms of the other person’s consent. On subjectivism, a performativist might argue that consent itself isn’t morally transformative. Let’s return to Harry who is having sex with a paralyzed Sally, if we treat this as consent, then we have to say that Sally’s consent makes no difference in what situation Harry finds himself in. With or without her consent, he has the same information and their relationship is exactly the same from his point of view. Harry’s behavior is still reprehensible since with or without Sally’s consent, he still would have had sex with her. The salient point is that consent matters because of the difference it makes in what other people have reason to believe. Many would say that regulating behavior is the function of consent and since consent can only serve this function if people communicate it, it cannot merely be a mental state. As Tom Dougherty puts it, consent’s function is releasing other people from their duties to you. “If you consent to someone entering your home, you release her from a duty not to trespass that she owed to you” (Dougherty, 2014, p. 232). It isn’t sufficient for Sally to simply be okay with the act occurring; to make it permissible for Harry to have sex with Sally, he needs to have good reason to believe that she willingly consents to sexual intercourse with him. If consent is purely subjective, it cannot account for this difference. Only the expression of consent can accomplish this.

The standard subjectivist response to this is that we have to separate harm from culpability (Alexander, 2014, p. 104). Sally hasn’t been harmed but Harry has still done something wrong and should be held responsible, regardless of whether or not he has actually caused harm. When Harry has sex with paralyzed Sally, he is committing attempted rape. Attempted rape is still a monstrous act but he didn’t actually rape Sally. This explains why Sally isn’t upset or angry about Harry’s actions. The reverse can also happen, you can commit a harm without being culpable. Imagine a different scenario where Sally isn’t paralyzed. A killer threatens to murder Sally if she doesn’t have sex with Harry. Harry doesn’t know this, so as far as he is concerned, Sally really does want to have sex with him. Since Sally is under duress, she isn’t really giving her consent. In this scenario, I would argue that Harry has committed rape but he isn’t culpable for the rape. Of course, this depends on how we define rape. We could imagine a theory of rape where someone can be raped without there being a
rapist. If having the mens rea of rape is necessary for more than just culpability then he isn’t committing rape. On the definition that a rapist is someone who has sex with someone else without their consent, Harry is a non-culpable rapist. In this way, consent can still be morally transformative on the subjective view, just in a different way. As I will explain further later in this paper, subjectivism might be committed to denying that consent fundamentally serves a regulatory function in the relationships between people but it does a better job of explaining why non-consensual acts are wrong than any of its competitors and hence arguably makes a more potent case for why consent is so morally transformative.

4.3. The Objection from Mental Absence

There are cases where we seem recognize that both people have given their consent, despite not having any present mental state associated with it. Consider a man and a woman who are in a relationship, the man goes up to the woman and gropes her breast. Even if she doesn’t have any occurrent mental state associated with consent, he hasn’t sexually assaulted her if they are in a long term relationship. This would apply to many cases at least. Prima facie, this would apply even if the woman didn’t appreciate it. It might even be permissible for one person to initiate sex while the other is asleep. If they are in a long term relationship and they have already established that that is something that can happen, then it seems perfectly fine. Intuitively, it would even be permissible if your partner was asleep for the entire duration of the sex as long as he or she didn’t mind that it happened. Wertheimer considers a more extreme case where X, a man, and Y, a woman, join the Ulysses club. This club hosts events where all participating parties sign a form stating that no one will be held legally liable for any sexual acts, including forced sex. Both X and Y are competent adults and give informed consent, you can ask someone to refrain from a sex act but you have no recourse if he does not. X approaches Y and propositions her, she turn him down so he enlists some other members to hold her down as he has sex with her. Y arguably consented to this but since she is genuinely resisting we cannot say that subjective consent is present (Wertheimer, 2003, p. 156).

Admittedly, these cases pose a problem for the subjectivist. The first two examples seem like fairly innocent interactions between sexual partners and to label these cases as examples of
sexual assault would have some radical moral consequences for how partners interact with
one another. We usually accept that sexual partners give their tacit consent to these kinds of
interactions by being in a relationship. This is essentially an argument that the subjective
view has overly strict moral consequences. As for the Ulysses case, there is such a thing as
consenting to the risk of a certain level of harm and it seems as if Y did just that. The worry is
that subjectivism cannot account for people willingly submitting themselves to a period of
time where they are unable to revoke their consent. We have to keep in mind that invoking
the concept of prior consent is not a viable alternative for the subjectivist since all it takes to
revoke consent, ontologically speaking, is to change one’s mind. However, there might be
some ways for the subjectivist to avoid these problems as we are about to see.

One possible response could be to simply deny that there is such a thing as implied consent.
The girlfriend hasn’t consented to the groping because she hasn’t considered it and mentally
agreed to it. Implied consent isn’t uncontroversial these days, as there are some who deny
that it exists. However, I would argue that most of the skepticism around implied consent
revolves around people applying it wrongly. There are certain ideas involving implied
consent that we should challenge, such as if a woman is dressed a certain way she is giving
her tacit consent to sexual contact. However, there are clear cases where tacit consent seems
perfectly reasonable, such as in the examples that I listed in the earlier paragraph. Despite the
lack of affirmative consent, verbal or otherwise, the man who gropes his girlfriend’s breast is
generally justified in his actions because his girlfriend probably won’t mind, or at the very
least not raise moral objection to it.

The best tactic for the subjectivist to deploy is to appeal to a concept that I mentioned earlier
in this paper, namely dispositional consent. Consider belief; you are not constantly aware of
all the beliefs that you hold but your beliefs don’t disappear just because you are not actively
conscious of them. They don’t even disappear when you are asleep, when you are conscious
of nothing. We can say that you believe that P if you would agree to P, were you to consider
it. The same thing is true of consent. Just because the mental state of consent isn’t
consciously present doesn’t mean that it isn’t there. When we think that the groped girlfriend
has no present mental state associated with consent, we really mean that she has no occurent
mental state associated with consent. However, your dispositional mental states are present in your mind, they are just not at the forefront.

This is how a man can grope his girlfriend’s breast, even if she is surprised, because her consent is present dispositionally. If the girlfriend were to consider her boyfriend grabbing her breast, she would consent to it. This would presumably be true even if she wasn’t in the mood for it and hoped that he wouldn’t do it, at least in many relationships. Again, it is possible to consent to things that you don’t want. The same thing goes for initiating sex while your partner is asleep, since dispositional attitudes are still present while you are asleep. This somewhat entails that someone can consent without being directly aware of it. This doesn’t strike me as deeply counterintuitive since there are situations were we do seem to recognize that consent doesn’t have to be actively considered. The girlfriend might not have actively considered the proposition that her boyfriend should be allowed to grope her breast at any point but we still don’t consider this sexual assault. The real question as it pertains to consent is; would you, upon reflection, mentally permit the conduct?

H. M. Malm has argued that this appeal to dispositional consent causes problems for our intuitive notion of consent. Her argument is that dispositional consent fails because it does not account for times when you have the relevant mental state but don’t consider yourself to have consented. She uses the example of desiring her car to be stolen despite the fact that she cannot be said to have consented to it being taken away when it is stolen (Malm, 1996, p. 150). Malm mentions desiring her car to be stolen which is not the same as consenting to having it stolen. It is possible to desire something but not consent to it. Even if we were to amend her example and say that she would have consented to it, were she to consider it, her counterargument still doesn’t work. This is a question-begging argument since a hidden premise in her argument seems to be that consent is more than a mental state. Her argument is that she didn’t consent because, although she subjectively consented to having her car stolen, this isn’t sufficient to consent. On subjectivism, if she mentally consented to having her car stolen then she would be consenting and it wouldn’t be theft, although the thief would be culpable for theft. Her argument seems to be more of a statement of performativism, rather than an argument against subjectivism.
Wertheimer’s Ulysses case is a fair bit more difficult since Y is actively resisting, so we cannot defer to dispositional mental states. Her earlier actions aren’t sufficient to count as consent since people can change their minds and so the subjectivist is somewhat at a loss with this particular case. The same defense as the one I offered above cannot be deployed here since Y’s attitude to X is in an entirely different category than the girlfriend and her handsy boyfriend. The girlfriend is dispositionally consenting to her boyfriend whereas Y is being physically forced by a stranger into having sex against her will. Unlike the girlfriend, Y would not consent to the act in question, were she to consider it, so to say that she is dispositionally consenting is a bit of stretch. It might be said that she dispositionally consented because she is aware of the rules in the club and that might well be true when she initially entered the club but it is possible to change your dispositions. So when X propositions her, gets turned down and forces her, she might change her dispositions. Merely changing her mind is sufficient to revoke consent. Notice that there is an internal sense of victimization with her that the groped girlfriend doesn’t share, which is a major clue into how their dispositions differ. If you are arguing, as I am, that consent is merely a matter of mental states then you have to allow for cases like this to be possible. Malm articulates the problem for subjectivism by pointing out that subjectivism makes it “impossible for us to consent to something that we know we may not want at the time of its execution.” (Malm, 1996, p. 150)

So how should a proponent of dispositional consent deal with cases like this? A subjectivist might appeal to higher-order mental states but I am inclined to simply bite the bullet and say that Y isn’t consenting. As far as I can tell, this is by no means a huge bullet to bite. To say that Y is not consenting doesn’t strike me as wildly counterintuitive. After all, Y seems to suffer the same amount of harm as a more traditional rape victim. Her self-governance was similarly violated. To those who are hesitant to accept my conclusion, there are some details that might make biting the bullet more palatable. I would argue that, due to the context and Y’s earlier actions, X shouldn’t be held legally liable. In fact, I would even go as far as to say that X shouldn’t be considered morally culpable either. Perhaps feigning resistance wouldn’t be uncommon in such a club and in a context like that, X cannot be blamed for the harm he inadvertently inflicted. From a moral and legal culpability standpoint, both X and Y are adults who signed away some of their rights for a certain amount of time, so there is a certain amount mitigation of personal responsibility here. Of course, the question of moral
Responsibility is dependent on whether X has good reason to believe that Y has revoked her consent. If for whatever reason X becomes aware of Y’s revocation of her consent, he becomes morally culpable for the rape.

4.4. The Objection from Consensual Withdrawal

A related point in favor of the performativist is the claim that withdrawing consent requires expressing yourself. If you consent to any given act, the assumption is that your consent remains for the duration of that act. If you wish to withdraw consent, you need to express that somehow. Your mental states are really irrelevant in these scenarios, if you don’t signal that you have changed your mind, the sex is treated as consensual. This argument has been made by several people, including Tom Dougherty (Dougherty, 2014, p. 234) and H.M. Malm (Malm, 1996, p. 150), all of whom have similar arguments. Dougherty argues for his view that consent is analogous to a promise by presenting the case of Paula and Tim. Tim promises Paula to buy her a theatre ticket. If Paula initially accepts but then wishes to turn down his promise, then she has to articulate that. An intention is not enough. Similarly, if Paula wants to allow Tim onto her property, what does she have to do in order to release Tim from his duty not to trespass? She needs to consent. What does she have to do to reimpose that duty? She needs to revoke her consent. Dougherty writes:

By contrast, if Paula merely forms an intention to reverse the promise, then this is not enough to give up her right. However, the attitudinal view of consent holds that for consent, a mere intention can waive a right and release another person from a duty; for example, Paula would waive her right against Tim’s trespass by forming an intention, such as an intention to forgo complaining about Tim entering her home. (Dougherty, 2014, p. 236)

This argument begs the question, a subjectivist would simply deny that revoking consent requires certain behaviors. The premise behind this argument is that the aim of consent is to release people from their duties by giving them signaled permission, which is a view of the purpose of consent that the subjectivist denies. The central claim of the subjective view is that consent is a mental state and that anything involving consenting or revoking consent is
something that takes place in the mind. The purpose of consent is to form a promissory attitude to the conduct of another person or persons. To say that revoking consent requires you to evince certain behaviors is to assume the thing you are trying to prove, that consent requires communication. It’s important to note that if Paula initially consents to have Tim enter her property but then revokes her consent without telling him, he wouldn’t be morally culpable for the trespass even though he would be on her property without her consent. It’s absolutely reasonable to assume that someone is consenting to an act if they have done nothing to convey the withdrawal of their consent, but conceptually speaking it doesn’t require any type of signalling.

Dougherty’s comparison to promises also doesn’t quite work. If I promise my sister to feed her hamster then even a disingenuous promise is sufficient for the promise to have been made. If I am lying and I have no intention of feeding her hamster, then I have still made the promise. I have still placed myself under the obligation to feed the hamster. The only mental state required for promises is an intention to make the promise (someone who unintentionally promises doesn’t seem to be under the same obligations as an actual promise-maker). In this way, promises are analogous threats. You don’t have to intended to follow through on your threats to make the threat, they don’t have to be earnest. Both promises and threats are about making someone else believe something. Disingenuous consent, on other hand, is not really consent since it requires willed permission. Promises are unconnected from one’s willingness whereas consent is necessarily tied to the will. Since someone can exercise their will without a corresponding performative and someone can evince behavior that correlates to consent without any subjective permission, the comparison is imperfect.

4.5. The Objection from Consensual Gradation

H. M. Malm objects to the subjective view by arguing that the mental states that are associated with consent come in degrees, whereas actual consent does not. You can merely tolerate sex or you can hunger for it, but both of these mental states can presumably be consensual. With consent you either give it or you don’t, if you consent to sex and have a wonderful time, you haven’t consented more than someone who didn’t enjoy himself and merely put up with the sex. Malm is certainly correct in that it would be an erroneous use of
language to say that “he has consented to sex, but only to a small degree”. Imagine someone describing two people having sex as some kind of “half-rape” because one of the participants had only given a certain amount of consent. Malm’s point is that consent is a very bidary thing so to explain consent using components that do come in degrees doesn’t work (Malm, 1996, p. 149).

If one were to formalise her argument, it would look like this:

(P1) Consent cannot come in degrees.

(P2) The mental states associated with consent come in degrees.

(C1) Consent cannot be a mental state.

I would like to draw attention to the fact that the behaviors associated with consent also come in degrees. A person can express enthusiasm about the act they are consenting to or they could merely allow it to happen. A person could say “Absolutely!” or “Fine, do it if you have to”. I don’t see how the performativist can say that behaviors are black and white in a way that mental states are not. So if Malm’s argument works, which I don’t think it does, this is an equally big problem for the performativist. Naturally, the same problem applies to hybrid theorists as well. Of course, no matter what view of consent one has, it is possible to argue that there is a minimum requirement of desire or accepting behavior that one has to evince in order to consent. I think that holds true but the point of this argument is to show that the performativist is in no better position to explain consensual gradation than someone who holds the subjective view.

More importantly, there are some mental states that have the same either/or feature as consent but you can hold them more or less strongly. I would put knowledge in this category. This depends on what account of knowledge you subscribe to but arguably, for any proposition P, you either know it or you don’t. Knowledge seems to have an either/or feature but the broader mental states involved in knowledge certainly do come in degrees. You might be certain about proposition P or you might hesitantly accept proposition P. Despite these
associated mental states, you either know P or you don’t. Having a justified true belief that P means that you have knowledge. It’s very much an either/or issue, at least on some accounts of knowledge. This is what I would argue consent is like. The relation between the certainty of your beliefs and knowledge is the same relation as the one between the degree of your willingness to acquiesce and consent. You either acquiesce or you don’t but the extent to which you desire to acquiesce might vary. That does not take away from the fact that mental acquiescence combined with a genuine desire to acquiesce amounts to consent. This undermines premise two of Malm’s argument since consent itself is binary. Some of its components may come in degrees but, much like knowledge, this doesn’t undermine its either/or identity. Since her second premise is false, her argument is invalid.

4.6. The Objection from Deception

Alan Wertheimer objects to subjectivism on the grounds that it cannot explain violation of consent by deception. It is generally accepted that consent can be undermined by deception. Imagine if one person sells another person a product without telling that person that the product is broken. This would invalidate the person’s consent since he didn’t consent to buy a broken product. Similarly, if a man impersonates a woman’s husband and has sex with her, then she hasn’t really given him her consent. She consented to sex with her husband, not the man impersonating her husband. This is known as “rape by deception”. Wertheimer asks us to imagine a deception case and then imagine the same case without deception. Imagine two cases like this:

Case 1: A woman has sex with her husband

Case 2: A woman has sex with a man impersonating her husband.

In case 1, she consents and in case 2, she doesn’t. Notice that from the woman’s point of view, the two cases are identical. In both cases she thinks that she is having sex with her husband, in case 2 she is mistaken, but her beliefs are the same. According to Wertheimer, the problem for the subjectivist is that her mental states are the same in both cases, seemingly making neither of the cases rape. If we want to be able to say that there is such a thing as rape
by deception, then we have to say that consent isn’t a mental state. The only way to
differentiate case 1 from case 2 is to make an appeal to behavior (Wertheimer, 2003, p. 149 -
150). Of course, the relevant behavior isn’t the behavior of the woman, but rather the
behavior of other people. If a performativist were to say that consent is a matter of the
woman’s behavior in the case that Wertheimer is presenting, then deception would be a
problem for the performativist as well since the woman’s behavior is the same in the same
way that her mental states are supposedly the same.

What objections can a subjectivist raise in response to Wertheimer? Well, Wertheimer is
assuming that the mental states of the woman is the same in both cases. I would argue that
they are not. Let’s say that I think that I have a brand new TV in my dorm. In the morning, I
really do have a new TV at home but at the noon, the TV has been stolen. In the evening, I
still believe that I have a TV at home. Are my beliefs in the morning the same as my beliefs
in the evening? Internally, everything seems to be the same. I seemingly have the same
beliefs at both points in time and I am completely oblivious to what has actually happened to
my TV. Despite this fact, I would argue that my beliefs cannot be the same since my belief in
the morning is true whereas my belief in the evening is false. Through this lense, my beliefs
are clearly different. How can my beliefs be the same if they have different properties? The
point of this example is to illustrate that the type of mental state you have can be dependent
on external factors. So we can say that the content of your mental states are determined by
internal factors such as beliefs as well as external factors such as truth. To make a connection
to semantic externalism in regard to mental content, Hilary Putnam illustrated the difference I
am trying to convey in his “twin earths” thought experiment. There is another earth that is
identical to our own, except its lakes and oceans are filled with XYZ instead of H2O. When
the earthling, Fredrick, uses the term water he is referring to H2O whereas when his
physically identical twin, Frodrick, uses the same term he is referring to XYZ. Since they’re
clearly referring to different things, the difference in meaning has to be determined by
external, non-mental factors (Putnam, 1975).

With this in mind, let’s reexamine the case of the woman and the impersonator. Clearly, we
can say that her mental states are different since her beliefs are true in the first case and
wrong in the other. A necessary condition for a person to be able to consent to the relevant
act is that she has certain beliefs. I take this point to be self-evident, if you don’t have any beliefs about the act that you are about to consent to, then you cannot consent to it. You need to know what you are consenting to. Beliefs have intentionality and so they are about something. The thing that your beliefs are about will also have properties and those properties change the identity of your beliefs. If the content of one’s beliefs are dependent on external factors, as we saw in the case of my stolen TV, then consent is also dependent on external factors. Based on the intuition that rape by deception is possible, we can conclude that the beliefs that pertain to your consent have to be true in order for consent to obtain. Recall that one of my necessary conditions for consent to obtain is that the beliefs that pertain to your consent are true. So we can see that the subjectivist can defer to the broader external context in which the mental states exist to account for things like rape by deception.

4.7. Conclusion

The list of objections to the subjective view that I have dealt with in this section is by no means exhaustive but they are fairly common in the literature. I think that I have shown that none of them are sufficient to prove that subjectivism is implausible. With these considerations out of the way, it’s time to consider some of the problems with performativism.

5. Considerations Against Performativism

5.1. The Objection from Conceptual Vagueness

The central thesis of performativism is that you can only truly consent through a certain action or set of actions. But what actions, exactly, count as consenting? There is a conceptual vagueness to performativism that is problematic. Signalling consent can involve all sorts of things. It can involve saying things like “I want this” or “I agree”, perhaps using certain gestures or displaying a certain type of body language. Where do the boundaries of consent end and where do they begin? H. M. Malm admits that there will inevitably be a fair amount
of grey area on this topic but that; “As a general rule, the more the nonparadigmatic act is open to other interpretations (i.e., as done for reasons other than to signifying willingness, to a particular activity), the less justified we are interpreting it as an act of consent.” (Malm, 1996, p. 155). Alan Wertheimer calls valid performatives “consent tokens” and on the topic of what constitutes a valid consent token, he writes; “In my view, nothing much turns on the form of the token, so long as it is reasonable to assume that its meaning is understood by the relevant parties.” (Wertheimer, 2003, p. 153) He goes on to claim that “what constitutes a token of consent is, to use the vernacular, ‘socially constructed’” (Wertheimer, 2003, p. 153).

As we have seen, the performativist tends to appeal to the current social paradigm surrounding consent. There aren’t any universal set of actions that convey consent in every single situation. If social practice dictates that jumping on one leg while making clicking noises with one’s tongue signals consent, then that counts as giving consent. This response has the consequence of there being no single answer to this question, consent is a fluid phenomenon that changes depending on the wider social context in which the actions take place. One might argue that this response is somewhat vague but there are plenty of actions that are like this. An example of such an act is marriage. Two people who want to get married will have to perform a certain set of actions, the outcome of which will be that they become married. Notice that there is no one set of actions that can accomplish this, there are many different rituals and practices that need to be performed in different cultures. In short, it’s a matter of social convention.

However, this brings us to another problem for performativism. This appeal to social practice has the consequence of entailing some very morally questionable claims. If the relevant behaviors that constitute consent are determined by the wider social context, then some prima facie non-consensual are, in fact, completely consensual. In the past, marrying someone conveyed consent to all future sexual advances. This made it impossible to be raped by someone you were married to. Today, we all agree that a husband can rape his wife if she

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1 I am using Wertheimer’s book from 2003, Consent to Sexual Relations, for some of my claims about performativism. I should mention that Wertheimer himself has defended a slightly different view in recent years. Today, he claims that valid consent consists of a performative and an intention and that morally transformative consent is merely a performative.
doesn’t want to have sex with him. We also want to be able to say that it was possible for a husband to rape his wife before marital rape was culturally acknowledged. During these historical periods, a man who forced his wife into having sex didn’t have her consent, but performativism seems to deny this. Marital rape was truly impossible. In those days, the woman might have been trying to pry her husband away from her while screaming in protest but this isn’t sufficient to withdraw consent since those actions don’t always revoke consent. Consider people who enjoy acting out rape fantasies, the woman frantically resists but in reality the act is completely consensual. Verbally protesting only revokes consent under certain conditions determined by context and convention. In the context of a society that doesn’t believe in marital rape, protesting and resisting wouldn’t revoke consent. An act like saying “I do” at a wedding ceremony is actually quite ideal on a performative framework. We can easily imagine a society in which they do not recognize marital rape and that the act of saying “I do” at your wedding ceremony would be a very unambiguous way to signal all future consent to your spouse. Its meaning would be understood by all relevant parties. Therefore, the performative view traps people in their cultural context.

The alternative to equating consent to certain behaviors dictated by social practice is to instead designate specific, universal behaviors that always signal consent. I do not consider this a very attractive option either. The performativist claim is that consent matters because it changes how people relate to one another, so surely the appropriate signals can be any socially agreed-upon action? Reducing consent to a speech act such as saying “yes” would have the consequence of having many intuitively consensual acts be rape. Consider the culture where consent is signalled by jumping on one leg while making clicking sounds with one’s tongue. Is there any ethically significant difference between this and saying “I consent to this”? Aside from a seemingly insignificant communicative detail, there is no difference between this case and cases of signalled consent in our society. Any fixed set of actions will be arbitrary and have unacceptable consequences for what is and isn’t consensual.

The performativist has to either tie consent to specific behaviors or to social practice. Tying consent to specific behaviors is far too restrictive whereas social practice commits the performativist to denying the existence of things such as marital rape in certain contexts. The subjectivist doesn’t have this problem since he will say that it was the woman’s mental states
that mattered, not society’s view on marital rape. Perhaps the wife signaled her consent by marrying her husband but on the subjective view it is possible to signal consent without actually giving consent. The performativist could grant that marital rape wasn’t real in the past but still say that what the husband did to his wife was harmful. After all, it is in no way obvious that consent is sufficient to make sex moral. Still, this is a big, counterintuitive bullet for the performativist to bite. For a subjectivist, we could imagine scenarios where the woman forms a desire to acquiesce due to societal pressures, so there are grey areas on my account as well. In these cases I would argue that consent obtains but that the sex is wrong for other reasons. However, in unambiguous rape cases where there isn’t a desire to acquiesce and the woman physically resists her husband, a subjectivist can call this rape whereas a performativist cannot.

5.2. The Objection from Harm

One might wonder what is harmful about non-consensual acts. Paralyzed Sally hasn’t truly been harmed in any way since she desired to have sex with Harry. She exercised her will regardless of whether Harry was aware of this. There would be a considerable difference if Sally didn’t want to have sex with Harry but Harry had sex with her anyway. Subjectivism is able to capture this difference whereas performativism cannot. The reason why consent is relevant and morally important is because it is a manifestation of your will, and your will is a matter of mental states. Recall that my account of consent is acquiescence combined with a desire to acquiesce. The acquiescence itself is not an expression of your will since acquiescence can happen under duress and thus it can go against your will. It is the addition of a desire to acquiesce that serves as a manifestation of your will. The consented-to act cannot be against your will if you desired to acquiesce and that was your sole reason for acquiescing.

The reason why acts like rape are so horrific is because it is a massive violation of your will and personal autonomy. Drilling down to ethical bedrock, it seems fairly clear to me that this is the primary harm of non-consensual acts. This is why Sally isn’t harmed in the original case, because there hasn’t been any violation of her will. It’s through this appeal to the will that a subjectivist can explain how consent is morally transformative. The performativist is
committed to saying that mental states are irrelevant to consent and so she is also committed
to dismissing the relevance of will in regards to consent since will is a mental state. This runs
counter to the moral framework I established in the beginning of this paper. Instead of
exercising her will, the consenter simply has to fill an epistemic gap for the consentee.
Performativism places the consentee at the center of consent instead of the consenter. We
have to keep in mind that it is possible to signal your consent without having anything close
to what we would consider a will to acquiesce. Therefore, a performativist cannot directly
appeal to the will in same way that a subjectivist can. Certain behaviors might correlate and
typically be expressions of the will but the connection between behavior and specific mental
states is not a necessary one.

Deciding what theory of consent you want to subscribe to largely depends on what role you
think consent plays. A performativist will emphasize how consent transforms the moral
nature of the actions of other people. Even if someone has your dispositional consent, it is
morally wrong for them to have sex with you if they are not aware of your dispositional
consent. The only way for their actions to be morally acceptable is if they know that they
have your consent. That the behavior of the consentee is permissible is better accounted for
on the performative view. A subjectivist is less concerned with the communicative aspect of
consent and instead emphasizes the connection between consent and your personal autonomy,
how consent transforms subjective experience. To me, this is the fundamental divide between
performativism and subjectivism. This could suggest that the different theories are
appropriate in different contexts, a lawyer might be more concerned with the performative
aspects of consent whereas a psychologist might be more concerned with the subjective
aspects of consent. Morally though, it seems to me that subjectivism is able to account for the
moral importance of consent in a way that performativism cannot.

It would seem that Sally should be upset if an atrocious act like rape had been inflicted upon
her but that doesn’t seem to be the case here. In deception cases, it is true that the victim most
likely won’t be upset but if he or she were to find out about the deception it would be quite
devastating. Now, it may be the case that Sally doesn’t have all of the necessary information.
Perhaps it is necessary in order for consent to obtain to know whether your sexual partner is
intending to rape you or not. However, what if Sally doesn’t care if Harry is intending to rape
her? This would seem to be a strange reaction but if it were her genuine reaction then I don’t think that it would invalidate her consent. How she relates to what is happening should be up to her. I still think that Harry should face legal repercussions but if our main concern in regards to consent is Sally’s personal sovereignty then how she relates to what happened to her should be the most important detail. If self-ownership is the source of consent’s ethical importance, then the consenter should be the final arbiter of whether or not consent was given. If Sally were honest about her state of mind at the time of her sex with Harry, then she would have to say that what happened was not against her will. By tying consent to our right to autonomy, we should respect the will of the consenter even when the behavior of the consentee is reprehensible. It is the internal sense of victimization that the subjective view accounts for. There is a sense of violation that is tied to non-consensual acts that reliably presents itself on the subjective view since the act has to be against the consenter’s will. As we can see with Sally, the damage done by non-consensual acts on the performative view is not always clear.

5.3. The Objection from Unintentional Consent

What happens when someone offers the correct performative but does so by accident? One of Alexander’s objections to performativism is that any given performative act has an implicit mental state criteria, without that criteria the performative’s effectiveness is defeated. The point he is trying to convey is that in order for an action to count as a valid performative, there has to be the appropriate mental state behind the act. To return to our marriage example, the right kind of performative during a wedding ceremony is “I do”. That act of saying “I do” has to be accompanied by certain mental states to count as a valid performative. Alexander asks us to imagine a person who doesn’t know the English language and who is told by someone else to say “I do”. Arguably, he hasn’t really consented since he didn’t know the meaning of the words. Only when you have the appropriate mental states can we say that you have consented. Even if there is a performative aspect to consent, the mental state is the most relevant component. The mental state is what makes consent the kind of act it is. Alexander’s claim is that a purely performative view of consent inevitably collapses into a hybrid theory at the very least (Alexander, 2014, p. 103-104). Perhaps the performativist could argue that consent itself is a performative whereas valid consent requires certain mental criteria. This is
similar to how Westen considers acquiescence to be factual consent but that legal consent requires other criteria to obtain. Still, this conclusion seems somewhat counterintuitive.

Regardless of whether consent requires certain mental state criteria, there is clearly something to this objection since it seems to entail some very strange things about consent. Does the non-English speaker truly consent? Should he be held to his marriage vows? Arguably not since he “consented” by accident. The same thing would apply to someone who understands English but verbally consents to something by simply misspeaking. What happens when someone evinces the correct behaviors that are sufficient for consent by accident? Wertheimer discusses the case of a hospital patient who signs a medical consent form without listening to the doctor when he tells him about what he is consenting to (Wertheimer, 2003, p. 148). What if he just unintentionally consented to something that he doesn’t want? Wertheimer concedes that some of these cases of unintentional consent are tricky and suggests that the consenting patient hasn’t given valid consent. He qualifies his statement by arguing that whether the case of the hospital patient is a case of valid consent depends on how careful the doctor was in informing his patient. However, it is possible that unintentional consent can happen. According to him, the morally important question when giving a “consent token” (the correct performative) is whether it means that “B’s consent token makes it permissible for A to proceed.” (Wertheimer, 2003, p. 148)

Wertheimer is not alone in invoking this notion of valid consent but this seems to conflate the ontology of consent with the morality of consent, i.e. whether someone is morally blameworthy for acting a certain way toward someone else. Ontologically speaking, Wertheimer still seems to maintain that consent is behavior and nothing else. The problem is that if the performativist wants to account for unintentional consent then she has to appeal to mental states, in which case performativism collapses into some kind of hybrid theory. It is possible to bite the bullet and say that unintentional consent still counts as consent but this seems to cut against many people’s intuitive notion of consent, which even seems to be the case for someone like Wertheimer. My intuition is that many of the examples used in the discussion of morally invalid consent isn’t consent at all, so the account of consent that manages to explain why most of these acts are non-consensual without invoking the distinction between consent and valid consent should be the most successful one. That these
cases are, in fact, non-consensual is something that my theory implies. Returning to the moral framework sketched out earlier, unintentional consent also cuts against the notion that consent is tied to self-governance since unintentional consent allows the consenter to consent to things that are against her will.

5.4. The Objection from Coerced Consent

A frequently discussed issue is that of coerced prostitution. Consider a scenario where Clementine is being threatened by Patrick. He tells her that if she doesn’t have sex with Joel, then he is going to kill her. Joel and Clementine meet, both of them perform all of the necessary acts for consent to obtain, and they have sex. Can this be said to be consensual? All of Nozick’s criteria for coercion are present; Patrick aims to keep Clementine from not having sex with Joel and he communicates a claim to Clementin. His claim indicates that if Clementine refrains from having sex with Joel, then Patrick will bring about some consequence (killing her) that would make Clementine not having sex with Joe less desirable to Clementine than her having sex with him. His claim is credible, Clementine does not refrain from having sex with Joel and part of the reason why she has sex with Joel is to lessen the likelihood that Patrick will bring about the aforementioned consequence (killing her). Coercion obtains and, since coercion is one of the violators of consent, this prevents consent from obtaining.

On the subjective view, this isn’t consensual since Clementine doesn’t have the necessary mental state criteria. She may be acquiescing but she certainly doesn’t desire to acquiesce. This is a desirable conclusion since Clementine does seem to be a rape victim. Just because someone other than the person she is having sex with is coercing her doesn’t mean that she is consenting to the sex. What matters on performative views is what the consentee has reason to believe and Joel has every reason to believe that Clementine has consented. In cases like these, Wertheimer maintains that we wouldn’t want to say that someone like Joel is a rapist so as long as we agree that Patrick is morally culpable for coercing Clementine, he is happy to say that the sex between Joel and Clementine is consensual (Wertheimer, 2003, p. 149).
We seem committed to either saying that Joel is a rapist or that Clementine is consenting. We would want to say that Clementine is being raped since her intercourse with Joel is not wanted in any way but who is doing the raping? Is Patrick somehow raping Clementine by proxy? This doesn’t seem very plausible since he isn’t involved in the sex. A rapist is typically defined as someone who has sex with someone without their consent, which Patrick isn’t doing. If a performativist were to make the claim that Patrick is the rapist in this scenario, then she would have to develop a theory of rape that allows for rape by proxy. As far as I can tell, such a theory doesn’t exist and even if it did, it would seemingly contradict conventional wisdom. I believe that in this case we should simply say that Joel is raping Clementine but that he isn’t morally or legally culpable for the rape since he lacks knowledge of Clementine’s mental states and Patrick’s coercion. This example illustrates how performativism tends to neglect the victim in favor of emphasizing the epistemic situation of the consentee. It is not Clementine and how she relates to the situation that is relevant for consent but Joel and what he has reason to believe. Much like the objection from harm, this shines a light on how performativism undermines the moral relevance of consent in situations like these. What makes this wrong on a performativistic view is factors other than consent, whereas the subjective view is well-equipped to explain the wrongfulness of a situation like this by appealing to the lack of consent. Connecting back to our intrinsic right to autonomy, it is undeniable that Clementine has had her’s violated since this entire sequence of events was against her will. Her autonomy is compromised. Once again it seems like the subjective view is in a better place account for the liberal importance of consent.

5.5. Conclusion

In conclusion, the issues that plague performativism are largely a matter of counterintuitive consequences in terms of harm. While performative theories are mostly in line with what most people would consider to be consensual, there are cases where they imply that victimless scenarios are non-consensual and that cases where there really is a victim are consensual due to the behavioral conventions that performativism endorses. A theory that completely accounts for every single one of our intuitions about consent is a tall order but I believe that we can do better than what performativism has to offer. Before concluding this paper, I will now address hybrid theories.
6. Considerations Against Hybrid Theories

6.1. Preliminary Notes

At this point in the paper we have already considered most of the main arguments for and against the performative and subjective views of consent. There are not many counter arguments that are particular to the hybrid view, instead the problems faced by the other two views apply to hybrid theories to differing degrees. As Tom Dougherty remarks, there is little practical difference between the hybrid view and the performative view (Dougherty, 2014, p. 229). Hybrid theories avoid problems such as consenters giving their consent unintentionally since such consenters don’t fulfill the necessary mental state criteria for consent. As I interpret most hybrid theories, they usually only demand the correct mental states to be present at the time that the consenter gives the correct performative. In this way, they avoid the subjectivist conclusion to the Ulysses case but they have the same problem as the performativist in regard to the marital rape case. If mental consent must be present throughout the activity, the reverse is true. Dougherty claims that consent requires public behavior that signals permission but that behavior must be accompanied by an intention to signal said permission (Dougherty, 2014, p. 227-229). Similarly, David Owens characterizes consent in the following way; “To consent to S’s dentistry is to intentionally communicate the intention of hereby making it the case that S does not wrong you by whitening your teeth, etc.” (Owens, 2011, p. 407) Richard Healey explains that in addition to mental permission, since other people’s mental states are inaccessible to us, we need to add a publicity condition to consent, which requires the following: “both the consenter and consentee must, in principle, have access to the information that determines whether consent has been given or revoked.” (Healey, 2015, p. 360)

This chapter will mainly be devoted to addressing some concerns that someone who has rejected the performative view might have about the subjective view that might make them favor the hybrid view. Indeed, there are many valid intuitions that point to the hybrid view
that many of those who embrace the subjective view have been a little too dismissive toward in my estimation. I will focus on laying these concerns to rest while illustrating what you lose by abandoning subjectivism in favor of a hybrid view.

6.2. The Objection from Harm Revisited

As we have seen, subjectivism arguably does a better job than performativism of explaining what is harmful about non-consensual acts like theft and rape. But does the hybrid theorist suffer from similar problems as the performativist? I would argue that they do, but not the same extent. Let us once again revisit Sally and Harry. A hybrid theorist would say that Sally possesses the correct mental states but that consent doesn’t obtain because she was unable to perform the necessary acts to signal her consent. So we can see that the hybrid theorist finds himself in a similar situation as the performativist. He has to say that Sally was raped despite her elation that the act occurred. The same thing holds true of my stolen TV, I may well be happy with the act occurring but since I did not signal my consent to the thief, his confiscation of my property is non-consensual. There are clearly different intuitions about cases like this but hopefully my readers will catch the intuition that these implications are odd.

Of course, the hybrid theorist enjoys some benefits that the performativist doesn’t. He can make a direct appeal to the will in some cases since hybrid theories incorporate mental states into their conception of consent. However, as I showed in the earlier paragraph, it would be wrong to say that hybrid theories enjoy all of the benefits of both the subjective view and the performative view by incorporating them into one theory. As long as consent is reliant on behavior, we are bound to be committed to saying that certain acts are non-consensual despite there seemingly being no harm inflicted on the “victim”. The appeal to the will and personal autonomy cannot be reliably made by the hybrid theorist since there are cases where acts are in accordance with the consenter’s will but the requisite behavior is missing.

In surveying the literature, it seems to me that to some degree the different camps are talking past one another, which is why question-begging arguments like the objection from consensual withdrawal are common. Subjectivists are certainly guilty of this as well, often
arguing against performativists and hybrid theorists by appealing to intuitions that the opposition plainly does not share. What all philosophers of consent have in common, however, is a mutual recognition of the importance of consent. In more or less every opening paragraph of any paper written on this topic is a lecture stressing the sanctity of consent. But why is it so ethically important? On the performative and hybrid views, it seems to me that we fail to explain why, especially on the liberal framework that I am working with. If stealing a TV that I want to be stolen is non-consensual, why does consent play such a crucial role in the immorality of the act if the supposed victim is happy with the act occurring? This is something that both performative and hybrid theories fail to internally justify to a satisfactory degree, or at the very least to a lesser degree than subjectivism. The liberal intuition that consent is hugely morally consequential is shared by more or less everyone who are working on this but only the subjective view can actually justify this intuition.

6.3. The Objection from Conceptual Confusion

Larry Alexander critiques the hybrid view by asserting that hybrid theorists confuse culpability with wrongdoing, an argument that should look familiar at this point. In Richard Healey’s paper, *The Ontology of Consent: A Reply to Alexander*, he lays out his case against Alexander’s brand of subjectivism. Alexander uses the example of D who wants to borrow V’s car but is too shy to ask. V knows that D wants borrow his car and mentally consents. Instead of asking, D takes V’s keys and drives off. Healey’s intuition is that D culpably wrongs V in this scenario, an intuition I happen to share (Healey, 2015, p. 355-356). Alexander disagrees and maintains that D hasn’t wronged V despite being culpable for wrongdoing. He uses the term wrongdoing to mean the crossing of one’s moral and legal boundary (Alexander, 2014, p. 103). Alexander expresses himself in quite an undiplomatic way. There is such a thing as wrongdoing even when consent obtains. By giving a separate account of what kind of wrongdoing has occurred, the subjectivist can account for the intuition that some wrongdoing has occurred without changing her account of consent.

In my mind there is clearly something to Healey’s claims since in the case of paralyzed Sally, Harry seems to not only be culpable for rape but he also seems to have wronged Sally in some way. Despite the fact that she gave her permission, she was not treated in an ethical
way and there appears to have occurred a violation. Intuitions may differ on this point but I share Healey’s intuition in this particular case. However, a subjectivist is able to account for this. It is possible to wrong someone in a weak sense without wronging them in a strong sense. Disrespect is when we don’t treat other people with the dignity and reverence that they are owed, this would be wronging someone in a weak sense. D wrongs V in a strong sense if he violates V’s will which I don’t think he has since V mentally consented. The strong sense is when someone is wronged in the sense that the self-governance described by Feinberg is violated. This is also disrespectful but the disrespect is considerably stronger. When I refer to mere disrespect, I mean disrespect in the weaker sense that exists even when consent obtains. In both of these cases one’s moral boundary has been crossed but in different ways.

V might not have wronged D in a strong sense but he was perfectly willing to do so and that itself is a way of wronging D. Those who were being wronged were fine with having the act done to them but the information that V and Harry did not care about their consent should still trouble them. There is a duty to treat your fellow man with a certain amount of respect, which Harry and D did not adhere to. The level of disrespect is on a scale with how serious the harm would have been had they not had the other person’s consent. If D had not consented, there would have been a moderate level of harm whereas Sally would have come to terrible harm if she had not consented. So the mere disrespect is worse in her case. However, the wrong would be significantly worse in both cases if they did not mentally consent since their wills would have been violated. What this shows us is that a subjectivist can still account for the intuition that these people have been culpably wronged without having to say that the act was non-consensual. The fact of the matter is that consent may well be necessary for certain acts to be morally acceptable but most philosophers would agree that it is not sufficient.

Healey anticipates such a response, arguing that there is no reason to separate consent and the kind of disrespect I am referring to. According to him, to say that D needs V’s confirmation that he is allowed to borrow the car is to implicitly accept that consent is more than a mental state (Healey, 2015, p. 361). As I have already explained, non-consensuality and mere disrespect are not the same. Mere disrespect is immoral but doing something to someone else without their consent is considerably worse. The fact that these two are morally distinct
should be a clue that they aren’t ontologically identical. To return to the case of my stolen TV, if I secretly wanted my TV to be taken away from me and left the door open so that someone could take it, no substantial harm has been done to me. After all, I wanted my TV to be taken. The thief has still wronged me in the sense that he disrespected me, but I haven’t been wronged in the strong sense since I wanted to get rid of my TV. If I did not want my TV to be taken, the violation would be considerably worse since the thief trampled on my autonomy as a property owner. That is the harm of non-consensual acts. In as far as we view theft as non-consensually taking someone else’s property, I don’t consider it fair to victims of theft to consider this theft. Again, the thief has certainly committed attempted theft and should be held responsible, but I haven’t suffered any substantial harm. The violation of losing my property is non-existent since the supposed “theft” was in accordance with my will. Self-governance should be able to be practiced without other people’s awareness of one’s will since the idea of personal sovereignty involves setting your own boundaries. Since the unintentional non-thief didn’t cross that boundary by stealing my TV, we should allow this to be consensual. This is what you lose by making behavior necessary for consent.

Unlike the hybrid theorist, the subjectivist can fully account for why consent is crucial to prevent harm. Since Sally isn’t upset with Harry in our original case, it would actually trivialize the extreme evil of rape to say that the sex was non-consensual. In fact, it seems to me that by making the communicative aspects of consent a necessary condition you are lowering the ethical significance that consent should have. To say that Sally was happy to be raped is strange proposition to me. This has to be the reason why we should separate the aforementioned disrespect from consent, because it waters down consent. The hybrid theorist cannot fully capture the centrality of self-governance described in the beginning of this paper. By keeping the subjectivist account while supplementing it with this notion of wrongdoing someone in a weak sense, we are not forced to say that happy “rape victims” such as Sally are really rape victims. Of course, in deception cases there wouldn’t be this subjective sense of violation but if the victim were to find out the truth, the feeling of violation would be present.

6.4. Conclusion
Hybrid theories suffer from similar problems as performative theories do. While I do believe that they do a better job of giving an intuitive account of consent than performative theories, they suffer from many of the same problems as performativism due to their common feature of tying consent to behavior. There are cases where the intuitive appeal of hybrid theories is quite clear to me where it is usually denied by subjectivists but there are ways of accounting for certain types of wrong without conceding to the hybrid theorist. The benefit of not being a hybrid theorist is that we can better explain the harm of non-consensual acts and not make the relevant factor of grossly immoral acts the expression of permission.

7. Conclusion

Given the moral framework sketched out in the beginning of this paper, I believe that I have shown that the subjective view is generally more preferable to the alternatives. First, I gave what I believe is the most plausible account of the state of mind that is consent. It is mental acquiescence combined with a genuine desire to acquiesce as the sole reason for your acquiescence. In addition, the beliefs that pertain to your consent have to be true. Then, I dealt with some of the most common objections to subjectivism. I believe that I have shown that none of them succeed to a sufficient degree to make the subjective view implausible. What counterintuitive consequences it does have are not so severe as to make us discount it. I then laid out a case against performativism, showcasing its flaws and weaknesses. In light of the subjective view, I believe that the performative view looks rather implausible. Its biggest flaws are in its strange moral consequences and inferior ability to account for the harm of non-consensuality. Finally, I considered the hybrid view. Despite being more plausible than the performative view, it too has a hard time accounting for the harm of non-consensual acts. By showing that the subjective view can account for the stray intuitions that leads one to embrace a hybrid theory, I believe that the subjective view succeeds to a greater degree. Part of Sally’s self-ownership is being able to say that, despite Harry’s unlawful conduct, the act was not against her will. Every liberal thinker emphasizes the inherent link between consent and autonomy and part of being autonomous is being able to permit other people’s behavior, even when it is detestable.
References
