

## Introduction

When Kim Suozzi, a twenty-one-year-old woman, was diagnosed with an aggressive brain cancer, she sought ways to save her life. With no cure on the horizon, she turned to cryogenics. Her parents were uneasy with the idea, but Suozzi forged ahead with her plans. She raised the \$80,000 fee for cryopreservation from various donors, including the Society for Venturism. Shortly after she died at age twenty-three, a medical technician performed procedures to keep the blood vessels in her brain from collapsing, and she was placed into an ice bath and rushed to Alcor Life Extension Foundation, a U.S.-based cryonics organization. There, she was decapitated and cryoprotectant pumped through the main arteries in her brain. The hope was that one day, when technology had advanced enough, she would be revived with her brain largely intact, even though she would have no body. A CT scan later showed that the cryoprotectant had only reached part of her brain, leaving the rest vulnerable to damage.<sup>1</sup>

Advancements in science, technology and medicine have placed more ideas within the realm of possibility and created new situations which test societal norms and expectations. Yet, these ideas are fraught with unknown consequences. The pace of change surpasses the ability of lawmakers to respond. In some cases, new norms become established without consideration of their long-term societal implications. In other cases, laws quickly become outdated or obsolete.

At the center of many of these exciting innovations is the issue of consent. Should individuals be permitted to consent to participate in activities which are novel and dangerous? What does consent mean in situations which are replete with uncertainties? Should participants be permitted to withdraw from such activities – and if so, should there be constraints on their ability to do so?

<sup>1</sup> Amy Harmon, *A Dying Young Woman's Hope in Cryonics and a Future*, N.Y. TIMES (Sept. 12, 2015), [www.nytimes.com/2015/09/13/us/cancer-immortality-cryogenics.html](http://www.nytimes.com/2015/09/13/us/cancer-immortality-cryogenics.html); see also George Dvorsky, *23-Year Old Kim Suozzi Undergoes Cryonic Preservation After Successful Fundraising Campaign*, 109 GIZMODO (Jan. 21, 2013), <https://io9.gizmodo.com/5977640/23-year-old-kim-suozzi-undergoes-cryonic-preservation-after-successful-fundraising-campaign>.

Consent both protects individual liberties and permits the exercise of them. Yet there are reasons to doubt the invincibility of consent. Choices – and the ability to refuse to consent – may be affected by personal circumstances, economic constraints, social pressures, time restrictions and cognitive limitations. Human beings are impulsive and susceptible to manipulation and deception. To err is human, and so is the inclination to make decisions that are short-sighted, irrational and regrettable.

The passage of time may degrade consent. Consent given at one time may no longer be valid at a later time. The perspective, motivations or feelings of the consenting party may have changed. Time may have altered the nature of the act itself, making it more or less difficult or affecting its desirability. Additional information might become available about the harms or benefits of a particular act or transaction. The emotionally gratifying short-term benefits may have waned or been fulfilled. The value of the long-term benefits may have been recalibrated due to changing circumstances or needs. The shifting nature of consent poses difficult and troubling issues, especially where performance involves the risk of serious physical injury.

Tough questions arise when individuals, with their human weaknesses and cognitive fallibilities, are given the power to make harmful and potentially life-threatening decisions. The government determines what activities are lawful and so may limit the scope and power of consent. Laws and regulations seek to balance the value of autonomy with the compromises necessary for living in a civilized society. Individual desires must be weighed against community needs and mores. Yet, this balancing act often lacks transparency or discernible parameters. Why do we permit individuals to enter into some transactions and not others? Why do we allow individuals to consent to perform in pornographic movies but not to be paid for sexual services? Why do we allow an individual to risk his or her life to serve in the military or to participate in mixed martial arts fighting, yet prohibit that individual from selling a kidney which will save the life of another? Why do we turn away in disgust at the sight of people who have implanted silicon chips into their hands, yet ogle at women who have implanted silicone into their breasts?

New technologies raise new legal and ethical questions regarding the nature, scope and boundaries of consent. Individuals have more options today regarding how they choose to live, die, procreate, conceive and interact with the world. Should we allow people to sell their body parts? Should we let them participate in early-stage drug trials or medical experiments? Should they be allowed to modify their bodies – and, if so, to what extent? Are there limits to consent – and if so, what are they?

Issues regarding whether someone should be permitted to consent to an act or activity – which this book refers to as “consentability” – are usually framed as issues of public policy. For example, in some states, surrogacy contracts are unenforceable

because they are deemed to be against public policy.<sup>2</sup> In some cases, the public interest in prohibiting the act is deemed to be so strong that the act itself is criminalized.<sup>3</sup> But why are some acts considered inconsistent?

Consent in the law is typically viewed as a conclusion, an all-or-nothing concept where the actions of the parties are considered objectively and statically. This conception provides no guidance regarding which acts should be consentable. This book argues that consent is more complicated and should be understood as a dynamic which is context-dependent, incremental, variable and relative.<sup>4</sup> Decision-making does not occur in a vacuum, but is affected by what the consenting party knows, the available options and the consenting party's emotional state at the time consent is granted. It is also affected by the actions of the party seeking consent. Accordingly, while the requirement of consent recognizes the value of autonomous decision-making, the *validity* of consent hinges upon the context in which it is given and the dynamic unleashed by both parties.<sup>5</sup>

Consent is distinct from consentability. This book gives the term “consentability” two different meanings. The first involves possibility. An act which is consentable means that it is possible for there to be consent given the nature of the proposed activity. The second meaning of consentability involves legality. An act which is consentable is (or under the right circumstances, can be) legal. The possibility of valid consent is essential to consentability but it is not sufficient. Consentability is thus determined by assessing the effect of an activity upon both the individual and society.

This book proposes a framework for assessing consentability which is both normative and descriptive, meaning that it explains both what the state should do and what it often does. The descriptive account is only partially accurate because state action is often inconsistent or incoherent. The advantage of a framework is to render transparent the process by which decisions regarding consentability are made and in doing so, yield more consistent and predictable results. A structured way to think about consent and consentability may lead to better law and better policy; it may also

<sup>2</sup> See Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 *YALE J. L. & FEMINISM* 159, 162 (2013) (“Contracts between intimates governing decisions pertaining to the use of reproductive technologies are just the latest type of intimate agreements that many courts have shied away from enforcing on public policy grounds.”); Deborah Zalesne, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of Art*, 51 *U. RICH. L. REV.* 419, 420 (2017) (“Ethical and legal questions persist regarding the enforceability of contracts that facilitate the formation of non-traditional families.”).

<sup>3</sup> See, e.g., 42 U.S.C. § 274e (2012) (prohibiting organ purchases). This book discusses legal issues surrounding consent which are relevant in any jurisdiction where consent is part of the law. Please note, however, that unless otherwise indicated, references to specific legislation or rules assume U.S. law.

<sup>4</sup> See Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 *N.C. L. REV.* 1013, 1021 (2018) (stating that “[c]onsent is not a totemic concept that one must accept or reject wholesale, but rather a conclusion about the nexus between subjective will, conduct, and consequence.”).

<sup>5</sup> While there may be more than two parties to a contract and more than two parties affected by an act of consent, for simplicity, this book generally assumes the model of two parties: the consenting party (the consenter) and the party seeking consent (the consent-seeker).

help improve decision-making on an individual level and provide a restraint against impulsivity and the social and visceral influences which often cloud our best judgment.

This book is organized in three parts. Part I analyzes the meaning of consent. This part also highlights some of the problematic cases involving consent and consentability. Part II introduces a consentability framework which assesses the validity of consent based upon the robustness of the consent conditions relative to the given act and the conduct of the parties. Part III suggests ways to improve the conditions of consent and reduce opportunism. Part III also revisits the hard cases using a consentability framework.

## PART I

## The Contours of Consent

We use the word “consent” in a variety of contexts. A person might be said to have consented to the terms on a company’s website, to a search by a police officer, to having sexual relations, to undergoing surgery. But what does it mean to consent? The common understanding of consent is that it indicates a subjective state willing to accept or proceed with an act or activity. Another understanding of consent is that it is a conclusion which legally or morally justifies the commission of an act or activity. Under this second conception of consent, the subjective state is not determinative and may not even be relevant.

Part I provides an overview of the implications of these two interpretations of consent.<sup>6</sup> Chapter 1 examines the meaning of consent and the conditions necessary to establish its validity. It also introduces the concepts of consent construction and consent destruction. Chapter 2 presents three different types of situations which highlight the problems surrounding consent. They include cases of self-harm (such as suicide), self-improvement, contracts involving the body, and untested and novel technologies. These cases test societal norms, and prompt the question: Are there limits to consent?

<sup>6</sup> Selected passages in Chapter 1 and Chapter 4 are substantially similar to those previously published in Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165 (2017) (hereinafter Kim, *Relative Consent*).

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## 1

## What Does it Mean to Consent?

In societies which value individual freedom, consent plays a singular role. Philosophers and scholars have pondered its meanings, as have lawyers and ethicists who wrestle with its implications. Consent by one party permits another to act in a way that might otherwise be illegal or immoral. Without consent, sex would be rape, and the exchange of property would be theft. Consent permits private ordering, which in turn allows individuals to allocate their rights in a way that suits them. There is consensus that consent is legally and ethically transformative. Franklin Miller and Alan Wertheimer have written that consent makes it permissible to act “in a way that would be impermissible absent valid consent.”<sup>7</sup> Heidi Hurd has referred to consent as a “moral game-changer” and “morally magical.”<sup>8</sup> John Kleinig refers to consent as a “transformative moral notion.”<sup>9</sup>

Yet the moral authority of consent depends upon its authenticity or what we typically refer to as the “validity” of consent. It may seem nonsensical to refer to consent in terms of validity, because *invalid* consent is simply no-consent. Invalid consent is an oxymoron, yet it serves a useful purpose. To refer to consent in terms of validity is a way to separate out the act communicating consent (the “manifestation of consent”) from the conditions under which that communicative act was made, and to distinguish instances of consent from those of no-consent.<sup>10</sup> As Margaret Jane Radin notes, “A system based on consent, as is our institution of contract, must also be based upon nonconsent. Why? Because the system must have the basic commitments and procedures that will enable a decision-maker to conclude that observed

<sup>7</sup> Franklin G. Miller & Alan Wertheimer, *Preface to A Theory of Consent Transactions: Beyond Valid Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 79 (Franklin G. Miller & Alan Wertheimer eds., 2009).

<sup>8</sup> Heidi M. Hurd, *The Normative Force of Consent*, in *THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT* 52 (Peter Schaber ed., 2018).

<sup>9</sup> John Kleinig, *The Nature of Consent*, in *THE ETHICS OF CONSENT*, *supra* note 7, at 5.

<sup>10</sup> I use the term “no-consent” to refer to instances where a party has expressed objection to the activity, and the term “non-consent” to refer to situations where the party did not validly consent, or changed her mind. Non-consent captures instances of no-consent as well as instances where consent was defective or was withdrawn.

physical and verbal behavior (or lack of such behavior) amounts to nonconsent rather than consent.”<sup>11</sup> Referring to contractual consent, Brian Bix writes that the “gap between the assertion that there had (not) been consent and the conclusion that the agreement (should) not be binding is often hidden by use of terms like ‘*full consent*’ or ‘*valid consent*,’ which indicate, at the least, that there are different types or different extents of consent or, alternatively, that consent needs to be combined with other factors for it to transform the moral or legal effects of some action.”<sup>12</sup>

Recognizing and distinguishing the various types of consent accounts for consent’s contextual, incremental and variable nature. Chunlin Leonhard has referred to consent as a “spectrum” which runs from “informed consent to increasingly problematic consent.”<sup>13</sup> To say “yes” means to agree, but the way that yes is said and the acts to which it grants permission may be subject to dispute. A reluctant acquiescence, even if voluntary, may not merit the same moral or legal deference as an enthusiastic engagement. Consent may be incremental, especially in situations where the activity is progressive or where the boundaries are ill-defined. Orit Gan has stated that consent is more than a “yes-or-no question,” and can be “gradual and continuous.”<sup>14</sup> It can also be abruptly discontinued. For example, in the context of physical relations, an individual may consent to kissing and then to sex – or to kissing but *not* to sex. In commercial settings, one may consent to certain responsibilities given certain circumstances, but not to those same responsibilities in other circumstances. An important issue then is whether consent to one activity includes consent to a progressive or more involved version of that activity, or whether another communicative act is required. The answer affects the burden between the parties – is it the burden of the party consenting (the “consenter”) to communicate no-consent, or is it the burden of the party seeking consent (the “consent-seeker”) to obtain a new communicative act which permits the expanded activity? An answer cannot fairly be given in the abstract, as it would depend upon the nature of the communicative act (meaning how specific and how definite) and the nature of the

<sup>11</sup> MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 20 (2013) (hereinafter RADIN, *BOILERPLATE*).

<sup>12</sup> See Brian H. Bix, *Contracts*, in *THE ETHICS OF CONSENT*, *supra* note 7, at 251; see also RADIN, *BOILERPLATE*, *supra* note 11, at 19–32 (explaining that one way to consider consent is to consider what consent is *not* and to consider “varieties of non-consent” and “problematic consent” to explain the meaning of consent).

<sup>13</sup> Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 *CASE W. RES. L. REV.* 57, 69 (2012) (discussing “scenarios of consent” which “present a spectrum of consent, from informed consent to increasingly problematic consent”); see also Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 *CASE W. RES. L. REV.* 1, 3 (2010) (stating that consent “varies by degrees”).

<sup>14</sup> See Orit Gan, *The Many Faces of Contractual Consent*, 65 *DRAKE L. REV.* 615, 616–17 (2017) (“consent is not simply a ‘yes-or-no’ question; consent is more complex than such an analysis suggests and can be both gradual and continuous . . . Factors of power, intimacy, trust, arm’s length relations, and more all differently influence consent.”).

expanded activity (meaning how serious the consequences to the consenter of continuing to the more involved activity).

Consent may be affected by new information or changes in circumstance. A party may consent only because that party had misinformation. For example, an employee may consent to working at a company because she believed her supervisor was reasonable. Consent may be valid only to a certain extent, beyond which it becomes invalid. The employee may consent to working with a supervisor until she discovers that he is abusive. The employee's consent to working with the supervisor does not extend to working with one with a bad temper and an abusive personality.

Assessing the validity of consent requires recognizing the dynamic nature of consent and understanding the different conditions which are constitutive of it. *Consent construction* refers to the conditions under which the manifestation of consent was made. *Consent destruction* refers to the effect of new information or circumstances upon the conditions of consent.

#### A. CONSENT CONSTRUCTION

Consent has a variety of meanings in the law, but it is typically a conclusion based upon the presence or absence of three conditions: an intentional manifestation of consent, knowledge, and volition/voluntariness. Knowledge requires both *understanding* and *information* in light of the consenting party's *motive* for consenting. Consent must be *manifested* either through words or actions, meaning that the consenting party must express it in some way to the other party. This *manifestation of consent* must be *intentional*, meaning the reason or purpose for the manifestation of consent is to communicate consent to the act. Intentionality is closely related to the requirement of *voluntariness*. Voluntariness has two aspects. The first is that of volition or control, meaning that the manifestation of consent must have been intended rather than reflexive. The second is that of desire and is defined in relation to absence of undue pressure or coercion. Coercion is defined by context. An evaluation of coercion must consider the degree and likelihood of harm to the victim. A threat to cause physical harm is coercive provided that it is credible. Aside from credible physical threats, there is less certainty about what constitutes coercion.

My description of consent construction generally captures the basic requirements of consent put forth by other scholars. For example, John Kleinig states that where A consents to B, "consent is centrally and most appropriately a communicative act that serves to alter the moral relations in which A and B stand – and that for the moral relations to have been altered for B, a communicative act must have occurred."<sup>15</sup> In order for the communicative act to constitute consent for which A should be held responsible, Kleinig states that the conditions of competence, voluntariness, knowledge and intention must be met. Tom Beauchamp, focusing on informed consent,

<sup>15</sup> *Id.* at 5.

argues that autonomous choice and voluntariness are the central features of consent.<sup>16</sup> His theory of autonomy features conditions of intentionality, understanding and voluntariness.

Thus, the normative account of consent requires that a person with legal capacity must intentionally and knowingly (with understanding, and properly informed) engage in a voluntary communicative act. Each of these conditions must be sufficiently established in order to show that the consenting party was acting autonomously, meaning the act consented to is an expression of that person's free will, and not the result of compulsion or coercion. The legal account of consent, however, does not always correspond to the normative one. Often, these consent conditions need only be sufficiently established, because perfect conditions rarely exist. An act of consent will rarely be free from external influence, and a decision-maker will almost never have perfect information. The difficult legal question involves whether a condition has been "sufficiently established" in a given case. As Margaret Jane Radin notes, there is a "large grey area" in the space between "full consent" and "nonconsent."<sup>17</sup> While there is general agreement that consent requires enough information to make an informed decision, what is the extent and quantity of that information? Similarly, at what point does a voluntary act become involuntary? How much pressure is too much pressure? What type of external circumstances warrant a conclusion that the consenting party has been deprived of free will? The answers require assessing each of the conditions of consent with a nuanced and realistic understanding of human nature.

### 1. *Heuristics, Biases and the Limits of Human Cognition and Self-Control*

Perhaps the most difficult and problematic consent condition to assess is the knowledge condition. The law typically requires only the provision of relevant information, and not evidence of understanding. The responsibility for providing that information depends upon the transaction and the relationship between the parties. For example, a surgeon should provide more information to a patient before an operation than a car seller provides to a buyer before a sale.

Yet, the mere provision of information is inadequate, given the limits of human cognition. Nobel Prize winner Herbert Simon coined the term "satisfice" to refer to the concept of bounded rationality. As he explained, because of limits on cognitive capacity, time, and access to information, human beings must settle for a certain level of information in order to make a decision.<sup>18</sup> Yet, to acknowledge that human

<sup>16</sup> Tom L. Beauchamp, *Autonomy and Consent*, in *THE ETHICS OF CONSENT*, *supra* note 7, at 55.

<sup>17</sup> RADIN, *BOILERPLATE*, *supra* note 11, at 161.

<sup>18</sup> See Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 *AMER. ECON. REV.* 493, 503 (1979) (noting that as soon as a decision-maker finds an alternative which has certain desired attributes "he would terminate the search and choose that alternative," which Simon refers to as "satisficing"); see also Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 *Q. J. ECON.* 99 (1955).