

CONSENTABILITY

Problems regarding the nature of consent are at the heart of many of today's most pressing issues. For example, the #MeToo movement has underscored the need to move beyond viewing consent as a simple matter of yes or no. Consent is complex because humans and their relationships are complicated. Humans, as a result of cognitive limitations and emotional and physical vulnerabilities, are susceptible to manipulation and mistakes. Given the potential for regret, are there some things to which one should not be permitted to consent? The consentability quandary becomes more urgent with technological advances. Should we allow body hacking? Cryogenics? Consumer travel to Mars? Assisted suicide? In *Consentability: Consent and Its Limits*, Nancy Kim proposes a bold, original framework for evaluating consentability, which considers the complexities surrounding consent.

Nancy S. Kim is Professor of Law at California Western School of Law and Visiting Professor at the Rady School of Management, University of California, San Diego. She is an elected member of the American Law Institute and the author of numerous articles, essays and two books, *Wrap Contracts: Foundations and Ramifications* and *The Fundamentals of Contract Law and Clauses: A Practical Approach*.

Cambridge University Press
978-1-107-16491-8 — Consentability
Nancy S. Kim
Frontmatter
[More Information](#)

Consentability

CONSENT AND ITS LIMITS

by

NANCY S. KIM

California Western School of Law



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-107-16491-8 — Consentability
Nancy S. Kim
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107164918

DOI: 10.1017/9781316691311

© Nancy S. Kim 2019

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Kim, Nancy S., 1966– author.

TITLE: Consentability : consent and its limits / by Nancy S. Kim, California Western School of Law.

DESCRIPTION: Cambridge, United Kingdom ; New York, NY, USA : Cambridge University Press, 2019. | Includes bibliographical references and index.

IDENTIFIERS: LCCN 2018038863 | ISBN 9781107164918

SUBJECTS: LCSH: Consent (Law)

CLASSIFICATION: LCC K579.16 K56 2019 | DDC 344.04/12–dc23

LC record available at <https://lcn.loc.gov/2018038863>

ISBN 978-1-107-16491-8 Hardback

ISBN 978-1-316-61655-0 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press
978-1-107-16491-8 — Consentability
Nancy S. Kim
Frontmatter
[More Information](#)

To S. B., M. B. and A. B., as always.

Cambridge University Press
978-1-107-16491-8 — Consentability
Nancy S. Kim
Frontmatter
[More Information](#)

Contents

<i>List of Figures</i>	<i>page</i> ix
<i>Acknowledgments</i>	x
Introduction	1
PART I. THE CONTOURS OF CONSENT	5
1. What Does it Mean to Consent?	7
A. Consent Construction	9
B. Consent Destruction	15
2. The Hard Cases	18
A. Self-Directed Activities	19
B. Bodily Integrity Exchanges	32
C. Novel/Experimental Activities	44
PART II. CONSENTABILITY AND CONTRACTABILITY	49
3. A Consentability Framework	53
A. Relative Consent	71
B. A Hierarchy of Autonomy Interests	74
C. (Valid) Consent as a Sliding Scale	81
D. The Limits of Consent	86
4. Consent and Contracts	91
A. The Consent Conditions in Contract Doctrine	96
B. Contractability and the Problem of Time	106

PART III. THE REGRET PRINCIPLE AND THE OPPORTUNISM COROLLARY: APPLICATION	117
5. Improving the Conditions of Consent	121
A. A More Definite Manifestation of Consent	121
B. Strengthening the Knowledge Condition	123
C. The Voluntariness Condition and External Factors	129
D. Discourage Impulsivity and Encourage Deliberation	133
E. Age and Maturity	137
6. Reducing Opportunism	142
A. Duty of Candor	143
B. No Solicitations: Limiting the Influence of Solicitors, Advertisements and Marketers	146
C. Regulating Providers and Procedures	155
D. Remedies and Enforcement	156
E. Presumption of Defective Consent	162
F. Disclosure, Defective Consent and Liability	166
7. Revisiting the Hard Cases – Some Final Thoughts	168
A. Self-Directed Activities	168
B. Bodily Integrity Exchanges	187
C. Novel/Experimental Activities	203
D. Summary and General Guidelines	212
Conclusion	217
<i>List of Cases</i>	221
<i>List of Statutes</i>	223
<i>Bibliography</i>	225
<i>Index</i>	241

Figures

II.1	Consentability Framework	<i>page</i> 50
3.1	Societal Interests/Values	54
3.2	Autonomy Interests/Individual Rights	54
3.3	Consent Construction/Assessing the Conditions of Consent	72
3.4	Hierarchy of Autonomy Interests	75
3.5	Relevant Factors in Assessing Threat Level to Autonomy	75
3.6	Figure Showing No Valid Consent	82
3.7	Figure Showing Valid Consent	82

Acknowledgments

I am grateful to many people for their support during the process of writing this book. I thank William Aceves, Dan Barnhizer, Orit Gan, Danni Hart, Tom Joo, Chunlin Leonhard, Kaipo Matsumura, and Joanna Sax, all of whom read portions of this book at various stages and provided valuable comments. I presented portions of this book at KCon XII at Southwestern Law School, the Osher Institute at UC San Diego, and at a faculty workshop at California Western School of Law, and I thank the attendees at these presentations for helping me refine my ideas. For their careful research and diligent cite-checking assistance, I thank my wonderful research assistants, Heather Daiza, Vivian Lin, Ethan Shakoori, and Meagan Stevens. I thank my employer, California Western, for providing me with necessary resources, Heddy Rudd for much needed help preparing the bibliography, and the always amazing library reference desk staff for their efficiency and professionalism. I also thank my students at California Western and the University of California, San Diego, for their questions and their eagerness to learn which makes my job so rewarding.

Much thanks to my editor, Matt Gallaway, for shepherding me through the publication process a second time, and to the editorial and production team at Cambridge University Press for pulling it all together.

Finally, I am most grateful to my family, Seth, Mina, and Amelia. Thank you for your support, wisdom, encouragement, humor, and so much more. I really could not have done it without you.