

## **The Scope of Consent**

### **Abstract**

Acts of consent can bring about normative change, but such normative change is restricted in its scope. When A permits B to enter her home, she does not thereby permit C to do so, or B to kiss her. The normative scope of consent is not the same thing as the intentional content of an act of consent. This raises the questions: what exactly is the normative scope of an act of consent, and what determines it? In this entry some suggestions are made by way of an answer and some connections are made to other debates about consent, its nature, and limits.

### **The Scope of Consent**

Consent renders permissible certain kinds of action that would otherwise be impermissible. Consent of this kind—*permissive* consent—is operative in many domains. For example, in many jurisdictions the building of new homes requires "building consent". Here consent is sought from and given by institutions. Our focus here will not be on this kind of institutional consent but upon individual consent. Whilst it is true that a "building consent" decision may be made by an individual, this is not the sense of individual consent that we are concerned with here. First, this individual only has a normative power in virtue of the role she plays: the power attaches to the role, and the institution, not the individual herself. Second, although we may refer to this kind of normative change as "consent" it is importantly different from the consent that will concern us here. Although the employee may have some discretion in her decision whether or not to give permission, the proper exercise of the normative power is constrained by the criteria for permissible building of new homes (that they have to be in certain regions, the building materials of a certain quality, and so on). The individual's role is partly an epistemic one: to ensure that the planning criteria and standards are met. It is not simply up to her whether or not to give consent. Her role is also an *executive* one: *somebody*

needs to decide whether the criteria are met. The individual consent that concerns us, by way of contrast, is a radically discretionary kind of consent where it is simply up to the consentor whether or not to bring about normative change. She may consent for good reasons, for bad, on a whim, to impress her boss, to secure trust, to forge a friendship and so on.

*Individual discretionary permissive consent*—from here, just *consent*—is often operative against a backdrop of individual rights. Consider the right that each of us has against bodily touching. Such a right protects the holder from the intrusive and invasive acts of others. But they may also pose a barrier to the right-holder's interests (e.g., suppose she wants medical care from another). The power to permit by consent, allows us to maintain the protection of those rights whilst exercising a distinctive kind of control over other's dispositions to act. We exercise this control by changing their reasons: more specifically, consent removes a reason that another agent has for refraining from acting in certain ways.

Although consent plays this key role against a backdrop of rights, it is also operative in domains where we might not think that rights talk has any purchase. For example one social obligation of politeness is to ask before sitting by someone in a vacant seat on a train, or on a park bench. It is not clear that the sitter has a right against being sat beside, but politeness demands that we ask before doing so. Indeed, further norms of politeness seem to place serious constraints on the exercise of the power. If the seated party refuses to permit, without good reason, we may judge that the refusal itself breaches norms of politeness.

### **The normative scope of the *power to permit by consent***

Consent can change the normative situation with regard to different kinds of norms: moral, social and legal, or even *ad hoc* norms introduced by agreement. In our "building" example, *legal* permission is given. Here our focus will be upon consent as something that is morally transformative, against a backdrop of rights. When consent is transformative in this way the

changes it brings about are limited. Consent has a *normative scope*. We can think about the normative scope of consent in two ways. The first is in terms of the scope of the power to permit by consent. If A has a right against other parties touching her without her consent, A's power is typically restricted to creating an exception to others' directed obligations towards A (Wenar 2013). A has the power to permit acts of bodily touching that would breach the obligations owed *to her*. In some contexts, however, the power to permit by consent may range over rights that other parties have. Parents have the power to create exceptions to their children's rights against being touched. But here too the power to permit is restricted in its scope and concerns only obligations directed at *their own* children. The parent of child A does not have the power to permit bodily touching, or clinical treatment for *other people's* children.

There are some challenging ethical questions to do with parental consent that are, at root, questions about the proper limits to the scope of the parents' power to permit by consent. Where parents have the power to permit their (young) children's medical treatment, those same children, at some later point, will become adults and will (normally) acquire the sole power to permit their own treatment. Should it the parents' power be removed in a single step, or should there be a transitional period of power sharing where, for example, the parent has a power of limited scope (e.g., an "emergency" normative power to permit life-saving treatment in the face of an adolescent's refusal) (Manson 2015)?

The normative scope of the power to permit is bound up, more generally, with considerations of competence. This is because the exercise of the normative power in question is a discretionary one that puts a certain level of cognitive demands upon the consenter and, unlike our "building consent" example, the power must be exercised by a particular individual, not some other individual playing the same role. The individual in question must understand that she has the power to permit, she must understand what it is she is doing when

she permits others to act; she must understand something about the act that consent is given *for* and the agents that consent is given *to*. If an agent is unable to adequately make decisions to permit by consent, she cannot properly exercise the discretionary power to permit by consent. A discretionary power that one cannot exercise is not a discretionary power at all.

Questions about the normative scope of the power to permit by consent will thus arise when agents have diminished or limited decision making capacity. For example, we might coherently hold that a particular agent with dementia is competent to decide whether or not to permit her neighbour to enter her house, and create an exception to *that* right, whilst, at the same time arguing that she does not have the competence to make large financial decisions or decisions about major surgery. Or, we might argue that the agent has the power to permit, or refuse, medical interventions when the stakes are low, but not when the stakes are high (where refusal would be life-threatening, say) (Wilks 1999).

We noted at the outset that the power to permit by consent allows us to set aside the protection of certain rights. Given that rights protect fundamental interests, the power to permit by consent can be a liability for the right-holder. Setting aside her rights leaves her vulnerable to intrusion, invasive acts, loss of property, and so on. Questions about the scope of the power to permit by consent direct us towards broader, deeper, normative issues to do with the balance between norms that protect us and norms—including norms that assign powers—that give us the discretion to set aside that protection. This kind of debate—often framed in terms of determining the proper balance between beneficence and respect for individual autonomy—is central to medical ethics. At root, this fundamental debate in medical ethics is one about the limits of the normative scope of the power to permit by consent, in a context where other important norms are also in play. The normative scope of the power to permit may be restricted, overridden, out-weighted, and so on, by other considerations.

## The normative scope of acts of consent

The power to permit by consent is one thing; the exercise of that power is another. Suppose agent A has a right against being touched by others and a right against others' use of her property. Such rights imply obligations on others to refrain from acting in certain ways. The first point to note is that when A consents she does not set aside, or abrogate, her rights. Her rights remain in place, but a limited *exception* is made for some parties to do some things.

Second, A can create an exception to one *kind* of right, without thereby creating an exception to other rights that she has. The third point is that each kind of right applies to a range of distinct entities, objects, regions, and so on. In the case of property rights, for example, A can create an exception for the use of her car without thereby creating an exception for the use of her catapult. She can also create an exception for one person, without thereby creating an exception for others. In the case of her right of bodily integrity, the right pertains not just to the body as a undifferentiated stuff, the body has distinct parts, regions or zones. One can consent to surgery on one's ear, without consenting to surgery on one's leg or eye.

An act of consent always has a more or less specific content. We can express the content of an act of consent, in ordinary English, with the permissive auxiliary "may": an act of consent is aimed at bringing it about that [some agent or set of agents] *may* [perform some kind of action F], where F *may not* be done without consent. The content of an act of consent is not the same thing as its normative scope. An act of consent may be made, even explicitly articulated, without bringing about normative change. For example, suppose A and B are joint legal owners of some item X, where the conditions of their ownership allow *either* party to transfer ownership to a third party. Suppose C asks A if she may use the item. A consents. But A did not know that B had sold the item to someone else. Here A's act of consent has a

content—that D may use X, not that D may use Y, or that E use X—but the act is *normatively* inert. This is because, in that context, unbeknownst to A, she no longer held the normative power in question.

Suppose we restrict our focus to situations where A *does* have the power to permit B to do some action; even here an act of consent may lack normative force. For example, if A is *coerced* by B, with threat of death, say, into signing a "consent form" that says "B may take my prize motorbike", the *content* of the speech act is that B may take the motorbike (not that C may, or that B may perform surgery on A), but the *normative* scope of the act is the empty set: nothing is permitted by it. Though, note, we might wonder here whether we should call such an act an act of *consent*. The coerced victim feigns consent and feigned consent is no more consent than a fake diamond is a diamond. But a diamond must have a specific physical constitution (something the fake lacks). Consider a different analogy. A forged ticket might still be usefully referred to as a ticket. Indeed, a forged ticket can be viewed as having some kind of "content" even when it is normatively inert. A forged ticket for the musical *Phantom of the Opera* is not a forged ticket for *Chicago*. It has a content, but, as a forgery it has no normative force: it is *void, invalid, null*.

Let us leave aside the question whether a normatively null act of consent is properly an act of consent. Let us focus on acts of consent that are normatively transformative. What is the normative scope of such acts? Here a note of caution is needed. Suppose A consents to B's borrowing her camera. B then borrows it. B's act of taking the camera is a *unique particular* act. It takes place at a particular time, for a particular duration, involves a particular (unique) trajectory through space, and so on. In light of this, it might seem that the normative scope of A's consent is the particular action that B performs: A's consent permits *that*. But, the fact that an act of consent renders permissible a particular act does not imply that the normative scope of consent is that particular act. Suppose B in fact takes the camera whilst wearing a

tie with pictures of *eagles* on it. Now suppose that he had taken it wearing a tie with pictures of *beagles* on it instead. Although these differences would constitute a different token act, such differences are normatively irrelevant.

The fact that consent is directed at *types* of act feeds into a debate in medical research ethics that is often framed in terms of the normative scope of consent. Biobanks—mass research repositories of human biological samples, including genetic samples—are valuable research resources because samples and data can be endlessly re-used in an open-ended range of research projects. This creates an ethical problem because the consent for such uses is gained at the time of initial acquisition of the sample (Steinsbekk & Solberg 2011). Given that future research uses may be unknown at the time of consent, the question arises whether the subject can permit such unknown uses by her consent. If we simply consider consent, then the answer is unproblematic: of course she can. All consent is "broad" consent, and all consent involves ignorance of countless facts about the actions that are permitted by consent. If A consents to B's use of her camera, she may have no idea what pictures A will take. If A consents to B's use of her car, she may not know that at this junction she will turn left, at that, turn right, and there is no requirement at all for B to *re-contact* A every time she does something.

Because actions can be individuated indefinitely finely, or with reference to indefinitely many individuating factors, it is correct, in one sense at least, that an act of consent permits indefinitely many actions. But this does not imply that an act of consent permits *anything* or that it is somehow "open". There is nothing odd or untoward about this kind of "open-but-bounded" feature of consent, it is a general feature of communication. Suppose A makes a request to B "bring me five red apples". It is open as to which red apples B brings (the set of token actions that *would* fulfil the request is very large), but it is not a request for green, or

yellow apples, or for four apples or five millions apples (the set of actions is indefinitely large, but membership of the set is not “open” to all).

A biobank participant can clearly consent "broadly" to members of any of a defined set of actions—research actions—without knowing which actions will be performed. Broad consent is not "open": it does not permit the sale of her data, its use by the police, or its being made available to insurance companies. The debate, however, is not so simple. This is because medical research ethics does not work the concept of consent alone, but, rather, with a different concept: *informed consent*. Informed consent is not simply a matter of knowing something about the actions one is consenting to, it is a distinctive doctrine that holds that there are obligations on patients and research subjects to make consent decisions in a certain way (on the basis of specific information about specific types of action), and obligations on clinicians and researchers to *facilitate* and *ensure* that decisions are made in that way by providing large amounts of specific information (Schneider 1988). Whilst there are questions about the normative scope of *informed consent* in contrast to *consent*, we cannot address those here.

A normatively efficacious act of consent renders permissible some actions but not others, for some agents, but not others. Consent to surgery on one's ear is not consent to surgery on one's foot. But such an example is one where the scope of consent seems intuitively clear. But now consider another example: B asks A "May I kiss you". A says "Oh yes, darling, do!" If B kisses A *there and then* we will typically think that the action is permissible. But what if B (rudely) turns and runs out the room, goes off for a week's holiday, then returns and tries to kiss A. Does A's earlier act of consent permit him to do so? What if B disappears for twenty years and then, on his return argues that he may kiss A, after all, consent *was* given. What if B goes off on a forty minute bike ride? A quick trip round the block? What set of actions is it that A's consent permits?



What we need is a clearer articulation of what determines the normative scope of consent. Having a clear sense of what determines the normative scope of consent is not simply some abstract bit of philosophical book-keeping. A lack of clarity about the normative scope of an agent's consent may leave it unclear whether or not a consentor was wronged by another's actions.

### **Explaining the normative scope of acts of consent**

The power to permit by consent is discretionary. It is up to us whether and how to exercise it. As such, the normative scope of an act of consent is importantly bound up with the consentor's will. When A consents to B's taking her camera, she *intends* to create an exception *for B* to do *that kind of* act. She does not intend to create an exception for other parties, or for B to do other types of act.

The normative scope of consent is thus importantly bound up with the consentor's intentions. This line of thought is further supported when we consider examples where an agent is wronged by another party acting outside the scope of her consent. Suppose B enters A's room in the dark, A has sex with B thinking that B is her partner C. Here B wrongs A—B acts without A's consent—because A did not intend to consent to sex with B, but intended to consent to sex with C. We might be tempted to generalize here: if a person does not intend to permit an action that is F, no doing of F is thereby permitted. If she does not intend to permit B to do F, then B is not permitted to do F.

But, as it stands, this cannot be the correct account of the normative scope of consent. For example, suppose A consents to clinician B taking blood. B takes blood with a syringe that is, in fact, made in Scotland. Insofar as A is unaware of the origins of the syringe A cannot intend that B perform the action that B in fact performs: *taking blood with a syringe made in Scotland*. If A doesn't know that an action of type G is to be performed, or is actually

performed, how can she permit it? If the normative scope of consent were to be *exclusively and exhaustively* determined by what the consentor intends, *no* action would be permissible. This is because consent is directed at sets of possible actions and any action that falls within that set will be a member of countless other sets. Whenever B does some action with A's consent, there will be facts about the action that are unknown, both to A and B. Consent *always* involves an indefinitely large amount of *ignorance* with regard to the act that is actually performed (the idea of a "fully informed" consent is nonsense).

Here we need to take care to distinguish different aspects of consent. In everyday English "consent" is used as a synonym for *agreement*. Suppose B seeks A's consent for B to do X. If A does consent, we might say that A *agreed* to the proposal. We cannot agree to something in ignorance. If A does not know—or have good reason to believe—that a proposed action is F, she does not *agree* to an action that is F being performed. A did not *agree* to being touched with a Scottish syringe. But *agreeing* to something and *permitting* it are not the same thing. A can agree to cut B's grass without thereby *permitting* B to cut his grass. The problem here is that when permissive consent is offered by way of response to a proposal, we can frame it *both* in terms of agreement and permission: A *agrees* to B's proposal to do X, and *thereby* permits B's doing X. But what we *permit* by our consent need not be what we agree to. One can *permit* an action that is *in fact* F without *agreeing* to an action that is F being performed.

So what it is that the consentor needs to know, and intend, in order to permit an action? Why does she not need to know about the origins of the syringe? One simple response we might have here is that the origins of the syringe—and countless other facts about the act in question—are *irrelevant*. As we shall see, this is the right kind of response, but raises the question: *why* are facts about the origins of the syringe irrelevant? We might think something like this: *if* she would have made the same decision had she known the additional

information, that additional information makes no difference to the decision made, and thus to the normative scope of consent: it is *immaterial* to her decision.

But this cannot be the whole story. We can *regret* consent with hindsight, without undermining the normative force of that consent. Suppose A is very much attracted to B and consents to casual sex with him. B, unbeknownst to A, takes A's consent to be indicative of a commitment to an ongoing relationship. B, fuelled by this false belief, pesters A. Weeks later, A wishes she had never had sex with B in the first place. Here A consented to an act *that led to her being pestered by B*. Unlike the syringe case, here A *would not* have consented to the act *had she known* all the facts about it, but her ignorance of these facts does not void her consent. The consentor's attitudes—especially her beliefs and intentions—may well determine the scope of her consent in a *psychological* sense (what she *agrees* to, or what she *intends* to permit) but what we want is an account of the *normative* scope of consent.

Part of the problem here is that any particular action will be an instance of indefinitely many types of action. Nobody can know *all* the truths about any action. Only some descriptions of an action are of *normative* relevance, most are not. The underlying issue here is one of what the consentor has in mind out of a very large set of descriptions of actions. But this issue surfaces elsewhere. When an agent breaches a norm it *may* also be appropriate to blame them, but whether or not an agent is blameworthy depends upon what she believes, knows and intends. Suppose A switches on the light in her bedroom, unaware that a terrorist has rigged the switch to detonate a huge bomb beneath a school. A's act is, unwittingly, an instance of the type *unjust killing*. But it does not follow from this that A is blameworthy for what she did. Alternatively, if A presses the light switch falsely believing that it will detonate a bomb under a school, she is blameworthy, even if, in fact, her act wrongs nobody.

Here legal theorists use the concept of *mens rea* (“a guilty mind”). Suppose B intends to perform an action of the type: *using an item made in Scotland*. There are no norms prohibiting such actions. As such, it makes no sense to ask whether B had *mens rea* with regard to the action so described. In contrast, if B intends to perform an act of the kind *puncturing another person's skin* she ought to recognise that such an action breaches norms. When B asks to take blood from A, she proposes an act of a type that *would* breach A's rights. It is *this* fact that it is of importance for the question of B's blameworthiness. This is because *mens rea* and *blameworthiness* are *norm-referenced* notions.

We can draw upon the kind of norm-referencing found in *mens rea* to solve our current problem with the normative scope of consent (Hurd 1996). Permissive consent is operative against a backdrop of distinctive norms, where agents *may not* perform certain kinds of action without consent. The act of *taking blood*, by itself, may not be impermissible (suppose the blood was daubed 20,000 years ago on an ancient cave wall). However, in our example accessing the blood requires B to intrude upon A's body. The act, when performed will also be an instance of countless other types: an instance of *doing something with an item made in Scotland*; *putting liquid in a container less than 15ml*; *extracting liquid from an object with 19g of magnesium in its body*, and so on, *ad infinitum*. But actions of these latter types are, considered in isolation, not prohibited. An action of these latter types is only prohibited if, and insofar as, it is *also* an instance of some type of action that *is* prohibited without consent. It does not matter for B's *mens rea* that she know that the syringe is made in Scotland; similarly, it does not matter from A's point of view, in exercising her normative power, that she knows that the syringe is made in Scotland, or that it weighs 15g, or that it is 80mm long. What *does* matters is that A knows that the action in question is of a type that *would* breach A's rights—i.e., the type of action that B *would* be blameworthy for if B knowingly

performed it *without* consent—and that A intends to create an exception for B to perform an instance of that type of act.

At this point it would seem that the normative scope of consent is determined by two different elements. First there is the normative background context. The background not only involves an assignment of normative powers (with limits on the scope of those powers) to various agents, it also determines *what types of action* are impermissible without consent. Second, there are the consentor's intentions. The consentor has many rights, and can create many different exceptions for many different agents. The normative scope of her act of consent is that set of prohibited actions that the agent has the power to permit, and that she intends to permit, restricted further by indexing the set of actions to a set of agents that A intends to create an exception for (in many cases this latter set will contain a unique individual agent).

Whilst this account of the normative scope of consent is both plausible and defensible, it is not quite the whole story, as it fails to properly register the distinctive way that we can and do exercise a more fine-tuned kind of control over the normative scope of consent.

### **Clarifying and negotiating the scope of consent**

We noted at the outset that the power to permit by consent that concerns us is a radically discretionary one. But the way that we have framed things so far has been in terms of a discretion to decide *whether or not* to consent. But consent transactions are richer, and more fluid, than this. One thing that happens in consent transactions is a process of *clarification* of the scope of consent. Suppose B asks A "May I borrow your camera?" A might not know exactly how long B intends to use it: "How long do you want it for?" Here A could continue to ask B questions until a clear specification of the action was given, such that she then makes a *binary* decision to permit (rather than refuse) that type of action, so specified. Or, the

clarification may work in the other direction, as it were. B may ask A "Can I just check, is it OK to take it for the whole week?"

Consent transactions may also involve *negotiation* of the scope of consent. Suppose B, in response to A's question "How long for?" says "I need it for a week". A then replies "I really need it back in five days". If B wants the camera for longer, B may then try to induce A to revise the scope of her consent: "Really? You have six cameras and mine is broken." This kind of negotiation involves one party seeking to *change* the (offered) scope of the other party's consent.

Although the scope of consent is something that can be clarified, negotiated, revised, expanded, amended, it is not always appropriate to do so. Suppose a medical researcher B needs blood from a range of subjects to use in her research into cancer. She asks A's consent to take blood for this purpose. Suppose A has a deep, violent, irrational hatred of people of religious faith X. She explicitly restricts the scope of actions that she is willing to permit: "You may take my blood, but not store it in the same building as any blood from those of faith X". This would be inappropriate, unfeasible and prejudicial. In this context, if B knows that there are many more potential donors, then a non-negotiable "consent or refuse" option can be offered to many people. The practical context means that B *need not* engage in negotiation about the scope of consent sought.

The scope of consent is revisable and negotiable. But most consent transactions proceed and succeed without very much being said. This fact raises the question of how it is that consent transactions can and do proceed with so little being said. Recall our example earlier. When A responds to B's request for a kiss, with "Yes of course" how does the scope of consent get restricted to a kiss *now* (not in five years time). Why does A not make these restrictions explicit? Given that B risks wronging A if he gets it wrong, why does B not ask A to be more

explicit by way of clarifying the scope of consent "Do you mean *right now* or *in a few seconds*? Do you mean *just gently* or is *with unbridled passion* also in the scope of your consent?"

The short response here is that there is no more need to make things explicit in the case of consent than there is in any other form of social interaction, or any other kind of communication. Consider A's request "Five red apples". The shopkeeper does not have to ask "What? Do you want me to *throw* five red apples at you? Do you want them given to you on your deathbed? Do you want rotten apples? Pictures of apples?" All social interaction and communication takes place—and can only take place—against a backdrop of common knowledge and shared practices. Young children have to *learn* what a store is, and what to do in a store. But they also learn that they do not have to *say* very much at all: entering the store and simply *pointing* at an item may be sufficient to generate an appropriate response. Our everyday social interaction, and communication, not only involves a wide range of practices, and shared background knowledge, there are some very useful *pragmatic* "principles" in play. One such principle is that one ought to seek to *make known* to relevant others any *deviation* from the shared background. So, if A wants five *tiny* apples, or wants the apples to be *concealed in a bag so that he cannot see them*, he ought to *make known* these deviations from the norm.

### ***Making things normatively significant and the "ontology" of consent debate***

Let us return to, and amend, the "Scottish Syringe" example. Suppose A has a phobia about the use of Scottish items: she cannot bear the thought of anything Scottish touching her skin. Suppose B has no idea that A has this unusual phobia. Now consider two situations. First, A *explicitly says to B* "Look, I have this weird phobia about Scotland, you *may not* take blood if the syringe is from Scotland" Here A explicitly *restricts* the set of actions that she

intends to permit. The striking thing about this kind of revision to the scope of consent is that *although there was no general prior prohibition against using a Scottish item there is now a specific local prohibition on doing so*. What B is doing, is, in effect *making* something normatively significant—the origins of the syringe—that would otherwise not be so. This changes the normative situation for B. If B does not know whether the syringe is Scottish, she ought to refrain from acting until she does know that it is not. If B does know that it *is* Scottish, she *may not* take the blood (though, note, B *may* seek to *negotiate* the scope of A's consent "Look, Scottish syringes are no different from any others, and you need to get this blood taken now").

But now suppose that A does not bother to make explicit her (very unusual) restriction on the scope of consent. She has the opportunity to make her odd views known to B; she is not silenced by deference to authority, say. Although she does not *intend* that B take blood with a Scottish syringe, she *does not say so*, in a context where she readily *could* say so. The question now arises: does B *wrong* A by using a Scottish syringe?

At this point our discussion of the normative scope of consent feeds into another debate: the nature or "ontology" of consent. Some theorists hold that merely performing the appropriate kind of mental act is *sufficient* for rendering others' actions permissible (Hurd 1996; Alexander 2014). Such theorists acknowledge that public acts of behaviour, including communicative acts, play an important role in consent practices. But, they argue, the role such acts play is not a normative one. If A *mentally* sets aside her rights against B doing X, there may be good *practical* reasons for A to *communicate* that decision to B, but the *normative* work is done by what A intends to permit, not what she *says*.

An alternative account is that normatively transformative consent requires some kind of *other-directed* act (which may be verbal or nonverbal). Acts of consent, on this view, are a



species of *performative* (Wertheimer 1999; den Hertogh 2011; Manson 2016). Certain kinds of performatives, like promises and commands, change the normative situation by the right kind of person, with the appropriate authority making the appropriate kind of speech act (in the right kind of conditions). Just as a promise in the mind is not yet a binding promise, a command in the mind is not an order, so too, on this view, an act of consent in the *mind* alone does not change the normative situation.

One way of framing this debate about the "ontology" of consent is to focus on simple binary cases: B proposes to take A's blood. A says "yes, you may". The question then is: what does the *normative* change co-vary with: A's intentions alone, or something else? But our discussion of the normative scope of consent raises the question: how well does either theory deal with discretionary, perhaps unusual, revisions to the scope of consent.

On the mentalist theory, where A has in mind her unusual restriction on the scope of consent, and has the opportunity to say so but remains silent, B *wrongs* A by using the Scottish syringe but, perhaps, blamelessly so. In contrast, the performative theorist argues that insofar as A has not *made explicit* the unusual restriction, in a situation where A *could* make the restriction explicit, B is not merely blameless, B does not wrong A. By analogy, suppose A promises B "I will help you clean your car today" but then *in her mind* thinks "but only if there is a total eclipse of the sun here today". A mentalist theory of promises would hold that A has only placed herself under a *conditional* obligation to B: she is obliged to clean the car *only if* there is an eclipse. A performative theory, by way of contrast, holds that the promise undertaken is *the promise declared*, and given that the qualification remains undeclared, it is not part of the normative scope of the promise. Now, such an analogy is illustrative, and not at all conclusive, but the aim here is not to settle the debate about the ontology of consent, it is, rather, to highlight the fact that any account of the nature of consent has to be able to plausibly accommodate and explain, not just consent transactions of the simple "binary"

proposal/response form, but must also be able to explain the various ways in which we negotiate, revise, amend and expand the normative scope of consent.

The underlying problem here is that the simplest way to explain why the origins of the syringe *did not matter* was to make appeal to background norms: that *type* of action is not prohibited, so A does not need to know whether or not the syringe is Scottish. But this is to solve the problem of *which* descriptions of an action are normatively relevant by making appeal to a *static* or *fixed* normative background. But the normative context of consent is not static, it can be shaped and transformed, and we have the power to *make* things of normative significance that would not otherwise be so. The open question here is whether this kind of positive *making* of normative significance is something that could be done in the mind alone.

## **Conclusion**

Individual, radically discretionary, permissive consent has a normative scope. First, in the sense that the power to permit by consent is limited, especially to adjusting certain kinds of directed obligations that others have towards us. Second, *acts* of consent also have a normative scope. The normative scope of an act of consent is not the same thing as its *content*, nor is it purely a psychological matter. The normative scope of consent is determined by the consentor's intentions against a background normative framework which, in turn, fixes what it is that both consentor, and those to whom consent is given, need to have in mind for consent to be normatively transformative. The discretion involved in the power to permit by consent is not simply a discretion in deciding *whether or not* to consent, or refuse. We have discretionary control over the scope of consent. Given that consent transactions proceed with a great deal remaining implicit we noted that there are open questions about *how* it is that we keep track of the normative scope of consent, given that it is fluid and revisable. It was suggested that here consent transactions are no different from other

communicative transactions, relying upon shared background knowledge and various pragmatic principles (such as that one ought to signal deviation from common knowledge). Finally, it was noted that our ability to revise the normative scope of consent feeds into a broader debate about the ontology of consent. We did not have the space to settle this debate here.

## **RELATED TOPICS**

The Normative Importance of Consent; What is Consent; The Normative Force of Consent; Valid Consent; Consent for Others; Coercion and Consent; Informed Consent; Consent to Medical Treatment; Consent in Clinical Research

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## **FURTHER READING**

Relatively little has been written that focuses on the scope of consent *in general*, although discussions about whether this or that person consented to *that*, or had the power to do so, are commonplace in a wide range of discussions about consent. Hurd (1996) is an exception, and is essential reading for anyone interested in this topic (and it is Hurd's account that forms the core of the discussion in this entry). Alan Wertheimer's work on consent, both in the context of sexual consent, and in bioethics, involves a lot of careful thinking about the scope of consent, via a wealth of examples: e.g., see *Consent to sexual relations*. Cambridge University Press, 2003. In the context of sexual consent, Tom Dougherty's (2013) account of how *deception* undermines consent has a very useful, and focused, discussion of the scope of consent: "Sex, Lies, and Consent," *Ethics*, 123(4) (2013), 717-744.

## **BIOGRAPHICAL SKETCH**

Neil C. Manson is a Senior Lecturer in Philosophy at Lancaster University (UK). He is the author, with Onora O'Neill, of *Rethinking Informed Consent in Bioethics* (Cambridge CUP, 2007). He is currently working on a range of topics to do with the fundamental nature of permissive consent.

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