A Theory of Consent in Sexual Relations

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Ian J. Snapp
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by
IAN J. SNAPP

has been approved for
the Department of Philosophy
and the College of Arts and Sciences by

John W. Bender
Professor of Philosophy

Robert Frank
Dean, College of Arts & Sciences
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A Theory of Consent in Sexual Relations

Director of Thesis: John W. Bender

Despite being one of the most important phenomena in human experience, much of the philosophical work done in consent theory has been lacking, particularly in regards to the ontology of consent. I argue that this is in part due to the fact that many consent theorists fail to highlight the bilateral nature of consent. In this paper I offer a critical analysis of the most well-articulated forms of the Subjectivist theory (as presented by Hurd) of consent ontology and the Performative theory (as presented by Wertheimer) and suggest that we adopt a Hybrid theory of consent ontology (of my own construction) since it is better able to account for the bilateral nature of consent. I then present the two most prevalent consent transaction models (Faden and Beauchamp’s AA model; Miller and Wertheimer’s FT model), analyze them in terms of how well they account for sexual consent transactions, and then offer my own model which better tracks our intuitions regarding sexual consent.
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I. Introduction

Consent is one of the most important phenomena in human relationships. It holds sway over many different aspects of our social lives, from merely borrowing clothing from a friend to the sexual encounters which can have great impact on our lives. Yet despite its importance, much of the philosophical work on consent has struck me as dissatisfying. I believe this is in part due to the fact that many consent theorists seem to focus their attention only on one party in a consent transaction, usually the consent-holder, when instead they should highlight the bilateral nature of this transaction between two parties. My goal in this paper is to show how most consent theorists fail to take the bilateral/relational nature of consent into consideration and then to suggest how to proceed to build a more robust model of the ontology of consent.

The main body of this paper will be split into six sections. The first section will lay out the groundwork for the rest of the paper. In two sections which follow it, I will present the subjectivist and performative theories of consent ontology along with critiques of the two types of theories. In section four, I will describe my hybrid theory of consent ontology. Section five will concern transaction models (which describe the circumstances under which consent is morally transformative). In that section I will present a transaction model for sexual relations which I think best captures the circumstances under which sexual consent is morally transformative. The final section will conclude my thesis; I will summarize the main points of my arguments and suggest further study which will need to be done.
II. Foundations: Value of Consent, and the Function of Consent

As stated above, I will argue that a hybrid theory of the ontology of consent is the best theory because it best matches the bilateral nature of consent. But why value a more bilateral account of consent? By closely analyzing both parties, we can better understand what occurs during a consent transaction, thus gaining a clearer account of consent’s ontology. If we ignore a party, or focus more on one than the other, then we risk missing out on details or factors which could greatly affect how we view consent. Additionally, we must keep in mind that consent is a social act; it is an action which requires more than one party. As such, any true, rigorous philosophical analysis of consent necessitates that we analyze both sides of the relationship. We would be remiss if we did otherwise. If one goal of philosophy is to elucidate the nature of things, then we must try to give the most in-depth analysis possible.

This leads us back to our main question; which theory of consent will offer us the strongest bilateral account? The goal of this paper is to argue for choosing a hybrid theory over a subjective or performative theory. Much of my argument will hinge on this idea of bilaterality. Though the subjective and performative theories both have some degree of bilaterality to them, they are not as strongly bilateral as the hybrid account. It is for this reason, among others, that I argue that the hybrid theory serves as a better philosophical theory of consent ontology.

We start our analysis of consent with an uncontroversial premise: we value consent in sexual relations. This leads us to the question: why do we value consent in sexual relations? It is important to ask this question because the answer will inform our
analysis of what consent is. But to answer “why do we value consent?” we must first ask, “What does consent do?”

First, I’ll briefly outline the basic nature of a consent transaction. Consent is obviously a social act which occurs between parties. That is, consent is not an action one does privately, individually. It occurs in a social context between parties. John Kleinig describes consent acts as a three-place relationship, in which \( A \) consents to \( B \), rendering it permissible for \( B \) to \( X \), \( A \) must be an agent of sufficient maturity. By “agent” I mean a rational, autonomous person capable of moral reasoning. Maturity is a relevant factor because we often believe that children, though they may be somewhat rational, are not rational enough to make certain decisions on their own. Children are not allowed to sign contracts, for example. In this paper, I shall refer to \( A \) as the “consent-holder”, the agent (either an individual or group) who holds the consent token necessary to permit \( B \)’s action. \( B \), whom I shall refer to as the “consent-seeker”, is an agent (once again, either an individual or a group of persons) who (generally) initiates the consent transaction. \( B \) is seeking permission or agreement from \( A \) to do something (\( X \)). \( X \) is a course of action to which \( B \) has no moral claim or entitlement. Another way of putting this is that \( B \) has no right to \( X \) without \( A \)’s consent. \( X \) may be a continuous action or it may be conclusive. With this brief outline in mind, let us go into the function of consent.¹

Simply put, under the right circumstances, an act of consent changes the moral nature of an action. Consent makes permissible that which would normally be impermissible. For example: crossing through my neighbor’s yard would normally be

¹ (Kleinig 2010, 5-9)
trespassing, but with her consent it becomes permissible to do so. Nonconsensual sexual relations are impermissible, but seeking and receiving valid consent changes the permissibility of the action. If I took my roommate’s guitar without his permission, that would be stealing, an impermissible act. However, if I ask him first and receive his consent, then I am permitted to act.

What happens when we consent to someone’s actions? It seems that we alter the rights/duties relationship between the two parties. My roommate has a right to his property (his guitar), so I have a duty, that is, I have an obligation not to take his guitar. By consenting to me, he waives the right to his property (in relation to me, not in general), permitting me to take his guitar until such time as he withdraws his consent. It should be noted that he may still have some degree of control over what I do with the guitar, his rights are not completely waived. For instance, he may consent to my playing his guitar, but that does not mean I am allowed to destroy it. Sexual consent is similar in nature. I have a right to bodily autonomy, therefore others have a duty not to have sexual relations with me without my consent. It should be noted that consenting and therefore waving the right, that does not create an obligation to act on the part of the consent-seeker. It merely creates a liberty where they previously had none. If my roommate consents to me borrowing his guitar, that does not mean I am obligated to borrow it, it simply means I am at liberty to do so.

Heidi Hurd calls this ability to alter morality of another’s actions “the moral magic of consent”\(^2\). By mere force of will we alter our own and others’ rights, liberties,
duties, obligations, and permissions. Consent is an act of the will, an act of an autonomous agent, and with these ideas in mind, we can begin answering why we value consent.

First, it seems that part of the reason we value consent is because we value and respect autonomy. To respect consent is to respect the autonomy of an agent. To ignore the consent (or dissent as the case may be) is to disregard the autonomy of the agent. It should be noted that we can think of autonomy in two ways, positive and negative. When we define these concepts in terms of sexual consent we say that we respect a person’s negative autonomy when we declare that it is impermissible for others to have sexual relations with her without her consent. We respect positive autonomy when we allow her to have sex with persons to whom she has given her consent.

Why do we value autonomy though? Without going too deep into philosophy of autonomy, a simple rather uncontentious answer would be that autonomy is a necessary condition, if not sufficient condition, for freedom. If someone is acting autonomously, then they at least have the potential for acting freely. Freedom is something that we value greatly. We can either claim that freedom’s value is intrinsic, in and of itself, or we could justify it in terms of being necessary for an agent’s well-being. Either way, it is obvious that autonomy and freedom are closely linked, and therefore consent and freedom are as well.

Another reason we value consent is the desire to prevent harm. All consent transactions involve some risk on the part of either party. In sexual consent, risk is obvious. When we enter a sexual relationship, even if it is casual, there is great potential
for various types of harm: physical, psychological, moral, etc. Through understanding and respecting consent, we are able to alleviate these risks. However, due to the sometimes ambiguous nature of consent, the risks can still be great. I will argue that this is in part due to the fact that most current theories of consent fail to highlight the bilateral nature of a consent transaction, thereby losing some aspects of the relationship which are important to understanding a consent transaction. A close and careful analysis of consent and consent transactions could clear up some of the ambiguity that we experience in consent relationships, and, as a consequence, reduce the amount of risk in these relationships.

Alan Wertheimer presents us with another way of framing the value of consent. He does this in terms of Kant’s formula of humanity: “Act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”3 In our interactions with others, we must “respect the capacity that distinguishes and gives dignity to human beings.”4 That is, we must respect the capacity for agency which sets persons apart from non-persons. This capacity seems to consist at least partially in an agent’s rationality and autonomy. Christine Korsgaard proposes that we can understand what the formula of humanity is saying in the following way. When we treat someone merely as a means, then we treat her in such a manner that she would never consent to. “To treat someone as an end, by contrast, is to respect his

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3 (Kant, 38)  
4 (Wertheimer 2003, 127)
right to use his own reason to determine whether and how he will contribute to what happens.\textsuperscript{5}

It should be fairly easy to see how the formula of humanity relates to consent theory. To disregard consent is to treat someone merely as a means, ignoring the fact that a person has their own ends, interests, and desires. To treat someone merely as a means is to ignore their autonomy and agency. Rape is one of the most obvious and detestable examples of a violation of the formula of humanity. It is a complete disregard of someone’s desires and well-being. So to truly value consent is to subscribe to the formula of humanity, at least to some extent.

There is an odd issue that arises from this interpretation of the formula of humanity. Namely, would it be possible for someone to consent to being treated merely as a means? For example, an individual could have a desire to be used as a mere means, perhaps as a form of punishment which they believe (rightly or wrongly) they deserve. My initial thoughts are that the issue hinges on the person who is treating the individual as a means. If A feels like he needs to be punished for some reason, so he seeks out B in order to be used as a mere means, we must ask how B acts and reacts to the situation in order to answer our initial question. If B would not agree to use A as a means without A’s consent, then it seems that B respects A’s autonomy and is therefore not treating A as a mere means. If B would use A regardless of A’s consent, then B is violating the formula of humanity and A’s consent would not matter one way or the other. As interesting as this... 

\textsuperscript{5} (Korsgaard 1993, 45)
question is I will not spend too much time on it, it being well outside the scope of this paper.

With these perspectives on the value on consent in mind, we can now move on to describing the ontological nature of consent. What kind of thing is consent? How does it occur and under what circumstances is it valid or not?
III. The Subjective Theory

As I explained in the previous section, consent is an action in which we will an alteration of a rights/duties relationship. This ability to modify the duties and permissions of others is one of the essential features of being an autonomous moral agent, and, as I explained, we place great value on autonomy. This close connection between consent and autonomy has led some philosophers to argue that consent is exclusively an act of willing, more specifically, that it is a subjective mental state. This account of consent, referred to as Subjectivism, was the standard view of consent for much of the last century. However, after examining one of the best articulated versions of Subjectivism, I will argue that the purely Subjectivist theory does not give a sufficient account of the bilateral nature of consent.

Heidi Hurd, in her paper “The Moral Magic of Consent”6, gives us one of the most robust accounts of the Subjectivist view. Hurd argues that consent must consist in a subjective mental state which fulfills certain requirements (which I will elucidate later) and that this subjective mental state is all that should matter when attempting to determine if consent is valid or not. She begins her argument by exploring the function of consent, similar to the analysis I gave in the previous section. Hurd says, “[C]onsent can function to transform the morality of another’s conduct – to make an action right when it would otherwise be wrong.”7 For example, valid consent turns rape into sex, trespassing into a pleasant visit from a friend, and theft into a gift.8

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6 (Hurd 1996)  
7 (Hurd, 123)  
8 (Hurd, 123-126)
When discussing whether consent is morally transformative or not, Hurd relies on her “Fine-Grained Identity Thesis”\(^9\). This thesis contains two principles which Hurd claims determines if consent is valid or not. The principles are as follows: valid consent obtains if and only if the consent-holder “(1)… intends what the defendant [Hurd’s term for the consent-seeker] must have \textit{mens rea} with regard to in order to be liable in the absence of her consent… and (2) the action that the defendant must perform in order to be liable in the absence of the victim’s consent… matches the victim’s description of it.” (Hurd, 134) This may be a little difficult to comprehend, so I will paraphrase it as best I can. Consent is valid if and only if (1) the consent-holder has the same intention as the consent-seeker - the intention being such that if the consent-holder did not hold that intention, then the consent-seeker’s action would be impermissible - and (2) the action which the consent-seeker wishes to perform must match the consent-holder’s mental description of it. To clarify the point regarding matching mental descriptions: if A thinks the surgery she is about to receive is just the removal of her wisdom teeth, but she wakes up to find the dentist took out all of her lower teeth and replaced them with dentures, then the consent was not valid because her mental description did not match the actual act.

From here, Hurd argues that the mental state is all that is needed to deem consent valid and as such there does not need to be a performative act of consent. Her reason for this is that action is morally irrelevant when it comes to judging consent, it is merely useful for judging the content of an individual’s mental state. For instance, performative acts can be

\(^9\) The Fine-Grained Identity Thesis is the second formulation of the Identity Thesis. Hurd presents the initial Identity Thesis, which is simply the first principle of the Fine-Grained version, but she refines the thesis in order to respond to certain criticisms. Rather than reiterate Hurd’s entire process, I choose to skip ahead to her finished product.
deceiving; if I pretend to listen to my friend when he asks to borrow my car and then I say yes not really knowing what I am consenting to, then my consent (according to Hurd) is invalid because my intention did not match the intention of my friend. So, if the action is merely evidence of the mental state and not an independent component of consent, then “a person *can* consent to another’s actions without manifesting her consent in any manner. The magic that transforms the morality of another’s conduct…is done entirely by a person’s mental state.”\(^\text{10}\) If a man has sex with a deaf mute quadriplegic, and she desires that he has sex with her, then he is not, in Hurd’s view, raping her. He has some moral culpability because he had no reason to believe that she consented, but it is not, technically speaking, rape. \(^\text{11}\)

There are many problems with the purely subjective view Hurd advances, but I will focus my criticism on how it fails to achieve the bilateral aspect that a satisfying theory of consent should contain. While I agree that the acquiescent mental state of the consent-holder is necessary for valid consent, I fail to see how the mental state alone is sufficient for validity. Let us look again at the case of the deaf mute-quadriplegic; Hurd says that while the man in the case is still morally culpable he is not guilty of rape, because the woman wanted him to have sex with her. Of what, then, is the man morally culpable? I say that it is of violating her autonomy, which would mean he did not have valid consent, and I will justify this by using Hurd’s own account of consent and prove that she needs a performative act to account for valid consent.

\(^{10}\)(Hurd, 137)  
\(^{11}\)(Hurd, 136-137)
Recall that Hurd claims that the ability to consent/dissent gains its power from autonomy, it is an expression of one’s will. As stated above, this is one of the reasons we value consent, because to respect an individual’s consent (or lack thereof) is to respect that individual’s autonomy. Now think back to the deaf mute quadriplegic; she had no way of expressing her consent, therefore she had no way of making her will known to him. The man acted without knowledge of her will, he had no justified reason to believe she wanted to have sex with him. If he acted in line with her will, it was purely coincidental. How could he respect her autonomy in this instance if he had no idea what her intentions and desires were? Consequently, since he had no reason to believe she was consenting, how could he have valid consent? It would appear that he was going to have sex with her whether she wanted him to or not. This seems to lead us to the conclusion that some performative action indicating consent is necessary.

But, Hurd could respond, he would be interfering with her autonomy in the positive sense by not having sex with her. This may be true, however, he has no reason to believe he should act one way or the other, he does not know if she wants to have sex with him or not. The situation is one of uncertainty and it seems to me that in such cases it is better to err on the side of caution and not to act. We can never be completely sure as to what another person’s will is, but performative acts give us the best insight into their mind. If we wish to build a robust bilateral account of valid consent, then we need performative acts on the part of the consent-holder to give the consent-seeker a justified reason to believe they have consent. Otherwise, consent seems to fail to be an act of sociality, instead being a private act that occurs only in an individual’s mind, ignoring the
consent-seeker’s need to know if they have permission to proceed. In order to be a truly 
social act, a consent transaction requires a performative action which gives the consent-
seeker some knowledge as to whether the consent-holder permits the action the consent-
seeker wishes to perform. The consent-seeker must be in a certain epistemic state in order 
to proceed; a state in which he has some justified belief of the consent-holder’s desires 
and intentions.

Now, though I do not believe that a purely subjective account of consent is 
sufficient for an account of sexual consent, I do believe that a proper analysis of consent 
requires a subjective element. That is, an account of sexual consent which does not 
contain an analysis of the mental states of the parties in the relationship will not be 
sufficient. Why is this the case? First, much like ignoring the importance of the 
performative element of a consent transaction, ignoring the mental states of the parties 
also undermines our ability to give a truly bilateral account of consent. However, I shall 
argue that point more in the next section.

There is another, perhaps more compelling reason for including an analysis of 
mental attitudes in a consent transaction. There are a number of factors which we 
consider as having a mitigating effect on one’s ability to give morally transformative 
consent. That is, there are conditions under which if a consent transaction occurs, 
transformative consent would fail to obtain and the action which the consent-seeker is 
requesting permission for would remain impermissible. These conditions include (but are 
not limited to): intoxication or drug-induced state, extreme mental impairment, 
immaturity (not being of a sufficient age), and extreme emotional duress. These
conditions are considered to be mitigating factors in part because they affect an agent’s ability to make rational decisions. The mental state of the parties in the relationship can have an impact on whether or not they are able to give morally transformative consent. So it is apparent that we place great importance on the mental state of the parties in the consent relationship. That being said, I wish to make clear again that I do not believe mental states alone are sufficient for morally transformative consent. Since consent is a social act between two parties, it requires some form of communication in order to be morally transformative.

So now we see that we need the subjective element in our analysis, but what does this subjective element consist in? With the Fine-Grained Identity Thesis, Heidi Hurd gives a decent foundation to build upon. I agree with her in that the subjective element of consent is an intentional state. However, there are parts of her theory which will need to be altered for various reasons.

The first condition of her Identity Thesis (from now on, I.T.) is quite problematic. The first condition is that the consent-holder must intend what the consent-seeker intends. As Larry Alexander points out in his companion piece to Hurd’s article\textsuperscript{12}, we should be hesitant to say that one can intend another’s actions.\textsuperscript{13} Instead, we should think of our new version of the Identity Thesis in terms of an intention, on the part of the consent-holder, to assent to the consent-seeker’s action. That is, when consenting, the consent-holder is waiving a claim-right, agreeing to the action and allowing the consent-seeker to

\textsuperscript{12} Alexander’s article is also entitled “The Moral Magic of Consent”; originally there was to be an single co-authored article by Hurd and Alexander, however two separate articles were written do to unresolvable disagreements.

\textsuperscript{13} (Alexander 1996, 166 fn6)
proceed with an action that would otherwise be impermissible. To put this into context; A has been talking to B at a bar and they have really hit it off. A says “Hey, would you like to come back to my place and stay the night?” B is amenable to this proposal and forms the intention to agree to the suggestion and have sex with A. It should also be noted that B is not necessarily intending to do the same action as A, because it could be the case that B is consenting to have some action done to her, and though it is obvious that she is participating in the act, that is not the same as performing the same act.

However, this is only the first part of the I.T. The second condition, regarding matching descriptions of the action, may need some altering though perhaps not as much as the first condition. Hurd’s matching description condition stated that the action which the consent-seeker wishes to perform must match the consent-holder’s mental description of it. This condition seems reasonable. Let’s return to our previous example in order to elucidate this condition. Suppose that A has unconventional sexual fetishes, and when he propositions B, his mental description of the act involves these fetishes. B, on the hand, is picturing a more conventional sexual encounter. When they go to A’s bedroom, B prepares for the conventional sex that she is expecting, and A pulls out whips and chains. It does not seem outlandish to suppose that B is no longer consenting to the sexual encounter. “I did not consent to that, and would never had come here if I knew that is what you were planning”, she could say. B is perfectly within her rights to withdraw her consent, rendering any sexual advances A may make impermissible. This condition would work the same if the roles were reversed and A was expecting conventional sex and B was the one who brought out the whips and chains. A would be perfectly within his
rights when he withdraws his consent. This fits with the bilateral nature of a consent relationship, both parties in a sexual relationship have to consent and therefore need matching descriptions of the action.

How close do the descriptions need to be? Does the language have to be exact or just close enough? I think it is safe to say that the language does not have to be exact, because that would be far too demanding. To use a non-sexual example, if I consent to have my “pointy tooth” removed when my dentist asks for my consent to have my incisor removed, would that invalidate my consent? I think not. Similarly, do A and B need to have exact matching descriptions of how the sexual encounter will occur? No, but they need to be close enough. The above example serves to illustrate this point. B’s mental description held no possibility of the more unconventional fetishes that A held. So the descriptions were not close enough. However, the problem of “how close is close enough” arises. The resolution to that problem may depend on the parties involved in the encounter. For some, the slightest deviation from expectation may be enough to invalidate their consent, while others may be open to a wide variety of results.

So now we have a better understanding of the subjective element in regards to the consent-holder’s mental attitude. I already noted that the consent-seeker shares in the matching description condition. But do they share in the first condition? It seems that when someone is seeking consent, their intention is just that, to get consent for an action. Their own consent, that is the consent-seeker’s permission for the consent-holder to act, could be seen as being contained within the act of seeking consent.
In this section, I have shown why a purely subjective view of consent fails to give us a strong analysis of sexual consent. The Subjectivist seems to miss the mark in regards to accounting for the bilateral nature of consent. Hurd does give some degree of bilaterality in her analysis, mostly in terms of the shared intentions between the consent-seeker and the consent-holder. However, she neglects vital aspects of the consent transaction by denying the necessity of the performative element. Still, the subjective element is still necessary for an analysis of sexual consent which seeks to give a robust explanation of what consent is and how it occurs.
IV. The Performative Theory

Now that we have a better grasp on the subjective element of a consent transaction, we can move on to an analysis of the second part of the transaction, the performative element. The performative element consists in the physical actions of the consent transaction. This includes the actual act or acts of consenting (or not consenting) as well as the “moral background” of the consent transaction (e.g. the relevant moral information which may influence whether valid consent obtains or not). Theorists such as Alan Wertheimer argue that the performative aspect is the only relevant factor when it comes to determining whether consent is morally transformative or not and that, therefore, consent only needs to be analyzed as a performative action. According to these theorists, there is no need to worry about the subjective element. While I agree that examining the performative may be the most pragmatic way of determining if consent is morally transformative, that does not mean that when analyzing consent we should discount the subjective element. I will examine the performative theory as presented by Wertheimer and then argue that though we need an account of the performative element, we need a hybrid theory which takes both performative and subjective elements into consideration.

In his book, *Consent to Sexual Relations*, Alan Wertheimer argues that there must be public communication about the content of our will. He uses Hurd’s case of the deaf-mute quadriplegic to illustrate his point and he comes to a conclusion similar to the one I arrived at. The man who has sex with the quadriplegic, without justified knowledge of
her will, does not have valid consent, so the act was, in fact, rape. The man in the example lacks the epistemological standing to proceed with the act and demonstrated a lack of concern for what the quadriplegic desired. Wertheimer’s conclusion is that the performative act is both a necessary and sufficient condition for valid consent. His performative consent theory says that valid consent is given when B’s consent token renders the A’s action permissible.

So when does a consent token render an action permissible? Wertheimer gives us the following example to elucidate his point: the results of a mammogram reveal a potentially cancerous lump in B’s breast. A informs B that he wishes to do a biopsy under general anesthesia and, if the tests are positive, perform a lumpectomy. B only appears to be listening, but her attention is elsewhere and she does not fully comprehend what she is agreeing to. A asks B to sign a consent form which authorizes both procedures. B gives the form a cursory glance, but does not read it all the way through and she signs. Is it permissible for A to proceed with the lumpectomy if the biopsy proves positive? The subjective and some hybrid accounts would say that A’s action was impermissible because B’s mental state did not match her action because there was no intention to consent to the lumpectomy. Wertheimer tells us that hybrid theorists (he is addressing Patricia Kazan’s version of the hybrid theory in particular) believe that there needs to be a positive attitude towards the act of consenting, even if there is not one towards the object of consent. For example, I may not like the idea of having my teeth drilled at the dentist, but I still approve of the procedure. In the case of the lumpectomy the hybrid

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14 (Wertheimer 2003, 147)
15 (Wertheimer 2003, 148)
theorist would say that since there was no mental state that approved of the lumpectomy the consent to the surgery could not be valid. But Wertheimer believes that the surgery was permissible. He justifies this by considering the moral background of the consent transaction. It was never A’s intention to deceive B or violate her will; A honestly believed he was acting with B’s intentional consent. The surgeon had a reasonably justified belief that B consented; namely, she signed the consent for. Therefore, Wertheimer claims, the consent is still morally transformative.16

Now, Wertheimer does not want to say that the mental attitudes of the consent-holder are not important. In fact, he says, performative tokens of consent are valuable “precisely because they are reliable indications of desires, intentions, choices, and the like.”17 In many ways it seems like Wertheimer actually holds a hybrid view, he even admits that his theory and most hybrid theories will come to similar conclusions regarding the moral transf ormativity of consent. But he is reluctant to label himself as a hybrid theorist. One of his worries, as stated above, is how many hybrid theorists claim that having a positive mental attitude towards the act of consenting validates consent.18 To argue his case against the hybrid theorist he gives this example, Charade. In this example, B is walking down the street when A approaches her with a gun and tells her they are going up to his apartment where B will tell A that she wants to have sex with him. If she does not do this, A will kill her. Wertheimer says that B will want to give consent, otherwise she will die. The difference between this case and the dental surgery

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16 (Wertheimer 2003, 147-150)
17 (Wertheimer 2003, 147)
18 See Patricia Kazan in “Sexual Assault and the Problem of Consent”, published as part of Violence Against Women: Philosophical Perspectives [Cornell University Press, 1998]
case from earlier “is not to be found in B’s subjective attitude towards the act of tokening consent, but in the moral character of the background conditions that motivate B’s token of consent.”¹⁹ (Emphasis added by Wertheimer)

There are problems with Lumpectomy and Charade. For Charade, I fail to see how it succeeds at being a critique of hybrid theory. The moral question in this example ends up being more about the conditions under which the consent transaction occurred (Wertheimer’s “moral background”) and less to do with the ontology of consent (what an act of consent actually is). Coercion is one of the many things that will undermine a person’s ability to give valid consent. It does not matter which ontological account of consent we affirm, if there is a factor in the transaction which undermines the consent-holder’s ability to give morally transformative consent, then the consent will not be morally transformative and the action will remain morally impermissible. No one would say that the woman gave morally transformative consent, even if she had an approving attitude towards the act of consenting, because the man’s coercion violates her autonomy, thus mitigating her consent. So Wertheimer’s main criticism of hybrid theories is not as powerful as he may have hoped.

More interesting to me is Lumpectomy. Unlike Charade, in which it would be impossible for the consent-seeker to believe he had valid consent, in Lumpectomy the surgeon had good reason to believe that the consent he received was valid. But the fact remains that B did not intend to assent to the lumpectomy. Does that mean that the entire transaction was not morally transformative? It seems unreasonable, in this case, to hold A

¹⁹ (Wertheimer 2003, 152)
accountable for B’s negligence. We could declare this situation to be morally impermissible in a certain sense, but legally permissible, a distinction even Wertheimer makes. However, I do not know if that is satisfying. Much like Wertheimer, I want to say that it was morally permissible for the surgeon to proceed. I am still hesitant to say that the consent was valid because B never held the intention to consent to the lumpectomy. There could be cases, such as Lumpectomy, when the consent-seeker receives technical consent or hypothetical consent; that is, the consent-holder never held the intention to consent, but the consent-seeker has reason to believe they would have consent under other circumstances. For instance, say a doctor comes across a bleeding, unconscious individual. The doctor cannot actually receive consent from the individual in this case, but they could reasonably presume that the individual would consent if they could. Now, it is important to put qualifiers on this type of hypothetical consent. I would say that a person should assume hypothetical consent in limited situations, obviously no one should assume hypothetical consent in sexual cases. The cases in which I think hypothetical consent is permissible are ones similar to the ‘unconscious victim’ case, in which the would-be consent-holder is in some form of danger.

Hypothetical consent is problematic in its own way. Assuming that someone consents to being rescued may be reasonable, but what if they believed that their bleeding out on the side of the road was an act of God and they did not actually want to be saved? We could argue that the individual in that case may not be rational and we can disregard their wishes. But we often allow people to make those kind of decisions, cancer patients

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20 (Wertheimer 2003, 122-124)
refusing chemotherapy, for instance. Ultimately, I believe that despite the issues with hypothetical consent, it can still function for our purposes in cases like *Lumpectomy*. But all of this moves us away from the main point of this paper.

Wertheimer, though acknowledging that mental states are important, fails to emphasize how important they truly are. Recall how in the previous section, I explained that many of the mitigating factors of consent are ones which affect the mental states of the consent-holder. I will not repeat all that I said there, I shall merely reiterate the fact that these mitigating factors affect the consent-holder’s mental states gives us good reason to include an analysis of the mental attitude in our inquiry into the nature of consent. A purely performative account of consent focuses almost entirely on the consent-seeker, placing them at the center of the transaction. As long as the consent-seeker is not coercing or taking advantage of the consent-holder, then (if the consent-holder says yes) the consent is morally transformative. This may be sufficient for a legal analysis of consent, when determining whether a rape occurred we should look at the moral background and whether the consent-holder said yes or not\(^{21}\). However, a robust philosophical account, one which seeks to treat consent as the bilateral social act that it is, requires more than the performative. If we ignore what is going on in the consent-holder’s mind, then we lose much of the sociality and the bilateral nature of a consent transaction. A performative account is, ultimately, unsatisfying and not rigorous enough. However, we still need an account of the performative element of the consent transaction. The performative token is what normally provides justification for acting or not acting.

\(^{21}\) I am not arguing that the performative theory *is* sufficient for a legal account, but a strong case could be made for it.
When we speak of consent in everyday language it is usually referred to as an action, not a mere mental state (“he gave consent” “she consented” etc.). So an examination of the performative element is necessary.

If we consider the performative element to be the actual consent transaction, then an analysis of the performative element will be fairly straightforward and in many ways my analysis falls in line with Wertheimer’s. The performative refers to the act of seeking consent and giving (or not giving) consent. The transaction occurs, to borrow Wertheimer’s phrase, against a moral background. The moral background consists in the conditions under which the transaction occurs which determines whether morally transformative consent can obtain. These background conditions are usually determined by our transaction model, which I will explain in more detail in the next section.

There are two major questions that arise when analyzing the performative element. First, given that the background conditions are met, when does the consent token render the consent-seeker’s action permissible? Second, what counts as a consent token? The answer to the first question is relatively simple. The consent token must give the consent-seeker the epistemological grounding for believing whether they have permission to proceed or not. The token should give them insight into the intentions of the consent-holder. If the consent-seeker is uncertain, then they should seek clarification. Now, whether or not there is some uncertainty will depend on the situation. A clear consent token for one person may be very ambiguous for others. So it is hard to make any universal claims about what kind of token is uncertain or not.
This last point leads us into answering the second question, what counts as a consent token? It is obvious that speech acts are tokens and probably the clearest and easiest to understand tokens as well. Asking for someone’s consent to an act, and having them respond “yes” or “no” gives little room for doubt as to whether or not you have permission to proceed. But can nonverbal tokens count as well? Could a coy smile, a kiss, or a beckoning gesture be enough to give the consent-seeker the justified belief that their action is permitted? Some theorists believe that a verbal “yes” is a necessary condition for consent to be morally transformative. However, that may not always be the case. Couples who have been in a long-term relationship may not need verbal exchanges. Even a couple engaging in a one-night stand might not need a verbal token. The need for a verbal token will depend on the situation. But if there is any uncertainty as to the permissibility of the consent-seeker’s actions, then the seeker should ask for a verbal token. For instance: Mike meets Maggie at the bar and invites her back to his place. They go to his apartment and spend the next 30 minutes making out on his couch. Maggie gives him coy smile and goes to his bedroom. Mike thinks this means that she has consented, but he is not completely sure. Mike should ask for verbal confirmation, just to be sure. But, let us say that Mike and Maggie have been married for 15 years and Mike knows from experience that when Maggie smiles like that, she is consenting. Does he still need to ask for verbal confirmation? Some days it may be prudent, but not necessary.

We now have a better understanding as to the nature of the performative element. I have shown why a purely performative theory of consent fails to give us a truly
bilateral, relational account of consent. Next, I will present my hybrid theory of consent ontology in its entirety.
V. The Hybrid Theory

In the previous two sections I argued why we should reject the strictly subjective and strictly performative theories of consent ontology. To sum up: both theories fail to be robustly philosophical due to their lack of bilaterality. A hybrid theory gives us the best analysis of consent as a social act occurring between two parties. In those sections I hinted at what my hybrid theory would look like. In this section I will present that hybrid theory in full.

To begin, let us go back to the basic questions: what is consent? To answer this we first need to think about what a consent transaction is. When I participate in a consent transaction, what is the nature of that act? In the first section I offered Kleinig’s analysis of consent transactions, which I will use here as well, though using some of my terminology. Recall that Kleinig describes consent transactions as three-place relationships. In this relationship we have A, whom I will call the consent-holder (CH), and B, whom I have called the consent-seeker (CS). In a consent transaction, B seeks A’s permission to do action X, which, absent A’s consent, would be morally impermissible.

So, within the context of the consent transaction we go back to asking “what is consent?” On both sides we have a two-part analysis: first, there is the subjective element, the mental states and intentions that the two parties hold. Second, there is the performative element, the actions which are used to inform the parties as to the other’s intentions. So the consent-seeker forms an intention or desire to perform an action involving the consent-holder in some manner. The CS then initiates the consent transaction by seeking CH’s consent, informing CH as to their desires (to have sex, to
borrow a guitar, etc.) through the use of some performative action (e.g. asking “would you be interested in Xing with me?”). The consent-holder’s analysis is very similar to the consent-seeker’s. After receiving the request, CH forms an intention to either approve or deny CS permission to act. CH then preforms some action which lets CS know if they have CH’s consent or not.

The analysis of consent ontology as I presented above can be summarized as follows: Consent comprises in

1) The Subjective Element: consisting in (a) an intention on the part of the consent-holder to permit the consent-seeker’s action with (b) some degree of matching descriptions of the act being consented to.

2) The Performative Element: consisting in some expressive token of consent which gives the consent-seeker the epistemological grounding for believing they have permission to proceed with their action.

3) The Secondary-Subjective Element: consisting in the consent-seeker’s justified belief in whether they have permission to proceed in their action.

More time could be spent on unpacking the subjective element. Arguments could be made for whether we should consider the intentional state to be *de re* or *de dicto* and how fine grained the matching description should be. Despite the weakness of her theory in general, I think Heidi Hurd can give us some guidance on this issue. In regards to the *de re/de dicto* distinction, if B is being propositioned by someone whom she thinks is Ryan Reynolds, we can ask whether the intention B forms is *de re* or *de dicto*. If she intends to consent to “that man” regardless of who he actually is, then the intention is *de*
re. If her intention is to consent to “the star of Deadpool” then her intention is *de dicto.*

Hurd argues that most intentions are *de dicto.* For example, “If C intends to shoot the thing in the meadow and that thing is a hunter C does not intend to kill a person if, in fact, C mistook him for a stump.” (Hurd, 127) Now, I do think it is possible that in some cases the intention formed may be *de re.* In casual sexual encounters the content of the intention may actually refer to “that man” regardless of who he actually is. But for the majority of cases I think that it is safe to say that the intentional states are *de dicto.* If B intends to consent to “the star of Deadpool” and then finds that the man is actually Bob from Vancouver, then the consent does not obtain unless she changes the description of her intention to be “having sex with Bob from Vancouver.”

I discussed the issue of fine-grained descriptions in section II, so I will briefly reiterate what I said there. Do the descriptions of the action for which consent is being sought need match and, if so, how closely must they match? I believe having too strict a requirement regarding descriptions is problematic for various reasons. First, unless the parties trade play-by-play descriptions of the intended act, it seems that they would never have perfectly matching descriptions. There will always be some variance in the mental description. Second, it seems that in sexual cases we often do not know the full content of the intended act until we are in the midst of the act itself. The parties may have certain boundaries on what they will and will not consent to, but often there may be a wide

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22 But, what if it was Ryan Reynolds, and B knew that it was Ryan Reynolds? Would the *de re/de dicto* distinction even matter in this case? I think not. Intentions to consent can be *de re* or *de dicto* and this does not pose any problem for my theory.
variety of activities which they may engage in that might not be part of the initial description but do not invalidate the consent.

In regard to the analysis of the performative element the main question is what counts as a proper token of consent? I discussed this in greater detail in section III, but I will reiterate it here. The performative token of consent should be sufficient enough to give CH good reason to believe he/she has permission to proceed. What counts as sufficient will vary depending on the context of the consent transaction. Strangers engaging in a one night stand may require a verbal agreement, but a couple who have been married for 15 years may only need a coy smile.

Here I have describe the hybrid theory of consent which I believe gives us the best analysis of the ontology of consent. The strongest objections would, I think, come from performative theorists who ascribe to some version of Wertheimer’s theory. Most of the objections I could envision would revolve around the problem of accessing other’s mental states and that mental states may ultimately be irrelevant; and I believe I have offered sufficient responses to those objections in §III. Now I will move to a brief discussion of transaction models and how I think my hybrid model offers us a model for sexual consent transactions.
VI. Transaction Models of Consent

The ontological account I provided tells us what an act of consent is, but it does not tell us when consent is morally transformative. For that we will need a transaction model. Transaction models inform us as to the conditions under which a consent token renders an action permissible or impermissible. In other words, a transaction model tells us when consent should be considered “valid consent”. In this section I will examine different transaction models and argue that, at least for cases of sexual consent, the “valid consent” model I propose will serve us best.

One of the most popular transactions models is the Autonomous Authorization model (AA) proposed by Faden and Beauchamp. The AA model states that consent is valid if it reflects the consent-holder’s autonomous will. Faden and Beauchamp claim that an action is autonomous only if the agent acts “1. intentionally, 2. with understanding, and 3. Without controlling influences.”23 A major component of AA is the idea of informed consent. Informed consent requires that the consent-holder understands the features of the act.24 For instance, if I am going to consent to a surgery, then, according to AA, I should have some understanding about what the surgery entails. Otherwise, AA claims, it may not be permissible for the surgeon to proceed. The AA model allows some flexibility as to how thorough the understanding must be, much of it depends on the context of the transaction, but in each situation there must be some level of sufficient understanding.

While the AA model focuses on the concept of autonomy and informed consent, Franklin Miller and Alan Wertheimer’s proposed Fair Transaction model (FT) focuses

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23 (Faden and Beauchamp 1986, 238)
24 (Faden and Beauchamp, 280)
strongly on the moral background of the transaction; specifically it focuses on whether the transaction is fair or not. The FT model is explained as follows:

[A] consent transaction between B and A is morally transformative if B tokens consent under conditions in which A has acted fairly toward B or, in the case of a flawed or unsuccessful consent transaction, that A is permitted to proceed in the absence of B’s consent if it is fair for A to do so… the transformative power of B’s consent… is a function of the transactional circumstances under which B chooses (including the behavior of A) rather than the specific mental states that characterize or motivate B’s choice.25

It is easy to see how the FT model grew out of Wertheimer’s performative ontology. The FT model is concerned with the “transactional circumstances” which is equivalent to the “moral background” which Wertheimer discusses in his ontological work. The FT model allows for a lower level of required understanding on the part of the consent-holder. Unlike the AA model, I could waive my right to sufficient comprehension of the surgery I am about to receive. I could tell the surgeon, “I do not need the details, I trust you”, and that would be sufficient for the surgeon to proceed.

One of the interesting elements of the FT model is that it allows for instances of mistaken consent to be considered morally transformative. For example: my neighbor asks to borrow my lawnmower. I am barely paying attention and am not fully cognizant of what he is requesting. I nod my head as an indication that I am “paying attention”. Later, after mowing my own lawn, I leave my mower out so I can clean it later. My neighbor sees the mower and thinks that I left it there for him to use and use it he does. According to the AA model, it seems that my neighbor would not be permitted to use my lawnmower because I was not fully informed about what I was consenting to. But the FT

25 (Miller and Wertheimer 2010, 94)
model says that my neighbor is permitted to use the mower because he was a) not treating me unfairly and b) could reasonably construe my nodding and leaving the mower out as consent. Miller and Wertheimer believe that this is an advantage of the FT model over the AA model. It treats the consent-seeker more fairly than the AA model does. However, as I will argue in the next few pages, I believe that despite the strengths of both the AA model and the FT model, they both fail as models for sexual consent transactions.

Concerning the AA model, it is important to keep in mind that it was designed for use in medical and research situations. Faden and Beauchamp’s focus was on consent transactions involving patients consenting to medical treatment or research projects. Though it is possible to extend the idea of informed consent to sexual relationships, it seems ill-fitting and perhaps too demanding for many sexual encounters. If informed consent is necessary for moral transformation, then many casual sexual encounters would be morally impermissible. For example, A goes to the bar and is approached by B, whom she has never met before. After chatting for a while, B asks A if she would like to go back to his place for the night. Despite not knowing him very well, A consents to the proposition. Would we say that, in this case, B was not morally permitted to proceed after getting A’s token of consent? I think not. Our sexual culture is one in which casual sexual encounters are considered permissible, if not exactly approved of.

Now, I do believe that, occasionally, having relevant information is important to having a morally transformative consent transaction, and that withholding or lying about that information can undermine the permissibility of the transaction. What information is considered relevant will often change from person to person, but there are some kinds of
information which I think are universally relevant. This type of relevant information mostly centers on potential harm to the consent-holder. For instance, if A, before consenting, asks B if he is HIV positive and B lies, saying that he is not when he really is, then any consent token A gives will not be morally transformative. To lie about something which can have an incredibly harmfully impact on the well-being of the consent-holder is morally unacceptable.

Written in opposition to the AA model, the FT model does a better job at explaining moral transformativity than its predecessor. FT can extend beyond the realm of medical consent into business consent as well as other types of consent. However, I think that while it does capture some of the moral transformativity of sexual consent transactions, it still falls short. Though fairness may be very important to business transactions, there are cases of unfair sexual encounters which we would consider morally transformative. For example; Matt has been very down on himself lately. His self-esteem is low and he does not think much of himself. He goes to the bar and sees Martha. Matt and Martha used to date, but had an ugly breakup. Matt knows that it would not be a good idea to sleep with Martha, but due to his personal issues decides that if she propositions him, he will agree. Martha knows about Matt’s emotional state and knows that she can use that to her advantage. She propositions him, he consents.26

It seems like this is an unfair situation, Martha is using Matt’s emotional turmoil to get what she wants. But would we say the sexual encounter was morally impermissible? I do not think so. We may tell Martha it was unkind and wrong for her to

26 I would like to thank Dr. John Bender for helping me with this example.
take advantage of Matt in that way, but we would not say that the sex was morally
impermissible. I think we come to that judgment by realizing that Matt was exercising his
autonomy, even if it was a bad decision. Even if we do not respect the decision due to its
self-harming nature, we must respect his ability to do what he wants in this case. Many of
us do things which are self-harming: we smoke, drink too much, eat too much, spend too
much time sitting. But we would not say that binge watching Netflix is morally wrong.

Additionally, I think that it should be pointed out that Wertheimer and Miller give
us little in the way of a definition of fairness. If their transaction model rests on a concept
of fairness, then they need a theory of fairness with which to support their transaction
model. It is possible that such a theory could be formulated, but it would be a massive
undertaking which they have not yet attempted. As it stands, the lack of a robust
definition of fairness undermines their theory.

I have argued that neither the AA model nor the FT model work as models of
sexual consent transactions. I propose a simple alternative; the valid consent model (VC).
VC shares elements with both AA and FT, but gives us a better idea as to when sexual
consent transactions are morally permissible. The VC model states:

V.C.: Consent is morally transformative (that is, the CS is permitted to proceed in
their sexual encounter with CH) iff the CH gives what can reasonably be
construed as a consent token (a consent token being some performative action
which tracks and reflects the mental state of CH), absent any factors which would
invalidate the consent.

While this may seem vacuous and blatantly obvious at first glance, I think that it
captures our common sense intuitions regarding sexual encounters. First, we have the
condition of “reasonably construed consent tokens”. We could define it as: “some
performative token, performed by the CH, which tracks the CH’s intentional state, and which the CS can reasonably construe as giving them permission to proceed in their action”. If there is no such token, or the token is not clearly understood, then the CS may not proceed in their action. Second, there is the condition of “invalidating factors”. I have mentioned these various factors in previous sections. They include subjective factors which prevent the consent-holder from making a truly autonomous decision: intoxication, competence, etc. They also include moral background factors like coercion and certain levels of deceptions.\textsuperscript{27} If these factors are not present, we are then able to say that the CH is capable of acting as a rational, autonomous agent and that their consent was made of their own free will. In these ways, VC reflects the bilaterality of my hybrid theory of ontology. It acknowledges the importance of the subjective element (that is, the mental-states) of the CH by recognizing that consent made under the influence of invalidating factors will not be morally transformative because the CH would not be acting as an autonomous, rational agent. It also acknowledges the importance of some public communication of the will (the performative element of consent) which gives the CS the epistemological grounds for believing they have permission to proceed.

Now, there is some question as to what counts as “invalidating” levels of deception. If Matt lies to Mary about how much he is able to bench-press in order to impress her, does that invalidate the consent? It seems unlikely, but there may be cases in

\textsuperscript{27} It should be noted that the times at which some of these factors are invalidating depend on the individuals in the transaction. For example: Mary may be able to give valid, morally transformative consent after having two beers, but she may be too intoxicated to be rational after three. Martha, on the other hand, may be more susceptible to alcohol and not be able to give valid consent after a single beer.
which deception does invalidate consent. The two most relevant factors when it comes to
deception are: potential for harm (see my HIV case above), and, perhaps, whether the
consent-holder would have not consented had they been told the truth about a certain
factor. If Martha would never consent to have sex with a married man, and Matt lies to
her saying that he is not married, does that count as an invalidating factor, rendering the
transaction non-morally transformative? Perhaps; it is definitely an immoral way to get
consent. Some would argue that receiving consent which would normally be morally
transformative using morally impermissible means renders the entire transaction morally
impermissible. Furthermore, there is a question as to whether all cases of invalid sexual
consent are rape. For instance, should a sexual act committed under invalidating levels of
deception be considered rape in the same way a sexual act committed under a threat of
violence is considered rape? Much of this depends on our definition of rape, but I do not
have time for delving too deep into this issue. These are definitely topics which require
further investigation.

In this section I examined the two most prevalent consent transaction models and
argued that they are unsatisfactory for the purposes of modeling sexual consent
transactions. I then sketched my own sexual consent transaction model, V.C. There is
more work to be done fleshing out the specifics of the various invalidating factors, but I
think I have offered a strong case for using this transaction model for sexual consent
transactions.
VII. Conclusion

In this paper I presented a theory of consent in two parts. First, I argued for a hybrid ontology of consent on the basis that it provides the most robust, philosophical analysis of consent which reflects the bilateral nature of consent. The hybrid theory I have given contain two parts; first, the subjective element: consent involves an intentional state on the part of both parties, as well as some level matching descriptions of the intended action for which consent is being sought. Second, the performative: consent is an action and therefore requires some kind of performative token, giving the consent-seeker the knowledge or justified belief of whether or not they have permission to proceed with their action.

Though the specifics of my theory may need some work, I feel that I have presented a good argument as to why we should prefer a theory similar to the one I have offered. As philosophers, we seek to understand the world in the clearest possible manner. For consent, this means analyzing both parties in the transaction and recognizing that there is both a mental and performative aspect to consent transactions. Anything less would fail to be a truly philosophical analysis.

The second part of my theory was concerned with describing under what circumstances consent is morally transformative. I offered up a “valid consent” transaction model. The VC model states that consent token is morally transformative when the token is given absent any invalidating factors, provided that the token is reasonably interpretable as a token of consent. The specifics of what count as an
invalidating factor will often depend on the context, but generally involve (though are not necessarily limited to): coercion, intoxication, deception, mental capability, etc.

More could be written regarding the invalidating factors and how they affect our ability to give valid consent, but that goes beyond the scope of my project here. My goal is to present a transaction model which tracks our intuitions concerning sexual transactions. This goal was driven by the fact that I believe that while there may be some similarities between various types of consent transactions, there are also major differences between medical, business, and sexual consent. What functions for morally transformative medical consent (generally thought of in terms of informed consent) could be too demanding for sexual consent. I do not believe that V.C. is sufficient for medical consent transactions, nor does it need to be. It is for that reason I do not find any lack of general applicability troublesome for my transaction model. It should be noted that the ontology of consent I offer is generalizable. Though the content of the transactions may differ, the basic nature of consent remains the same.

Some of the examples I used in the transaction model section raise some interesting questions, specifically between the nature of deception and sexual consent. Though some may think any amount of deception would invalidate consent, I think we often find that some types of deception are permissible. This is definitely an issue which demands further investigation.

Finally, a further upshot of having a clearer, more accurate understanding of consent and consent transactions is that we can improve the conversations we are having regarding consent. Consent is as widely discussed as it is misunderstood. As
philosophers, we are in a unique position to help disambiguate the discussion and perhaps lead people to make more informed decisions in their sexual relationships. I hope that in presenting this theory of consent, I may help the conversation progress and become more effective.
Works Cited


