

Lecture 3: Consent

Some wrongs do not involve harms. The conduct is not wrong because it's harmful but rather because it violates consent. To make sense of this, we need an account of consent.

Examples:

1. Unconscious rape.
2. Secret trespass.
3. Harmless theft.
4. Self-sacrifice prevention.

Can't we insist that the wrong here really does consist in harm, after all? After all harm is a matter of reduced well-being and our notion of what counts as well-being is somewhat flexible.

Maybe, there is a notion of well-being expansive enough to accommodate all cases. But it seems that this is getting things the other way around. Our judgment that the party is wronged seems prior to our judgment that their well-being is reduced. This gives us good reason to take this judgment at face value. The wronging does not consist in a reduction of well-being but rather in a violation of consent.

Consent-Sensitive Duties

Consent can make it permissible to use other people's property, have sex with them, perform surgery on them, et. These things are impermissible unless the other party consents. Call such duties are consent-sensitive. X owes a consent-sensitive duty to Y not to v when:

1. X owes a duty to Y not to v;
2. Y can release X from this duty by consenting to X v-ing;
3. If X v's without Y's consent, X wrongs Y; but not if Y consents.

In order for Y's consent to give X permission to v, Y's consent needs to be valid. An important question in the philosophy of consent concerns when consent is valid.

How does Consent Work?

Could consenting merely be a mental state: matter of having some particular intention or desire? This seems implausible. Consider promises. To make a promise is not merely a matter of being in some mental state.

Rather, consenting is an intentional action. Intentional actions always involve a mental element. To consent to X's v-ing, Y needs to intentionally release X from her duty to not v. To say that consent is intentional need not mean that it involves public behaviour. After all, mental actions (for example, deciding, resolving, choosing) can be intentional. That's a further, substantive question.

There are thus, three options:

1. Consent is an act that can be performed purely mentally, without any attempt to communicate.
2. Consent is an act that requires an attempt to communicate;
3. Consent is an act that requires both an attempt to communicate and uptake.

Which one is right?

(3) Seems implausible. Imagine Bob signs and hands in his patient consent form on Monday but the surgeon does not look at it until Tuesday. It seems that Bob has consented on Monday, even though the surgeon was unaware of it.

There's something more to say here: the reason why X owes Y a consent-sensitive duty not to v is that it is valuable to Y that she has control over the duties that X owes her. But requiring uptake means that Y does not have such control.

(1) In contrast, seems to grant Y full control. She can just consent to something in her own mind. But there are other problems. Notice that there is something incoherent about Y's consenting to X's v-ing but deciding to keep this decision secret from X. One way to explain this is to think about the function of consent. Consent is meant to change the duties that X is under. Duties are the kinds of things that constrain practical deliberation. But X cannot take into account in her practical deliberation what she is unaware of.

These suggestions favour (2). Consent requires an attempt at communication.

We said that consenting is an intentional action. What is the content of the relevant intention? Y has the power to release X from a consent-sensitive duty by executing an intention to release X from that duty. Thus, the relevant content is a normative content: it's not an intention for X to v but rather an intention for it to be permissible for X to v.

We can consent to others acting in particular ways even if we don't want or intend them to act that way. And we can want or intend others to act in particular ways without consenting to their doing so (e.g. entrapment cases).

The normative power exercised in consent is direct: in the case of consent, we alter which duties the other party is under without needing to alter their circumstances, i.e. the facts or evidence that gives rise to duties.

An objection:

Terri consents to be Sandra's slave. Both Terri and Sandra believe that Terri is thus Sandra's slave. Both believe that Sandra is permitted to do with Terri what she wishes, irrespective of consent. Terri loves Sandra. Sandra needs a kidney transplant to save her life. Terri wishes Sandra to take her kidney; she says, truly, that she cannot bear to see Sandra die. As she loves Terri, Sandra takes Terri's kidney only because Terri wills it.

Sandra and Terri have both false normative beliefs. In light of this, Terri is not in a position to intend to release Sandra from her consent-sensitive duty because Terri believes that Sandra does not have any such duties to Terri. Does it follow that Sandra acts without Terri's consent?

Normative Powers of Consent

Independent Interest View: We have interests in what happens. Consent matters because it ensures that others act in ways that are compatible with these interests.

Problems:

1. The Independent Interest View only gives lack of consent a derivative role in explaining wrongness: it's wrong because violations of consent tend to interfere with people's getting what they want. This doesn't seem right.

2. The importance and validity of consent does not depend on whether the action I'm consenting to will harm or benefit me.

3. The view cannot distinguish between consent-sensitive duties and duties to seek other's advice before deciding whether to v.

Relationship View: if we are under consent-sensitive duties, others can form special relationships with us by consenting. If Y consents to X that X may v, Y signals a certain relationship with X.

Problems:

Can this really explain, for example, the wrongness of rape? X's duty not to interfere with Y's body without Y's consent is not best explained by the fact that such duty allows Y to form special relationships with others by consenting to such interference only with them.

This suggests: at least some consent-based duties are simply grounded in our interest in controlling and regulating interpersonal interference.

Readings:

Dougherty, Tom (2015). "Yes means Yes: Consent as Communication".

Owens, David (2012). *Shaping the Normative Landscape*. Oxford University Press.

Tadros, Victor (2016). *Wrongs and Crimes*. Oxford University Press.