

A Defense of Subsequent Consent

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1. Introduction

Prior consent is morally transformative; it has moral magic. In other words, whether an intervention is morally permissible sometimes depends on whether it was consented to beforehand. On this everyone agrees.¹ However, from this assumption I argue it follows that subsequent consent—the kind that occurs after the intervention for which it is consent—can be morally transformative as well.² This is important because if subsequent consent is merely a natural extension of prior (and concurrent) consent, then it could justify many interventions which cannot appeal to prior (or concurrent) consent, for example clinical research in emergency settings,³ and which would therefore otherwise have to appeal to potentially less reputable sources for their justification, such as paternalism or counterfactual consent—what a subject would have consented to in some relevant counterfactual situation.⁴

Gerald Dworkin was the first to suggest that subsequent consent might be efficacious, but his comments on the subject were quite condensed, and he never followed up on his brief suggestion, which was also unnecessarily restricted to parental paternalism toward their children:

There is . . . an important moral limitation on the exercise of parental power which is provided by the notion of the child eventually coming to see the correctness of his parents' interventions. Parental paternalism may be thought of as a wager by the parent on the child's subsequent recognition of the wisdom of his restrictions. There is an emphasis on what could be called future-oriented consent—on what the child will come to welcome rather than on what he does welcome.⁵

Rosemary Carter developed and defended the idea in some detail in her 1977 article "Justifying Paternalism".⁶ Her discussion and defense was more thorough but still harbored inadequacies which were much criticized in the ensuing replies. Subsequent consent is now considered dead in the water, discussed and rejected only in passing on the way to more important topics.⁷ I hope to revive it. I will do this by considering the most important of these criticisms, each in its own section. For each objection my strategy will be to argue that subsequent consent is relevantly like its prior cousin, in that the objections considered apply to both or to none. Because we believe that prior consent can be efficacious, we should also believe that subsequent consent is efficacious as well.

2. The Nostalgia and Dismissive Effects

The four most important and powerful objections to the efficacy of subsequent consent center on (1) its alleged incoherence, (2) its vulnerability to bilking, (3) its alleged licensing of mind control, and (4) its alleged licensing of rape. I will discuss each of those worries shortly, but I will begin with a brief discussion of a weak objection, mainly to illustrate the strategy I will employ in the rest of the article when I tackle those four more serious objections.

Peter Gardner illustrates the *nostalgia effect*, “Rose-tinted spectacles, it seems, distort the memory, expurgating the unpleasant from our vision of the past”, and the *dismissive effect*, that “Some adults still see the sufferings of the young as being of little importance . . . those with this attitude are frequently consistent and dismiss the pains and sufferings of their own upbringing and schooldays as being of little consequence.”⁸ A subject influenced by either of these two effects will be more likely to offer subsequent consent for earlier interventions. Does this show that subsequent consent is illegitimate?

No, because dismissal and nostalgia can occur in both temporal directions. Consider the nostalgia effect first. If you remember more at one time than another, then perhaps your attitude toward consent or dissent at the more knowledgeable time should count more heavily, for moral purposes. But this observation discredits *uninformed* consent, not necessarily subsequent consent. After all, a wishful thinking analog to the nostalgia effect can occur for prior consent as well—I might consent to some future intervention without first considering all its negative ramifications, because I view the *future* through rose-tinted spectacles. In other words, subsequent consent has no monopoly on subjects making decisions with a selective memory, not entertaining all the relevant facts at their disposal; such cases abound for consent in general, in both temporal directions. Just as prior consent can be morally efficacious in principle, in spite of exceptions created by wishful thinking, likewise subsequent consent can be morally efficacious in principle, in spite of exceptions created by nostalgia.

The same reasoning applies for the dismissive effect: it can occur in principle in the other temporal direction, discounting future pains relative to past ones. That would make it easier to acquire prior consent for future interventions, which may be objectionable, though even that is debatable. However, admitting the legitimacy of subsequent consent creates no additional problem. The dismissive effect is not unique to subsequent consent and is not an objection to it in particular.

Now, there is the distinct issue that an agent influenced by the dismissive effect might tend to intervene against others more frequently than is permitted, because such an agent erroneously discounts *other* subjects’ (present) suffering against their future ones. But this is no worry: such intervention is not justified if the agent irresponsibly substitutes her own judgment of the intensity of the subject’s suffering with that subject’s own (perhaps later) judgment.

Of course, it may turn out that the nostalgia and dismissive effects occur more often for subsequent consent than for prior, but, first, there is no reason to think

this is the case, and, second, even if it were the case it would still be inappropriate to rule out subsequent consent in principle on that basis. At best that would be a reason to restrict the legitimate use of subsequent (and prior) consent to cases where the effects do not operate.

3. Coherence

Now that we see the argumentative motif I will adopt in this article, I move to some more serious objections. The first such objection claims that subsequent consent is incoherent, because it is a conceptual mistake to think that you can consent to something that has already happened. By the very meaning of the concept, consent is concerned with what is happening or what will happen, not something that has already happened. Gardner, for instance, observes that “Talk of subsequent consent is somewhat odd because consenting, like giving permission and granting, is concerned with the present or future.”⁹ And Donald VanDeVeer voices the same worry using Carter’s conceptual apparatus when he says, “. . . it is reasonable to believe that one who has an alienable right has it *until* he alienates it.” VanDeVeer goes on to claim to understate his point by saying it is “surpassingly mysterious” how later consent can alienate an earlier right, and he wonders, again rhetorically, whether we need to invoke backward causation in time to explain this “philosophical fiction.”¹⁰

3.1 *Subsequent Consent as Gratitude*

One way of providing a firmer foundation for subsequent consent is to link it to gratitude or thanks—to consent to an intervention after the fact is the same as being grateful or thankful that it occurred. This is a poor strategy, and we will see why shortly. Unfortunately, those hostile to subsequent consent often assume it is the only strategy available. For example, Tziporah Kasachkoff in her critical article, “Paternalism: Does *Gratitude* Make it Okay?” (my emphasis), summarizes the Dworkin quote cited in section 1 of this article by writing, “That paternalism may be justified by subsequent *gratitude* was suggested in an early article by Gerald Dworkin . . .”,¹¹ even though Dworkin never used that word. And VanDeVeer makes the same error when he focuses his rebuttal on a scenario where you are grateful you were knocked out by a gang of hoodlums and thereby restrained from boarding a plane that later exploded, killing everyone on board.¹²

In part this error can be traced to the original defenders of subsequent consent. Though Dworkin never relies on gratitude to explicate subsequent consent, he does rely on the concept of *welcoming*,¹³ and Carter links subsequent consent to *approval*.¹⁴ Now, all these attitudes—gratitude, thanks, welcoming, and approval—entail desiring the intervention in question. You cannot welcome, approve, be thankful for, or be grateful for something without also wanting it. But that is the problem, because you can consent to something without desiring it: I can consent to go to your favorite restaurant while desiring to go to mine, for example.

Granted, it might be plausible to say that in this situation my *all-things-considered* desire is to go to your favorite restaurant rather than mine, because my stronger desire to satisfy your desires outweighs my weaker desire for my favorite restaurant. But even then, things are messy. For one reason I might consent is that I want you to be happy, which perhaps is explained nicely by positing a necessary connection between consent and all-things-considered desires. Unfortunately, another reason for my acquiescence might be that I am selfish but afraid of losing a gamble, and this sort of reason is not well explained by linking consent with all-things-considered desires. Let me explain. One way to flesh out the restaurant scenario is by assigning three options in my preference ranking: at the top would be insisting on going to my favorite restaurant and winning, which is preferred to conceding and going to your favorite restaurant, which in turn is preferred to insisting but losing (and thus eating alone). Now, I may all-things-considered prefer the middle option to the gamble between the top and bottom, but that is not to say that I all-things-considered prefer the middle to the top, which is what the “all-things-considered” thesis seems to require: that whenever I consent to go to your favorite restaurant over mine, I all-things-considered prefer your favorite restaurant to mine. It is not that I prefer your restaurant to mine; rather, I prefer the sure thing of your favorite to the gamble between my favorite and eating alone.

Further, even if there is a link between consent and all-things-considered desires, this is not so much an objection to my contention that consent is not the same as gratitude, welcoming, thanks, or approval. Rather, it is merely an insistence on unnecessary precision. That is because the appeal to all-things-considered desires is not necessary to connect gratitude, thanks, welcoming, and approval to desires—the claim that those concepts involve desire need not be qualified by restricting ourselves to all-things-considered desires. In contrast, that restriction has to be made when linking consent with desire. Therefore, consent is not the same as gratitude, thanks, welcoming, or approval.¹⁵

Now, just as one can consent to something without desiring it, so also one can desire something without consenting to it. For example, I might desire sunshine, but it seems a category mistake even to ask whether I consented to it. Further, I can desire something and yet still *dissent* to it, and in fact VanDeVeer’s case is of just this sort. That is, it is perfectly coherent to say that in hindsight I (all-things-considered) desire being knocked out and restrained from boarding the soon-to-explode plane, even though I still think what the hoodlums did was wrong, so that I never consent to it and indeed might demand compensation. More explicitly, I rely on the intuition that if a subject consents to an intervention (and the surrounding conditions are satisfactory—for example she is a calm, rational adult not in a hurry) then she thereby rescinds her right to demand compensation for it. Suppose a prankster throws my bag into the river, and, unbeknown to either of us, a poisonous scorpion had just crawled into it. I can be glad that things turned out the way they did and still be justified in attempting to seek compensation for my water-logged bag and belongings.

3.2 *Subsequent Consent as Forgiveness*

This insight about demanding compensation leads to a more useful story about the nature of consent, both subsequent and prior. I take for granted that it is essentially connected to a particular kind of reactive attitude,¹⁶ but, as we have seen, the relevant attitude need not involve desire and indeed might even involve aversion. What we need, rather, is the mental state of *not minding* the relevant action. In not minding your intervention, the subject decides not to seek compensation for being affected; she rescinds her right to press charges. She considers it and concludes, “Sure, I don’t mind what you did.” She may even prefer that you had not intervened, but she still does not mind, in the operational sense that she gives up her right to press charges or demand compensation.¹⁷

Now, I said that consent is essentially connected to a reactive attitude, rather than identical to one. That is because I do not want to take a stand on the tangential debate concerning whether consent is performative—requiring observable behavior—or subjective—requiring only a requisite attitude.¹⁸ In other words, it does not matter for the purposes of my thesis whether consent requires overt behavior or whether mere mental states would suffice. What does matter is that the relevant mental state—which either alone suffices or must be expressed in overt behavior—is one of not minding.

Maybe the state of mind so expressed can be called one of forgiveness? I am not sure—can you forgive your dastardly brother for his betrayal, and yet at the same time demand compensation for it, as for example by taking legal action against him? My intuition is that doing the one precludes doing the other, but I admit that the intuition is not strong, and some deny it. I am not particularly attached to this identification of subsequent consent with forgiveness, but the proposal is intriguing, and it might satisfy those who think there must be some well-understood concept expressible in one common English word that is the same as subsequent consent.

In any case, whatever it is called, that is the reactive attitude which is relevant for subsequent consent, one of “I won’t press charges or demand compensation for an infringement on my liberty”; to use Carter’s and VanDeVeer’s terminology, the required attitude is one of being willing to alienate one’s right. (Again, perhaps what is relevant is an outward expression of the attitude, rather than the attitude itself.) And surely there is nothing particularly mysterious or difficult about having that attitude even after the fact.

Indeed, this attitude is also all we require for prior consent. That is, even in the prior case, desiring the intervention is irrelevant for consent. All that matters even for prior consent is whether the subject (outwardly expresses whether she) minds the intervention. Then linking consent with this reactive attitude of not minding shows nicely how both prior and subsequent consent can be coherent and efficacious. Subsequent consent is not an entirely different breed of animal than prior consent, hoping to ape prior consent but with dicey ontological status.¹⁹ No, the part of it that generates moral force is the exact same as for prior consent—the

attitude of not minding—it is just that in the subsequent case this attitude comes after the fact rather than before.

4. Bilking, or “What if Lightning Strikes?”

Subsequent consent can be bilked by unfortunate circumstances, which is to say that if we intervene on the basis of expected subsequent consent, there is always the chance that our expectation is frustrated, as for example if the agent dies in the interim:

... it is always an open question as to whether S will survive long enough, to a point where S might indeed “consent” to prior interference. By chance S might be struck down by lightning, or, more likely, an automobile. If so, no subsequent consent will be forthcoming. Betting on actual consent in the future is a highly risky matter. Indeed the very idea that the permissibility of interference at time t depends on a possible occurrence at $t + n$, one which fortuitous factors may prevent, makes the morality of interference depend on chance—a curious element in any proposed justification.²⁰

The proper response to this objection begins by distinguishing between two ways of speaking. According to one way of speaking, moral assessment depends on how things actually turn out. According to the other way, moral assessment is linked to our reasonable expectations of how things turn out.²¹ Thus, for example, a factual utilitarian, that is, a utilitarian who links moral assessments to the way things actually turn out, says that you act rightly if you maximize actual utility, wrongly otherwise. In contrast, an evidential utilitarian, that is, one who links moral assessment to reasonable expectations, says that you act rightly if you maximize expected utility, wrongly otherwise. An example: you save a drowning child who, unbeknown to all, goes on to become the next Hitler. The factual utilitarian will say your action to save him was wrong (though perhaps not blameworthy, if criteria for praise and blame come apart from criteria for right and wrong—more on this shortly), but the evidential utilitarian will say it was right. Similarly, a factual deontologist links the moral assessment of your action with whether it actually complies with the relevant rules, whereas an evidential deontologist links that assessment to whether you reasonably expected your action to comply with them. I invite the reader to supply an example.

Which mode of speaking is more accurate: factualism, which links moral assessment to actual facts, or evidentialism, which links it to reasonable expectations? Douglas Husak relied on evidentialism in his response to the bilking objection, but that is unnecessary.²² The debate between these two positions is thorny, and thankfully we need not take a stand on it. All we need do is to take care not to slide back and forth between one and the other, as the bilking objection requires. That is, in rejecting subsequent consent while preserving prior, the bilker equivocates between factualism and evidentialism. In particular, the bilker relies on factualism to impugn subsequent consent but must rely on evidentialism to avoid the same objection to prior consent, that whether subsequent intervention is

permitted on the basis of prior consent might turn on fortuitous factors that would make the morality of subsequent interference depend on chance.

Let us go slowly through this reasoning. Suppose first that we prefer a factual way of speaking. Then moral assessment is linked to the actual facts of the matter, and subsequent consent *can* be bilked, because whenever the intervener thinks she has a very high chance of subsequent consent, chance or a malevolent meddler can step in between the intervention and the expected subsequent consent. However, on a factual way of speaking, prior consent can also be bilked. That is because chance or a malevolent meddler can step in between actual prior dissent (consent) and the subsequent intervention to manipulate the intervener into acquiring a high reasonable expectation of consent (dissent). The two kinds of cases are structurally symmetric. They both involve an intervener who is acting on the basis of a high reasonable expectation of consent, but in both cases chance or a malevolent meddler ensures that this expectation is frustrated. In the subsequent case, this is ensured by the untimely death of the subject before she can consent, and, in the prior case, it is ensured by the manipulation of evidence so that it seems that the subject consented when in fact she did no such thing. That prior consent is open to such bilking, on a factual way of speaking, is surely not an objection to its moral power, in principle. Likewise, that subsequent consent is open to bilking, on a factual way of speaking, is not an objection to its moral power, in principle.

Perhaps, then, we should resort to an evidential way of speaking, according to which moral assessment is linked to the intervener's reasonable expectations. If so, then the agent who intervenes on the basis of prior consent is invulnerable to bilking. That is because, regardless of what chance or a malevolent meddler might do, moral assessment of the intervener's actions depends only on her reasonable expectations, not on the manipulable link between those expectations and the actual facts at hand. Thus, for example, if a surgical patient really dissented today from surgery tomorrow, but malevolent meddlers made the surgeon think that she consented, then according to the evidential way of speaking the surgeon is off the moral hook for operating without consent. For even though the surgeon did not in fact have consent, she had very high reasonable expectation of it. However, as I hope is evident, subsequent consent is also invulnerable to bilking, if we adopt the evidential way of speaking. For, even if lightning strikes between the time of my intervention and the subsequent time when I have a high reasonable expectation of consent, still, I am off the moral hook for intervening without consent. For even though in fact I will not have consent, I have a very high reasonable expectation of it.

Thus, no matter which sort of way of speaking we choose to adopt—a factual way according to which moral assessment depends on the actual facts of the matter or an evidential one according to which moral assessment depends on reasonable expectations of those facts—subsequent consent is in the same boat as its prior cousin. Both are vulnerable to bilking if we adopt a factual way of speaking, and neither is vulnerable to that charge if we resort to evidential discourse. What we must not do is to adopt the evidential way of speaking when

talking about prior consent (invulnerable) but adopt a factual way of speaking when talking about subsequent consent (vulnerable).

I will end this section with three related points. First, things are slightly complicated by the option of adopting a factual way of speaking when discussing certain normative concepts, say *good* and *bad*, while simultaneously adopting an evidential way of speaking when discussing other normative concepts, say *praise* and *blame*. No matter, I did not say that we must adopt the same way of speaking for all moral concepts, only that we must adopt the same way of speaking when evaluating the merits of prior versus subsequent consent. Thus, for example, if *good* and *bad* are assessed factually, then that is so for cases of both prior and subsequent consent. Likewise, if *praise* and *blame* are assessed evidentially, then that is so for cases of both prior and subsequent consent.

Second, I admit it could be that, as a matter of contingent fact, subsequent consent is always much chancier than prior consent, and therefore much more prone to (factual) bilking. That may be true, but, as in section 2, it is not a reason to reject subsequent consent in principle. Rather, it is at best a reason to think that reasonable expectations about subsequent consent often will not be high enough to reach the appropriate threshold. But surely at least some instances of subsequent consent can be predicted with fairly high accuracy. John Stuart Mill's unsafe bridge crosser might be a good example: "If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back. . . ." ²³ Subsequent consent explains Mill's intuition rather nicely (in a way different from Mill's own strategy).

Finally, the distinction between factual and evidential ways of speaking is useful in helping to see what is wrong with an objection related to the bilking one, that prior consent grants future powers but subsequent consent cannot grant past powers. On a factual way of speaking—where what matters is whether the person really consented, rather than the potential intervener's evidence of such consent—future consent does grant past powers. Mill's public officer, for example, is granted the power to seize the unsafe bridge crosser based on what will transpire in the future. This past power is no more mysterious than my past power to get a loan from a bank today, based on what will transpire in the future—my paying back the loan plus interest. And on an evidential way of speaking, what matters in both the prior and the subsequent case is concurrent evidence of (prior or subsequent) consent, rather than the actual token act (be it mental or behavioral) of consent. In that case, strictly speaking, consent conveys no power at all—what gives the moral authority is rather the justified expectation of consent. ²⁴

5. Mind Control

Before broaching the thorny issue of mind control, I will begin by discussing briefly what I call the problem of vacillation. I will use the proper solution there to help resolve the more challenging problem that mind control poses.

5.1 *Vacillation*

Kasachkoff has tried to discredit subsequent consent with a two-step move. She first points out, correctly, that we are likely to invoke subsequent consent only when the subject changes her mind about whether to consent. Second, she wonders whether a defender of subsequent consent might want to limit the number of times she is allowed to vacillate on whether to consent:

And how shall we regard an act of paternalism for which the subject later comes to be grateful, but upon an even later further change of his values comes to regret? Indeed, is there any limitation on the number of times a subject's rethinking and retracting a former evaluation may determine our present moral judgment with respect to what was previously done to him?²⁵

The first point we should make is that Kasachkoff's puzzle arises even if we believe only in prior consent. That is, there is still a puzzle of what to do about a vacillating subject, even if all the vacillation occurs prior to the intervention. A subject can certainly continue to change her mind, to the exasperation of would-be interveners, up until the very moment of proposed intervention.²⁶ Now, you might think that there is an asymmetry between the prior and subsequent cases of vacillation, because we should always use the subject's opinion at the last possible moment before the intervention. This is a bad response, for three reasons. The first reason is technical: There may not be a well-defined last moment before the intervention. Imagine a very fast person who says "yes" one second before, then "no" half a second before, then "yes" 1/4th of a second before, then "no" 1/8th of a second before, and so on. The second reason is that the subject's opinion at some other time may be weightier. Suppose, for example, that one day ago the subject said "no" while sober, but a moment before the intervention said "yes" while drunk. The third reason is that this suggestion has an obvious symmetric counterpart for the friend of subsequent consent: the first possible moment after the intervention.

Therefore, as before, the vacillation worry is not unique to subsequent consent, and does not count as an objection to it. Now, I grant that the problem becomes more burdensome once we allow subsequent consent, but rightly so. That is, if we allow subsequent consent, a concerned moral agent will thereby appropriately have much more to consider: she will have to consider not just her subject's prior states of mind about the proposed intervention, but also all her potential future ones as well. In particular, she will have to consider not only whether the subject minded the intervention beforehand but also whether she will mind it afterwards as well. And that seems appropriate, not objectionable.

The second point to emphasize is that the solution to this puzzle of vacillation is far from obvious. The easiest answer—rely on the subject's concurrent state of mind—is obviously insufficient, because she might have been more calm, rational, knowledgeable, sober, and so on at some other time. Joel Feinberg thinks the decision made at the subject's most voluntary time is the relevant one, but when

there is a tie perhaps the earlier decisions should take precedence.²⁷ Gerald Dworkin suggests that if the subject's former consent explicitly attempted to rule out the efficacy of later dissent, then it does.²⁸

Still, even these reasonable proposals seem susceptible to counterexamples: is an agent really permitted to euthanize a mildly senile subject who no longer wants to be euthanized in this state, even if the subject explicitly accounted for this situation when formerly rational? Or is this perhaps a Parfit-style case where the later subject is no longer the same person as the former?²⁹ And what of a creature who spends its entire life in a less voluntary state but by some miracle has a single isolated five-minute period of lucidity and increased voluntariness? Should that creature's choices about the rest of its life, made in that five-minute span, trump all its previous ones? Suppose, for example, the creature usually likes to wear his red hat, but during his period of increased lucidity decides that wearing the red hat is demeaning, and commands that you never let him wear the red hat again, even after his brief period of lucidity. What to do? My intuitions are not strongly on one side or the other for these difficult questions, but thankfully the puzzle is tangential. Still, the lessons we have learned—first that the problem arises even for prior consent and second that its solution is not easy—will be useful in our early discussion of mind control, to which I now turn.

5.2 Inappropriate Causal Relations

Suppose a mad scientist accosts bystanders and brainwashes them to consent subsequently to various interventions. Is such an act permissible? The question is not one of practical impotence, isolated to the realm of science fiction. Members of religious cults indoctrinate their children to believe their own crazy and restrictive religious tenets. Plausibly, such children will consent later to all the earlier restrictions, because their parents have instilled those crazy values in them. Indeed, Haley Richmond has pointed out that this is not even limited to religious zealots.³⁰ In just about any successful child rearing, parents restrict children in ways that they later come to appreciate, on the basis of values and beliefs that those parents also instill, along with those restrictions. Are such acts permissible, or are they cheating?

Some cases, such as brainwashing, are obviously cheating, but some cases, such as normal child rearing, and the essentially connected value-instilling that goes along with that, surely are not. How to tell the difference? One way to address this question is to reduce it to the problem of vacillation. If the subject changes her mind over time, which opinion counts most? Surely the pre-brainwashed opinion counts for more than the post-brainwashed opinion; satisfying that constraint should be a criterion of adequacy for any solution to the problem of vacillation. In other words, the problem brainwashing poses to our moral theory may simply be a special case of the problem of vacillation, which we already need to solve: What criteria determine which of the subject's vacillating

opinions counts more. There may be no independent problem for subsequent consent.

Unfortunately, reduction to vacillation will not get us all the way home. Some cases of mind control may be more accurately described not as having changed opinions, but rather coming to form one from nothing, so to speak. Presumably this is the best way to describe cult members indoctrinating their children, for example, as well as the best way to describe legitimate education and upbringing. It is not that the children once dissented to the indoctrination/education and now consent, after the fact. No, they grew into it and never had the chance to dissent. The problem with these sorts of cases does not reduce to the problem of vacillation.

For these cases, the appropriate answer will invoke, among other things, causal chains and describe some as legitimate and some as illegitimate. Brainwashing is inappropriate because it short-circuits the subject's own mind, hence the term "mind control," causing consent inappropriately by skipping the subject's rational processes. But of course not every case of subsequent consent is like that. When I physically restrain the pedestrian from crossing the unsafe bridge, for example, whether he consents subsequently to that intervention still depends on his rational faculties.

Thus, mind control does not impugn subsequent consent in principle. It may impugn certain instances of it, but not all. Some causal chains leading from an action to subsequent consent are morally suspect, such as ones that involve circumvention of the subject's rational faculties, that is, brainwashing. But, of course, we accepted this already even in the case of prior consent. That is, if I brainwash you so that you consent now to some later intervention, my later intervention is obviously still impermissible, for that particular instance of prior consent was impotent. And yet this does not impugn the moral efficacy of prior consent more generally.

Just so for subsequent consent. For both prior and subsequent consent, some causal chains will be perfectly appropriate, and the real work will be in figuring out which are the permissible causal sequences and which impermissible, but this will not reduce merely to noting the temporal sequence of events and then rejecting all those where consent comes after the intervention. Whether the act is permissible does not depend on the temporal ordering of events; rather, it depends on the causal relations between those events, in a way that I leave nebulous here but that the consent theorist must eventually noodle out.³¹

6. Rape

Consider Don Juan, who feels licensed to initiate sexual intercourse with heretofore dissenting subjects, because (he is justified in believing that) his partners always change their reactive attitude after the fact. Surely the subsequent

consent to Don Juan's advances is irrelevant to whether Don Juan should proceed—it is still rape.

Two points are in order here. First, we must be careful to distinguish subsequent consent, which I have argued can have moral force, from gratitude, on which I have no comment. Indeed, cases where the subject is grateful after the fact tend to obscure whether there is genuine subsequent consent: in the clearest cases of subsequent consent, the subject does not welcome the intervention at all. For example, I recently gave subsequent consent to a graduate student who cited a draft of this manuscript in his dissertation and then asked permission: I had no desire that he cite it, but I still did not mind, and I said as much after the fact. Now, perhaps ironically, if we build into the Don Juan case the stipulation that the woman did not welcome or desire the encounter, even after the fact, but that she still does not mind it after the fact (i.e., gives subsequent consent), then arguably Don Juan was permitted after all.

I have suggested that the intuition that Don Juan acted wrong is misleading, because the case is most easily imagined as one of welcoming rather than of genuine consent. But let us grant that the intuition—that Don Juan should not proceed, even on the basis of subsequent consent—is correct. My second point is that the best explanation for this intuition is not that subsequent consent is illegitimate. Rather, it is that sexual relations are special cases and require special rules.³²

We can see that something is wrong with the rape objection immediately by employing the general strategy of this article, emphasizing that a similar worry arises for prior consent. Thus, for example, suppose the woman gives prior consent to sex but concurrent dissent. Surely, if Don Juan proceeds regardless, she has been raped, even in this variant case. And yet, this does not discredit the validity of prior consent in principle. Thus, the same is true for subsequent consent, and we must reject the hypothesis that subsequent consent never has moral force. All these examples show is that sometimes, perhaps often when something as intimate as sexual activity is at stake, instances of dissent outweigh other non-contemporaneous instances of consent.³³

Contrast sexual cases to a more ordinary mutually consensual transaction. Suppose, for example, I offer to sell you my Beatles album collection for \$50 tomorrow, and you agree. Perhaps we write up and sign a contract. Then a day later, at the moment of sale, I change my mind. Now, even if I should be allowed to renege on this exchange, it is plausible that my change of heart should not be protected to the same degree as a person's right to change her mind about sexual intercourse: a contract promising future sexual relations can be reneged more easily than a contract promising my Beatles albums can be. In other words, it seems that special consideration is necessary when sexual relations are at stake, and this explains why Don Juan should not proceed in both the original case (prior dissent and subsequent consent) and the variant case (prior consent, concurrent dissent). Thus, the hypothesis that subsequent consent never has moral force cannot explain why Don Juan should refrain in the variant

case where his partner consented yesterday but dissents contemporaneously. In contrast, the alternative hypothesis that in some scenarios dissent trumps consent can explain this nicely.

To be clear, my reasoning is not that the alleged illegitimacy of subsequent consent cannot explain what it purports to explain, namely that Don Juan should not proceed in the original case of prior dissent and subsequent consent. Rather, my reasoning is that the alleged illegitimacy of subsequent consent is unnecessary in the explanation, because another fact—namely, that dissent is typically weightier than consent when sexual relations are at stake—does all the explanatory work we require. And, moreover, that same other fact is also needed to explain some other things, namely that Don Juan cannot proceed in the variant case of prior consent and concurrent dissent, which the alleged illegitimacy of subsequent consent cannot explain. Once again, if there is a problem with subsequent consent and rape, then there is an analogous problem with prior consent and rape.

7. Conclusion

I have argued that if prior consent can be morally efficacious then subsequent consent can be also. First I argued that neither the nostalgic nor dismissive effects are unique to subsequent consent. I then defended the concept as coherent, linking consent to the reactive attitude of not minding. I rejected the relevance of bilking by insisting that we not equivocate between factual and evidential ways of attributing moral judgment. I moved on to argue that illegitimate cases of mind control do not impugn subsequent consent generally. Finally, I argued that subsequent consent does not license rape. The general argumentative motif in all cases is that subsequent consent is relevantly similar to its prior cousin—the objections raised against subsequent consent are already problems we have to address even if we believe only in prior consent.

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Notes

¹The phrase “morally transformative” comes from Alan Wertheimer. Most recently, see Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003). The phrase “moral magic” comes from Heidi Hurd, “The Moral Magic of Consent,” *Legal Theory* 2 (1996): 121–46. Neither of these authors distinguishes between prior, concurrent, and subsequent consent. Thus, when they claim that consent is morally transformative or that it has moral magic, I interpret them cautiously to mean only prior and concurrent consent. I will discuss *why* consent is morally transformative (has moral magic) in section 3.

²I say “morally transformative” to make clear that my concern is with ethical issues surrounding consent, not legal issues. For more on legal issues, see, for example, Peter Westen, *The Logic of*

Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct (Farnham, UK: Ashgate Publishing, 2004).

³R. J. Levine, "Research in Emergency Situations: The Role of Deferred Consent," *Journal of the American Medical Association* 273, no. 16 (1995): 1300–02.

⁴Paternalism grates against the liberal ideal that people should be restricted only from harming or offending others. See, for example, Joel Feinberg, *Harm to Others*, vol. 1 of *The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1984), 26. Therefore, it would be nice if the rationale for certain attractive restrictions appealed to actual, albeit subsequent, consent rather than to paternalism. Of course, some might argue that soft paternalism—that is, paternalizing only against non-defective choices—is the right way to go. See, for example, Joel Feinberg, *Harm to Self*, vol. 3 of *The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1986). I do not think this is correct, because soft paternalism is unstable—I argue in my unpublished 2003 PhD dissertation, *A Duty Against Paternalism*, that it collapses into hard paternalism or extreme anti-paternalism. But even if soft paternalism is a liberally kosher strategy, it is still paternalism, and it would be even better still for the liberal if many plausible interventions could be justified straightforwardly on the basis of consent rather than even soft paternalism. On the disreputable status of counterfactual consent, see, for example, J. J. Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), 188–89; and Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 150ff.

⁵Gerald Dworkin, "Paternalism," *Monist* 56 (1972): 107–26, 119.

⁶Rosemary Carter, "Justifying Paternalism," *Canadian Journal of Philosophy* 7 (1977): 133–45.

⁷One notable exception is a recent article by John K. Davis, "Precedent Autonomy and Subsequent Consent," *Ethical Theory and Moral Practice* 7 (2004): 267–91. Davis's article is rich and insightful, but its main goal is to reject the thesis that respecting autonomy requires respecting concurrent preferences. Davis thus offers a brief and limited defense of subsequent consent en route to a different destination.

⁸Peter Gardner, "Paternalism and Consent in Education, or One Day You'll Be Grateful," *Journal of Philosophy of Education* 17 (1983): 57–72, 66–67.

⁹Gardner, "Paternalism," 62.

¹⁰Donald VanDeVeer, "Paternalism and Subsequent Consent," *Canadian Journal of Philosophy* 9 (1979): 631–42, 638.

¹¹Tziporah Kasachkoff, "Paternalism: Does Gratitude Make It Okay?," *Social Theory and Practice* 20 (1994): 1–23, 1.

¹²Donald VanDeVeer, *Paternalistic Intervention: The Moral Bounds of Benevolence* (Princeton, NJ: Princeton University Press, 1986), 69. See also Westen, *Logic*, 256.

¹³Dworkin, "Paternalism," 119.

¹⁴Carter, "Justifying," 134.

¹⁵My overall goal here is to argue that consent is not the same as gratitude (thanks, welcoming, or approval). Whether consent necessarily involves (all-things-considered) desires is interesting, and I suspect the question must be answered in the negative, but in the end that issue is important to me only insofar as it helps illuminate a difference between consent and gratitude.

¹⁶On reactive attitudes, see P. F. Strawson, "Freedom and Resentment," *Proceedings of the British Academy* 48 (1960): 187–211.

¹⁷Remember that failing to have any attitude whatsoever does not imply having the attitude of not minding.

¹⁸John Kleinig, "The Ethics of Consent," *Canadian Journal of Philosophy* 8 (1982): 91–118 contains an early argument for the view that consent is performative, while Hurd, "Magic," 1996; and Larry Alexander, "The Moral Magic of Consent II," *Legal Theory* 2 (1996): 165–174 argue that it is subjective. See Wertheimer, *Sexual*, esp. 144ff for some more recent discussion of this debate.

¹⁹The analysis at Carter, "Justifying," 179, especially invites this criticism.

²⁰VanDeVeer, *Intervention*, 68.

- ²¹ Davis calls this a distinction between “justification in fact” and “agent-relative justification,” and he invokes the distinction to refute a similarly confused objection to the efficacy of subsequent consent, as I do. Davis, “Precedent,” 286.
- ²² Douglas Husak, “Paternalism and Autonomy,” *Philosophy and Public Affairs* 10 (1981): 27–46. Also, see Judith J. Thomson, “Imposing Risks,” in *To Breathe Freely*, ed. M. Gibson (Totowa, NJ: Rowman and Allanheld, 1983) for remarks in favor of factualism.
- ²³ J. S. Mill, “On Liberty,” in *On Liberty and Other Essays*, ed. John Gray (Oxford: Oxford University Press, 1991): 106–07.
- ²⁴ Of course the evidential way of speaking can be used in analyzing the bank loan case too: what justifies a loan officer in granting me a loan today, according to an evidentialist, is the officer’s current expectation that I will repay it in the future, rather than the fact that I will repay it in the future, a fact which may, after all, be bilked by a lightning strike.
- ²⁵ Kasachkoff, “Gratitude,” 20.
- ²⁶ Indeed, if the intervention itself occurs over a span of time, the subject might continue to vacillate while the intervention is ongoing.
- ²⁷ Feinberg, *Self*, 83.
- ²⁸ Dworkin, “Paternalism,” 120.
- ²⁹ See Derek Parfit, “Later Selves and Moral Principles,” in *Philosophy and Personal Relations: An Anglo-French Study*, ed. Alan Montefiore (London: Routledge & Kegan Paul, 1973), 137–69; and Allen Buchanan, “Advance Directives and the Personal Identity Problem,” *Philosophy and Public Affairs* 17 (1988): 277–302.
- ³⁰ Haley Richmond, “Paternalism and Consent: Some Educational Problems,” *Journal of Philosophy of Education* 32 (1998): 239–51.
- ³¹ See Roy Sorensen, “Future Law: Prepunishment and the Causal Theory of Verdicts,” *Noûs* 40 (2006): 166–83, especially section 6, for similar remarks.
- ³² That entire scholarly books have been devoted exclusively about the issue of sexual consent is evidence for the thesis that sexual ethics requires special principles. See, for example, David Archard, *Sexual Consent* (Boulder, CO: Westview Press, 1998) and Wertheimer, *Sexual*. Also, I take no stand in this article as to the contours that such special rules must take, or the interesting question of why sexual activity requires special rules.
- ³³ Of course, this is not to suggest the implausible thesis that dissent always trumps consent in cases of sex, no matter what—suppose the lone instance of dissent was ten years ago, but the subject has been a willing partner ever since. Note also that this topic is a very small sliver of what I earlier called the more general problem of vacillation. The suggestion here is that the degree to which instances of dissent should be weightier than instances of consent is greater in sexual cases than it is in non-sexual cases. Why is this? I cannot give a thorough discussion here, but a plausible starting point is the principle that we should always err on the side of caution when something as intimate and vulnerability-exposing as sex is in play.

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