

Fickle consent

Tom Dougherty

Published online: 10 November 2013
© Springer Science+Business Media Dordrecht 2013

Abstract Why is consent revocable? In other words, why must we respect someone's present dissent at the expense of her past consent? This essay argues against act-based explanations and in favor of a rule-based explanation. A rule prioritizing present consent will serve our interests the best, in light of our interests in having flexibility over our consent and in minimizing the possibility of error in people's judgments about whether we consent.

Keywords Consent · Tense · Present · Past · Promise · Rights

1 Introduction

The idea that we need others' consent to lay our hands on their persons or property is familiar. What is less familiar, at least from a theoretical point of view, is the difference made by the timing of their consent. It will help to illustrate this difference with two examples.

The first example concerns someone's person. Alfred has long told me of his desire to spruce up his image by wearing an earring, and he finally built up the nerve to ask me to pierce his ear. We made an appointment for me to do so today, but this morning, he began to worry that others will think he is not cool enough to pull off an earring. As a result, Alfred has told me that he has changed his mind. I know that Alfred always loses the courage of his aesthetic convictions at the crucial moment, only to regain them afterwards. So I know that he will later tell me that it would have been fine for me to have pierced his ear.

The second example concerns someone's property. Last week, Bethany told me that I could take a helpful shortcut across her lawn today. But yesterday she

T. Dougherty (✉)
Department of Philosophy, The University of Sydney, Darlington, NSW, Australia
e-mail: thomas.dougherty@sydney.edu.au

mistakenly came to believe that I was responsible for the disappearance of her favorite garden gnome, and so she has taken back her offer. Fortunately, I have proof of the real thief's identity, and so I know that she will later tell me that it would have been fine for me to have walked across her lawn.

It is a commonplace that it would be wrong for me to pierce Alfred's ear, or walk across Bethany's lawn, because I lack their consent. But what is intriguing is the moral difference made by the timing of their dissent. So long as they *presently* dissent, it is irrelevant that they have consented in the *past*. (If we allow that there is such a thing as future consent, it would also be irrelevant that they will consent in the *future*; but I will not be assuming there is future consent.) In slogan form, we might say that their present dissent *trumps* their past consent. The question I wish to discuss is why is this so: when it comes to the moral force of consent, why is someone's present consent typically special? One way of seeing that there is an interesting question here is to observe that there are other principles that could govern our practices based around consent. An alternative principle would make consent like promise: once consent is given, it cannot be taken back. According to this alternative principle, past consent would trump present dissent. Why isn't this alternative principle normative for us? Why are we morally bound by our actual principle, according to which present dissent trumps past consent? Put another way, why is consent revocable? If consent has been previously given, why can it later be taken back?

I will argue that we should reject several salient candidate act-based explanations—explanations that appeal to a feature of the act of respecting someone's present dissent. Then I will argue that we would do better to accept a rule-based explanation—an explanation centered around the claim that our interests are best served if we follow the rule that present dissents trump past consent. To provide a full explanation, this claim would have to be integrated into a broader theory that guides us to follow useful rules. Since I will not try to defend any such theory here, I do not intend to offer the final word on the issue. Instead, my aim is to call attention to a puzzling and neglected question and hopefully to make progress towards answering it.¹

2 The importance of present consent

Let us begin by characterizing more carefully what needs to be explained. What makes it the case that Bethany previously consented, but presently dissents? Some think that consent is a mental state.² They will say that Bethany previously consented because she had decided that I could cross her lawn and presently dissents because she has changed her mind and her present will is opposed to my crossing it.

¹ In the literature, the closest discussion concerns whether someone's future consent can ever justify treating him or her in a particular way. See, for example, Davis (2004) and Chwang (2009).

² See, for example, Hurd (1996) and Alexander (1996).

Others think that consent consists in an act of communication.³ They will say that Bethany previously consented because she had said I could cross her lawn and I presently lack her consent because her most recent communication was that I am no longer allowed to cross it. We need not decide which view is right since on both views Bethany consented in the past, and does not in the present. As such, a question arises as to why her present dissent trumps her past consent.⁴

More contentiously, some would think that Bethany's present dissent trumps her *future* consent. There are two considerations that might suggest that it is possible to look back on someone's past action and consent to it. First, we sometimes aim to treat children in ways that they will later agree to as adults. A plausible, though certainly not the only, explanation of this is that we are trying to respect their future consent to our present actions.⁵ Second, Bethany will later change her mind and say that it would have been fine for me to have crossed the lawn today. Her future decision and utterance are, respectively, similar in their structure and content to her past decision and utterance that I could cross the lawn. Since the latter would constitute her past consent, there is a reasonable case that the former would similarly constitute her future consent. But on the other hand, talk of "future consent" strikes many of us as somewhat suspect. So to avoid unnecessary controversy, I will primarily focus on the conflict between past consent and present dissent.

By focusing on this conflict between past consent and present dissent, I am setting to one side conflicts between present dissent and other ethical considerations. If I am being pursued by a violent mob, then considerations of my personal safety may trump Bethany's present dissent and I may permissibly cross her lawn. Additionally, sometimes in the context of friendships or other relationships, it may be the case that we need not have secured someone's consent in order to make minor uses of his or her property. For example, if my pen is lying around and I am absent, then a friend may permissibly borrow it, without my permission. In light of the fact that other ethical considerations may be more important than consent, we may put the point as follows: insofar as Bethany's consent or dissent matters, it is her present consent or dissent that matters.

But when we focus only on consent and dissent, how far can we generalize from the particular cases of Alfred and Bethany? In other words, how broad is the phenomenon of present dissent trumping past consent? We need to add two important qualifications. First, present dissent trumps past consent only when it is "well-formed"—the dissenter is in a suitable state of mind when she withdraws her

³ See, for example, Wertheimer (2003) and McGregor (2005).

⁴ In saying that her past consent was trumped, I am assuming that morally inefficacious consent is possible. This strikes me as the standard view—consent given by an incompetent person is morally inefficacious consent. But we could be neutral on this by framing this as a question about why, for example, Alfred's past will and utterance in favor of the piercing is trumped by his present will and his most recent utterance against it. But, as the previous sentence suggests, this way of framing things would make our discussion rather cumbersome.

⁵ Davis (2004, p. 271); For affirmation of future consent, see Dworkin (1972) and Chwang (2009). For denial of future consent, see VanDeVeer (1979).

consent. By contrast, if Odysseus were insane as the result of listening to the sirens' song, then his refusal to be tied to the mast would be ill-formed, and so would not trump his previous consent. Besides insanity, what else would make someone's dissent ill-formed? Suppose someone consents to undergo surgery without anesthetic, but is unable to bear the pain, fear and anxiety during the surgery itself, and so asks the surgeon to stop. Plausibly, the surgeon may disregard this dissent on the grounds that it is ill-formed in light of the patient's perturbed mental state.⁶ But can someone's dissent be ill-formed even when given in a cool hour? Andy Egan has created a fascinating case that probes this issue. He asks us to imagine "Subtle Sirens" who do not leave listeners mad. Instead, their song merely creates a preference shift in listeners, which the listeners then act on in a calm and rational manner. We might imagine that the song merely causes listeners to give up their previous goals, and instead prioritize a life of continuing to listen to the song.⁷ Since Odysseus is keen to return home to his wife and son, we could imagine him framing a plan to be tied to the mast, and asking his sailors not to untie him. In this version of the story, he is of sound mind when he dissents to being bound, but is merely dissenting on the basis of a temporary preference shift that has been produced by an alien cause. Does Odysseus's past consent trump his present consent, in these circumstances? My own intuition is that it does not. The men are effectively kidnapping him at this point, as they are holding a rational person against his present will. The fact that he previously consented to this arrangement does not change this basic fact. Indeed, I think the Subtle Sirens case is in the morally relevant respects similar to the case of Alfred, and I take it that it is clear that Alfred's present dissent trumps his past consent. Although several people share these intuitions about the Subtle Sirens case, I have learned that a majority of people do not.⁸ In light of this disagreement, I will simply leave open what exactly counts as "well-formed" dissent, at this stage. Leaving this term a little vague is an unfortunate, but unavoidable, cost of attempting to characterize the explanandum in a neutral way that is acceptable to everyone.

⁶ Thanks to Andy Egan for making this point in his comments on this paper for the 2013 Bellingham Summer Philosophy Conference. These comments also contained his presentation of the Subtle Sirens case discussed next in the main text.

⁷ Compare Homeric sirens:

"...you will come to the Sirens who enchant all who come near them. If any one unwarily draws in too close and hears the singing of the Sirens, his wife and children will never welcome him home again, for they sit in a green field and warble him to death with the sweetness of their song. There is a great heap of dead men's bones lying all around, with the flesh still rotting off them."

The fact that the listeners end up willingly being "warbled to death" surrounded by rotting corpses casts doubts on their rationality. But we could modify the case so that the listeners are able to live out long lives on the island, framed around listening to this song—their desire to enjoy the song becomes their central life project that they pursue in a rational manner. Homer, *The Odyssey*, translated by Samuel Butler, accessed at <http://classics.mit.edu/Homer/odyssey.12.xii.html>.

⁸ In a casual show of hands poll, the audience of the Bellingham Summer Philosophy Conference voted 27–10 in favor of it being permissible for the sailors to continue to bind Odysseus.

A second qualification concerns contracts.⁹ Depending on the laws in place concerning contract and property, some legally binding contracts may explicitly and irrevocably transfer easements of fixed durations. For example, some leases or rental agreements may be non-cancelable. Thus, some landlords cannot evict tenants at will, and nearly all cannot do so immediately, without having given reasonable notice. In addition, it may be that certain tacit workplace agreements grant employees access to company property, and employees must be given reasonable notice if the employers wish to revoke their access to this property.

But if we set aside legally binding contracts, and focus only on the moral power to give consent that we exercise in everyday life, then I am inclined to think that well-formed present dissent always trumps past consent. Although I can think of many cases in which someone's well-formed dissent is trumped by *other* morally relevant considerations, such as considerations of welfare, I cannot think of any non-contractual cases in which someone's well-formed dissent is trumped by her previous consent. With these qualifications in mind, the claim for which I will search for an explanation is:

PRESENT DISSENT. Outside of binding contracts, we *pro tanto* must respect someone's well-formed present dissent even when she has given her well-formed consent in the past.¹⁰

This is the principle that I will have in mind when I say, for ease of expression, that present dissent trumps past consent.

3 Act-based explanations

In this section, I will argue against explanations that aim to explain why present dissent trumps past consent by appealing to the features of a particular act of respecting someone's present dissent. These direct explanations contrast with indirect explanations that I discuss in the subsequent section, which appeal to the salutary features of rules that prioritize present dissent.

We can quickly set to side some proposals as non-starters. We might be tempted to think that it is wrong for me to pierce Alfred's ear because it would be awful for him to experience his present will being violated. However, an appeal to experiences cannot provide a general explanation, since I may not walk across Bethany's lawn even if she is not around to observe this. Alternatively, we might be tempted to think that people's prior consent is typically offered conditionally on their not changing their minds later. If so, it may be that the content of Alfred's previous speech-act covers only the possibility where he continues to want to have his ear pierced. But this attempt at an explanation does not get to the bottom of

⁹ Thanks to an anonymous referee and Brian Weatherson for pressing me on these explicit and implicit contractual arrangements, respectively.

¹⁰ Fans of future consent are invited to strengthen this claim so that it states that we must respect someone's well-formed present dissent at the expense of her well-formed future consent.

things, as even if Alfred had explicitly stated his previous consent unconditionally, I would still have to respect his present dissent.¹¹

A proposal that presupposes what is to be explained, albeit subtly, is a simple appeal to the value of autonomy. Respecting someone's autonomy involves seeing some key areas of her life as hers to control. In particular, she should make the relevant decisions about what happens to her person and property. As a result, we need her consent to lay hands on these. We could apply this general story to the case of Alfred. Plausibly I must respect his autonomy by letting him decide which alterations should be made to his body. Along these lines, the proposal claims that I respect Alfred's autonomy only if I have his consent to pierce his ear.¹² But although there is arguably an important link between autonomy and consent, this proposal does not offer a proper explanation. It implicitly assumes that respecting someone's autonomy involves following his or her *present* consent or dissent. As such, it simply presupposes the moral significance of present dissent, without explaining it. Moreover, there seems to be no intrinsic connection between autonomy and the timing of consent: I would equally be letting Alfred govern his own life if I acted on his previous consent. I would still be basing my actions that affect his life on decisions that he himself made. These would simply be his *past* decisions. And we do not think Alfred's autonomy is limited because a previous decision shapes his life. For example, we would consider him autonomous were he to act on an intention or a promise that he formed as the result of a past decision. The reason why is that such a decision would still be *his*, even though he made it in the past. Simply put, being ruled by one's past self and being ruled by one's present self are equally forms of self-rule.

Clearly, we need an explanation that explicitly places some importance on tense or time. But the issue of promises highlights an opposite danger: an explanation cannot place too much importance here. If Alfred promises to help me move house, and later says he takes back this promise, then this later utterance does not release him from the obligation to help me: unlike consent, promises are not revocable at will. So there is a sense in which the past takes priority for promises, while the present does so for consent.¹³ This point rules out certain explanatory avenues. An explanation cannot simply appeal to a metaphysically privileged status of the present.¹⁴ For example, it would not do for a so-called presentist, who holds that only the present is real, to say that past consent is unimportant in virtue of being "unreal," lest they thereby also make past promises unimportant for the same reason.

¹¹ I say "at best" because if future dissent is possible, then consent is not always revocable: present consent would not be revoked by future dissent.

¹² Similarly, a Kantian might say I must treat him as an "end in himself and not as a mere means." This claim aims to capture my obligations to him as an autonomous agent, and hence faces the same problem faced by an explanation in terms of autonomy.

¹³ Thanks to an anonymous referee for making this point.

¹⁴ These problems do not simply affect an explanation based on presentism, but also explanations that appeal to other versions of the so-called A-theory of time, according to which there are irreducibly tensed properties. For a helpful overview of the A-Theory, see Zimmerman (2005).

Similar problems beset appeals to the ethics of personal identity. One might distinguish person-stages within Alfred's life. To say why the consent of the present person-stage matters, we might say that each person-stage has an independent moral status,¹⁵ so that treating this person-stage with respect requires interacting with it in ways to which the person-stage consents. Just as Alfred cannot consent on behalf of Bethany because they are independent moral entities, one person-stage cannot consent on behalf of another, because each person-stage is an independent moral entity. As a result, Alfred's past person-stage cannot properly consent to my piercing his present person-stage. This explanation would indeed provide an explanation of why present consent trumps past consent. But it comes at two insuperable costs. The first cost is that the explanation fails to handle other cases involving consent adequately. Suppose Jessica has recently become a hipster, and asks me to give her a trendy tattoo. I know that fashions change, and she would later regret it. Still, if she will enjoy the tattoo for long enough, then intuitively it would be permissible for me to give it to her. However, this would involve leaving her future person-stage, future-Jessica, with an unwanted tattoo without future-Jessica's consent. The fact that there is a delay between my action and this unwanted effect on Jessica does not excuse my action on this count. If I pour water on present-Jessica, then future-Jessica must be allowed to complain that her clothes are wet. The second cost is that the explanation fails to handle promises adequately. Alfred cannot make a promise that places Bethany under an obligation, and this is because they are independent moral entities. So by parallel reasoning we would expect this personal identity proposal to lead to the unacceptable result that past-Alfred cannot place present-Alfred under a promissory obligation. As a fall-back, we might deny that person-stages have independent moral statuses, and say simply that Alfred's present person-stage has a special authority to "speak for Alfred the agent" at any time with respect to his consent. But while this claim has some plausibility, it simply re-states the explanandum in terms of person-stages. It begs the question of why the consent or dissent of his present person-stage matters. We have not seen an adequate answer yet.

4 Rule-based explanations

Two themes have emerged in our discussion so far.¹⁶ First, some proposals simply presupposed the importance of present consent without explaining it. Second, other proposals did offer an explanation, but only at the expense of unwanted implications for other areas of ethics, and in particular for promise. So one moral that we should draw is that a satisfactory solution must accommodate the importance of past promises. Indeed, some work on promises suggests an alternative explanatory

¹⁵ Derek Parfit defends a similar view, according to which distinct temporal selves have independent moral statuses. However, Parfit's conception of a self is too coarse-grained to provide a solution to our puzzle. The relevant person-stages of Alfred and Bethany will be strongly psychologically connected and so will be the same Parfitian selves. Thanks to Carla Merino for making this point (Parfit 1984).

¹⁶ Thanks to an anonymous referee for highlighting these themes.

strategy. The explanations canvassed so far have looked for an ethical aspect of consent or dissent that *directly* features in each individual case. Arguably, a similar strategy fails when we try to explain our promissory obligations.¹⁷ Instead, we do better to explain these promissory obligations *indirectly* in terms of how a rule-governed social practice of making and keeping promises enriches our lives. A key virtue of this indirect strategy is that it allows us to look at how promises *tend* to have certain advantages, without claiming that these advantages arise in every case.

The indirect strategy that I will discuss aims to establish the claim that the rule PRESENT DISSENT is the most desirable rule to govern our consent. It would allow us to claim that prioritizing present consent *tends* to have welcome effects, without insisting these welcome effects are present in every case. Moreover, establishing this claim would be significant for various broader moral theories. Rule-consequentialists hold that we ought to act according to optimific rules. Some define the optimific rules as those such that were everyone to adopt and attempt to follow them, the best outcome would obtain. Meanwhile, contractualists hold that we ought to act according to rules that we would adopt under morally significant circumstances.¹⁸ Both rule-consequentialists and contractualists will find it significant that a rule serves our interests better than other rules. Other theorists may find this significant too, so long as they appeal to the fact that a social practice organized around various rules would *hypothetically* have welcome effects. In light of the differences between these broader normative ethical theories, theorists may prefer to frame this issue in different ways. A rule-consequentialist may be interested in whether a set of rules leads to the greatest amount of good. By contrast, if a contractualist has a Kantian persuasion, then she may be interested in the extent to which one may reasonably will certain rules.¹⁹ In light of these differences of emphasis, I cannot see a fully neutral way of framing the issue. So I will choose to frame it in a way that allows our discussion to flow smoothly, and consequently will discuss which rules “best serve our interests.” If readers prefer to frame the issue differently, I hope that it will be straightforward for readers to translate this way of talking into theirs.

To investigate whether PRESENT DISSENT serves our interests better than any other rule, we should ask what the alternative rules could be. I will start by focusing on the question of whether we are better served by our present consent and dissent being efficacious or by our previous consent and dissent being efficacious. Towards this end, I will compare PRESENT DISSENT with the rule that offers the opposite priority:

¹⁷ Hume makes this point in his *Treatise on human nature* (2010, Book III, Section II).

¹⁸ Rawls (2009, esp. pp. 98–101) and Scanlon (1998).

¹⁹ It seems to me that the contractualist strand to Kantian ethical theory is the most promising avenue for explaining why present dissent trumps past consent. The Formula of Humanity looks an unpromising avenue because, as I mentioned in footnote 12, merely stating that one only treats someone as an end in herself by respecting her present dissent simply states, in a theoretically-laden way, what needs to be explained. The Formula of Universal Law seems unpromising in light of the alternative rule, INITIAL CONSENT, which I shortly discuss in the main text: it seems to me that I could act on a maxim of following initial consent, while simultaneously rationally willing that it become universal law.

INITIAL CONSENT. Someone's well-formed initial consent trumps any present dissent on her part.

This rule would make consent like promise: just as someone's initial promise cannot be taken back, the rule implies that someone's initial consent cannot be taken back. As a result, this rule would entail that past consent trumps present dissent. In evaluating these rules, I suggest that the two key questions to focus on are: how much flexibility does each rule give us in taking back our consent? How easy is it for people to follow the rule?

INITIAL CONSENT allows us to rigidly transfer our consent once and for all. This rigidity can be valuable. Alfred's plans to wear an earring are settled on the whole, and are frustrated if he can take back his consent. In general, rigidity can safeguard against an anticipated and unwanted change of mind that one expects to regret soon after. It can also facilitate coordinating interactions with others: I have greater reason to make an appointment with Alfred for the piercing, if I am convinced that he will be unable to back out. By contrast, PRESENT DISSENT gives us the flexibility of taking back our consent at any time. This flexibility has its own value. It lets us take advantage of the fact that, with time, we can acquire more evidence. More evidence does not always leave us with more accurate beliefs—think of Bethany's acquiring misleading evidence that I stole her gnome—but more evidence does tend to leave us with more accurate beliefs. Additionally, flexibility lets us take advantage of the fact that, over time, we develop and revise our conception of what is worthwhile in life. Some changes will be corruptions; others will be neutral. But when our earlier values and preferences change, we often realize that our less mature values and preferences were mistaken. So we would hope with the wisdom we gain from experience, there is a trend towards progress in personal development and so changes will tend to be improvements.

However, when it comes to flexibility and rigidity, it surprisingly turns out that the rules are closer than they might first seem. First, even if we follow INITIAL CONSENT, we could still keep our consent flexible by making our initial consent *conditional* in its content.²⁰ For example, Bethany could irrevocably consent to my crossing her lawn on a particular day *only on condition* that she still wants me to do so on that day. Irrevocable, but conditional, consent can play much the same role in our lives as that played by revocable, unconditional, consent.

But things are also better for PRESENT DISSENT with respect to rigidity than they may first seem. This is because flexible consent can be combined with various self-binding instruments. Alfred can form a resolution to have his ear pierced, aiming not to reconsider this intention even if his preferences change.²¹ If he is not sufficiently strong-willed to follow through on this resolution, then he can promise me that he will not later withdraw his consent. He can supplement this with a separate promise to pay a penalty, such as mowing his enemy's lawn for a year, should he back out. If he wants to keep his word, or cares about his reputation, then this can be a further

²⁰ Thanks to an anonymous referee for offering this argument, and for several pressing comments showing the relative merits of irrevocable initial consent.

²¹ Holton develops this conception of a resolution in his *Willing, wanting, waiting* (2009).

source of motivation. Additionally, if the promise can be reliably enforced by a third party, then the prospect of this enforcement will act as a deterrent against his breaking it. In this way, a rigid power of giving irrevocable promises can supplement a flexible power of giving revocable consent.

So there are procedures by which we could mitigate the drawbacks of either rule. But these procedures will sometimes fail. If *PRESENT CONSENT* were operative, then sometimes our interests would be set back by our failure to bind ourselves into consenting later. By contrast if *INITIAL CONSENT* were operative, then sometimes we would mistakenly offer unconditional consent ahead of time. Which of the two ways of going wrong should worry us more?

On the one hand, failing to self-bind might mean that we forego beneficial interactions with others. Arguably, the most valuable of these would be medical treatment. Someone could want an operation, but get cold feet on the day of the surgery. She might be well served by a rule that allows her to pledge her consent in advance. But while this type of problem is imaginable, it does not seem to be a serious one in practice. In the real world, surgery is governed by *PRESENT DISSENT*, and problematic cases along these lines are rare: if someone withdraws her consent to surgery, then she is also likely not to be present for the surgeon to carry out the surgery. The same could be said for other aspects of our lives besides surgery.

On the other hand, mistakenly offering unconditional consent gives others unwanted access to our persons and property. The most serious cases would involve someone's person or intimate property. Suppose that deeply in love, Antonio expressed his unconditional trust by telling his boyfriend that he could enter his home whenever he liked. Alas, things rapidly turned sour, and the former lovers became bitter enemies. In this case, Antonio would be best served by a rule that lets him take back his consent. The example illustrates a more general phenomenon. As fallible creatures, we do not want to leave important aspects of our lives hostage to our skill at offering unconditional prior consent only when appropriate. We are more secure if we can make mistakes, without giving people unwanted access to our persons and property. Sexual consent is perhaps the most obvious example of this. When it comes to important and intimate aspects of our lives, we want rules that are foolproof, because most of us are, at least on occasion, prone to making foolish decisions.

So mistakenly offering unconditional consent under *INITIAL CONSENT* is more worrisome than failing to self-bind under *PRESENT CONSENT*. This constitutes a case in favor of the latter rule over the former. But this case is inconclusive in light of the difficulty we face in estimating the likelihood of mistakes like these in a world where we take ourselves to be governed by *INITIAL CONSENT*. It is hard to have much confidence about this from the armchair, given how distant this possible world is. Perhaps we would become highly adept at offering prior consent only conditionally? Still, in light of our general fallibility as decision-makers, I think the most plausible speculation is that these cases would be more common than the infrequent cases in the real world where people are ill-served by *PRESENT DISSENT*. As a result, I am inclined to think considerations of rigidity and flexibility yield an advantage to *PRESENT DISSENT*, but perhaps not a decisive one. The possibilities that the rules are

on a par, or even that INITIAL CONSENT serves us best, cannot be ruled out. To settle the matter, we must turn to the second ground on which to compare the rules.

While the first ground on which to adjudicate the rules concerned the mistakes that *patients* might make in consenting or dissenting, the second ground concerns the mistakes that *agents* are liable to make when attempting to follow the rules in question. How easy it is for an agent to reliably discover whether the patient consents in the past or present? How easy is it to discover whether the patient is in sound mind so that this consent is morally efficacious? These issues will vary case by case, depending on the agent's source of evidence. A vivid memory of hearing the patient's past consent would be a better source of evidence than third-hand testimony of her present dissent from a disreputable source. By contrast, hearing the patient express her present dissent would be a better source of evidence than a vague memory of her past consent.

But even though cases vary, we can still note some general tendencies among them. When an agent is in the company of a patient, she usually has an excellent way of knowing whether he presently consents—she can ask him. In addition, the agent is well-placed to observe whether the patient is in sound mind. Now interactions with someone's person involve being in that person's company, and so an agent is often well-placed to establish whether someone else presently consents to these interactions. This is particularly significant because respecting bodily consent tends to be more important than respecting property consent; people typically feel more violated when others non-consensually use their persons than when others non-consensually use their property. Correspondingly, it is harder to compensate someone if his body is trespassed upon or damaged than if his property is. Again, sexual consent is the clearest example of this trend. Thus, the epistemic availability of present consent and dissent places a premium on the rule, PRESENT DISSENT, according to which present consent or dissent is what matters. Meanwhile, an agent is worse placed to establish whether a patient offered his well-formed consent in the past than they are to establish whether he offered his well-formed consent in the present. There are two key reasons why this is so.

The first reason is that the faculty of memory is unreliable, and so the possibility of error increases when agents have to rely on their own memories or others'. Agents rely on memory more often when judging whether someone consented in the past than they do when judging whether someone presently consents. The following case illustrates the potential pitfalls. After several drinks in a bar, Maria invites Daniel back to her home for sex. In the context, the most likely interpretation of her words, and the one Maria intends, is that this consent is conditional: if she changes her mind later, then all bets are off. But her communication was slightly ambiguous as the context does not entirely rule out the interpretation that the consent is unconditional. By the time they reach her apartment, Maria has changed her mind and clearly communicates that she no longer wants to have sex. If INITIAL CONSENT were operative, then whether Daniel believes he has her consent for sex would depend on whether he believes her initial communication was conditional or unconditional in its content. This could well turn on what words he believed were used and in what context. One might reasonably expect people's memories to be unreliable, especially when alcohol is involved. Moreover, we are supposing that the

initial context of utterance made available, but less likely, the interpretation that the patient consented unconditionally. As a result, there is a significant risk that Daniel may adopt this interpretation. The fact that INITIAL CONSENT allows for this risk counts heavily against it. Of course, there are other moral reasons why Daniel should not proceed in these circumstances—consent is a necessary, but not sufficient, condition for sex being permissible. But it is a serious defect in any rule governing consent that the rule increases the risk that an agent believes that non-consensual sex is in fact consensual. By contrast, the possibility of mistaken beliefs in such a case is greatly reduced under a rule like PRESENT DISSENT: Maria's statement that she presently dissents would settle that it is impermissible for Daniel to proceed.

The second reason why it is easier to discern someone's present dissent than his past consent is that it is easier to clear up mistakes about whether someone presently consents than mistakes about whether he previously consented. If doubt arises in an agent's mind about whether the patient consented in the past, or did so conditionally, then the chance has gone to clarify this directly. She cannot ask him directly, but instead must rely on her and his memories about what he thought or said. In addition, when the consent is past, the patient has lost some of his epistemic authority about the content of his communications and his thoughts. To return to our previous example, we could imagine an argument in the apartment. Maria says that her previous consent was conditional. But Daniel doubts her drunken recollections, and places more credence in his own recollections. As a result, he overrules her judgment. Indeed, the details of the case could be filled in a way so that it would be epistemically *rational* for him at that moment to form the judgment that the consent was unconditional. (Sometimes, an agent's total evidence is misleading.) So again, under INITIAL CONSENT, there is greater room for error on Daniel's part. But whatever initial doubt arises in Daniel's mind about Maria's present consent, her say settles the matter. She is the final epistemic authority on the current content of her mind and what she presently intends to communicate. So if she says that she presently dissents, then there is no room for a reasonable mistake on David's part. In light of this, PRESENT DISSENT leaves less room for error.

These epistemic considerations become more significant when we consider that well-functioning rules need to be enforced by punishment, and some people will deliberately break the rules and seek to avoid this punishment. For a state to punish someone legitimately for a crime like rape, it must establish that he satisfied the requirements for *mens rea*. Typically, this involves showing that he believed that the other party did not consent, or showing that this was the only reasonable belief in the circumstances. The clearer the evidentiary source about the victim's dissent, the easier it is to prove that a rapist had this belief, or that it was the only reasonable belief for him to have. Let us return to the earlier case, and suppose that Daniel is uninterested in Maria's consent, and proceeds by force. PRESENT DISSENT would offer Daniel little room for a plausible defense, as her repeated communication of her present dissent would make it unreasonable for him to believe that she consented at the time of sex. But consider how the case would be treated under INITIAL CONSENT. In most courts, Daniel would be taken to have an excuse if he could make plausible the defense that he reasonably believed that Maria's initial consent was unconditional.

Moreover, note that he would only have to make sufficiently plausible the proposition that he held the reasonable belief that she had *once* offered this unconditional consent. This is because a single instance of consent would be enough for the consent to be transferred irrevocably. Speaking carelessly, and backtracking later would not be an option for the patient, if INITIAL CONSENT were operative. This example illustrates a more general point: we can expect defenses based on ignorance to be more viable the larger the evidentiary gap between the agent and the patient's consent. As a result, rules that leave a larger evidentiary gap here are harder to enforce. Since we should be particularly concerned about crimes against the person, and the evidentiary gap is smaller when it comes to whether patients presently consent than whether they previously consented, people's interests are better served in this respect by the rule PRESENT DISSENT than by INITIAL CONSENT.

So far, I have offered two key grounds for why PRESENT DISSENT is preferable to INITIAL CONSENT: its greater flexibility is valuable and because it is easier to use, it will lead to fewer mistakes in practice. But our discussion also lets us see why PRESENT DISSENT is preferable to other rules. If future consent is possible, then an alternative rule could make this consent morally efficacious. But given how hard it is to predict the future, such a rule would often be hard to use, and mistakes would arise in practice. If we set aside future consent, then the other possibility would be a rule that makes *both* the past and present relevant for consent, balancing various instances of consent and dissent against each other:

OVERALL CONSENT. You should only lay hands on someone's person or property if you have his or her "overall consent," which is some aggregative function of his or her consent and dissent in the past and present.

But there are many things to be said against such a rule. For a start, we should be somewhat skeptical that there is a well-defined aggregative function that could be used to work out someone's "overall consent."²² There certainly does not seem to be a function that we can easily implement in our everyday lives, in such a way that we can predict how others will behave when we offer our consent or dissent at various times. Moreover, our difficulty in calculating this function leads to a difficulty in following this rule. As a result, agents are left with a significant possibility of error. This compounds the possibility of error in discovering someone's past consent: the problems just noted would resurface with respect to OVERALL CONSENT since following this rule requires having evidence about someone's past consent. As a result, it is an inferior rule to PRESENT DISSENT.

Let me end by noting a further reason to think that we are on the right lines with the claim that PRESENT DISSENT serves our interests the best. At the outset, I limited our discussion to consent outside of legally binding contracts. If the key considerations are the ease of use of rules and the value of rules' flexibility or rigidity, then we can see why some contracts would present a special case. First, the contract itself makes it easy for each party to know what exactly has been consented to, making the evidentiary gap between an agent and the patient's consent slight. It

²² Thanks to Agustin Rayo for raising this worry.

is easy to comply with someone's initial consent when this consent is stated in an explicit contract. Similarly, implicit contracts are only binding when each party is able to find out its terms. Second, rigidity in contracts facilitates exchanges that are mutually beneficial *ex ante*, by providing assurance that these contracts will be carried out. To be sure, this benefit can be outweighed by other factors. For example, we particularly value flexibility in contracts concerning one's person; we are opposed to contracts that commit one far in advance, such as indentured servitude contracts, and we are reluctant to enforce with specific performance contracts concerning the person. But the case tips in favor of rigidity when the other party comes to rely heavily on someone's consent persisting, and the consenter has relatively little to lose by being held to the contract. The consent that landlords give to tenants for the use of their property is a case in point. This suggests a pattern for when contractual consent should be revocable. When flexibility is particularly valuable, so that people can change their minds, the contractual consent is revocable; when rigidity is particularly valuable, so that people are committed, the contractual consent is irrevocable. This is of course the pattern generated by the rule PRESENT CONSENT.

5 Conclusion

A brief summary is in order. In this essay, I have searched for an explanation of the fact that present dissent trumps past consent. Several natural attempts aim to explain this directly by pointing to an omnipresent ethical feature of consent. But these either begged the question or failed to accommodate the fact that past promises are binding. The failure of these explanations suggested indirect strategies that appeal to the tendency of the rule PRESENT DISSENT to serve our interests. Following this approach, I argued that a successful explanation could be based around the claim that PRESENT DISSENT is the best available rule. First, the flexibility of PRESENT DISSENT is more valuable to us than the rigidity of INITIAL CONSENT. Second, the former rule is much easier to use than the latter. In particular, it leaves a smaller evidentiary gap between an agent and the patient's consent, thereby reducing the possibility of error. We should note, however, that establishing that PRESENT DISSENT is the optimal rule is not, by itself, an explanation of why present dissent trumps past consent. To complete this explanation, the claim would need to be combined with a broader theory, according to which the fact that a rule tends to serve our interests counts in favor of that rule being normative for us. These broader theories are, of course, controversial. Since these theories have implications for other areas of ethics, we would have to explore these implications before accepting them. Still, it would count in favor of these theories that they can explain why present dissent trumps past consent.

I will end by noting two broader themes that have emerged from our discussion. First, it has frequently been helpful to think of the normative powers of promise and consent at the same time. These are of course moral powers that mirror the function of each other. By promising, one gives another party a right, thereby incurring on oneself a corresponding duty; by giving consent, one waives a right, thereby

releasing another person from a corresponding duty. In addition, each power's temporal profile mirrors the other's: past consent is revoked by present dissent, but past promises are irrevocable. Now the fact that consent and promise have these differences allows these powers to complement each other when exercised in tandem. We have seen that revocable consent gives us flexibility by allowing us always to retain control over others' permissions with respect to our persons and property. However, when rigidity has a special value for coordinating our interactions with others, promise can pick up the slack. This is because we can make irrevocable promises not to withdraw our consent, and these promises allow others to rely on our consent persisting. Of course, if we break these promises, and do withdraw our consent, then others would be obliged to respect our present dissent. So this point does not change the fact that present dissent trumps past consent. Rather it shows that promises give us ways of planning our lives around this fact about consent.

Second, if my preferred explanation turns out to be correct, then this connects with a broader way of thinking about consent, rights and justice. Simplifying a little, the case for PRESENT DISSENT being the best rule was built on the fact that we care more about avoiding giving people unwanted access to our persons and property than we care about ensuring that they have this access when we want them to. Forgoing a consensual interaction is a loss, but we are considerably more worried about non-consensual invasions of the intimate areas of our lives. In this way, the morality of consent is importantly risk averse—more concerned with protecting our lives from harm and interference by others than with allowing ourselves to optimize our own and others' lives. Now since we waive our rights over our persons and property by giving consent, and respecting these rights is a matter of justice, duties to respect each other's consent are duties of justice. As a result, we have come across an example of justice placing special importance on guarding individuals' inviolability at the expense of facilitating mutual aid—a pattern that we notice elsewhere, such as when we observe that providing greater benefits to some people does not in itself justify violating another person's rights. In this way, my preferred explanation of the importance of present consent is continuous with a view of rights as prioritizing protection and a view of justice as concerned particularly with security.

Acknowledgments For helpful discussions and comments, I would like to thank Larry Alexander, Michael Bratman, Josh Cohen, Tyler Doggett, Andy Egan, Dan Halliday, Anne Hamilton, David Hills, Sophie Horowitz, Seth Lazar, RJ Leland, Ishani Maitra, Ned Markosian, Julia Markovits, Carla Merino, Sara Mrsny, Daniel Nolan, Kristi Olson, Govind Persad, David Plunkett, Agustin Rayo, Debra Satz, Paulina Sliwa, Jean Thomas, Brian Weatherston, two anonymous reviewers, and audiences at the Pacific APA, Stanford University, the Australian National University, Dartmouth College, the Workshop on Time, Agency and Decision at Monash University and the 2013 Bellingham Summer Philosophy Conference.

References

- Alexander, L. (1996). The moral magic of consent II. *Legal Theory*, 2(3), 165–174.
- Chwang, E. (2009). A defense of subsequent consent. *Journal of Social Philosophy*, 40(1), 117–131.

- Davis, J. (2004). Precedent autonomy and subsequent consent. *Ethical Theory and Moral Practice*, 7, 267–291.
- Dworkin, G. (1972). Paternalism. *Monist*, 56, 64–84.
- Holton, R. (2009). *Willing, wanting, waiting*. Oxford: Oxford University Press.
- Hume, D. (2010). *Treatise on human nature*. Boston: MobileReference.
- Hurd, H. (1996). The moral magic of consent. *Legal Theory*, 2, 121–146.
- McGregor, J. (2005). *Is it rape? On acquaintance rape and taking women's consent seriously*. Aldershot: Ashgate.
- Parfit, D. (1984). *Reasons and persons*. Oxford: Oxford University Press.
- Rawls, J. (2009). *A theory of justice*. Cambridge, MA: Harvard University Press.
- Scanlon, T. M. (1998). *What we owe to each other*. Cambridge, MA: Harvard University Press.
- VanDeVeer, D. (1979). Paternalism and subsequent consent. *Canadian Journal of Philosophy*, 9, 631–642.
- Wertheimer, A. (2003). *Consent to sexual relations*. Cambridge: Cambridge University Press.
- Zimmerman, D. (2005). The A-theory of time, the B-theory of time, and taking tense seriously. *Dialectica*, 59(4), 401–457.