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The Power to Consent and the Criminal Law

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Mark Dsouza

THE POWER TO CONSENT AND THE CRIMINAL LAW

Mark Dsouza¹

Although consent is widely accepted as one of the most important situational variables that the law confronts, and is widely theorised, many important ontological questions about consent remain disputed. Debate continues about whether consent involves a mental state of choosing or desiring; whether it consists of invitation or indifference to a boundary crossing; whether it is perfected by a subjective state of mind or a performative token; and whether it can be granted retrospectively.² The diversity of academic opinion on such fundamental ontological issues stems from the fact that

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2 The companion essays on consent by Hurd and Alexander set out many of these ontological debates, and also exemplify the differences of opinion that exist between consent theorists. Hurd and Alexander had set out to address the subject thinking themselves aligned, but parted ways on important details, and ended up authoring separate pieces because of their disagreements on matters of detail. For instance, Hurd argues that consent requires an invitation to cross a boundary, whereas Alexander believes that indifference to a boundary crossing will suffice. Hurd and Alexander agree that consent requires the making of a choice, and that a subjective choice is necessary and sufficient for the grant of consent. However, these assertions are disputed by others. Wertheimer argues that some performative token of consent is essential for consent to have any legal and normative value, and Westen asserts that the mental state of consent is a desire rather than an authorisation. Westen also argues that consent may be granted retrospectively, but Witmer-Rich insists that consent can be granted only prospectively or contemporaneously. See Heidi M. Hurd, 'The Moral Magic of Consent', *Legal Theory* 2 (1996) 121; Larry Alexander, 'The Moral Magic of Consent II', *Legal Theory* 2 (1996) 165; Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press, 2003), Peter Westen, *The logic of consent: The diversity and deceptiveness of consent as a defense to criminal conduct* (Ashgate Publishing Limited, 2004) and Jonathan Witmer-Rich, 'It's Good to be Autonomous: Prospective Consent, Retrospective Consent, and the Foundation of Consent in the Criminal Law', *Criminal Law and Philosophy* 5(3) (2011) 377, 393.

different writers seem to use the word consent differently, referring to various related, but subtly different ideas and phenomena. As such, the question, 'What is consent?' has plausibly been answered in different ways, each shedding some light on a different characteristic of the concept. This, perhaps, is one reason that theorists such as Wertheimer abandoned that question altogether, and chose to focus instead on a different, logically subsequent, question: 'How does consent achieve what it does?'.³ Wertheimer's approach has obvious advantages – it allows him to identify and describe features of consent that define its importance in the practical world rather than the philosophical one. With his findings, Wertheimer inductively hypothesises about the nature of consent, and suggests answers to vexed problems of law. Unfortunately, as I will point out in this paper, there are a variety of plausible opinions about *what* consent does, and therefore answers to Wertheimer's preferred question that focus only on a limited set of cases, tend to give us only a partial picture, poorly suited to inductive theorising about consent. Instead, I suggest that there is value in asking another question, logically prior even to the question of what consent is. In this paper, I examine what it is to have the ability to give valid consent, and then study the implications of the answer for issues relating to the ontology of consent, how one may consent, and how consent is different from ratification. Given the richness of the existing discourse on these issues, many of the positions for which I argue will already have some academic support. This paper supplies a principled argument to link these existing views about ontological issues, such that they generate a theory of consent that is coherent across the law. I focus primarily on issues arising in the criminal law, although as a concept, the importance of consent transcends the civil-criminal divide in law.

The arguments I make are not meant to explain or justify the existing state of law in any jurisdiction. They are entirely normative, and describe the generalised features of consent in a liberal state. I focus on the liberal state because the features we associate with liberal theory dovetail nicely with the features we associate with consent. In the liberal tradition, the central case

3 Alan Wertheimer, 'What is Consent? And is it Important?', *Buffalo Criminal Law Review* 3 (2000) 557.

for the heavy-handed intervention of the criminal law is conduct that causes harm to others.⁴ Harms to the self are excluded from this category. This reflects the fact that in liberal theory, respect for an individual's autonomy requires that she be left free to decide for herself where her best interests lie.⁵ This autonomy is also the source of the moral power of consent.⁶

Liberal theory also gives us a convenient framework for understanding consent, which I adopt here. If respect for an individual's autonomy over her own interests extends to allowing her to extinguish, or adversely affect them, it must surely also extend to allowing an individual to place her interests at the disposal of another. This act of autonomously choosing to place one's interests at the disposal of another appears intuitively to be a core necessary (even if not sufficient) attribute of valid consent. On this view, the giving of consent is one way in which a person may exercise moral autonomy over her interests. With this minimalistic working understanding of consent, I now examine ontological issues relating to consent.

1. *Understanding Consent*

A. *The ability to validly consent is a power*

Beyleveld and Brownsword, in their meticulous study of the Hohfeldian nature of consent, argue that in consenting, a person either exercises a power to change, or authors a change internal to, the baseline relationship between the parties to the consenting transaction.⁷ The appropriate characterisation in any given case depends on how the baseline relationship between the consenting parties is drawn. For instance, where the baseline relationship between the consenter, V, and another

4 John Stuart Mill, *On Liberty* (Rowman & Littlefield Publishers, Inc., 2005), 33-36. See also Joel Feinberg, *The Moral Limits of Criminal Law – Vol.1 Harm to Others* (Hart Publishing, 1984), 14-15 and Alan Brudner 'The Wrong, the Bad, and the Wayward: Liberalism's Mala in Se', in F. Tanguay-Renaud and J. Stribopoulos (Eds.), *Rethinking Criminal Law Theory* (Hart Publishing, 2012), 55-74.

5 Mill (n4) 112-113.

6 Hurd (n2) 124; Alexander (n2) 165.

7 Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart Publishing, 2007), 64-85.

person, D, is one of right and duty [for convenience, throughout this paper I refer to the alleged consentor as 'V', and to the person crossing V's moral-legal boundaries as 'D'], the relationship may be described in one of two ways:

1. V has a right that D do an act, \emptyset , and D has a duty to V to \emptyset . *Additionally, V has the power to consent to D not \emptyset ing, and V has a liability to D's exercise of this power; or*
2. V has a right that D \emptyset *unless V consents to D not \emptyset ing*, and D has a duty to V to \emptyset *unless V consents to D not \emptyset ing*.

For Beyleveld and Brownsword, the appropriate description of the baseline relationship between V and D depends on the context. Where the first description is appropriate, to consent is to exercise a power (external to the right-duty relationship), and where the second description is appropriate, to consent is to effect a change internal to the right-duty relationship. They make analogous findings in relation to alternate cases in which the baseline relationships between V and D involve either a privilege and a no-right; a power and a liability; and an immunity and a disability.

Although Beyleveld and Brownsword are right that the appropriate description of the baseline relationships between V and D depends on the context, in either description of the baseline relationship, the Hohfeldian nature of the *ability* to validly consent is a power. The appropriate description of the baseline relationship between V and D changes only the situation of that power – whether it is external to the baseline relationship, or an integral part of it. For the purposes of this paper, this situation of the power is irrelevant. I focus instead on the proposition that the ability to validly consent is a Hohfeldian power, and examine its sequiturs.

Before doing so, it is useful to briefly describe the breadth of opinions offered as to the kind of jurial relations an exercise of the power to consent creates. There is a plurality of views on this issue. Westen proposes that consent, insofar as it is relevant to the criminal law or tort law, creates a Hohfeldian privilege in others, although in other contexts it may create a right or power in others.⁸

⁸ Peter Westen, 'Some Common Confusions About Consent in Rape Cases', *Ohio State Journal of Criminal Law* 2

Hurd argues that consent creates rights and obligations in others,⁹ and Beyleveld and Brownsword argue that depending on the terms used, consent can create either a right, privilege, power or immunity, or perhaps permutations and combinations thereof in others.¹⁰ Although I tend towards Beyleveld and Brownsword's view, I need not adopt a strong stance on this issue here. For this paper, what is important is that an exercise of the power to consent alters the jural relations of the consenter with others in some context-specific way.

B. *The power to consent is exercised by choosing, not desiring*

If the ability to validly consent is a power, then the minimum necessary conditions for its exercise must include the minimum necessary conditions, if any, for exercising a power. There may, of course, be additional necessary conditions for exercising the capacity to grant valid consent – perhaps this specific exercise of power can only be exercised if certain special procedural formalities are met – but any such additional necessary condition proposed must be supportable by arguments applicable to all cases of consent. Context-specific additional conditions for the grant of consent are not definitive of consent as a concept. We start then, with the minimum conditions for the exercise of a Hohfeldian power.

According to Hohfeld, when a given legal relation changes due to some superadded fact or group of facts under the volitional control of a human being, the person whose volitional control is paramount possesses the power to effect that change.¹¹ For him then, the exercise of power is inextricably bound up with an exercise of volition, or the making of a choice. The ability to validly consent, as a power, must therefore also be exercised by choosing. Indeed, many consent theorists including Hurd,¹² Alexander,¹³ and Ferzan¹⁴ adopt this position and treat consent as a mental state of

(2004) 334.

9 Hurd (n2) 121, 124.

10 Beyleveld and Brownsword (n7) 64-85.

11 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (Yale University Press, 2005), 50-51.

12 Hurd (n2) 126.

choice or authorisation rather than mere desire.

Westen seems to disagree. He characterises the mental state of consent as a state of desire rather than of authorisation, and on that basis says that all instances of valid consent are not necessarily instances of authorisation.¹⁵ Indeed, Ferzan criticises Westen for this very assertion.¹⁶ However, it may well be that Westen's position is not as drastically opposed to the orthodoxy as Ferzan supposes, but only appears to be so, because of Westen's somewhat esoteric usage of the terms 'desire' and 'authorisation'. For instance, each of the desire states that Westen treats as instantiating consent, are cases in which V makes a subjective choice – either to welcome D's action with unconditional enthusiasm, or to accept it as a conditional preference, or to acquiesce to it with indifference.¹⁷ For Ferzan, desires are mental states that we cannot directly control through the exercise of volition,¹⁸ and therefore a chosen desire is a contradiction in terms. Much of her criticism of Westen therefore stems from the fact that she uses the word 'desire' differently (and perhaps more appositely) than Westen. Yet it would appear that Westen is actually aligned with Ferzan, Hurd and Alexander in acknowledging the fundamental importance of choice¹⁹ to consent.

Westen's argument that all instances of consent are not instances of authorisation also arises from his stipulation that to authorise \emptyset is to desire (as he uses the term) it, *while being aware of*

13 Alexander (n2) 166.

14 Kimberly Kessler Ferzan, 'Clarifying Consent: Peter Westen's The Logic of Consent', *Law and Philosophy* 25 (2006) 193, 206.

15 Westen (n2) 28-34.

16 Ferzan (n14) 205-8.

17 Westen (n2) 29.

18 Ferzan (n14) 205.

19 Of course, this choice needs to have been made by a person with sufficient freedom and capacity to choose for themselves. While there are plenty of interesting discussions to be had about how much capacity and freedom are sufficient, I cannot engage in them in this paper. See instead Mark Dsouza, 'Undermining Prima Facie Consent in the Criminal Law', *Law and Philosophy* 33 (2006) 489.

ones (sic) *right to withhold the privilege of* \emptyset . This too is not necessarily the sense in which the term is invariably used in moral discourse. However, he understands Alexander to be working with this understanding of authorisation when Alexander asserts that to consent is to forgo one's moral objection to a boundary crossing. In a sense, Westen's interpretation of Alexander's assertion is understandable – surely, to forgo one's moral objection to something, one needs to be aware that one has a moral objection to it. On that basis, Westen constructs a hypothetical to demonstrate that a person who is unaware of her legal 'right' to withhold the 'privilege' of consent may still give valid consent, if in fact, she is entitled to consent.²⁰ From this he concludes that consent may be present even when authorisation is absent. However it seems to me that a stipulation either in favour of or against the need for awareness of one's entitlement to (grant or) withhold consent, is not integral to the argument that Alexander was making in piece that Westen cites. Alexander set out to explain why, unlike Hurd, he believes that in principle, indifference may also amount to consent.²¹ So while Hurd insisted that the consenter must positively invite the boundary crossing, for Alexander, the consenter could consent by indifference – by merely forgoing her moral objection to the boundary crossing. In fact Alexander and Westen agree that indifference can amount to consent. Alexander's argument against Hurd would stand even if he substituted the words 'forgo one's moral objections, to the extent that, as a matter of law (whether or not one is aware of it), one has any' for the words he actually uses, viz. 'forgo one's moral objections', but of course, such a cumbersome qualifier was superfluous to the argument being made. I therefore doubt that Alexander can be read as taking the stand that in order to consent one must necessarily always know of one's legal 'right' not to

20 Westen (n2) 31-32. I use the scare quotes to indicate that the characterisation of the entitlement to withhold consent as a right, and of consent itself as a privilege, are Westen's, and that I do not necessarily agree. Westen's hypothetical is entitled 'Sharon the Unwitting Adult', and involves a young girl who being new to a jurisdiction is unaware that in that jurisdiction girls her age can legally consent to sex. She tells her lover that although she 'knows' that she cannot legally consent, she would very much like him to have sex with her anyway.

21 Alexander (n2) 166.

consent.²² Moreover, when one chooses to forgo one's moral objections, to the extent that, as a matter of law (whether or not one is aware of it), one has any, one still makes a choice, and no doubt Alexander would say that the making of such a choice could, in appropriate contexts, amount to consenting, even if the consentor was unaware of her entitlement to withhold consent.

But before concluding on this point, we should consider whether anything in the nature of a Hohfeldian power implies that it cannot be exercised by a person who is unaware that she has the power. Nothing in Hohfeld's exegesis of power seems to necessitate that limitation. If the exercise of a power requires only that a superadded fact or group of facts under the volitional control of a human being come into existence, then there is no reason why this superadded fact or group of facts cannot be brought into existence by a human being who does not realise the legal significance of her deliberate exercise of volition because, for instance, she makes an error as to the content of the law. When D chants racial epithets at a football match in England, believing that she is allowed to do so in the exercise of her right of free speech under English law, she exercises her Hohfeldian power to change jural relations between herself and the criminal legal system, despite not realising the legal significance of her volitional act. By her racist chanting, D creates a liability in herself, and a power in the criminal justice system, to convict her for an offence under s.3 of the Football (Offences) Act, 1991.²³ Westen's example of 'Sharon the Unwitting Adult'²⁴ also illustrates the same

22 This is not to say that such knowledge is never necessary. In some contexts it is imperative that the 'consenter' be properly advised of her options. For instance, when consenting to medical procedures, or when being questioned upon arrest, the fact that the consentor was not made aware of her options or rights will vitiate her consent to the medical procedures, or to answering questions after arrest. However, this is not an across-the-board rule, as Westen's 'Sharon the Unwitting Adult' hypothetical (mentioned above) itself demonstrates.

23 By the same act she also exercises other Hohfeldian powers which she possesses in respect of her jural relations with other persons, including members of the public (upon whom she confers the Hohfeldian power to make a citizen's arrest, while imposing upon herself a corresponding liability to be arrested) and the police (with respect to whom she also brings about similar changes in the pre-existing legal relations).

24 Westen (n2) 31-32.

proposition. Clearly then, a Hohfeldian power can be exercised unwittingly. Accordingly, it is plausible to think that the power to consent may also be exercised by someone unaware that she possesses that power, provided that she forms the volitional state required to give consent. What that volitional state is exactly, is discussed in the next section of this essay.

C. *The choice need not be to invite the boundary crossing*

This brings us to the question: 'What is the mental state of consent?' Hurd has argued that the act of consenting goes beyond mere indifference as to whether another person crosses one's boundaries – V, must positively intend that D cross her boundaries, or at the very least, she 'must intend to aid (to allow or enable by act or omission) a defendant's actions with the intent that these actions be of the sort that must be intended by the defendant for prima facie liability'.²⁵ Hurd makes no direct argument as to why V must necessarily intend an boundary crossing in order to truly consent to it. Her primary argument is in support of what she calls her 'first identity thesis', viz. that it is plausible to suppose that 'the mens rea of consent is essentially identical to the mens rea required for principal liability',²⁶ and she takes it that should this thesis be correct, then 'inasmuch as a defendant must intend his own actions for prima facie liability, a literal application of the identity thesis requires the plaintiff to intend the defendant's actions as well'²⁷ in order to grant consent. She then argues at length that it is possible to intend the actions of other autonomous moral agents in the same way as it is possible to intend states of affairs such as the death of a person, or the burning of a building. She hedges her argument by pointing out that even if one wishes to be technically correct and insist that 'intentions regarding states of affairs is always elliptical for talk of intentions regarding actions or omissions causally related to such states of affairs', then criminal liability for accomplices establishes that liability can follow if one 'intend[s] another's actions [by intending] to allow or enable those actions by means of some act or omission of one's own.' She accepts that such a

²⁵ Hurd (n2) 130-131.

²⁶ *ibid* 122.

²⁷ *ibid* 130.

modified formulation is defensible, but says that the modification is minor, and that 'if courts can elliptically equate the mens rea of accomplice liability with the mens rea of principal liability without inviting doctrinal confusion, they can elliptically equate the mens rea of consent with the mens rea of principal liability without obscuring an important conceptual distinction.'²⁸

Alexander, who initially set out to co-author Hurd's article, disagreed with her on this point, and this was one of the reasons that he ended up writing a separate piece on the subject. In his view, V can consent to a boundary crossing without intending that the boundary crossing take place. As he explains, 'frequently, we are relieved, not frustrated, when one to whom we have given consent to cross our moral boundary does not do so.' Alexander infers from this that '[t]o consent is to form the intention to forgo one's moral complaint against another's act',²⁹ and this position does seem intuitively stronger. Surely, if while leaving University for a year's sabbatical, I were to leave my bicycle unlocked in my college for any student of the college to take, without really caring whether or not it was taken, or perhaps even imagining what a pleasant surprise it would be to find it waiting unclaimed upon my return, I have consented to its taking by a student at my college. If a student at my college does take the bicycle, I have no complaint against such taking. Similarly, when two boxers enter the ring to fight each other, we accept that each consents to being punched by the other.³⁰ Yet we would find it hard to believe that they actually intend that the other successfully hit them. In the absence of any context-specific posited restrictions, V's dominion over her interests includes the entitlement either to give them away, or to abandon them.

The problem with Hurd's argument is that in expanding upon the proposition that consent's

28 *ibid* 130-131.

29 Alexander (n2) 166.

30 I will qualify this in §1.D, where I suggest that a better explanation of such cases may be that in consenting to a gateway risky activity (the sport concerned), the agent accepts the moral luck that comes with it, and accepts any foreseeable harms that the activity may occasion. Nevertheless, at this stage I raise this example to suggest that Hurd's understanding of consent is incomplete insofar as it does not address such cases.

'moral magic' flows from its being an exercise of autonomy,³¹ she makes an unsubstantiated logical leap and therefore wrongly characterises the content of consent. She argues first that if autonomy resides in the ability to will the alteration of Hohfeldian legal relations,³² and consent is an exercise of autonomy, then consent must be a subjective mental state – that of willing something. After characterising consent as an intentional state of mind, she concludes by a process of elimination that it is the intentional state of making a choice. She next examines what the object of the choice should be, and concludes that it must be a description of an act. So far, so good. She then states her first identity thesis – that the mental state of consenting is essentially identical to mens rea in principal liability – and on that basis identifies the operational parameters of consent by analogy with mens rea in principal liability. This is deeply problematic because even if Hurd is correct about her first identity thesis (and I doubt that she does enough to prove that she is), that implies less than she seems to think it does.

Hurd makes no direct argument to support her first identity thesis. She merely says that it is plausible, and then considers whether the implications of accepting it correspond to accepted legal notions of consent.³³ To this end, she starts by considering the various ways in which the intentional state required for the offence of battery can be analysed, viz. the intention to do the act that causes harmful contact; the intention to make contact that turns out to be harmful; and the intention to make harmful contact. She then says that the criminal law does not refer to the outlying descriptions since they are over-inclusive and under-inclusive respectively. Hurd then notes that purported

31 Hurd (n2) 124; Alexander (n2) 165.

32 Hurd actually says that autonomy resides in the ability to will the alteration of 'moral rights and duties', but she was probably using loose terminology. As Beyleveld and Brownsword have pointed out, in strict Hohfeldian terms, autonomy, at least as exercised while consenting, may create or alter rights, privileges, powers and immunities. In other words, like any Hohfeldian power, the grant of consent alters Hohfeldian legal relations. See Beyleveld and Brownsword (n7) 64-85.

33 Hurd (n2) 127-128.

consent to battery could also take any of three forms, viz. consent to the act that causes harmful contact; consent to the contact that turns out to be harmful; and consent to harmful contact – and that her first identity thesis would imply that for consent too, the median description of the act would be the threshold legally adequate mental state. Since this appears to be the case in modern legal systems, she concludes that her first identity thesis is at least roughly right.³⁴

Hurd treats this as proof of the plausibility of her thesis that in order to consent 'the victim must have as her purpose that which the defendant must have as the object of his mens rea for purposes of prima facie liability'.³⁵ However it is not just mental states that can truthfully be described in different ways that convey different amounts of information and suggest different inferences – the same is also true of other situational factors, including actus reus elements such as conduct. For instance, the same conduct can be described as 'D flexing her finger', 'D pulling a trigger' or 'D shooting V'. It is no revelation that the criminal law is interested in only certain types of descriptions, and all that Hurd's argument shows is that the criminal law is interested in the same type of descriptions in respect of the mens rea elements of an offence, and consent. In other words, even if Hurd is entirely correct in her argument, all she shows is that the victim must have as her *object* [as opposed to purpose] that which the defendant must have as the object of his mens rea for purposes of prima facie liability in order to give effective consent. The choice that she makes with respect to that object may be to invite a boundary crossing in respect of it or to be indifferent to such a boundary crossing, and nothing in Hurd's argument supports her insistence on the former rather than the latter. Hurd therefore fails to show either that 'the mens rea of consent is essentially identical to the mens rea required for principal liability',³⁶ or that philosophically, consent and mens rea for principal liability do, or should, function in analogous ways. In sum then, it is a mistake for Hurd to assume that her first identity thesis extends far enough to allow her to explain what mental

34 *ibid* 128-130.

35 *ibid* 129.

36 *ibid* 122.

state constitutes consent by analogy with mens rea in principal liability.

We could still accept Hurd's argument insofar as it takes us, and agree that the object of V's consent must be the same as the object of D's mens rea for principal liability.³⁷ Now if consent is an instance of exercise of a power derived from autonomy, then its grant must alter the consenter's Hohfeldian legal relations with others. V can, in the exercise of her autonomy, either destroy her own car, or abandon it, or give it to D. In the first case, V's exercise of autonomy has no effect on how D may deal with V's car. But in the other cases, V's exercise of her autonomy over her car (a) privileges D so that D can take V's car, and (b) gives D the power to create property rights over it. If so, then there is no philosophically sound reason to treat only the instance in which V intends D to take her car as an instance of consent. Either case – intentionality qua D's appropriation, and indifference towards it – answers to the description of forming an intentional state of mind in relation to an object – taking V's car and dealing with it as her own – that would have had to have been the object of D's mens rea if D were being prosecuted for theft. In the absence of any other morally relevant factors, either exercise of autonomy would mean that V has no complaint in respect of D's boundary crossing, provided that the boundary crossing falls entirely within the scope of V's autonomous permission. Therefore, either exercise of autonomy should ordinarily be characterised as the grant of consent. Alexander's formulation of consent as choosing to forgo one's moral complaint against another's (boundary-crossing) act better captures this conception of consent.³⁸ On his view, consent is present in all the cases in which Hurd treats it as being present, as well as in cases of abandonment of interest or indifference to a taking.

At this stage though, we recall that Westen's challenge to what he took to be Alexander's

37 There are reasons to doubt even this proposition, but for the present purposes, it is not necessary to explore them.

38 The context in which Alexander made this assertion suggests that by 'complaint', he means moral complaint, rather than the sort of complaint that is made after the act, to a judge or to the police (although consent will have obvious repercussions on the outcome of such a complaint). It is in this sense that I understand Alexander's thesis.

stipulation of the mental state of consent remains undefeated.³⁹ Although it was argued that Westen's restrictive reading of Alexander's stipulation of the mental state of consent was probably mistaken, if Alexander were to be read in the manner that Westen read him, Westen's point would stand. Accordingly, it would probably be useful to take Westen's objection on board and clarify that technically, the volitional state required for granting valid consent is the state of choosing to forgo one's moral objections, to the extent that, as a matter of law (whether or not one is aware of it), one has any, to the proposed boundary crossing. However, for the sake of convenience in the rest of this essay, I will use Alexander's shorthand – choosing to forgo one's moral objection to the boundary crossing – to refer to the technical stipulation spelt out herein.

D. *Consent need not be performative*

In Wertheimer's extensive study of consent in the context of rape law, he dismisses the metaphysical ontology of consent as relatively unimportant, and instead addresses himself to the conditions under which consent can be morally transformative. He says,

...the important question is not whether consent *is* – ontologically speaking – a performative or mental state. Rather we begin by reminding ourselves that we are interested in consent because it renders it permissible for [D] to engage in sexual relations with [V], and we ask 'what could do that?' From that perspective, a suitably qualified – that is, moralized – performative view is, I think, closest to the truth. It is hard to see how [V's] mental state – by itself – can render it permissible for [D] to proceed. The fact that [V] actually desires sexual relations with [D] or would like [D] to proceed does not authorize [D] to have sexual relations with [V] if [D] proceeds before [V] has indicated her agreement. It is possible, I suppose, that [V's] mental state would be sufficient to cancel [V's] right to complain if [D] proceeds (although I think it does not), but it is hard to see how it could affect what [D] is entitled to do.⁴⁰

Wertheimer's argument is that in order for consent to have any actual effect on what D is

39 See §1.B supra.

40 Wertheimer (n3) 568. See also Wertheimer (n2) 119, 146.

permitted to do, D must know about it, or at least V must have made it possible for D to have known about it. To my mind, this argument stems from a flawed understanding of permission as a concept. Although a permission is forward-looking in that it renders actions acceptable *ex ante* rather than *ex post* forgiving them, it need not necessarily guide conduct. An *ex ante* permission that is relevant only to the evaluation of conduct is still a permission. The converse however, is not true – a permission that has no effect on the evaluation of conduct is not a permission at all.⁴¹ Thus when V makes it permissible for D to do something, her communication need not necessarily be with D. However, it must necessarily be with the person or body that judges whether D's actions were permissible. For instance, a company may change the limit of the amount for which its signatory may sign cheques without ever telling the signatory. Such a change need not necessarily alter the signatory's duties, and it need not guide the signatory as to how she should exercise her signing authority. Nevertheless, it would change the normative status of her signing a cheque for the company *at the time that she signs it*, rather than merely at the time that she is questioned for signing the cheque.⁴² In this example, the communication need only be between the company and the bank. The authorised signatory may be completely unaware of this communication, but it will still change the scope of her effective authority to sign cheques.

One might counter that since the state, through the criminal justice system, decides on the rightness of D's actions, the state is the arbiter of the scope of D's actual authority. If so, then although the communication need not be with D, it must be with the state; and perhaps this is all

41 Thus where the age of consent to sexual intercourse is 16, the purported consent of a 15-year-old (V) to sex is not consent at all, even if the person receiving the consent and acting upon it (D) had no way of knowing V's true age. If we accept that the absence of consent is an *actus reus* element of rape, then D may, depending on the applicable rules in a jurisdiction, have a *mens rea* based defence, but D will not be able to negate the absence-of-consent predicated *actus reus* element.

42 I assume here that the signing instructions are not amended during the period between the signing of the cheque, and its presentation for payment. But even if this were the case, the normative status of the signatory's action is determined by her authority at the time that signs the cheque, rather than when the cheque is presented for payment.

that Wertheimer is arguing for in insisting on some performative token of consent. Even if the state is not actually made aware of the consent when it is granted, the performative token may be treated as a communication sent to the state when it is disclosed in evidence. This objection, which stems from underlying scepticism about whether an unexpressed subjective choice can have consequences in the external world, is misconceived. The vast majority of instances in which one person gives consent and another acts within the ambit of that consent, never come to the attention of the criminal justice system. These include cases in which the consent is not evidenced by any performative token. Yet from V's perspective (and surely her perspective is of central importance), her consent is just as real in those cases as it is in cases that do reach the courts. There are several examples of a purely subjective exercise of a power (including the power to consent) altering the power-holder's legal relations with other persons, without the need for any other person's consent, knowledge or even potential knowledge. Hohfeld himself gives the example of a person exercising the power to abandon property. Doing so creates in other persons privileges and powers relating to the abandoned object.⁴³ Suppose for instance, that I forget my book in an airport lounge. I retain ownership of it if I have not realised that I have forgotten it, or if I intend to go back to retrieve it. Any other person picking up the book at this time violates a duty not to interfere with my property rights over the book. However, if I realise my carelessness after boarding is completed, and instead of insisting on deplaning, I decide (subjectively) to let the book go (even if I really liked it and continue to desire it), at that moment I abandon it, and a person picking the book up thereafter exercises a Hohfeldian privilege, and violates no duty. By a subjective exercise of power then, I change the rights and privileges of all other persons. By forming the requisite subjective state of

43 Hohfeld (n11) 51. Walter Wheelan Cook points out in his introduction to Hohfeld's essays (p.8) that the exercise of this power changes the legal relations of all persons in the world without their consent. Moreover, since the abandonment of property need not be proclaimed to the world at large, or indeed at all, these legal relations come to be changed without the persons affected even being aware. I treat abandonment of property or an interest as equivalent to indifference to its taking, and therefore, as consent to its taking.

mind,⁴⁴ the person picking up the book after I abandon it will acquire property rights over it and place all other persons under a correlative duty not to interfere with the book. Neither my subjective decision to abandon the book nor the subsequent finder's decision to appropriate the book after picking it up, need be evidenced by a declaration or performative token. Yet if I subjectively abandon the book before it is appropriated, my property rights over it are *never* violated, and when the subsequent finder forms the subjective intention to appropriate the book, she legitimately, and without actual or potential notice, creates duties in all other persons in respect of it.

I suggest that for consent, the communication, such as it is, is from V as the consenter, to herself as the primary arbiter of whether D subsequently acts within the limits of the authority given to her (D) while dealing with V's entitlements.⁴⁵ When evaluating the criminality of D's actions, the state merely takes note of the presence or absence of consent, and to the extent that the scope of the actual consent is disputed, it acts as a secondary arbiter of the scope of the actual consent granted. Principally though, the state need not be aware (or even potentially aware) of the consent in order for it to be legally valid. The fact that consent is a *communication* with the self emphasises that the grant of consent requires willed choice rather than experiential desire.

Westen approaches the question differently. He notes that the proponents of the view that consent is performative, chief among them being Feinberg,⁴⁶ believe that their formulation does two things better than a subjective formulation of consent:

- a. it protects D when she innocently acts within the scope of V's putative consent, where V's secret subjective state of mind is not one of consent; and

44 Characterised as the intention to appropriate the property by Walter Wheelan Cook in his introduction (p.8) to Hohfeld's essays on Fundamental Legal Conceptions.

45 This ties in with the view that autonomy is self-legislation (Hurd (n2) 124). Since consent is an exercise of a person's autonomy over her own interests, and autonomy is self-legislation, the self must be the primary arbiter of whether another person acts within the scope of one's own actual (rather than perceived) consent.

46 Joel Feinberg, *The Moral Limits of Criminal Law – Vol.3 Harm to Self* (Oxford University Press, 1986), 173-176.

b. it captures the morally culpable D when she acts within the scope of V's secret subjective consent but does so despite the absence of any expression of consent by V (or indeed despite her expressed non-consent).

These concerns are also shared by Wertheimer, who argues that, '(f)rom a purely moral perspective, and without regard to any legal consequences, ...[D] acts wrongly if [V] has not tokened consent, whatever her state of mind. For similar reasons, [D] does nothing wrong if [V] indicates consent and if [D] has no reason to believe that [V] does so because she fears that [D] would harm her if she does not.⁴⁷

Westen argues that the first concern can satisfactorily be addressed, and is addressed in some jurisdictions that adopt a subjective formulation of consent, by requiring a subjective mens rea element relating to the actus reus circumstance of the victim's non-consent.⁴⁸ As to the second concern, he points out that while predicating offences of non-consent upon the putative complainant's subjective attitude may not capture some culpable offenders, it ensures that the criminal law only intervenes where there is actual harm.⁴⁹ Whereas D's culpability, as a function of her moral reasoning, is the same in cases of subjective non-consent and secret subjective consent, this does not mean that the moral (or legal) assessment of the occurrence (as opposed to D's choices) should also be identical. As Husak points out, what happens to V when V subjectively consents is not as harmful (if at all it is harmful) as what happens to her when she does not consent.⁵⁰ Hence it is perfectly coherent to say that D did something which was not morally bad, but which showed her in a morally poor light.

Westen also notes that even jurisdictions that prefer a subjective formulation of consent can

47 Wertheimer (n3) 568.

48 Westen (n2) 141-145, 160.

49 *ibid* 145-152.

50 Douglas N. Husak, 'The Complete Guide to Consent to Sex: Alan Wertheimer's "Consent to Sexual Relations"', *Law and Philosophy* 25(2) (2006) 267, 275-6.

punish D for a lesser crime to reflect D's culpability in inflicting what he calls dignitary harm – the indignity that D inflicts upon V by manifesting that she has so little regard for V that she is ready to abridge V's legitimate interests in order to aggrandise herself – and that in fact, some jurisdictions punish attempts (including presumably, those rendered impossible by secret subjective consent) as harshly as they do a completed offence.⁵¹ He therefore concludes that it is legitimate for a jurisdiction to refer to either a performative or a subjective formulation of consent, and says that since there is little difference in the liability outcomes, the choice between the two is largely a matter of policy. However, as Ferzan points out when reviewing his work, despite Westen's overt refusal to take a stance on the issue, his arguments tend to support a subjective formulation of consent insofar as he seems to accept that the primary harm of rape is a function of the putative victim's *subjective* mental state.⁵² Moreover, for Ferzan the distinction between cases in which consent is subjectively absent and those in which it is secretly present is important because, in her view, it has implications for the permissibility of third party interventions.⁵³ I take no stand on whether Ferzan is correct on either of these points, but it seems to me that since Westen does recognise the moral relevance of harm to criminal liability, and accepts that a 'dignitary harm' is either not an 'actual harm' or a lesser harm, it should follow for him that the moral liability of a person who inflicts only 'dignitary harm' ought to be less than that of a person who inflicts the harm involved in a non-consensual offence. A criminal legal system that referred to performative consent would find it difficult to accommodate such a refinement. On the other hand, a system that referred to a subjective formulation of consent would be able to take account of the defendant's culpability. It could exonerate a non-culpable defendant despite the presence of harm, and although it would not necessarily mete out equal punishment to equally culpable defendants, that would not be a matter of concern, because as Westen concedes, there are factors other than culpability that are morally

51 Westen (n2) 149, 161.

52 Ferzan (n14) 215-216.

53 *ibid* 216.

relevant to criminal liability.

Westen also enumerates three other cases in which V may not form the mental state to subjectively consent, but may still be treated as having consented.⁵⁴ These are:

- a. *Constructive consent*: Based on V's acquiescence to one activity or institution, the law treats her as having consented to an injury suffered in the course of her participation in the activity or institution to which she consented. Thus for example, when V consents to play a contact sport, she is taken to consent to injuries incurred in the course of the sport, even if the injury is caused by a foul – something strictly outside the scope of permissible play;
- b. *Informed consent*: Based on V's informed acceptance of a risk or set of risks, e.g. the risk of complications in a surgery, or the risk of being hit in the course of a fistfight, the law treats V as having consented to whatever happens when the risk(s) fructify; and
- c. *Hypothetical consent*: Based on a finding that V would have acquiesced to something if she were competent at the time, the law treats V as if she did consent.⁵⁵

In both constructive and informed consent we see that V non-fictionally consents to one thing, which then protects D against liability for causing harms to V that were foreseeably within the scope of the thing to which V consented. While there is no getting around the fact that in these cases the law may *treat* V as having consented to injuries that she did not actually consider, I would tentatively suggest that these cases are probably best described in terms of moral luck. V consensually participates in/acquiesces to a gateway activity – a soccer or boxing match, or a surgical procedure – which carries with it the implicit or explicit risk, but not certainty, of the

54 In fact, Westen's analysis of these cases goes beyond suggesting that in them V's consent is morally transformative despite V not forming a subjective mental state of consent. For him, factual consent may be either subjective or expressive, but in these cases, consent is treated as being present despite the absence of either form of factual consent. Nevertheless, for the purpose of this paper, I will focus on the fact that according to Westen, in these cases consent that is not predicated on a subjective mental state may still be morally transformative.

55 Westen (n2) 271.

crossing of a boundary set by one or more of V's entitlements. Whether or not these risks materialise is a matter of moral luck, and by consenting to the gateway activity V is taken to accept without demur the luck intrinsic to it. If V does suffer some harm, then the criminal law's focus is on evaluating whether or not the harm was a matter of moral luck intrinsic to the gateway activity.⁵⁶ When playing a sport, one accepts the risk of injuries attendant to the sport, including injuries caused by foreseeable actions not strictly permissible under the rules, i.e. fouls, provided that they were committed in the course of *play*, as opposed to with an intention to deliberately injure V by going outside the rules of the sport.⁵⁷ Similarly, when consenting to a medical procedure, one accepts the risk of side effects, and the possible failure of the medical procedure, since these are intrinsic to the moral luck involved with the medical procedure. However, one does not accept risks external to the procedure, such as risks stemming from medical negligence.⁵⁸

None of this is incompatible with Westen's characterisation of situations of constructive and informed consent as involving fictional consent to outcomes to which subjective consent was not given. However, the statement made in these cases that V's 'consented' to the harm that materialised is actually elliptical for the proposition that V's consent to the gateway risky activity or institution means that she assumes the risk of the occurrence of events intrinsic to the moral luck involved in the gateway activity or institution. Furthermore, the consent to the gateway institution, at least, is not fictional consent. The moral work of extending the morally transformative consequences of the factual consent to the gateway activity to the harms that do materialise is done by moral luck, and

56 For a useful summary of this argument, advanced in the context of liability as a principal, see Andrew P. Simester, et.al., Simester and Sullivan's *Criminal Law: Theory and Doctrine* (Hart Publishing, 2010), 198-201. This analysis is easily transposed to explain constructive and informed consent.

57 See in this context *R v. Barnes* [2004] EWCA Crim 3246, where D's late rugby tackle injured V, but the injury was ruled to have been within the scope of V's consent since it was caused by an action within the 'zone of toleration' for rugby, and was therefore foreseeable.

58 I borrow the concepts of intrinsic and extrinsic luck from Bernard Williams, *Moral Luck* (Cambridge University Press, 1981), 25-26.

not by consent. Consent to the gateway activity or institution is just a precondition for moral luck to apply, and nothing in Westen's analysis of cases of constructive or informed consent shows that the gateway consent can be granted without forming one of the subjective mental states of consent.

As for the instances of what Westen describes as hypothetical consent, I doubt they should be considered instances of consent (whether real or created by legal fiction) at all. Where *ex ante* permission is given by a guardian or the state to the crossing of an incompetent person's moral boundaries, there is no pretence that the incompetent person is consenting. And in cases where it is argued after the boundary crossing, that the victim would have consented had she had the chance to do so, I argue that these instances should be analysed in the manner described in §2 below.

I therefore tend to agree with Hurd⁵⁹, Alexander⁶⁰ and Husak⁶¹ that subjective consent, even if unexpressed, can be morally transformative. Of course, in specific contexts like a medical procedure or the execution of a cheque, the law may demand context-specific performative signifiers of consent, but in philosophical terms, these are not *sine qua non* for consent. Furthermore, the law may also posit more general rules requiring some externalisation of the subjective consenting state of mind for evidentiary reasons. Such rules, while not necessarily incompatible with the philosophical bases of consent,⁶² are not a necessary condition for consent imported by these philosophical bases.

E. *Consent must be prior or contemporaneous*

Westen suggests that consent can be given retrospectively and still have the same effect as contemporaneous consent. He refers to cases in which D and V are lovers, and D initiates sexual

59 Hurd (n2) 124-126, 137.

60 Alexander (n2) 165.

61 Husak (n50) 275-276.

62 In this, I find myself aligned with Hurd, who while refusing to rule out the possibility that the law may require consent to have a performative element for prudential reasons, maintains the moral irrelevance of such a performative element. Hurd (n2) 137-8.

intercourse while V is asleep. V awakens during the act, and 'retrospectively consents' to D's actions. Westen cites decisions based on facts like these to say that D (in his opinion, rightly) has a defence of consent to a charge of rape in subsequent proceedings.⁶³ Referring to these illustrations, Witmer-Rich argues that these cases may be more appropriately analysed as instances of contemporaneous consent, and that the courts considering the cases cited by Westen did not address their analysis of the facts to the question of the validity of retrospective 'consent'.⁶⁴ But even if the facts were slightly different so that the question was unambiguously one of retrospective 'consent', what should the result be? Imagine that V has not previously decided that it would be alright for D to have sex with her while she was asleep. D does so, and moreover, he intends for V to remain asleep for the entire duration of the act. Upon awakening and being told by D of the events of the previous night, V retrospectively 'consents' to the act. One might intuitively tend to doubt that D would be convicted of rape on these facts, but this is not because V's 'consent' retrospectively makes D's act legal. A conviction is unlikely simply because there would be no one to initiate proceedings, and if some busybody did initiate them, the circumstances would probably call for non-prosecution, or mitigation in view of the victim's lack of interest in prosecuting. Strictly though, there seems no reason to deny that D has committed a crime, and that a conviction is possible. If V had refused to retrospectively 'consent' to D's actions, then undoubtedly D would have committed an offence. It seems strange to suppose that V's subsequent act of granting or refusing retrospective 'consent' could change the nature and criminality of D's actions *ab initio*.

Perhaps Westen would counter that it is an error to believe that the criminality or otherwise of D's action is fixed at the time of the action. However, this seems to fly in the face of general principles of criminal law theory. This view would require Westen to assert that D action remains innominate at the time of its commission, and that it subsequently acquires its criminal or non-criminal character, depending on V's choice about whether or not to retrospectively consent to it.

⁶³ Westen (n2) 254.

⁶⁴ Witmer-Rich (n2) 393.

But subject to limited exceptions that are not obviously applicable here,⁶⁵ the criminal law generally concerns itself with the facts that exist or are perceived to exist at the time of D's act, and not with facts that arise or are perceived to arise subsequently. Any proposed additional deviation from that principle would have to be supported by convincing normative arguments, which Westen does not offer. Moreover, our hypothetical defence of Westen's conclusion would also raise difficult practical questions. Can a complaint be made in respect of D's seemingly criminal action until it is confirmed that V has decided not to retrospectively 'consent' to it? If the nature of D's action is innominate until a decision on whether or not to retrospectively 'consent' to it is taken, then answer would appear to be 'No'. But for how long must the system wait for V to make her decision? Answering these questions would require a theorist not only to draw a temporal line, but also to defend it on a principled basis. Since Westen does not attempt such an exercise, I take it that he does not base his assertion on the position that an action can be made criminal or non-criminal by an autonomous human being's subsequent independent decision to retrospectively grant or refuse 'consent' to it.

If, building upon the hypothetical facts described above, after initially retrospectively 'consenting' to D's act, V gives the matter some more thought over her morning cup of coffee and finding herself becoming increasingly outraged at D's presumptuousness, files a criminal complaint against D, then surely D does not have an unqualified right to rely on V's initial retrospective 'consent' as a defence in criminal proceedings. I think this result is not just defensible, it is desirable – D shows no respect for the autonomy of V, and so in principle, is morally and legally guilty. However, if the state or D were to rely upon V's retrospective 'consent' to D's act and alter their respective positions (for the state, by deciding not to prosecute D or by mitigating D's punishment; and for D, by arranging his subsequent affairs on the basis that V has no complaint), then V might be restrained from changing her mind. This flows from straightforward principles of estoppel.

65 Like the continuing act doctrine and the complex single transaction doctrine. See in this connection, Simester et.al.

(n56) 74; 168-170.

2. Ratification

This leads us neatly into the question of what effect, if any, V's anticipated or actual subsequent 'consent' – which I will characterise as ratification – should have on D's criminal liability. I have argued that ratification, whether anticipated or actual, is not an instance of consent. On that basis, the option of treating anticipated ratification as a negation of the offence's mens rea, and actual ratification as a negation of the offence's actus reus is unavailable. In my view, the moral power (to the extent that there is any) of anticipated or actual ratification can be explained by reference not to its effect on the elements of the prima facie offence, but rather, to its effect on the availability of supervening defences to the completed offence. I briefly expand on this proposition in the sections that follow.

A. *Acts done in expectation of ratification*

There may arise situations in which D crosses V's moral-legal boundaries in the expectation that V will thank her later for the boundary crossing. Here, D acts without actual consent, and makes no claim to believing that actual consent existed. Her claim is that she acted because she expected V to ratify her actions. Consider for instance, a situation in which D pushes a daydreaming V out of the way of oncoming traffic. V having been unaware of the threat (and possibly also of D), and having never given any thought to consenting to being pushed to safety, cannot be said to have actually consented to D's act. Yet, if once the dust settles, she thanks D profusely, she ratifies D's act. Should a particularly fastidious prosecutor lay charges against D, D's defence would not be that the actus reus of battery did not occur. Nor would she say that she truly believed that V had consented, and therefore lacked the intention to act without consent. D's defence would be that she acted in a situation of emergency, relying on the best information available to her as to V's attitude towards her interests, and so was entitled to a supervening rationale-based defence.⁶⁶ The same claim could

⁶⁶ In this connection, see generally Mark Dsouza, *Rationale-Based Defences in Criminal Law* (Hart, 2017). I argue that both justifications and the subset of exculpatory excuses that do not deny responsible moral agency, are rationale-

be made with equal success even if, unknown to D, V was attempting to self-harm, and therefore resented D's boundary crossing.

B. *Unexpected ratification*

An interesting variation on the ratification question is the case in which D acts without V's consent, and without expecting V's ratification, and yet V does ratify D's actions. Here too, the actus reus and the mens rea of the offence are easily established. On some accounts of the justification defence, particularly strictly objectivist accounts similar to Paul Robinson's,⁶⁷ it might be argued that D is entitled to claim a supervening defence here too, since there was no net social harm. But this is a fringe view of supervening defences, and it seems to me that philosophically D would not be entitled to any defence in such a situation, because she acts for reasons that do not merit exculpation. Nevertheless, for reasons not explicable within the philosophical paradigm adopted, it is possible that she may benefit from the exercise of prosecutorial or judicial discretion.

3. *Conclusion*

If the ability to validly consent is a power, then the necessary conditions for its exercise must include all the necessary conditions for the exercise of a power. Using this idea, I have tried to enumerate some context-independent minimum conditions necessary for the grant of consent. Thus consent may be granted by choosing to grant it; there is nothing to require that in all cases this choice must be to invite a boundary crossing rather than merely to permit one; and there is nothing to require that the choice must invariably be accompanied by a performative token. I accept that in

based – they depend for their exculpatory force on the agent's reasons for acting. The claim made by D when she violates one of V's boundaries in the expectation that V will ratify her boundary crossing is of the nature of a claim to a rationale-based defence, which may be either a justification or an excuse. However, it is unnecessary for, and beyond the scope of, this paper to venture an opinion as to which.

⁶⁷ Paul H. Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability', *UCLA Law Review*, 23 (1975), 266. See also Paul H. Robinson, 'The Bomb Thief and the Theory of Justification Defenses', *Criminal Law Forum*, 8 (1997), 387.

certain contexts, more may be required, but these context-specific requirements are not intrinsic to the notion of consent.

Furthermore, I refer to general principles of criminal law to argue that consent, as we understand the concept, does not include ratification. The power to consent cannot be exercised so as to have retrospective effect. I argue that when D crosses V's boundaries in anticipation of V's ratification, she does not claim to be acting without the mens rea necessary to constitute the prima facie offence, but instead claims to be entitled to a rationale-based defence. When D crosses V's boundaries without V's consent and with no anticipation of her ratification, she commits a prima facie offence, and on a mainstream subjectivist view of supervening defences, she has no claim to a supervening defence. If V unexpectedly ratifies D's act, the best that D can hope for is that prosecutorial or sentencing discretion may operate to her benefit. She does not acquire any moral claim to a defence based on V's ratification.