

Inferring Consent Without Communication

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Some claim that consent requires common knowledge. For a doctor to obtain consent, a doctor must know that her patient has given her permission to perform surgery, and her patient must know the doctor knows that she has given this permission. Some claim that such common knowledge requires communication, and so consent requires communication: the patient must tell the doctor he consents for both to know consent took place, and for both to know the other knows consent took place. I first defend the claim that consent requires common knowledge, responding to recent objections. I then argue that, though consent requires common knowledge, it does not always require communication. It does not require communication when the agent obtaining consent can infer common knowledge based on non-behavioral facts about the world.

Before a doctor performs surgery, she must ask her patient for consent. Before someone borrows a stranger's pen, he must ask the stranger for consent. Before an individual has sex with their partner, they must ask their partner for consent. For the patient, stranger, and partner to validly consent, they must hold the right mental state: they must decide that another is permitted to act a particular way, or intend that another act a particular way, or at least intend to forego any complaint if they act a particular way.¹ We often only know another's mental state if they have communicated this mental state: usually a patient must sign a consent form; the stranger with the pen must say 'fine'; and a partner must express agreement. Communication is therefore usually necessary for valid consent.

Some have argued not that communication is usually necessary for valid consent, but that it is always necessary. To validly consent to an offer, an agent must utter that they consent, such as saying 'yes,' or behave in a way that communicates consent, such as nodding.² Tom Dougherty and Richard Healey present the most recent and compelling arguments in support of this claim. They claim that valid consent requires common knowledge: for a doctor to obtain valid consent, a doctor must know that her patient has consented, and her patient must know that the doctor knows that she has

¹ These are just some of the potential mental states necessary for consent. See Larry Alexander, 'The Moral Magic of Consent,' *Legal Theory* 2(1996) 166-174 at 166; Heidi Hurd, 'The Moral Magic of Consent,' *Legal Theory* 2(1996): 121-46 at 131; Victor Tadros, *Wrongs and Crimes*, Oxford: Oxford University Press 2017 at 205 and 206; Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct*, Aldershot: Ashgate Publishing 2004, Ch. 1.

² Govert Den Hartogh, 'Can Consent be Presumed?' *Journal of Applied Philosophy* 28(3)(2011):295-307; Lois Pineau, 'Date Rape: A feminist analysis,' *Law and Philosophy* 8(2)(1989):217-243 at 233-237; Emily Sherwin, 'Infelicitous Sex,' *Legal Theory* 2(1996)209-231 at 217; A John Simmons, *Moral Principles and Political Obligations*, Princeton: Princeton University Press 1990 at 52; Alan Wertheimer, *Consent to Sexual Relations*, Cambridge: Cambridge University Press 2003 at 148.

consented. Such common knowledge requires communication from the patient to the doctor.³

In the following Section 1 I briefly summarize a defense of the claim that consent requires common knowledge, or what I call the Common Knowledge Claim. In Section 2 I defend the claim against recent objections. In Section 3 I demonstrate that, though consent requires common knowledge, this does not imply that consent requires communication. Sometimes we can use non-behavioral facts about the world to infer another's mental state, and they can infer our mental state, establishing common knowledge for consent without communication. I call this the Inference Claim.⁴ In Section 4 I defend this claim against objections.

Before I begin, some brief clarifications are necessary. From now on I shall use the word 'consent' to refer to valid consent, where one's consent has successfully waived one's own moral right and negated another's correlative moral duty. A patient consenting to surgery means she has successfully waived her right to not have the surgeon insert a scalpel into her body, and negated the surgeon's correlative duty towards her to avoid such an insertion.⁵ I will assume that for X to consent she must at least hold the mental state of *deciding to waive her right that Y not engage in the object*

³ This is a simplification of their arguments. Healey argues that consent requires the possibility of common knowledge, and such a possibility requires communication. Dougherty argues that, for high-stake interactions, common knowledge is necessary, but that mere common belief may be sufficient for low-stake interactions. Nothing in my argument hinges on these distinctions. See Tom Dougherty, 'Yes Means Yes: Consent as communication,' *Philosophy and Public Affairs* 43(3)(2015):224-253 at 248 and Richard Healey, 'The Ontology of Consent: A reply to Alexander,' *Analytic Philosophy* 56(4)(2015):354-363 at 358-260.

⁴ Inference consent may be contrary to how we use the word 'consent' in everyday language, but I argue that it can still serve the same function as communicated consent.

⁵ The duty the agent has negated must be a consent-sensitive duty, in that the duty is the sort that can be negated with consent. Not all duties are of this variety. For example, a surgeon might have a duty to not engage in very risky unnecessary surgery, and retains this duty even if a patient consents to such surgery. An alternative way of formulating this is: an agent consents to ϕ when she decides to give permission that the agent obtaining consent engage in ϕ . Nothing in this article hinges on this qualification. See Victor Tadros, *Wrongs and Crimes*, Oxford: Oxford University Press 2017 at 204-5.

*of consent.*⁶ In other words, when claiming that X and Y must share common knowledge about X's consenting to ϕ , this means that X has decided to waive her right that Y not ϕ , Y knows that X has decided this, X knows that Y knows she has decided this, and so forth. This assumption is for simplicity. We might suppose some other mental state is necessary for X's consent, such as X intending to not complain against Y for performing ϕ , in which case the Common Knowledge Claim is that X and Y must share common knowledge about X intending to not complain against Y performing ϕ .

Finally: the central goal of this article is not to persuade all readers to adopt the Common Knowledge Claim. While I shall defend this claim against recent objections, I am equally interested in demonstrating that the Common Knowledge Claim does not indicate that consent always requires communication.

1. The Common Knowledge Claim

To see why consent requires common knowledge, it helps to compare consent to other normative powers. Consider promises. Promises serve certain functions, including the promotion of assurance: if Jane promises to let you into her house in a week, you have an assurance that you will have a place to stay. This function is best met when promises alter the relationships of accountability. If Jane promises to let you stay at her house, you know she will be accountable to you if she breaks her promise, in the sense that it will be clear to you that she had a promise-based duty towards you which she violated, and you will be able to blame her for violating this promise-based duty. This gives you some assurance that you will have a place to stay. After all, if Jane breaks her promise, you will have a certain complaint, and she will recognize that she owes you an apology or compensation. For a promise to alter a relationship of accountability in the way described, you and Jane must both be aware of the promise. If you are not aware of her promise, then she will not be accountable to you: she will not be in position where you can blame her for committing a wrong and she recognizes

⁶ Tadros claims this is a necessary condition. Alexander claims a similar necessary condition: one holds the right mental state for consenting to an act when one intends to refrain from objecting to the act. See Alexander 1996 *ibid* at 166 and Tadros *ibid* 2017 at 205-6.

that she committed a wrong. For example, if she merely intends to let you stay at her house next month, but never tells you this, you will have no complaint if she does not let you enter, and so no assurance you will have a place to stay. We might suppose that only communication – or some public act to indicate one’s intentions – can ensure this common knowledge necessary for assurance. Jane must tell you she promises to let you stay at her house and you must respond that you accept her promise for the promise to alter the relationship of accountability.⁷

The same conclusion can be reached with consent. Like promises, consent is a normative power with certain functions. One function is that it enables alterations of rights and duties, giving control to the consenter. If Jane can consent to you entering her house, she is able to forego her property rights so you can enter, giving her control over her life. This control can be best achieved if her consent means you are no longer accountable for violating her property rights. This effect is best achieved if consent requires that you both have mutual knowledge of her consent, meaning you both have true beliefs about her consent due to strong evidence. This is far easier with communication, because communication serves as strong evidence of her consent.⁸

To see the force of this argument, imagine we lived in a world where Jane’s mental state was enough to waive her right against you entering her house, giving you permission to enter her house. Imagine that in such a world you entered her house without caring about whether she decided you were permitted to enter, and she had not in fact decided you were permitted to enter. It would be difficult to hold you accountable for this violation of her property rights. While she could blame you for the wrong, it would be difficult to make you realize that you committed a wrong. This is because you could never be certain she lacked the right mental state for consent. Contrast this with a world where consent required common knowledge, and common knowledge required communication. In such a world, Jane could tell you, ‘We both know I never communicated that you could enter my house,’ making you aware that

⁷ Dougherty 2015 *ibid* at 233-241.

⁸ Dougherty 2015 *ibid* at 244.

you committed the wrong of failing to obtain consent.⁹ This will give you good reason to ensure that you and Jane have common knowledge before entering her house, avoiding scenarios where you enter without her having decided you could. This will enhance Jane's control, fulfilling a central function of consent.¹⁰

The above reasoning is instrumental in nature: a rule which requires common knowledge encourages us to be certain that others really did decide to negate our duties, giving others more control over these duties. There is a second reason to require common knowledge which is non-instrumental. According to some, one central function of consent is to respect the dignity of the consenter.¹¹ More specifically, consent allows us to demonstrate concern for others' interests in controlling central spheres of their lives. To demonstrate such concern, it is often necessary to demonstrate that we are only willing to pursue an intervention if we are certain an agent has decided to negate our duty to not intervene.¹² For example, a surgeon demonstrates concern for her patient's interest in controlling his life if she asks him for consent, and both she and he know she will only perform the surgery when he replies that he consents and is aware that she has acknowledged his consent. Were she to perform the surgery without knowing whether he consented, she would

⁹ Dougherty 2015 *ibid* at 244-6.

¹⁰ It is worth pointing out that, to accept the claim that communication enhances control, we needn't presume that requiring common knowledge always enhances control. Sometimes it will not. Imagine that someone impersonates Jane, invites you into her home, and you think that Jane has decided you were permitted to enter and you think that you have common knowledge about this fact. In reality there is no such common knowledge, but Jane could not hold you accountable for the wrong of entering her home. In other words, she will have failed to negate your duty to not enter but she cannot hold you accountable for this fact. This is because she cannot blame you for a wrong which you are in no way responsible for, and you will not be in a position where you recognize yourself as having committed a blameworthy wrong. You will therefore not be incentivized to ensure you know her mental state the next time someone impersonates her, assuming the impersonation is again believable. It is nonetheless the case that requiring common knowledge increases the set of cases where consent alters relationships of accountability: there are more cases where it is clear there was no common knowledge via communication than cases where we can establish that the consenter lacked the right private mental decision.

¹¹ Kimberly Kessler Ferzan and Peter Westen, 'How to Think (Like a Lawyer) about Rape,' *Criminal Law and Philosophy* (Forthcoming) at 46.

¹² Healey 2015 *ibid* at 358-260.

lack respect for his interest in controlling his life.¹³ Even if she was aware he consented, if he thinks she is not aware he has consented, she would fail to demonstrate to the patient that she respects his interest in controlling his body. She can only signify such respect if she and the patient are both aware of each other's awareness of his consent,¹⁴ only possible with communication.

Both the instrumental and intrinsic argument can be summarized as follows:

1. Central functions of consent are to provide consenters control over their lives, and demonstrate respect for such control.
2. These functions are achieved through altering relationships of accountability, which are constituted by people's rights and duties.
3. For consent to alter these relationships of accountability, agents accepting and giving consent must have *common knowledge* concerning which duties are eliminated.
4. Therefore, consent requires *common knowledge* concerning which duties are eliminated.
5. This common knowledge requires *communication*, or at least some type of public behavior that signifies which rights are created or eliminated.¹⁵

2. Objections to the Common Knowledge Claim

¹³ This argument is similar to that of Dougherty, but with a slight twist. Dougherty states that, if consent requires common knowledge, this can assure both parties that there is respect for consent (Dougherty *ibid* at 246-247). I avoided this formulation of the argument, because it seems to beg the question of what consent is, which is precisely what is up for debate. I instead appealed to the notion of dignity which, in addition to being evoked in case law, is widely evoked in discussions of the ethics surrounding consent. See Ferzan and Westen at 46.

¹⁴ Healey ultimately concludes that common knowledge is not necessary for consent, because common knowledge is not possible, given that we cannot be certain of the mental states of others (Healey 2015 *ibid* at 359). However, we can understand 'knowledge' as being fairly certain of another's mental state based on strong evidence: if we are fairly certain that another holds a given mental state, and we are fairly certain they are fairly certain about our mental state, then we have common knowledge.

¹⁵ Dougherty 2015 *ibid* at 250-251.

The fourth step of the above argument is what I call the Common Knowledge Claim, and it has faced a number of objections.

2.1 The Permission Objection

Alexander, Hurd, and Westen accept that a role of consent is to give control to the consentor, and that this is best achieved by altering relationships of accountability. However, they reject the third premise that relationships of accountability can only be altered through common knowledge. They argue that consent creates permissions, and permissions alter relationships of accountability without common knowledge. To demonstrate this point, they raise a case similar to the following:

Party: Fatima has a fight with Gatwetch, but wants to make amends, so tells Julie to invite Gatwetch to her party. Julie doesn't like Gatwetch, so tells him he isn't invited. He angrily 'crashes' Fatima's party anyhow. Fatima soon find out that he thinks he crashed her party and is very upset with him.¹⁶

According to Alexander et al, it seems Gatwetch did no wrong towards Fatima, precisely because Fatima gave him permission to arrive. She may be upset that he came to her party thinking he wasn't invited, and he is perhaps blameworthy for intending to crash her party, but she consented to his arriving nonetheless. This is because her invitation altered the relationship of accountability: he was permitted to arrive at her party, and she no longer had a complaint against him because she had granted this permission.

Here is another way of expressing this point. Imagine a world where consent merely required a given mental state without common knowledge of this mental state. If Fatima had this mental state, she could tell Gatwetch, 'Though we both know you

¹⁶ Larry Alexander, Heidi Hurd, and Peter Westen, 'Consent Does not Require Communication: A Reply to Dougherty,' *Law and Philosophy* 6(35)(2016):655-660 at 656-657. For a similar claim and example, see Kimberly Kessler Ferzan, 'Consent, Culpability and the Law of Rape,' *Ohio State Journal of Criminal Law* 13(2)(2016):397-439 at 406-408.

thought I did not consent, by chance I did because I had the right mental state.’ She consented and so there was nothing to hold him accountable for. In contrast, if she lacked this right mental state, then she could later tell him, ‘I never consented because I lacked the right mental state, and we both know you did not confirm my mental state.’ She would be holding him accountable for lack of consent, and so it seems her mental state really would alter their relationship of accountability.¹⁷

There are two responses to this argument. First, the instrumental version of the Common Knowledge Claim remains intact. This is because, in general, it is very difficult for individuals who lack the right mental state for consent to prove to others what their mental state is, and so difficult in practice to hold others accountable when others are wrong about what their mental state is. In a world where a patient’s consent only required a given mental state, and the patient lacked even this mental state, the surgeon could always claim that she thought the patient did in fact have this right mental state for consent during the surgery. In contrast, such a claim would be difficult to make if consent required communication to establish common knowledge. The surgeon could not easily claim that she thought the patient did communicate his thoughts when he did not. If he failed to communicate consent, then it is far clearer to both her and the patient.

Moreover, there remains the intrinsic claim regarding respect. If Gatwetch thinks he does not have an invitation to come to Fatima’s party, he arguably has a duty to not arrive. This is because, if he arrives whilst thinking he is not invited, then he fails to demonstrate respect for Fatima’s interests in controlling her life. He is essentially signifying to her, ‘I don’t care whether I am invited or not; I’ll show up regardless of what you have decided.’ If he has a duty to not arrive until he is aware of his invitation,

¹⁷ This is similar to a claim, made by Tadros, that if X intends to communicate with Y that Y has permission, but has not actually succeeded in communicating, then X can hold Y accountable for not confirming whether X had the right intention (Tadros 2016 *ibid* at 208-209). Presumably, however, this is also applicable in cases where X does not even intend to communicate. In a world where intention to communicate was not necessary, then if X lacked the right mental state for consent, then X could tell Y that he never confirmed what her mental state was, and so could hold Y accountable.

then Fatima's mental state is insufficient for negating his duty to not arrive. If consent entails the negating of a duty, he fails to obtain her consent.

2.2 The Control Objection

Some might agree that Fatima did not consent to Gatwetch showing up at her party, but still reject the Common Knowledge Claim. The reason she did not consent was not because she and Gatwetch lacked common knowledge about her mental state, but because she lacked the right mental state for consent. When she told her friend Julie that Gatwetch was invited, she did not decide he could come under any condition; she decided he could come on the condition he was aware of his invitation. That is the best explanation for why Fatima was not upset when he arrived whilst thinking he was not invited. In contrast, she would not feel upset if she had told Julie, 'I have decided to invite Gatwetch to crash my party – I do not care whether he knows he is invited or not.' In making this statement, she would be thinking, 'I have decided to waive my right against Gatwetch arriving at my party even if he is not aware that he is invited.' It is important that she be able to waive her rights in this way, because it is important that she have control over the duties she is owed. She would lack control if the only way she could consent was by ensuring common knowledge about her mental state, because she would be forced to ensure such common knowledge every time.¹⁸

¹⁸ In an earlier article from Alexander, this general objection is expressed in a similar example. In his example, Sally sees Sam about to cross her property, but Sam is looking around warily to see whether his "trespass" will be observed. Sally has no objection to Sam crossing the property, so she shouts out "It's okay." She then realizes he's too far away to hear her. While Alexander does not stipulate whether Sally cares about whether Sam has heard her, it is easy to imagine that she does not. Like Fatima in the Gatwetch example, she would be expressing the following: 'I generally have a right that others demonstrate respect for my rights, and so a right that Sam not cross my lawn unless he is aware I give him permission, but I waive this right, as well.' Victor Tadros and Kimberly Kessler Ferzan similarly argue that the function of consent is to give the consenter control over the duties she is owed. Fatima consenting to Gatwetch arriving at her party is valuable because she has control over whether Gatwetch has a duty to refrain from arriving. If this is the function of consent, then we would not want to claim consent requires communication. See Larry Alexander, 'The Ontology of Consent,' *Analytic Philosophy* 55(1)(2014):102-113 at 108; Ferzan 2016 *ibid* at 405-406 and Tadros 2016 *ibid* at 207.

Here is another way of understanding this objection: the intrinsic argument in favor of common knowledge rests on the premise that there is value in demonstrating respect for others' interests in controlling their lives. Some might not care about this value, and only care about their ability to negate the duties others owe them. Fatima can better control what duties Gatwetch owes her if she can negate his duties with a mere mental decision alone, and so this mental decision is sufficient for consent. Moreover, if the instrumental argument is intended to demonstrate that common knowledge enhances control, it fails to do so, because individuals will be unable to waive others' duties with a mere mental state alone. If they could waive others' duties in this way, they would have more control, rather than less.

In a more recent article, Dougherty has responded to this Control Objection by claiming that in practice individuals have control over the duties others owe them even if common knowledge is necessary, because it is usually easy to secure common knowledge. It is just a matter of communicating to others one's consent.¹⁹ This response fails, however, when the costs of communication are very high; perhaps Fatima does not want to invite Gatwetch directly, because she is giving him the silent treatment. If it is very costly for her to invite him, her control may be diminished if she must invite him to give him permission, rather than holding a private mental state alone.

When the costs of ensuring common knowledge are high, we might still support the Common Knowledge Claim by slightly modifying the intrinsic argument. A modified version begins with the premise that there is an inalienable right that others demonstrate respect for our interests in controlling our lives, even if we do not care about this right. Such a right might be inalienable due to third-parties: third parties might have an interest in living in a society in which demonstrations of respect are widespread. There may also be an inalienable right to the dignity all possess in virtue

¹⁹ Tom Dougherty, 'On Wrongs and Crimes: Does consent require only an attempt to communicate?' *Criminal Law and Philosophy* (Forthcoming) at 12.

of their humanity,²⁰ and demonstrating respect for others' interests protects this dignity. If such a right is inalienable, and cannot be waived, individuals will often continue to possess duties to refrain from actions that would entail the violation of this right. The only way they can permissibly partake in these actions is if they successfully demonstrate respect for others' interests, only possible with common knowledge. Of course, this will limit others' control over their lives in one respect – they will be unable to give permission with a mental state alone – but limiting control may be justified nonetheless.

For example, Gatwetch normally has a duty to refrain from arriving at Fatima's party both to give her control over her rights, and to demonstrate respect for her interests in having control over these rights. If Fatima privately waives her right against Gatwetch arriving she has control over her rights, but Gatwetch still hasn't demonstrated respect for her control, because he thinks he is crashing her party. He therefore maintains a duty to not arrive even if she privately decided he could. Her decision was therefore not enough to negate his duty to not arrive. If consenting means she has negated his duty to not arrive, she has not successfully consented.

Here is another way of expressing this response, with another example.

As noted in the introduction, when I write that X consents to Y ϕ -ing, I mean that X has waived her rights against Y ϕ -ing, and negated Y's correlative duty towards X to refrain from ϕ -ing. A duty to not ϕ is grounded in two general duties: the duty to give X control over an important sphere of her life, and the separate general duty to demonstrate respect for X's interests in having control over an important sphere of her life. For X to consent to Y, X must therefore make it the case that Y can perform ϕ while both giving X control, and also demonstrating respect for X's interests in having

²⁰ It may be that all humans have an inherent property that warrants them a certain degree of respect which cannot be waived. See Laura Valentini, 'Dignity and Human Rights,' *Oxford Journal of Legal Studies* 37(4)(2017):862-885 at 881.

control. The latter is only possible with common knowledge, and so consent to ϕ requires common knowledge.

For example, when a surgeon has a duty to refrain from performing surgery before consent, this specific duty is grounded in two general duties: the duty to give patients control over their bodies, and the separate duty to demonstrate respect for patients' interests in having control over their bodies. If a patient gives consent to the surgeon, this means the surgeon no longer has a duty to refrain from performing surgery, which means the surgeon's surgery both gives the patient control and demonstrates respect for the patient's interests in having this control. Such respect requires common knowledge, and so the patient can only give consent to the surgery if there is common knowledge.

Some might reject the above, claiming it is not true that consent to ϕ negates another's duty to not ϕ . Consent is only intended to give individuals' control over their lives, and so the patient consenting only means he waived his right that the doctor not perform surgery grounded in his right to control. Once he has waived this particular right, there is consent, even if the surgeon maintains a non-consent-related duty to refrain from surgery until she demonstrates respect for her patient. Similarly, some might hold that, when the patient tells a surgeon that he consents to surgery, he is consenting twice over by negating twice over: he negates the surgeon's duty to refrain from surgery grounded in the surgeon's general duty to give him control over his body, and negates the surgeon's separate duty to refrain from surgery grounded in the general duty to demonstrate respect for his control. The patient's private thoughts are enough to waive the surgeon's first duty, even if not the second, and so he has given consent to negate one duty even if not the other. He can therefore give consent without common knowledge.

Importantly, some might reject the claim that there is always a duty to demonstrate respect for other's interests in controlling their rights. Perhaps doctors have such a

duty, but others may not, in which case others needn't always ensure common knowledge in consent before engaging in an action that requires consent.²¹

If one holds any of the above views, then the Common Knowledge Claim can be narrowed in scope: when engaging in an act that requires us to demonstrate respect for other's interests in controlling their lives, we can only demonstrate such respect with common knowledge. We therefore ought to ensure common knowledge in such cases. Even if some insist that this common knowledge is not itself consent, such common knowledge can still be necessary for ensuring we do not wrong those whose consent we seek.

Moreover, in cases where obtaining common knowledge is easy, there remains the instrumental benefit: requiring common knowledge ensures that agents can hold each other accountable. A world where mere mental states were all that were necessary for consent would be a world where X struggled to prove she lacked the right mental state for consent when such a mental state was lacking. If she would struggle in such cases to prove there was no consent, it would be difficult for her to hold Y accountable. While this entails a reduction in control in one sense – X cannot negate Y's duties with a mere thought alone – this reduction in control may be worth the incentive it gives Y to ensure that X has the correct mental state.²²

²¹ It is certainly true that we often lack a legal duty to demonstrate respect for others' rights in a range of cases. For example, as a helpful reviewer pointed out, if I attempt to enter your house and the door is locked, and I do not know whether you wish me to enter, I fail to demonstrate respect for your interests in controlling your life, but I am not committing a legal offense against you when merely attempting to open the door (even if it may still be morally impermissible).

²² Some might be concerned that, if we were to implement a law requiring common knowledge for consent, and widely-imbued social practices did not require common knowledge for consent, individuals would be convicted even when they did obtain consent according to widely-imbued social practices. Such an argument has been made by Ferzan and Westen (forthcoming at 59). However, if an individual intentionally refused to ensure common knowledge, they are arguably culpable for failing to follow a law aimed at protecting victims, and so their conviction may be justified for this reason. Regardless, those opposed to such convictions might still endorse adopting a moral norm of requiring common knowledge.

To see the force of these claims, consider their application to recent examples intended to support the Control Objection. In Kimberly Kessler Ferzan's *Alarm Clock*,

A woman performs oral sex on a man before he is awake. When he wakes he thinks, 'This is the best alarm clock ever,' but does not say this aloud,²³ and so does not establish common knowledge.

Some might suppose that, even if the man did not consent to oral sex at the start, he was not wronged the moment he awoke and endorsed the sexual act, and so his thoughts were enough to waive his rights against the woman performing oral sex on him. This conclusion is incorrect if there is an inalienable right that others demonstrate respect for our interests in controlling our lives. His partner failed to demonstrate respect for his interests in controlling his life when failing to ensure he endorsed her act.²⁴

Similarly, consider two additional examples supporting the Control Objection:

²³ Ferzan 2016 *ibid* at 405-410.

²⁴ Moreover, we can accept this claim without accepting that all such cases involve a wrong: if the woman was in a relationship with the man, he might have signified in the past that he enjoyed waking up to oral sex, such that when he awakes she knows he has the right mental state for consent, he knows she knows this, and so forth. Importantly, in cases where she has failed to obtain common knowledge, we can accept that there was no consent whilst maintaining there was no rape or assault. Rape or assault may require not only the absence of consent, but some other property, such as the victim being coerced into sex or opposing sex. There are a number of philosophers who claim that rape should not be understood as non-consensual sex. Catherine MacKinnon holds that rape should be defined in terms of forced sex, with force broadly defined. Gardner and Shute argue that sex is wrong because it entails the objectification of the victim, and the sheer use of another human being. It is likely that some non-consensual sex does not entail objectification or the sheer use of another human being. Wertheimer considers the claim that sexual offense should not be defined as non-consensual sex, but sex also involving force and a lack of desire on the part of the victim. Anderson argues that rape ought to be understood as coerced sex, rather than non-consensual sex. See Scott A. Anderson, 'Conceptualising Rape as Coerced Sex,' *Ethics* 127(1)(2016):50-87; John Gardner and Stephen Shute, 'The Wrongness of Rape' in (ed) Jeremy Horder, *Oxford Essays in Jurisprudence: Fourth Series*, Oxford 1998; Catherine MacKinnon, "Feminism, Marxism, Method and the State," *Signs: Journal of Women in Culture and Society* 8(1982): 635-58, at 650, 655; Allen Wertheimer, 'Consent to Sexual Relations,' *Legal Theory* 2(2)(1996):89-112 at 97 and 106-108.

Lawn: Sally is about to walk on Li Wei's lawn, Li Wei calls out, 'it's ok to walk on my lawn!' and Sally does not hear him. She walks on his lawn nonetheless, and he does not mind.

Lawn 2: As in *Lawn*, but Sally has heard Li Wei, proceeds to walk on his lawn as a result, but Li Wei thinks that Sally has not heard him.

In both cases there is no common knowledge about Li Wei's consent, and some may think it odd to claim that she has trespassed in either case.²⁵ In the latter case, it seems most clear that she has not trespassed because Li Wei not only called out, 'it's ok!', but she heard him, and she reasonably thought that he thought she heard him.²⁶

While it may be true that Sally did not trespass, this needn't imply that she obtained consent. Trespass is perhaps the violation of a particular duty: the duty to not use one's property when the owner does not want their property used, or when the owner has not decided to waive their right to the use of their property. Sally has not violated this duty when she steps on the lawn, but she nonetheless has violated the separate duty to demonstrate respect for Li Wei's interests in controlling his life. She can only demonstrate such respect if there is common knowledge of his mental state, and she therefore retains the duty to not walk on his lawn until there is common knowledge. If consent for walking on his lawn is the successful negating of the duty to refrain from walking on his lawn, then his declaration did not entail consent.²⁷

²⁵ The first example can be found in Alexander 2014 *ibid* at 108 and Ferzen at 405. A special thanks to an anonymous reviewer for the second example.

²⁶ Miller and Wertheimer present a similar example to defend a different claim. They claim that, for consent to be morally transformative, the agent consenting needn't hold a given mental state. It is enough that the agent asking for consent reasonably believes that the consentor has the right mental state. If this is true, Sally acts permissibly if she reasonably thinks Li Wei thinks she heard him. See Franklin Miller and Allen Wertheimer, 'Preface to a Theory of Consent Transactions: Beyond Valid Consent,' in (eds.) Franklin Miller and Allen Wertheimer, *The Ethics of Consent: Theory and Practice*, Oxford: Oxford University Press 2010 at 85.

²⁷ As noted in the last sub-section, it may be that there is no duty to demonstrate respect for other's interests in controlling their lives in all cases. Perhaps there is no duty to demonstrate respect for others' interests in controlling who walks on their lawns. If one holds this to be true, one might still accept a more modest claim: when one has a duty to demonstrate respect for other's interests in controlling their lives, then one must ensure common knowledge.

Joseph Millum and Danielle Bromwich provide a final type of example supporting the Control Objection:

Information: A surgeon tells a patient about risks A and B of surgery, intentionally withholding information about risks C, but the patient happened to know about risks C, and consents nonetheless.

There is no common knowledge here, because the doctor thinks the patient is consenting to a treatment that does not entail risk C, and the patient thinks he is consenting to treatment that does entail risk C.²⁸ Millum and Bromwich argue that the doctor has obtained consent, because it is the patient who is ultimately in control of the decision. While the patient is in control of the decision, the doctor still maintains a duty to refrain from conducting the surgery.²⁹ If the doctor still has a duty to refrain from the treatment because she disrespects the patient as an agent, there is an interesting question of how the doctor can demonstrate respect for the patient as an agent. It seems she can demonstrate this respect if she discloses the known risks and the patient responds that he consents as a result, such that both she and the patient have common knowledge about the patient's decision.

3. The Inference Claim

This section defends the Inference Claim: even if consent requires common knowledge, when we infer common knowledge without communication we can obtain consent without communication. More specifically, sometimes there are non-behavioral facts about the world that serve as evidence of an agent's mental state, such that common knowledge can be established. For example:

²⁸ Joseph Millum and Danielle Bromwich, 'Understanding, Communication, and Consent,' *Ergo* 5(2)(2018):45-68 at 60.

²⁹ Millum and Bromwich do acknowledge that the doctor commits a wrong in failing to respect the patient as an agent. They simply think that consenting to treatment is about having control over whether this treatment occurs, and the patient does have this particular type of control.

Hurricane: Katya's neighbor is abroad, and there is a hurricane that risks destroying his porch if it is not propped up with special reinforcements. Katya can only reinforce his porch if she enters his property. Though her neighbor hears about the hurricane, he is far away, and cannot tell her to prop up his porch. Given that Katya knows that humans in general care a great deal about the porches of their homes, she can infer his mental state is such that he has decided to waive his right against her entering his property, or at least decided he would like to waive a right against her entering his property. She can also infer that he can infer that she infers this, given that he has access to news about the hurricane, and given that he knows Katya knows that humans generally care about saving their porches from hurricanes.

In this example, we might suspect that Katya does no wrong in propping up his porch regardless of whether he consents; she should save his porch solely because this is in his interests. But we might suspect that the interest in saving his porch is not weighty enough to justify entering his home without his consent. It is therefore useful to know if such consent is possible. There is reason to suppose it is. If Katya is right about her neighbor's mental state based on the strong evidence she has, and he is right about her inferring his mental state, then they share common knowledge about his mental state, and the benefits of requiring common knowledge are upheld. The instrumental benefits are upheld, because in a world where Katya's neighbor consents due to common knowledge, we can hold individuals accountable for failing to ensure common knowledge. We can tell them, 'We both know that there was insufficient evidence of common knowledge that I had the right mental state for consent, and so you acted impermissibly.' For example, there would be insufficient evidence if there was no storm, or if there was a storm but Katya knew that her neighbor was due to be home in the next few minutes.

In *Hurricane* there is sufficient evidence. Both know that a storm means the porch will be destroyed without Katya's help, and both know the value individuals tend to place

on saving their homes from storms. Moreover, both know that humans in general know that humans in general hold this value. Importantly, the intrinsic value of respect has been upheld. Not only is Katya respecting her neighbor's rights because she is only entering his home in response to facts indicating he supports her actions, but she is also demonstrating to him that she respects his rights, because he can infer she is responding to the decision he made.

I call cases where we can infer common knowledge without communication 'inference consent.' Here is another example of inference consent:

Mobster: You are about to be severely tortured by a mobster as punishment for your actions. If Drew pretends to severely torture you by punching you, it will hurt, but the mobster will refrain from torturing you, thinking you received your due punishment, and you will suffer significantly less pain. At that very moment, you cannot communicate to Drew that you prefer being punched, as the mobster would catch on to our 'plan' and severely torture you. Drew is fairly certain you want to be punched, given how torturous the alternatives are, and you are fairly certain Drew is fairly certain you likely want to be punched, given that you know humans in general can infer from this scene that you want to be punched. Because you and Drew both infer that you want to be punched, you have common knowledge about each other's mental states.

As with *Hurricane*, perhaps Drew is permitted to punch you without your consent, but there is reason to suppose she should not: while torture may be worse than a punch, a punch is still painful, and painful punches require consent even if the alternatives are worse. If Drew suspects a punch is only permissible with consent, she can take comfort in the knowledge that she obtained your consent. She is aware that your mental state has changed as a result of non-behavioral facts about the world, and you are aware of her mental state about your mental state. You have altered your right to not be punched via a change in your mental state, and you and Drew know this alteration took place,

given the evidence. Because Drew has only punched you after establishing that you both know this alteration took place, she has demonstrated that she cares a great deal about your interests in controlling your life. In other words, she cares about your decision because she is responding to what she takes your decision to be, and you know she is responding in this way. Moreover, in a world where we take this inference as consent, the instrumental value of protecting rights would be upheld. In such a world, if there was no evidence that you wanted to be punched, you could tell Drew: 'we both know there were no facts which gave you reason to think I had the right mental state for consenting to a punch.'

It is important to emphasize that sometimes there will be evidence that an individual has the right mental state, and the agent seeking consent thinks she has common knowledge about this mental state, but she happens to be incorrect. Imagine a second version of *Mobster* where you do not want to be punched, but there is no way Drew could have known this fact, and she wrongly infers you decided it was permissible for her to punch you. In punching you she wrongs you, even if she is not blameworthy. In this sense, relying on inference consent is similar to relying on communicative consent: sometimes individuals will seem to communicate that they consented but without holding the right mental state for consent, in which case those seeking consent may be committing a blameless wrong. It remains the case that inference consent is possible: if an individual does have the right mental state for consent, and we can infer this fact, there can be common knowledge of this mental state without communication.

Moreover, if common knowledge is possible without communication, this can provide guidance for cases where the communication is sub-par. For example:

Locked-in Syndrome: Robert is suffering from locked-in syndrome, but prior to this he always enjoyed surprise hugs, and studies have found that individuals with his ailment later recall having enjoyed such hugs. He is aware that his daughter is aware both of his love for surprise hugs and these studies. His daughter is also aware of his awareness, because he

always expressed joy from hugs in the past and the studies on hugs were widely publicized.

In this example, it is an open question whether he has communicated his consent: he expressed joy for hugs in the past, but expressions in the past are not communication in the present. We can determine whether there is consent in the present by considering whether a non-behavioral fact – the general study indicating patients' attitudes towards hugs – establishes common knowledge. In other words, just as non-behavioral facts can establish common knowledge without communication in *Mobster* and *Hurricane*, non-behavioral facts can establish consent when communication is imperfect, as in *Locked-in Syndrome*.

This raises the possibility that, in all cases where common knowledge can be inferred, the act in question is permissible regardless of consent. In *Hurricane* Katya may be permitted to save the porch regardless of consent, because this will protect her neighbor's interests. In *Mobster* Drew may be permitted to punch you regardless of consent, because this will save you from torture. In *Locked-in Syndrome* the daughter may be permitted to hug Robert regardless of consent, because this will bring him comfort. While consent may not be required whenever common knowledge can be secured without communication, it is difficult to establish if this is true. Intuitions may vary regarding the permissibility of entering property, punching, and hugging without consent. It is therefore useful to know that consent for entering property, punching, and hugging is possible even without communication, because common knowledge is possible without communication. Moreover, if one function of consent is to demonstrate respect for others' interests in controlling their lives, then this function is fulfilled because common knowledge is obtained. The consent-seeker is demonstrating a type of respect in all three of the above cases, a demonstration possible because of common knowledge.

4. Conditions for inference consent

Though we can at times infer consent based on non-behavioral facts about the world, we should only do so when certain conditions are met.

4.1 Strong evidence

Consider a case by Douglas Husak:

Cousin: Juan's cousin Rachel requests to borrow his car for the day. Juan decides he will say "yes" but before he tells her she takes his car for a ride.³⁰

Husak uses this to demonstrate the necessity of communication for consent, because it seems Rachel failed to obtain Juan's consent due to his lack of communication. This example in fact demonstrates the need for common knowledge about the consenter's mental state. Juan's cousin has failed to infer what he has decided, and so there was no consent.

Now imagine a slightly modified version of this case, where Rachel was with Juan when he lent his car to Ahmed last month, and she relies on this to believe Juan will say 'yes' to her now, but knows this is very poor evidence of what he will decide. Imagine Juan knows that Rachel believes he has decided to lend her his car based on this weak evidence, and by chance he has decided to lend her his car, such that there is common belief about his mental state: Juan believes Rachel believes she decided to lend her his car, she believes he believe she believes this fact, and so forth. Even if there is common belief, Rachel's reliance on such weak evidence would not constitute common knowledge, which requires strong evidence of belief. As such, there is no increase in accountability: in a world where weak evidence was sufficient for consent, it would be difficult to hold individuals accountable for inferring wrongly about mental states. In such a world, if Juan did not decide to lend her his car, then Rachel could claim that his lending the car to Ahmed was evidence of his true decision and it was up to him to

³⁰ Douglas Husak, 'Review: The Complete Guide to Consent to Sex: Alan Wertheimer's "Consent to Sexual Relations,"' *Law and Philosophy* 25(2)(2006):267-287 at 276

prove otherwise. It is far easier to hold Rachel accountable in a world where she commits a wrong whenever there is only weak evidence of common knowledge. In such a world Juan can state, 'we both know you lacked strong evidence of my decision.' For this reason, a condition for relying on inference consent is that the agent obtaining consent relies on facts about the world that provide strong evidence of the consenter's mental state, rather than weak evidence that merely entails common belief.

Now imagine an even more complicated case where Rachel incorrectly thinks that Juan lending the car to Ahmad is strong evidence that he decided to lend her the car, even though it is not. Or imagine she has access to other facts she thinks are strong evidence, but they are not: she thinks her tarot cards provide strong evidence that Juan decided to lend her his car. When many agents wrongly think evidence is strong when it is not, demanding strong evidence for common knowledge will not increase accountability. If many people take Juan's car in response to their tarot cards when he has not in fact decided to lend the car, he cannot tell them, 'We both know you lacked strong evidence of my decision, given your reliance on tarot cards.' For, they do not both know this: the car-takers think tarot cards are strong evidence.

It is worth noting that the same problem is at play if we rely on communication for common knowledge. In a world where agents have poor communication skills, these agents might think others are communicating their consent when they are not. When such agents think others have communicated when they have not, it would be difficult to hold them accountable. This is because victims will not be able to state, 'We both know there was no communication.' Nonetheless, assuming agents are generally good at communicating, then a rule requiring communication can enhance common knowledge and so enhance accountability. The same is true for requiring strong evidence of common knowledge without communication: it will not ensure accountability for cases like that of Rachel and her tarot cards, but it can increase accountability if enough agents know what constitutes strong evidence.

Moreover, even when accountability cannot be increased, requiring at least some evidence can be justified by appealing to the value of respect. When Rachel relies on tarot cards, she does not demonstrate respect for Juan's interest in controlling his life, given that she has not allowed him to control his life. She has not allowed him to control his life because she is not responding to his decision, but to the luck of tarot cards. The fact that she thinks these cards respond to his decision is irrelevant: they do not, and so her attempt at respect has failed.

4.2 Inferring that they prefer no communication

To infer common knowledge without communication, it is insufficient to infer an agent consents that we act a particular way. We must infer that they consent we act a particular way without their communicating this fact. There are many instances in life where we consent to be treated a particular way on the condition that we communicate this fact.

For example:

Cousin 2: Juan's cousin Rachel is certain that he decided to lend her his car, because for the past few years he has lent her his car every weekend. She is right: he really has decided to lend her his car if she asks, and he knows that she knows this is the case. With this in mind, she takes his car for a ride without asking him, a fact that angers him because he only intended to lend her his car on the condition that she ask and he acquiesce.

Because Rachel has inferred merely that Juan decided to lend her his car, when in reality he decided to lend her his car only when communicating this fact, she has failed to obtain his consent. We can only consent without communication if we decide to waive our right without our communicating this fact, and there is common knowledge about waiving our right without communicating this fact.

There are a number of instances where we can infer that another decides to waive their right, and also infer that they decide to waive their right without communicating this fact. One instance is where communication is clearly undesirable. In *Mobster* Drew can punch you to save you from torture, but it is pertinent that you never show even the slightest behavioral change that indicates you want to be punched, because the mobster will then know Drew is merely helping you escape torture and he will torture you regardless. Drew therefore can infer that you both have decided to waive your right against her punch and decided to waive this right without communicating this fact.

In *Hurricane* it is impossible for Katya's neighbor to communicate, and she can infer that he decided to waive his right against her entering his porch without his decision being conditional on communication, given that communication is impossible. He can infer that Katya can infer his mental state, and this is the reason her actions are permissible. In this case, we might also imagine communication being possible but costly. Imagine Katya's neighbor could transmit a message indicating his consent, but his porch would face damage during the time it took the message to arrive. Katya can infer, knowing the value humans place on their porches, that the risks to further damage are a cost he does not wish to bare, and so she can infer he decided to let her secure the roof without a message.

4.3 Limited risks of a serious wrong

There is a final consideration. Relying on inference consent is more problematic if, in the event that we infer wrongly, we commit a very serious wrong. Imagine my partner does not hold the correct mental state to consent to sex, and I wrongly infer he does. In having sex, I commit a very serious wrong. This risk creates a weighty reason against relying on inference consent, a reason that is often decisive.

It is not always decisive, however. In some cases, though we risk committing a serious wrong in inferring incorrectly, we risk someone facing serious harm if we refuse to rely on inference consent. Such is the case in *Hurricane*: if Katya infers consent and is

incorrect – the neighbor did not want her to reinforce his roof – she will have committed the serious wrong of violating her neighbor’s property rights, but if she refuses to infer consent and he has in fact consented, then she will have allowed the serious harm of porch destruction to occur. There is a case to be made for prioritizing the prevention of a serious harm over the prevention of a possible wrong.

To clarify: I am not arguing that entering property is permissible because there is a type of objective good in saving a porch, and this good justifies entering the property regardless of consent. Rather, my claim is that Katya has reason to infer his consent based on the imminent destruction of his porch, but reason to believe she could infer incorrectly. To consider what to do, she ought to account for additional considerations: the wrong she commits if she acts as if he consented and has not, and the harm she allows if she acts as if he has not consented and he has. It seems the wrong she potentially causes in entering the house is of lesser significance than the harm she potentially allows if she does not.

This seems even clearer in *Mobster*. If Drew infers incorrectly and punches you, she risks wrongly punching you; if she infers correctly but doesn’t punch you, she risks allowing you to face harm from the mobster that you would gladly escape by accepting her punch. I believe the risk of you facing harm is of greater weight than the risks of Drew inferring wrongly about your consent.

These competing considerations are unlikely found in cases of sexual relations. There is a risk of committing a serious wrong when incorrectly inferring consent, but no risk of committing a serious harm if one refuses to have sex with their partner out of fear of inferring their partner’s decision incorrectly. If the partner will in fact face serious harm if he does not have sex, he could simply communicate his consent, ensuring both are certain of his consent.³¹ As a general rule we should not rely on inference consent

³¹ We might imagine a fictional case where an agent cannot communicate her consent to sex, and the common knowledge necessary for consent is present, and she requires sex to avoid some serious harm. If this were really the case, I believe that we should rely on inference consent.

for sex. While we may in fact infer correctly and commit no wrong, the risks of inferring wrongly create a decisive reason to rely on communication instead.

5. Objections

There are five potential objections to my claim that we can ever consent without communication.

5.1 Autonomy

Some claim that a central value of consent is to protect autonomy. We have true autonomy when we can control our lives, and we can control our lives when we alter our rights through voluntary behavior. The non-behavioral facts I described – such as facts about humans’ desire to save their porches or receive hugs – are not voluntary behaviors, and so even if these facts are evidence of a decision, they do not indicate consent.

One response to this objection is to reject the claim that autonomy is protected via voluntary behavior. Autonomy is protected through voluntary decisions, and under my view consent does require voluntary decisions: the individual giving consent must decide to waive her rights. I am merely claiming that, if common knowledge about this decision can increase accountability and respect, such accountability and respect can be obtained without communication, because common knowledge can be obtained without communication.

Moreover, accepting this view of autonomy – one that requires a voluntary decision rather than behavior – better protects the fulfillment of autonomous preferences. In *Mobster*, you prefer to not communicate your consent because doing so will lead to the mobster torturing you. Demanding your communication before accepting your consent would force you to face torture you prefer not to face. Given that you have little control regardless of how I act, it would seem better to punch you if I can infer that you have decided I am permitted to do so.

5.2 Hypothetical and presumed consent

Some might suppose that, in both *Hurricane* and *Mobster*, it is permissible for me to intervene because I have obtained what I call reason-oriented hypothetical consent. This is the consent a person would give if they were reasonable.³² If inference consent is the consent a reasonable person would give, it seems to be the same as this type of hypothetical consent. Moreover, if hypothetical consent is not actual consent,³³ then inference consent is not actual consent.

Others might claim inference consent is the same as what I call communicative hypothetical consent, the consent a person would give if they were able to communicate, regardless of whether they would be reasonable.³⁴ Katya's neighbor would consent to her fixing his porch if he were able to communicate with her, and in *Mobster* you likely would consent to Drew punching you if you were able to communicate without the mobster catching on. If inference consent is the same as communicative hypothetical consent, and such hypothetical consent is not actual consent, then inference consent is not actual consent. Actual consent would require actual communication.

A similar objection is that, in all of the examples of inference consent I present, there is only presumed consent. Presumed consent is what we presume a person decides we are permitted to do, despite being unable to communicate.³⁵ Presumed consent is

³² This is part of a broader category of hypothetical consent: the consent a person would give if certain conditions were present, such as the person being fully informed, rational, or free. Sirko Harder, 'Medical Non-Disclosure and Hypothetical Consent,' *King's Law Journal* 20(2009):435-455; Arthur Kuflik, 'Hypothetical Consent,' in (eds) Franklin Miller and Alan Wertheimer, *The Ethics of Consent: Theory and Practice*. Oxford: Oxford University Press 2009; Cynthia A. Stark, 'Hypothetical Consent and Justification,' *The Journal of Philosophy* 97(6)(2000):313-334.; Jeremy Waldron, 'Theoretical Foundations of Liberalism,' *The Philosophical Quarterly* 37(147)(1987):127-150 at 138-139.

³³ Hanna Pitkin, 'Obligation and Consent - I,' *American Political Science Review* 59(4)(1965):990-999; Judith Jarvis Thomson, *The Realm of Rights*, Cambridge: Harvard University Press 1990 at 360.

³⁴ This is somewhat similar to the hypothetical consent raised by David Enoch. See David Enoch, 'Hypothetical Consent and the Value(s) of Autonomy,' *Ethics* 128(1)(2017):6-36.

³⁵ Presumed consent has traditionally referred to the non-communicative consent we presume someone actually gave in the past. See V. English and A Somerville, 'Presumed Consent for Transplantation: A dead issue after Alder Hey?' *Journal of Medical Ethics* 29(3)(2003):147-152;

sufficient when we cannot communicate with an individual, either because they are far away, or cannot express their decisions due to a threat by a third party, as in *Mobster*. Presumed consent is not actual consent,³⁶ and actual consent is necessary when we can ask a person what they want. Such consent, we might suppose, requires communication.

There are a number of reasons why inferring consent without communication is distinct from both hypothetical and presumed consent.

It is distinct from reason-oriented hypothetical consent because sometimes there is evidence that an agent has not consented, even though a reasonable person would. Imagine Drew knows that you are about to be tortured by a mobster, but she knows you voluntarily took a pill which causes you to lose the capacity to reason, and so she knows you decided to not give her permission to punch you. If you were reasonable you would decide to permit Drew's punch, but there would be no inference consent in such a case, because there would be no common knowledge of your decision to waive your right.

Moreover, both versions of hypothetical consent do not require a given mental state. For example, an unconscious patient can give her hypothetical consent so long as she would consent were she conscious, but as she lies unconscious on the gurney she cannot decide to waive her rights. I assume that when one decides to waive their rights (or intends to waive these rights, or some other mental act), one has a certain level of control, such that one is controlling the rights one is waiving and the duties one is negating. If consent entails having at least some control over rights and duties, then

Ian Kennedy; Robert A Sells; Abdallah S. Saar; Ronald D. Guttman; Raymond Hoffenberg; Michael Lock; Janet Radcliffe-Richards; and Nichols Tilney, 'The Case for "Presumed Consent" in Organ Donation,' *The Lancet* 351(9116)(1998):1650-1652.

³⁶ C.A. Erin and J. Harris, 'Presumed Consent and Contracting Out,' *Journal of Medical Ethics* 25(5)(1999):265-366; Govert Den Hartogh 'Can Consent be Presumed?' *Journal of Applied Philosophy* 28(3)(2011):295-307; Thaddeus Mason Pope, 'Monstrous Impersonation: A Critique of Consent-Based Justifications for Hard Paternalism,' *University of Missouri-Kansas City Law Review* 73(3)(2005):681-713.

consent requires some mental state one has decided to engage in, and so hypothetical consent is not true consent in a range of cases. In contrast, inference consent demands such a mental state, even if we infer this mental state based on non-behavioral facts about the world.

Inference consent is also different from presumed consent, in that an agent presuming consent needn't demonstrate to the consentor that she knows of his decision. When a doctor performs surgery because she presumes this is what the patient decided, the patient needn't be aware that the doctor is aware of his mental state, and so needn't be assured that the doctor respects his interests in controlling his rights. For this reason, presumed consent is morally inferior to inference consent, where the consentor and consent-seeker are aware that there is an alteration of right and duties. Katya's neighbor realizes that she realizes he wishes her to fix his porch, allowing her to demonstrate to him that she respects his interests in controlling his life.

Because the value of demonstrating respect is better protected with inference consent, there are instances where we ought to obtain inference consent if we can, rather than only hypothetical or presumed consent. Imagine a conscious patient cannot communicate with her doctor, and the doctor can either perform a medical operation based on what the patient would have decided, or can create a scenario where both she and the patient hold common knowledge about his decision. She can create the latter scenario if she tells the patient what intervention she is about to perform, such that the patient is able to form the mental state of deciding to permit this intervention. The doctor can then use the facts about the situation to infer that this is what the patient has decided, and the patient can infer that the doctor infers this is what he has decided, and so forth. Had the doctor instead begun the operation without first informing the patient about what she was about to perform, the patient could not form the necessary decision for consent, common knowledge could not be established, and the doctor would not have demonstrated to the patient that she respected his interests in controlling his life. This is one good reason for doctors to tell patients unable to communicate what it is they are about to do, rather than simply performing an

intervention based on what the patient would have decided if such a decision was formed.

Some might not be persuaded by the above, feeling that the doctor is not obligated to tell the patient what she will do. It is enough that the doctor knows that the patient decided to waive his right, even if the patient is not aware that the doctor is aware of this fact. However, this would imply that it is not important for the doctor to demonstrate respect for the patient's ability to control his rights, for she can only demonstrate such respect if the patient is aware that she is aware of his decision, likely only possible if she is aware that he is aware of what she is about to do. This sometimes requires that she tell him what she is about to do. If we think that doctors do have a duty to demonstrate respect for their patients' interests in controlling their lives, then the doctor has good reason to tell the patient what she is about to do. Even if doctors do not have such a duty, a more modest claim still stands: when it is important to demonstrate respect for another's interests in controlling their rights, it is important to establish common knowledge about their mental state. Such common knowledge can be obtained without communication from the consentor to the consent-seeker, but may require communication from the consent-seeker to the consentor. If such communication takes place, respect is demonstrated, and would not have been demonstrated with presumed or hypothetical consent alone.

5.3 Low confidence

Some might feel that communication is a more reliable way of obtaining common knowledge. When others communicate to us that they consent, we can be fairly certain they know that we know they have consented, and so it is easier to ensure we are both aware of the altered rights and duties. Inferring another's mental state is a much less reliable mechanism for ensuring common knowledge.

While there are sometimes risks in inferring what another is thinking, this is merely a reason to only rely on inferences when we are likely to infer correctly. Moreover, there are similar risks when relying on communication. If a doctor warns a patient about the

risks of surgery, and the patient does not understand or is not listening, the doctor would be wrongly relying on the patient's utterance of 'I consent' as an indication of common knowledge about his decision. The doctor thinks the patient is deciding to have surgery despite the risks, while the patient thinks he is deciding to have surgery on the condition that there are no risks. Relying on communication may fail to ensure common knowledge, just as inferring another's thoughts may fail to ensure common knowledge.

Indeed, non-behavioral facts are sometimes better evidence of common knowledge than communication. In *Mobster*, your verbal expression is a less reliable indicator of your decision than the other facts we have access to, giving me good reason to rely on these other facts for determining your knowledge, and your knowledge about my knowledge.

5.4 There is communication

Some might claim that, in cases of inference consent, there is communication. If you are about to be beaten by a mobster, Drew knows that you would prefer her punch because you never told her otherwise. Your omitting to tell her otherwise could be interpreted as a behavioral omission which helps her determine consent, and so is a type of communication. At the very least, it is a behavioral fact about the world.

Even if an omission constitutes behavior in *Mobster*, it would seem odd to claim it does in *Hurricane*. In this instance, Katya's neighbor is unable to call her and so his not calling is not indicative of consent. It seems she must infer his intentions based on non-behavioral facts, and this inference is sufficient to alter her duties. Moreover, in viewing omissions as behavior, we risk undermining the distinctiveness of the claim that consent requires communication or behavior. If even the absence of an action constitutes communication or behavior in cases like *Mobster* and *Hurricane*, it would not be clear what we meant when claiming an individual did not exhibit communication or behavior, and so did not consent. If communication or behavior

lose most of their meanings, the claim that consent required communication or behavior would lose its meaning, as well.

6. Conclusion

Consent can serve as a normative power to alter relationships of accountability, and demonstrate respect for other's ability to control their lives. For consent to serve such functions, there must be common knowledge between the consenter and consent-seeker. Such common knowledge is usually only possible if the consenter communicates her consent, or at least indicates her consent through a change in behavior. In rare instances we can infer common knowledge without communication, relying on non-behavioral facts alone. Inferring such consent can protect the value of accountability, and ensure that agents obtaining consent are demonstrating respect for the interests of others in controlling their lives.

Instances where we can infer consent are rare, partly because it is rare to accurately infer another's knowledge, and to infer their knowledge about our knowledge. If we infer wrongly, there is no common knowledge about altered rights and duties, and so the benefits of common knowledge are not upheld. Consent ought to only be inferred when we are fairly certain we are inferring correctly. In particular, we must infer that another intends we act a particular way without their explicit communication. In some domains, such as with sexual relations, we are especially poor at inferring such consent, and so should rely on communication alone.

Even when we are exceptionally good at inferring consent, there are instances where we will be mistaken, and some of those instances will involve committing a very serious wrong. In cases involving a potentially serious wrong, we ought not rely in inferences if communication is a reliable source of establishing common knowledge about the decisions of others. But in cases where communication is not reliable, inferring consent can be sufficient.