Moral Risks and Communicating Consent
Renee Jorgensen Bolinger

1 Background

CORE FEATURES OF CONSENT

◇ OBSERVABILITY: Insofar as in consenting, A gives B permission to X, consent must be public; something that B (and possibly third parties) can track.

◇ AGENCY: Whether an agent A consents to a treatment X is essentially agency-involving.

Commonly assumed that AGENCY requires an internal state like *intent* or *assent*, but then it comes apart from OBSERVABILITY.

2 Rights & Coordination

A familiar picture:

◇ whether B is *permitted* to X depends on whether A internally consents
◇ whether B is *blameworthy* for Xing depends on evidence of A's internal consenting

Insisting on this division undermines the risk-managing function consent:

1. *Epistemic*: agents lack information to avoid unintentional rights-transgressions; avoiding culpability isn't enough
2. *Distributive*: responsibility for the cost of errors needs to be fairly distributed

To solve, observable behavior must be sufficient for morally valid consent.

3 Giving up Intention

Let ψ be 'intentionally consents', as filled in by your preferred theory

CONVENTIONAL CONSENT-BASED PERMISSIONS –
By βing, A gives B a moral consent-based permission to X iff

(i) β is ψ, *or*
(ii) β communicates that A ψs

To communicate ψ, β to be something A is *answerable* for, satisfying both:

◇ *Publicity*: it's public knowledge in the community that performance of β means ψ.
◇ *Burdens*: every member of the community can typically avoid β without undue cost.

RESPONSIBILITY FOR ERRORS:

1. *Reasonable error:* A does not ψ, but A communicates to B that A does, so B Xs.
2. *Rational error:* A does not ψ, but B believes (on other evidence) that A does, so B Xs.

A is partially responsible for, and so not wronged by, reasonable errors. B may be blameless, but is responsible for and wrongs A in rational errors.

IMPORTANT NUANCES

◇ Background information, cancellation, and undermining evidence can change what a behavior communicates.

◇ Whether β communicates ψ is determined by *signaling dynamics* in the community, not A's intent nor B's interpretation.

◇ Signals that fail the PUBLICITY and BURDENS constraints can't alter rights-boundaries (because they fail AGENCY), so can't communicate consent.

4 Constraining the View

LIMITATIONS

◇ Receivers must defer to better evidence when they have it, and seek confirming evidence if costs of error are high and asymmetric.

◇ Publicity is more stringent the larger and more diverse the community. The coordinating function needed by the relevant instance of consent sets the relevant community.

◇ Burdens are relative to the added value of the practice, and so are stakes-sensitive.

> *Rule of thumb*: If one cannot reasonably appeal to the value of the reduction in moral risk achieved by clause-ii consent to justify demanding that A sacrifice β unless she wishes to ψ, then β fails the burdens constraint.

BAD CONVENTIONS AND VICTIM-BLAMING

◇ For a given signal β, we can ask whether it satisfies the two conditions: if it doesn't, it's at most evidence diminishing B's blame, but not the wrong A suffered.

◇ Consent is communicative, but not just any actual practice can regulate consent. So this gives us reasons to modify our consent-communicating practices.

◇ Creates the needed space (& categories) to distinguish reasons that make an error rational (diminishing B's blame) from reasons that make A not wronged by an error.