

Mistreating Consent

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1 CASES

Car: Arvind consents to Blake borrowing his car. However, had Arvind not consented, Blake would have used the car anyway.

Sex: Audrey consents to have sex with Brice. However, had Audrey not consented, Brice would have had sex with her anyway.

Moot consent (*initial gloss*): A consents to B ϕ -ing. However, had A not consented, B would've ϕ 'd anyway.

Questions:

1. What, if anything, is problematic about moot consent?
2. What harms or wrongs do agents who give moot consent incur?

Puzzle version: How can consent be *moot* while still being *consent*?

2 CONSENT, LUCK, AND MODALITY

Two cases of modal irrelevance:

Moot consent: A consents to B ϕ -ing, but unbeknownst to A, B would've ϕ 'd anyway.

Pre-emptive consent: A knows that B will ϕ , so A consents to B ϕ -ing to avoid being a victim.

Ex: Moot vs. Pre-emptive consent to sex.

- **Pre-emptive:** Consent as a strategy to avoid rape (Gavey 2005)
- **Moot?:** "A lot of sex feels like this. Sex where we don't matter. Where we may as well not be there. Sex where we don't say no, because we don't want to say no, sex where we say yes even, where we're even into it, but where we fear... that if we did say no... it wouldn't matter. It wouldn't count, because we don't count." (Gattuso 2015)

	Pre-Emptive	Moot
Mental States	A knows their consent to B is irrelevant.	A doesn't know their consent is irrelevant.
Reasons	A consents to avoid being a victim.	A consents for the 'right' first-order reasons.
Direction	Consent is an afterthought.	Consent <i>appears</i> to have the right direction of fit.

Varieties of luck: In some sense, agents who give *moot* consent get lucky. Distinguish:

Thwarted cases: B intends to ϕ , but is thwarted by external circumstances.

Ex: Thwarted Theft: Theo intends to steal Amir's car, but he slips on a banana peel and is hospitalized.

Desideratum = Extensional Adequacy:

Moot vs. Pre-Emptive vs. Thwarted vs. Crime

3 IS MOOT CONSENT VALID?

Consent must be *valid* to be morally transformative!

One might suggest: Moot consent is not *valid* consent.

Valid consent must be informed.

- Requires "knowing everything that would make a real difference to whether or not she consented" (Archard 1998, 46).
- **Dealbreaker:** any feature F of some act, ϕ , that makes a "decisive difference" to the agent's decision to ϕ (Dougherty 2013)
- If the agent had known about F, she would not have agreed to ϕ .
- Dealbreaker: your consent was moot!

Virtue: Clear answers to our starting questions.

Problems:

1. Framework over-generates
2. Locally relevant vs. Generally moot consent
 - Lara's consent to Brice *is* relevant, but the fact that *Audrey's* consent is irrelevant to him is a dealbreaker for Lara.
3. Fails to capture cases of pre-emptive consent

Upshot: One argument for moot consent being invalid fails.

4 DEFLATIONARY VIEW

The consent-receiver is just a jerk. Bad dispositions!

Worries:

1. Unsatisfying & no unified *mens rea*
2. Fails to distinguish *Moot vs. Thwarted vs. Locally Relevant*
3. Fails to recognize the destructive social role it can play

5 MY PROPOSAL: MISTREATING CONSENT

The consent-receiver wrongs the consent-giver (in part) by mistreating the consent.

Consent fails to play a proper role in their practical deliberation and reasons for action.

Modality is primarily a proxy for motivations.

Frankfurt-Style Cases:

Bill is strongly attracted to Lisa, who is in love with Bill. Bill consents to sex with her only for these reasons. Lisa's violent brother wants Bill to have sex with Lisa and would have threatened Bill with death to get him to consent had he not done so already. (Tadros 2021, 300)

Intuition: nothing wrong with the *consent*.

Why care about modality?

- Shows us something about the reasons that the agent responded to when acting.
- By considering what the consent-receiver would do in the absence of consent, we better understand their reasons for action.

Mistaken Belief:

- Consent-giver does not know their consent is being mistreated.
- Mistaken belief about the consent-receiver's motivational profile.
- **Contrast:** Pre-emptive cases

5.1 Valid Yet Defective Consent

Why valid?:

1. Whether A's consent is valid should not depend on B's reason for action.
2. Some of our interests are protected by being able to consent even in non-ideal circumstances.
3. Easily captures the difference between Moot vs. Crime.

Ideal vs. Defective Consent: (cf. [Renzo 2022](#))

Ideal consent: (1) A consents to B ϕ ing, and (2) the fact that A consents plays a proper role in B's practical deliberation or reasons for acting.

Defective consent: Condition (1) but not (2) is present.

5.2 Questions & Desiderata

Answers our starting questions

1. **What’s wrong with moot consent?** Mistreated + Mistaken Belief
2. **What wrongs are incurred?** Those resulting from these flaws

Satisfies desiderata:

1. MOOT vs. CRIME: Valid vs. Invalid Consent
2. MOOT vs. PRE-EMPTIVE: Both defective; Mistaken belief
3. MOOT vs. LOCALLY RELEVANT: Mistreated vs. Not
4. MOOT vs. THWARTED: Nothing mistreated; no action to explain

Table 1: Scorecard

	Dealbreaker	Deflationary	Mistreated
vs. Crime	X	✓	✓
vs. Pre-emptive	✓	?	✓
vs. Local	X	X	✓
vs. Thwarted	✓	X	✓

6 THE EPISTEMOLOGY OF MOOT CONSENT

Moot and pre-emptive consent to sex is pervasive.

How do we identify or navigate it?

Two strategies: (1) Testing; (2) Corroborating

Many cases lie in between moot and pre-emptive consent.

- Ex: Retrospectively realizing your consent was moot may lead you to pre-emptively consent in the future.

⇒ Problematic feedback loop; culture of fear

Further Work: What are the epistemic obligations of consent-receivers?

7 SUMMARY

- Moot consent is disturbing, but it is difficult to articulate why.
- Moot consent is mistreated consent: the consent fails to play a proper role-in the consent-receiver’s reasons for action.
- When consent is defective, it cannot do all of the normative work that we want it to do.

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