FOREWORD TO SYMPOSIUM

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I. INTRODUCTION

Consent is supposed to be part of a positive, uplifting, happy story. It is a “magical” property¹ that can turn crimes into legal activities: what would have been rape becomes consensual sex, what might have been an assault becomes a sporting event or medical treatment, and trespass becomes being legally invited onto another’s property. And consent in market transactions—the proof that they are voluntary exchanges—is what is supposed to guarantee that such contracts are to the benefit of all. However, as Nancy Kim has shown in many of her works—and especially in her recent masterful book, Consentability: Consent and Its Limits²—the story is far more complicated, and frequently far darker.

First, consent to transactions is often far short of “perfect” or “complete” or “optimal.” Too often, consent is something more imposed or projected upon us, rather than something we offer.³ Also, to the extent that “consent to” has implications of both “authorize” and “make legal (not illegal),” Kim’s detailed and careful argument shows that there are some things that should not be, or not be always, or for everyone, “consentable.” We should be concerned about exploitation and opportunism, harmful effects on third parties and on society generally, and also about the type of

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  3. See id. at 7-116 (discussing the many ways in consent can be incomplete or defective). Sometimes there is a gendered aspect to how consent is perceived; Catherine MacKinnon wrote: “Privacy follows those with power wherever they go, like and as consent follows women. When the person with privacy is having his privacy, the person without power is tacitly imagined to be consenting.” Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1311 (1991).
decisions most likely to evoke significant regret by an agent at a later date.⁴

The articles contributed to this Symposium enrich what is already an important discussion. Articles by R. George Wright, Eric Zacks, and Jonathan Witmer-Rich explore the connections between consent, autonomy and consentability. Lori Andrews, Evan Selinger and Woodrow Hartzog, and Deborah Zalesne apply Kim’s ideas on consentability to show the need for prohibition or significant regulation of current practices regarding medical and psychiatric apps, facial surveillance technology, and mandatory arbitration in employment agreements. Sharon Thompson suggests that we need to supplement the consentability analysis to understand the problems with premarital agreements, while Philip Cook and Kimberley Krawiec would amend Kim’s approach to be more accepting of compensation for kidney donations.

II. ANALYSIS OF CONSENT, AUTONOMY, AND CONSENTABILITY

In Consent and the Pursuit of Autonomy,⁵ R. George Wright investigates the relationship of consent and autonomy. Wright describes autonomy as an idea that is “crucial, but vexed.”⁶ For example, if autonomy is, as Consentability claims,⁷ about the number of our options and opportunities, then one is left with questions about how to quantify such things, and whether actual numbers, however they are counted, should be our focus, or whether we should instead look at the significance or value of the options and opportunities we have.⁸

As Wright points out, there are also questions to be raised about whether autonomy requires that choices be made only on rational grounds (as Immanuel Kant, at times, seems to indicate), and what relation autonomy has to overcoming constraints or to assistance.

Wright considers the (extreme) example of Joan of Arc (the

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⁶ Id. at 91.
⁷ Nancy S. Kim, Consentability: Consent and Its Limits 74 (2019).
version given in George Bernard Shaw’s play: someone who puts her life at risk and narrows her future options to zero. Wright concludes: “In important respects, Joan’s decision to go to the stake obviously seems less than fully autonomous. But Joan also seems to act on carefully and authentically adopted and freely endorsed reasons central to a coherent, continuing, and stable, if tragic, character.”

In Autonomy Threats, Benefits, and Framing, Eric Zacks offers another perspective on the relationship of consent and autonomy. On one hand, Zacks agrees with Kim’s basic approach in Consentability: one should focus on the full context in which parties consent to transactions, and not just whether there is some objective manifestation of assent. At the same time, Zacks cautions: “Focusing on potential negative aspects of consumer transactions . . . should not obscure autonomy-enhancing aspects associated with such transactions or lead one to overlook the necessarily normative judgments involved with permitting or prohibiting such activities.” In particular, if we are concerned about autonomy, we should not be too quick to cut off options as “not consentable.” “[A]utonomy threat assessments depend on the baseline one uses.” For example, a high-risk automobile loan with a 50% default rate might still be autonomy-increasing for the half that succeed in paying off the loan. In such circumstances, restricting subprime automobile loans harms not only the consumers who ultimately would be able to repay the automobile loans but also those consumers who might not have been able to do so. Since we cannot know in advance which consumers will be unable to repay the loans, all consumers are harmed when the restrictions are imposed.

Finally, Zacks raises the same sort of concern that is sometimes raised regarding any analysis that depends on biases and other cognitive limitations: that many of the same problems
that afflict individuals consenting to actions would also apply to judgments about other individuals’ consent.\footnote{Erick A. Zacks, Autonomy Threats, Benefits, and Framing, 66 Loy. L. Rev. 103, 111 (2020).} For example, “one’s normative judgment about the desirability of the activity will influence one’s construction of consent and whether it is possible to validly consent to the proposed activity.”\footnote{Id. at 111-12.} It would not be surprising if one’s view about consent and consentability for abortion, surrogacy, violent or risky sports, and plastic surgery for purely aesthetic reasons, tracked one’s “priors” regarding whether these are “moral” or “normal” or even praiseworthy. As Zacks points out, the analysis of abortion in Consentability differs markedly from how a comparable analysis would look coming from someone who thought that fetuses were fully human, or that abortion was deeply immoral and likely traumatizing.\footnote{Id. at 112-13 (citing Nancy S. Kim, Consentability: Consent and Its Limits 134-35, 140 (2019)).}

Jonathan Witmer-Rich, in Consentability, Autonomy, and Self-Actualization,\footnote{Jonathan Witmer-Rich, Consentability, Autonomy, and Self-Actualization, 66 Loy. L. Rev. 75 (2020).} begins by exploring the “competing principles” he argues underlie consent: self-interest, self-sovereignty, self-actualization, and self-government.\footnote{Id. at 75.} The different principles can point in different directions on policy questions. Witmer-Rich favors the third, which he also associates with the work of Joseph Raz.\footnote{Id. at 75-76.}

Witmer-Rich describes Kim’s approach as focusing on “future autonomy,” where autonomy is equated with the “freedom to move, act or think without assistance or constraint”\footnote{Id. at 81 (quoting Nancy S. Kim, Consentability: Consent and Its Limits 74 (2019)).} However, as Witmer-Rich points out, “[f]or many individuals, projects of self-actualization and self-formation commonly involve creating bonds that significantly constrain our future selves,” including everything from the distinct vows of the monastic life or the life of the clergy to the common burdens taken on by parents everywhere.\footnote{Id. at 82.} And these are the types of life-changing—and autonomy-restricting—choices that society should (and does) support, not condemn. Without denying the value of the other
aspects of autonomy, Witmer-Rich asserts that “self-actualization—the ongoing human project of creating and embodying a coherent and meaningful values and choices—is the most fundamental good of autonomy and is the good that society should seek to further in the law of consent.”

III. APPLICATIONS

Lori Andrews, in *The Fragility of Consent*, summarizes a study of “hundreds of medical and psychiatric apps relating to diabetes, bipolar disorder, suicide prevention, and eating disorder.” What she finds is highly discouraging: “The legal standard for consent is not being met in the apps context. Knowledge is insufficient, coercion has replaced voluntariness, and consent is not adequately manifested.” Information about the apps—and within the apps—is too frequently hidden, obscure, misleading, or simply false. Use of these apps is far from voluntary, as there are often significant social pressures to use them, and sometimes there is a threat that a job or important state benefits could be lost if the apps are not used. Purported consent to terms (or a change in terms) is sometimes nothing more than the use of the app. And changes in terms frequently occur without notice (often including no prior notice that terms could be changed). Andrews offers sensible suggestions of the changes that need to be made, including more information up front to allow useful comparison among available options, no unilateral changes, no sharing of certain kinds of information, and significant sanctions for violations of these rules.

Evan Selinger and Woodrow Hartzog offer another salient example of a practice that should be incontestable in *The Inconsentability of Facial Surveillance*. The authors explain how the practice of facial recognition surveillance illustrates the sort of defects of conventional consent about which Kim’s book warns. Selinger and Hartzog “argue that valid consent is not possible for face surveillance in many of its current and proposed applications because of its inevitable corrosion of our collective autonomy, to say

27. Id. at 13.
28. Id. at 20.
29. Id. at 21.
nothing of the dubious validity of individual consent in these contexts. 31

Selinger and Hartzog outline the serious concerns: consumers and citizens do not have the information they need to make an intelligent decision about facial surveillance; and people are too easily persuaded to offer objective manifestations of consent, not understanding the dangers. 32 And, as the authors relate, there are significant dangers—not precisely to privacy or autonomy, but to the option of “obscurity”—in both public and private uses of facial surveillance. 33 However, once the practice of surveillance is established, it will be hard to go back: the practice will have its own momentum, based on “consent” and sunk costs. 34

Deborah Zalesne, in The Consentability of Mandatory Employment Arbitration Clauses, 35 offers a good overview of the problems with this now-almost-universal practice: “each of the consent conditions (voluntariness, knowledge, and manifestation of assent) is . . . insufficiently robust when talking about boiler plate with an often-buried mandatory arbitration clause, especially when the contract is for employment that is essential to the consenting employee’s well-being.” 36 Also to be considered, as Zalesne points out, are the differences in sophistication and bargaining power in most such agreements, along with the employee’s lack of information about the arbitration process. 37

As with facial surveillance, the problem is as much with the subject of consent as it is with the quality of consent. Zalesne writes: “in most cases, the social benefits of arbitration clauses do not clearly outweigh the social harms” 38 While one can imagine arbitration processes that actually work to the benefit of all, that is not the reality of mandatory arbitration for most employees (and

32. Id. at 36-37.
33. Id. at 45.
34. Id. at 49.
36. Id. at 117-18.
37. Id. at 120-21. Zalesne suggests that mandatory arbitration is far more acceptable in contexts where the parties have comparable bargaining power, as when such provisions are part of a collective bargaining process between an employer and a union. Id. at 144.
38. Id. at 119.
most consumers). Arbitration is too often expensive, one-sided, secret, and generally impractical for small claims. Zalesne ultimately concludes that there should be a rebuttable presumption of no valid consent to mandatory arbitration clauses in employment contracts, even when an employee “manifests” consent with a signature or click, with the presumption rebutted only by a showing by the employer that the term was agreed to through negotiation by parties with roughly equal bargaining power.

Mandatory arbitration provisions often appear in agreements where the parties’ attention is reasonably focused elsewhere (e.g., in employment agreements, the employee’s focus goes to wages and benefits). Employees are not focusing on the details of how potential disputes will be resolved, so it is at best misleading to say that they have “consented” to arbitration just because they have signed a document that included a mandatory arbitration provision. There are comparable issues with premarital agreements, where parties are often (reasonably) more focused on the marriage about to happen than they are on a future divorce they often optimistically assume will never happen.

On the topic of premarital agreements, Sharon Thompson, in Using Feminist Relational Contract Theory to Build Upon Consentability: A Case Study of Prenups, argues that while Consentability’s approach offers important insights in analyzing what is going on when parties agree to premarital agreements,

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39. See, e.g., Caroline E. Mayer, Win Some, Lose Rarely?; Arbitration Forum’s Rulings Called One-Sided, WASH. POST, March 1, 2000, at E1 (First USA gave companies that hired them a 99.6% win rate).
43. Id. at 134-35.
45. Thompson uses the label “prenup,” short for “prenuptial agreement.” I prefer and use “premarital agreement”; others use the label “antenuptial agreement.” These all refer to the same thing: agreements entered on the eve of marriage, with the intention of modifying rights during the marriage, at divorce, or at the death of one of
Thompson’s own approach, Feminist Relational Contract Theory (FRCT) (which she elaborated in a previously published article\textsuperscript{46}), would go even further towards highlighting the gender/power dynamics.

Reflecting those concerns, Thompson develops an argument for a more individualized and contextualized approach to regulating (sometimes enforcing, sometimes invalidating, sometimes modifying) premarital agreements. She argues that FRCT can recognize and highlight “the connection between divorce and poor economic conditions as a result of gendered changes and choices made during the marriage.”\textsuperscript{47} While doctrinal analysis focuses on consent at the time an agreement is signed, both Consentability and FRCT advocate viewing consent as a matter that changes over time, looking at the parties’ continuing relationship rather than just the snapshot view at the time an agreement is signed.\textsuperscript{48}

Philip Cook and Kimberley Krawiec, in \textit{Kidney Donation and the Consent of the Poor},\textsuperscript{49} offer a “partial dissent” to how Kim applied her approach to kidney donation:

Although we agree with the general conclusion that bodily integrity exchanges should be permitted, we disagree with the specific limitations that treat the decisions of the poor as suspect, proposing instead methods of structuring payments and the consent process that would enhance the decision-making quality and reduce the possibility of impulsive decisions for all donors—not just those meeting an arbitrary definition of poverty.\textsuperscript{50}

Cook and Krawiec are troubled by the different treatment of poor potential donors, arguing that the concern about impulsive responses to potentially large payments would be better solved, not


\textsuperscript{48} Id. at 69-70; see NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 15-17 (2019). (discussion of "consent destruction").

\textsuperscript{49} Philip J. Cook & Kimberly D Krawiec, \textit{Kidney Donation and the Consent of the Poor}, 66 LOL. L. REV. 29 (2020).

\textsuperscript{50} Id. at 32.
by prohibiting such donations, but instead by delaying or structuring payments (in lieu of immediate lump sum payments). 51

Additionally, Cook and Krawiec would not analyze kidney donation in the same way as other “bodily integrity exchanges,” 52 like non-medically-indicated plastic surgery. The obvious difference being that kidney donation, whatever its motivation, has significant benefits for others: saving, lengthening and improving the lives of those who receive the donated kidney. As the authors point out in a different work, it is ironic (or perhaps the right label is “hypocritical”), that we are happy to condone and even encourage young adults to risk their health while being paid to participate in violent sports for our entertainment, but we resist allowing them to risk their health for compensated organ donations that will save lives. 53

IV. CONCLUSION

In Consentability, Nancy Kim directs us not to look away from an event or transaction just because an agent has manifested consent. There are still frequently crucial moral and policy questions we need to ask regarding whether this is the sort of activity that should be consentable. The contributors to this Symposium have both helped to explore the moral and policy foundations of consentability inquiries and have offered examples of the power and range of consentability in application to moral and policy questions around us. There may be “magic” to consent, 54 but, as Kim and the Symposium contributors have amply shown, a manifestation of consent should not foreclose further analysis; there are too many crucial questions still to consider.

52. See NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 18 (2019).
53. Philip J. Cook & Kimberly D. Krawiec, If We Allow Football Players And Boxers To Be Paid For Entertaining The Public, Why Don’t We Allow Kidney Donors To Be Paid For Saving Lives?, 81 LAW & CONTEMP. PROBS. 9 (2018).
54. See, e.g., Heidi M. Hurd, The Moral Magic of Consent, 2 LEGAL THEORY 121 (1996) (analyzing the way in which consent transforms the moral and legal status of events)