

AUTHOR RESPONSE TO SYMPOSIUM

*Nancy S. Kim**

I am grateful to the *Loyola Law Review* for publishing this symposium issue on my book, *Consentability: Consent and Its Limits*.¹ The contributors to this issue are all prominent scholars who have wrestled with the issue of consent and autonomy in their respective fields, and this symposium is an invaluable opportunity to engage with them on these topics. I thank each of them for their insights and their helpful comments and criticisms. I also thank Danielle Kie Hart for conceiving of and thoughtfully organizing the symposium issue, Brian Bix for writing the incisive and comprehensive foreword, and the members of the *Loyola Law Review* for their careful work editing this symposium issue. It has truly been a pleasure and an honor.

This book project first started as a way for me to understand why the law permits individuals to consent to some activities but not others. This captures one of the two meanings of the term “consentability.” The first meaning refers to legality. Certain acts are simply not permitted and so one is not allowed to consent to them. These activities include paid sex work and selling one’s organs. But the question of legality or legal permissibility is tied to the second meaning of consentability, that of *possibility*. Some acts are not legal because it seems unlikely that anyone could or would actually want to consent to them. The nature of the act itself makes us question the validity of the consent. We believe that something went awry in the decision-making process—that there was some type of coercion involved, a lack of information about what the activity entailed, or some other defect in the decision-making process. We suspect, in other words, that given what the activity entails, nobody would really want to participate. This, however, raises the question—what does it mean to consent?

Consent plays a unique and critical role in a society that is

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1. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* (2019).

premised upon individual liberties. Guilt or innocence often hinges upon consent, as do violations of rules and regulations. Yet, the meaning of consent is amorphous and what the law and society deem to constitute consent in one context, would not suffice to constitute consent in another.

My book proposes a framework for evaluating consentability that recognizes the integrality and essence of consent. Consent requires three conditions: a manifestation (a word or act) of consent, knowledge, and voluntariness. The amount required of each condition (what I refer to as “robustness”) depends upon the activity. In my book, I introduced a hierarchy of threats to the autonomy interest.² (Figs. 3.4 & 3.5). The greater the threat to the autonomy interest, the more robust the consent conditions must be in order to constitute “valid” consent. Consent is invalid where the threat to autonomy outweighs the conditions of consent. (Fig. 3.6). Consent is valid where the conditions of consent outweigh the threat to autonomy.

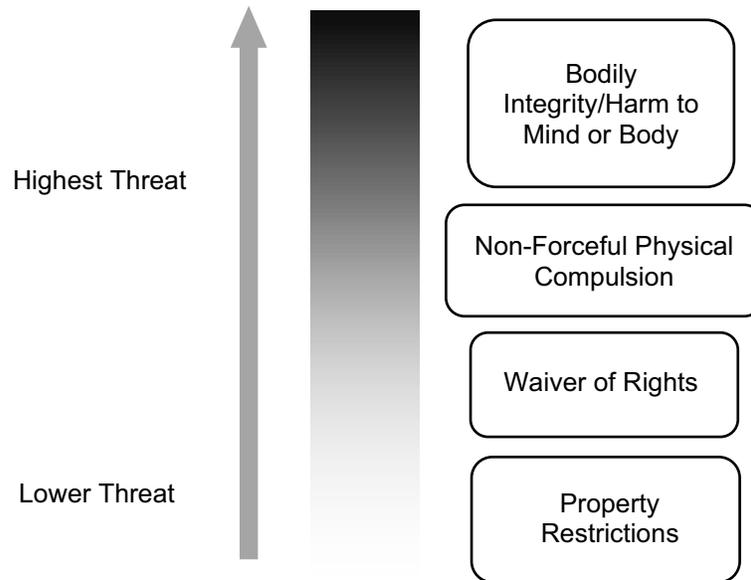


Fig. 3.4 – HIERARCHY OF AUTONOMY INTERESTS

(Reprinted from *Consentability: Consent and Its Limits* (Cambridge, 2019))

2. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 75 (2019).

		TYPE OF THREAT			
		HIGHEST LEVEL		LOWEST LEVEL	
		BODILY INTEGRITY/ HARM TO MIND AND/OR BODY	NON- FORCEFUL PHYSICAL COMPULSION	WAIVER OF RIGHTS	PROPERTY RESTRICTIONS
Factors to Consider	Duration		Duration of compulsory service or exposure	Duration of waiver	Duration of restriction
	Impact/severity of threat (Permanence/irreversibility, diminishment v. enhancement)		Condition/nature of threat	Type of Right/Importance	Type of restriction
	Pain		Degree of physical exertion or offensiveness	Likelihood of exercising right	Type of property/importance
	Availability of alternatives to bodily harm		Alternatives (Working conditions and degree of difficulty to avoid)	Availability of alternatives to waiver	Alternative compensation for restriction

Fig. 3.5 – RELEVANT FACTORS IN ASSESSING THREAT LEVEL TO AUTONOMY

(Reprinted from Consentability: Consent and Its Limits (Cambridge, 2019))

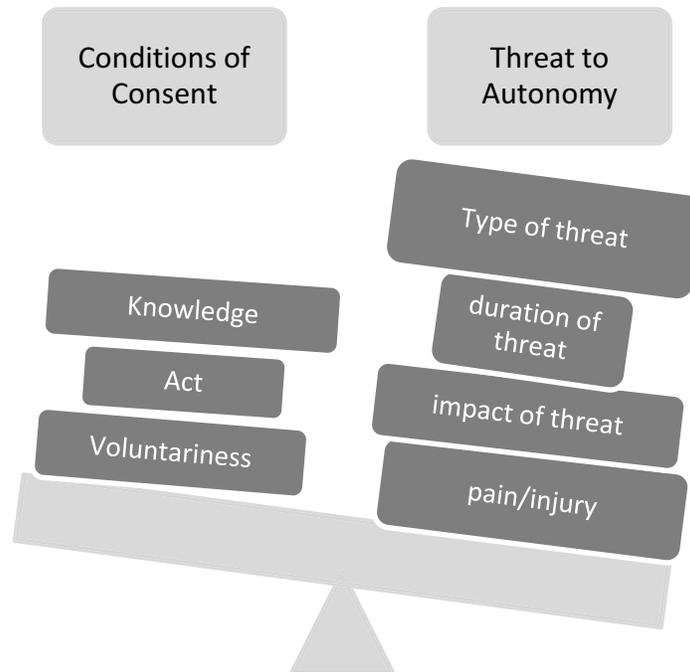


Fig. 3.6 – FIGURE SHOWING NO VALID CONSENT

(Reprinted from Consentability: Consent and Its Limits (Cambridge, 2019))

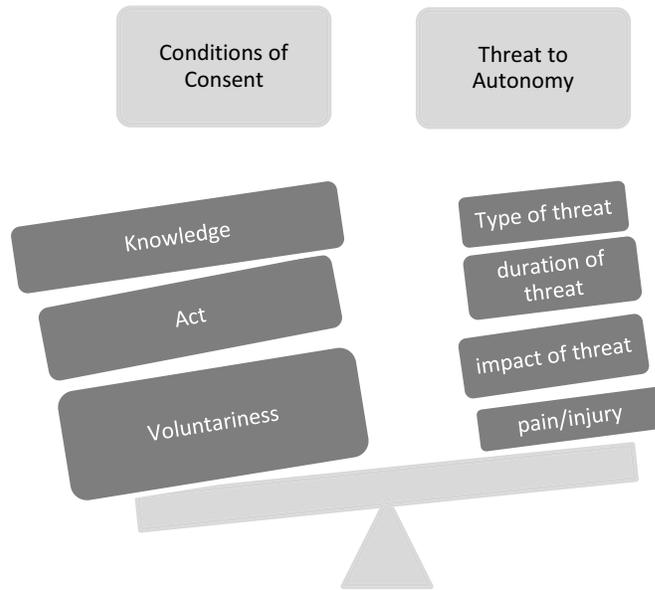


Fig. 3.7 – FIGURE SHOWING VALID CONSENT

(Reprinted from *Consentability: Consent and Its Limits* (Cambridge, 2019))

With an acute awareness of the diversity of morals, beliefs and personal preferences, I developed the hierarchy of autonomy interests (Fig. 3.4) which distinguishes activities based upon their threat to individual autonomy. My definition of autonomy used within the context of the framework is not meant to assess the worth or value of an activity, but to assess whether the activity might constrain the future self in such a way that it justifies greater caution (i.e., more robust consent conditions) before proceeding. The potential harm that someone might suffer from clicking “Agree” to a website’s terms and conditions before making a purchase generally poses less of a threat to the autonomy interest than signing a form to have a kidney removed, and so requires less robust consent conditions. Consenting to a kiss requires less robust conditions than consenting to sex. The greater the risk associated with the activity, the more certain we want to be that consent was given—and so the more robust must be the conditions of consent.

When it comes to applying the framework, I conceptualized two guiding principles: the Regret Principle and the Opportunism Corollary.³ The Regret Principle considers, and seeks to avoid to

3. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 69 (2019) (“The

the extent possible, severe regret on the part of the consentor.⁴ The Opportunism Corollary extends John Stuart Mill's Harm Principle by preventing those who knowingly harm or take advantage of others from benefitting from their opportunistic conduct.⁵

THE MEANING OF AUTONOMY

My definition of autonomy—the “freedom to move, act or think without assistance or constraint”—was adopted for the specific purpose of determining how robust consent conditions must be in order for consent to be considered “valid.” In other words, it serves as a constraint on an individual's actions and so, in order not to unduly burden individual freedom, was deliberately made as narrow as possible. A narrower definition of autonomy in the context of the framework allows for a wider range of consentable activities. Jonathan Witmer-Rich is correct to observe that the question of “future autonomy” as opposed to “self-interest” is a “central guiding principle throughout the book.”⁶ But it is not, as he suggests, because I think that future autonomy (in the sense of “freedom”) is better or more important than self-interest; it is because what is in one's self-interest may change with time, knowledge, and experience. One's self-interest is dynamic, not fixed. What may be in my self-interest today may not be so tomorrow. Jonathan Witmer-Rich, however, argues that my definition of autonomy “comes at a cost” because “projects of self-actualization and self-formation commonly involve creating bonds that significantly constrain our future selves.”⁷ It is certainly true that self-actualizing acts may also be constraining, but it is also true that one has greater autonomy—in the sense of choice and individual freedom—if one has the ability to change one's mind. This does not mean, however, that one should be prohibited from making binding commitments or prevented from engaging in activities which pose a high-level threat to autonomy (i.e., autonomy-as-freedom); what it means is that the conditions of consent must be more robust for those activities than for activities

Opportunism Corollary recognizes the mutuality of human interactions involving consent and thus applies to the conduct of both parties in a consent scenario. The Regret Principle seeks to improve the conditions of consent and discourages people from engaging in acts which they will profoundly regret because these acts will have diminished their (future) autonomy.”)

4. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 57 (2019)

5. *Id.* at 69.

6. Jonathan Witmer-Rich, *Consentability, Autonomy and Self-Actualization*, 66 *LOY. L. REV.* 75, 81-82 (2020).

7. *Id.* at 82.

that pose a lesser threat to autonomy. Witmer-Rich uses a young man's decision to enter the priesthood as an example of a self-actualizing but freedom-constraining act. But my autonomy framework does not prohibit such a decision; it only seeks to ensure that prior to making such a commitment, the young man has carefully considered the consequences of that decision. The Catholic Church recognizes the need to test the commitment of those entering the priesthood and to exclude those who may be acting impulsively, which is why it requires years of study and other requirements. To put it within the context of the consentability framework, the Catholic Church has designed the path to priesthood with enough barriers to ensure that each of the consent conditions are robust enough given the risk level to the autonomy interest.

The first prong of my consentability framework does not devalue or dismiss the other definitions of autonomy. Rather, it is precisely *because* I value the expansive and multiple meanings of autonomy that I adopted a much narrower definition for the hierarchy of autonomy interests. The hierarchy of autonomy interests considers when activities should be restricted because of the potential *harms to autonomy*. Accordingly, the narrower the definition of autonomy, the greater the range of potentially consentable activities.

R. George Wright observes that “[t]heorists are currently divided on the extent to which greater and lesser freedom can be measured or . . . reduced in particular to enumeration or other forms of quantification.”⁸ He, too, questions my definition of autonomy, wondering whether someone who has been assisted is in fact less autonomous, using examples of an “exhausted runner who wishes to finish a marathon, but who cannot do so unless she is physically carried across the finish line by outside parties” and canoers who “cannot successfully cross the river without the active cooperative assistance of the other person. Does their mutual assistance impair their individual autonomy?”⁹ But it is not that assistance leads to diminished autonomy; rather, it is that some acts cause harms that reduce one's independence in such a way that in the future, one *must* be assisted by others. The examples he cites of the runner being carried across the finish line, or the canoers helping each other across the river, are not examples

8. R. George Wright, *Consent and the Pursuit of Autonomy*, 66 LOY. L. REV. 91, 94 (2020).

9. *Id.* at 97.

where anyone is engaging in an act that poses a threat to the autonomy interest.

By contrast, is his example of Joan of Arc. Wright uses the story of Joan of Arc, as dramatized by George Bernard Shaw, to illustrate the problem of “multiple important” and “mutually incompatible” interests, including “our interest in sustaining autonomy itself”:

Shaw’s Joan vividly raises many fundamental questions about the meaning, role, and value of autonomy in a life well- and authentically lived. . . . On the world’s accounting, Joan’s decision making is pathologized and delusional, and thus hardly autonomous. She acts, it is widely thought, out of naivete and ignorance, both of which typically amount to fundamental barriers to meaningful autonomy. Joan does not act, ultimately, in such a way as to hold open over time a range of earthly future options and opportunities. Joan ultimately reduces her range of future choices down to zero.¹⁰

Joan of Arc provides an opportunity to show how the consentability framework can act as a “white box” to shed light on how a decision is being made and to assess whether that decision is one to which consent is being granted. In the language of consentability, Joan’s actions fall into the category of “highest level threat to autonomy” and thus require the most robust consent conditions. If we accept Wright’s description of Joan of Arc’s behavior, it is clear that the requisite high robustness level was not met. Her “pathologized and delusional” decision making manifests a lack of the knowledge condition, and she acts because she is being “commanded” to do so by “angelic voices,” indicating a deficient voluntariness condition.¹¹ It is not clear that Shaw’s fictional Joan was aware that her attempts to take Paris would result in her being burned alive at the stake, and she certainly had no idea what it would be like to undergo that horrific experience. Wright admits that “Joan seems far removed from exercising genuine autonomy.”¹² Yet, he is reluctant to conclude that her decision was the wrong one.

Joan of Arc’s decision—whether right or wrong—is not an autonomous one. On the contrary, she has lost all autonomy and

10. R. George Wright, *Consent and the Pursuit of Autonomy*, 66 LOY. L. REV. 91, 98-99 (2020).

11. *Id.* at 99.

12. *Id.*

is subordinating herself to God's authority. How we feel about Shaw's Joan of Arc and whether we believe her actions are right or wrong depends upon how we feel about God. The tragic, romantic figure depicted by Shaw is a fiction, and whether we are captivated by that fiction depends upon who "we" are—whether we have children; whether we have ever known anyone who suffered from delusions or mental illness; how we feel about war, religion and religious subordination. The consentability framework does not enable or cater to romantic notions of heroism or martyrdom; on the contrary, it seeks to render transparent the decision-making process and prevent actions which may lead to severe regret.

Yet, one may argue that relinquishing "autonomy-as-control" might itself enhance "autonomy-as-self-actualization." According to that argument and that definition of autonomy, subjugation is itself an autonomous (i.e., self-actualizing) act. I don't dispute that this might be the case sometimes, but only if the consent conditions are robust enough given the threat to "autonomy-as-freedom" *and* provided that there is a right to exit that subjugated state in the event of a change of heart.

The hierarchy of autonomy interests (Fig. 3-4) does not set forth a hierarchy of autonomy-enhancing acts; rather it sets forth a hierarchy of situations where more robust consent conditions should be required given the threat to one's future freedom. Of course, consent and autonomy are inextricably tied, as R. George Wright notes. But we are notoriously poor judges of our future preferences and if we are to make a decision today which limits our choices tomorrow, we should do so with care. If Joan of Arc had survived—if she had accepted life imprisonment instead of death—would she have regretted her youthful, life-altering decision? Would a middle-aged Joan, living her days in an underground cell without sunlight, have wished that someone, perhaps her parents, had convinced her to stay at home and tend to the farm? Would she have cringed at the foolishness of her young self, as so many of us do? Wright remarks that "Joan does not seem to consistently regret the status of sainthood, whatever the earthly price paid."¹³ But I believe the only reason was that she did not live to have any regrets. Who knows her thoughts while she was burning at the stake? This is not to say that one should never be allowed to undertake an activity which poses a high risk of (excruciatingly

13. R. George Wright, *Consent and the Pursuit of Autonomy*, 66 LOY. L. REV. 91, 99 (2020).

painful) death; only that if one is to do so, one should have given it clear-eyed deliberation with the most robust consent conditions.

MORALITY AND CONSENTABILITY

My definition of autonomy was specifically intended to minimize, to the extent possible, subjective beliefs about the harms or benefits of a particular activity even if it would be impossible to entirely escape them. Some definitions of autonomy are more susceptible to biases and subjective beliefs than others. The meaning of “self-actualization,” for example, requires a subjective determination of what such a state means. “Self-determination” raises more questions about adaptive preferences and the nature of free will than it resolves. By contrast, there is not as much subjectivity involved in determining whether severing a limb or removing an organ is painful, irreversible and limits autonomy-as-freedom (i.e., freedom of movement) or future options (i.e., the option to use that limb or organ or donate it at a later time). My definition of autonomy and the hierarchy of autonomy interests move beyond subjective determinations by categorizing activities based upon measurable or universally acceptable criteria. Permanent harms to bodily integrity rank as higher threats than temporary harms to civil rights even though an argument could be made that the latter may, at least in some cases, pose a greater harm to an individual’s right of self-actualization or self-determination. In my book, I recognized that there might be disagreement about the ordering or list of the autonomy interests and that “[s]ome may also disagree about which interest they value more. Some, for example, might value the freedom to speak more highly than bodily integrity. But the exercise of the right to speak is not possible if one is dead (the highest-level threat to individual autonomy).”¹⁴

In his contribution, Eric Zacks observes, “the same biases, heuristics, and other deviations from rationality that affect the consent process will impact one’s assessment of autonomy threats, voluntariness of consent, societal harms and benefits, and so on.”¹⁵ He raises the issue of abortion as an example of the difficulty of consensus on how to assess the relevant factors in determining consentability. An issue as divisive and complex as abortion warrants many more pages than I have here, but it is important to

14. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 77-78 (2019).

15. Eric A. Zacks, *Contract Consentability: Autonomy Threats, Benefits, and Framing*, 66 *LOY. L. REV.* 103, 111 (2020).

note that to grant an embryo or a fetus autonomy rights would have enormous ramifications for society—and for the individual freedom of both women and men. If we were to treat an embryo or a fetus as an autonomous human being, with equivalent interests to the woman carrying it, our society would move closer to a coercive one where individual choices become severely constrained and consent becomes irrelevant.¹⁶ Recognizing fetal rights also would have an enormous impact on the fertility industry, even resulting in its criminalization. Who would decide the fetus's preferences or its interests? Furthermore, where would we draw the line? If society recognizes that one has a duty to undergo a “high-threat” level act, such as pregnancy and childbirth, for the benefit of another, would that mean that one would be required to, for example, donate a kidney to save the life of another?¹⁷

As I explain in the book, I support reproductive rights, including the right to an abortion, because I believe that the woman carrying the fetus is an autonomous being (with autonomy rights) and the fetus is not. Accordingly, abortion is a matter involving women's health, not fetal rights.

Certainly, there are those who disagree, but their disagreements are based upon religious beliefs regarding when life begins;¹⁸ they are not based upon what is factually known now,

16. See Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1, 33-34 (1992) (stating that abortion is “a refusal to allow one's body to be devoted to the protection of another” and noting that [g]overnment never imposes an obligation of this sort on its citizens—even when human life is uncontroversially at stake.”).

17. See *id.* at 34 (“Parents are not compelled to devote their bodies to the protection of children, even if, for example, a risk-free kidney transplant is necessary to prevent the death of their child—and even though it could be said that the parents ‘assumed the risk’ of the bodily imposition by conceiving the child in the first instance.”).

18. I suspect there are some who oppose abortion rights because they do not actually believe women are fully autonomous beings; instead, they believe that women's bodies are communal and for the public good, to be safeguarded for procreative purposes to benefit all of society. This was a prevailing view in the United States and one espoused by the U.S. Supreme Court in *Muller v. Oregon*, 28 S. Ct. 324 (1908), when it upheld an Oregon law limiting work hours for women because a long workday would be “injurious” to the women's body and because “the physical well-being of woman becomes an object of public interest and care in order the preserve the strength and vigor of the race. . . . The limitations which the statute places upon her . . . are not imposed solely for her benefit, but also largely for the benefit of all.” *Id.* at 326-327. But this view is now outdated and a discredited, marginal one. Even those who hold it are loath to openly admit it. Although there are some even today who adopt an anti-abortion stance as an extension of their misogyny, there are others who, in good faith, believe both in the autonomy rights of women and in the autonomy rights of fetuses. The consentability framework presumes that men and women have equal

which is that a fetus is wholly dependent upon the woman and lacks autonomy. There are undeniable physiological differences between a fetus and a baby—a fetus depends entirely upon the woman to survive and a baby can survive outside the womb and has independently functioning organs.

In other words, disagreements about abortion are essentially disagreements involving religious beliefs. In a diverse and secular society such as the United States,¹⁹ the state should not restrict one person's autonomy (especially where doing so poses a high-level threat to autonomy) because it offends another's religious beliefs. That is the very essence of autonomy—the freedom to make decisions and act according to one's desires so long as those beliefs do not harm the autonomy interest of another. This presupposes that the other is an autonomous being.

Phillip Cook and Kimberly Krawiec's essay²⁰ also raises the question of the morality of consenting to certain activities. Cook and Krawiec object to my placing paid kidney "donations"²¹ in the same category as sex work and surrogacy because those transactions create "specific ethical concerns and distracting visceral responses."²² They suggest reframing the issue of consentability to paid kidney transfers, so it is comparable to a "wide array of risky but productive tasks," on par with working on a fishing boat or some athletic occupations.²³ Viewing kidney sales in the same context as physically dangerous occupations is helpful, but excluding prostitution and surrogacy is not. The same "ethical concerns and distracting visceral responses" associated with prostitution and surrogacy are raised with paid kidney transfers,²⁴ and all these activities engage the core of the consentability question—to what extent should an individual be able to make decisions consistent with that individual's preferences if those decisions conflict with the personal values of others? It is to

autonomy rights—just as the law does—and I limit my response to the latter view.

19. The United States Constitution expressly states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I, cl. 1.

20. Philip J. Cook & Kimberly D. Krawiec, *Kidney Donation and the Consent of the Poor*, 66 LOY. L. REV. 23 (2020).

21. I prefer to use the term "transfer" if the transaction is paid because it more accurately reflects the nature of the transaction.

22. Philip J. Cook & Kimberly D. Krawiec, *Kidney Donation and the Consent of the Poor*, 66 LOY. L. REV. 23, 25 (2020).

23. *Id.* at 25.

24. *Id.*

address this issue that I developed the consentability framework. I do not believe that sex work or kidney sales (or deep-sea fishing for that matter) should be inconsentable simply because others may find these activities immoral, distasteful, or unwise. But neither should we ignore the difficult issues these activities raise regarding the nature of consent and how vulnerabilities, economic circumstances and context affect one's choices, perceptions and the validity of consent. The difficult question for society is whether—and how—to regulate these types of activities given the potential for exploitation, negative social consequences, and individual harm.

My consentability framework has two major prongs. The first, “Is it possible to validly consent to the proposed activity?,” concerns the consenting individual and what it means for consent to be valid given the risk an activity poses to that individual. The hierarchy of autonomy interests examines, not the perceived morality of an activity, but the potential risk to the consenter. People may have additional and specific objections based upon personal beliefs which would be addressed by the second prong of my consentability framework: “Are social harms caused by the proposed activity outweighed by its social benefits?”

Those who are “desperately poor” are vulnerable to exploitation and predatory solicitations and should not be presumed to have validly consented to *any* paid transaction involving a high-level threat to autonomy. This would include paid maternal surrogacy, sex work,²⁵ and paid kidney transfers. It is unlikely that the voluntariness condition would be sufficiently robust given the threat to autonomy posed by the bodily intrusive activity. This does not, however, mean that the desperately poor should not be permitted to participate in these types of transactions. My proposal is that consent given by one who is desperately poor should be presumed defective. The presumption of defective consent, however, is not the same thing as a *void* transaction. Thus, the transaction would be lawful, but the desperately poor consenter can avoid it; moreover, the consent-seeker must be prepared to rebut the presumption of defective consent.²⁶

25. Although sex is not inherently dangerous, paid sex work would expose the sex worker to potentially dangerous situations and physical acts that are more intrusive than sex.

26. See discussion, NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 113-17 (2019).

Cook and Krawiec criticize my proposal because they believe it “treat[s] the decisions of the poor as suspect”²⁷ and, instead, they propose a structured payout so that potential transferors “are not confronted by the temptation of an immediate windfall gain in exchange for undergoing the risky procedure of donation.”²⁸

There are two different points to make in response to their criticism. The first, implicating the Regret Principle, is that those who are *desperately* poor often operate under a “scarcity mindset” which impedes decision making.²⁹ Thus, flawed decision making is often the result of a person’s circumstances.³⁰ The desperately poor are deserving of special protections not because there is anything deficient about the cognitive abilities of someone who is poor, but because *anybody* would make decision-making errors given similar conditions of scarcity. It does no good, and much harm, to pretend that severe financial constraints have no effect on decision making.³¹ To ignore the differences that the condition of poverty makes to consent serves to validate unfair terms and perpetuate inequality.³² It justifies harms under the guise of free

27. Philip J. Cook & Kimberly D. Krawiec, *Kidney Donation and the Consent of the Poor*, 66 LOY. L. REV. 23, 32 (2020).

28. *Id.* at 25.

29. Sendhil Mullainathan & Eldar Shafir, SCARCITY: THE NEW SCIENCE OF HAVING LESS AND HOW IT DEFINES OUR LIVES (2013) (discussing research showing how scarcity of resources affect the ability to make rational decisions).

30. Social scientists refer to the tendency to attribute a person’s decisions to character rather than circumstances as the “fundamental attribution error.” See Saul Mcleod, *Fundamental Attribution Error*, SIMPLY PSYCHOL. (2018) <https://www.simplypsychology.org/fundamental-attribution.html>.

31. See Hila Keren, *Consenting Under Stress*, 64 HASTINGS L.J. 679, 681-82 (2013) (stating that people under stress “often consent to detrimental, sometimes disastrous, agreements” which sometimes justifies legal relief given “its potential to undermine contractual consent”).

32. There is growing contracts scholarship that addresses the legal and moral consequences of believing that one has consented to a contract or that one has been the victim of a breach. See Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 STAN. L. REV. (forthcoming 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378353 (finding that consumers erroneously believe fine print is enforceable in cases of fraud); Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745 (2014) (discussing moral blame for contract and noting that blaming the consumer for consenting to a contract is psychologically and cognitively appealing); Tess Wilkinson-Ryan & David A. Hoffman, *Breach is for Suckers*, 63 VAND. L. REV. 1003, 1017 (2010) (proposing that contractual breach makes its victims feel exploited and “like suckers”); Eric A. Zacks, *Contracting Blame*, 15 U. PA. J. BUS. LAW. 1 (2012) (using attribution theory to explain how the design of a contract may lead to a party being viewed as more blameworthy); Eric A. Zacks, *Shame, Regret and Contract Design*, 97 MARQ. L. REV. 695 (2014) (exploring how contract design can encourage

will—and is precisely the reason for a consentability framework.

The second point, implicating the Opportunism Corollary, is that the poor are often taken advantage of precisely *because* they are poor. They are exploited because their economic condition leaves them with few choices. It is not solely bodily integrity contracts that are susceptible to opportunism and exploitation. As I note in the book, the groupings in my hierarchy of autonomy interests represent a band or range, and the precise nature or level of the threat depends upon different factors or variables associated with the activity.³³ The “threat level” thus depends upon “both the nature of the threat and the interest being threatened.”³⁴

As Eric Zacks and Deborah Zalesne point out in their essays, some purely economic transactions, such as home mortgage loans and employment agreements, pose substantial autonomy risks because they involve economic necessities and impose onerous, long-term obligations. These types of transactions should also be subject to regulatory safeguards regarding limits on solicitations and substantive “fair terms” because of the high potential for exploitation.³⁵

Bodily integrity transactions, however, are *sui generis* because, unlike purely economic commercial transactions, the act cannot be undone by a court. A kidney cannot be returned to a deceived transferor the way that a consumer may be allowed to rescind a bad mortgage loan agreement; the bodily intrusion cannot be erased like a debt can be erased.

The scarcity mindset is particularly vulnerable to the skilled manipulation of marketers. Marketers and solicitors may frame offers to take advantage of the cognitive blind spots and impulsivity that the condition of scarcity creates. In the words of Nobel Prize winners George Akerlof and Robert Shiller, the free markets, while having many benefits,

also create an economic equilibrium that is highly suitable for economic enterprises that manipulate or distort our

non-drafting parties to blame themselves for entering into an unfavorable contract).

33. Refer to Figures 3.4 & 3.5. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 74 (2019).

34. *Id.* at 74-75.

35. In the rental market, for example, one study found that the exploitation of tenants was highest in poor neighborhoods. See Matthew Desmond and Nathan Wilmers, *Do the Poor Pay More for Housing? Exploitation, Profit, and Risk in Rental Markets*, 124 AMER. J. SOC. 1090 (2019).

judgment. . . . Insofar as we have any weakness in knowing what we really want, and also insofar as such a weakness can be profitably generated and primed, markets will seize the opportunity to take us in on those weaknesses. They will zoom in and take advantage of us.³⁶

This is the reason that my proposed defective consent presumption in the context of bodily integrity transactions prohibits solicitations. Marketers are specially trained to manipulate consumers to engage in activities which may not be in their best interests, and doing so is considered fair game in a free market.³⁷ But bodily integrity transactions should not be treated the same as other commercial transactions, and marketers should not be able to manipulate perceptions and solicit participation in bodily integrity transactions.

Cook and Krawiec's proposal focuses solely on the impulsivity created by economic need and ignores the opportunism that it often attracts. Under their proposal, the transferee may be in the vulnerable position of having undergone a kidney transplant only to then worry about whether each subsequent payment will be paid when due. It thus increases the potential for opportunism where the recipient, having received the benefit of the bargain (a kidney), may seek ways to escape or reduce the recipient's payment obligation. A bad-faith recipient might, for example, argue that the kidney does not perform as well as expected and try to withhold payments. A recipient might delay payments due to other financial obligations. The organ transferor then would be in the sorrowful position of having to hire legal counsel to enforce the contract, which would be difficult to do without money.

My defective consent proposal does not prohibit the poor from engaging in bodily integrity transactions, such as organ transfers; however, if they later regret their decisions and believe they were coerced, misinformed, or that their consent was otherwise defective, the system will give them the benefit of the doubt. This proposal reflects the Opportunism Corollary. The poor are frequently the target of exploitation which should be understood not as a fault of the poor, but of the opportunist. Instead of desperately poor consenters having to explain why they "manifested consent" if they did not mean to consent, the burden

36. See GEORGE A. AKERLOF & ROBERT J. SHILLER, PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION & DECEPTION, at x (2015).

37. *Id.* at 45-49.

would be on consent-seekers to explain why they thought someone who was desperately poor would agree to undertake the procedure in the absence of coercion or misinformation. This burden could be met by showing that the terms of the transaction were fair and reasonable, and that they did not solicit the consenters' participation.³⁸ In other words, a presumption of defective consent moves the transaction out of the realm of private ordering and contract and into the realm of equity and tort.

Cook and Krawiec's proposal has the benefit of equal application, and so avoids the line drawing and categorization problems of my own proposal. I had originally considered applying the presumption of defective consent to *anyone* for *all* high-risk level bodily integrity transactions but decided that doing so was unnecessary since the same concerns I had regarding opportunism did not apply to those who were not desperately poor. Yet, the decision to single out the desperately poor for special treatment did—and still does—make me uneasy because I did not intend for it to be misconstrued as a commentary on the decision-making capability of the desperately poor. Cook and Krawiec's criticism that an "arbitrary definition of poverty"³⁹ ignores "other forms of financial distress" such as "indebtedness . . . or financial setbacks" prompts me to revisit my proposal.⁴⁰ In retrospect, perhaps I should have proposed that decisions by *all* donors to engage in paid organ transfers be subject to a presumption of defective consent. The presumption implies that something went awry in the consenting process and that deciding to sell an organ is inherently suspect. That was an implication I sought to avoid by limiting my presumption to the desperately poor,⁴¹ but on balance, that may be a more practical and more inclusive proposal. Although it may be overbroad, it avoids the greater harm of discriminating against a category of people based on economic status.

The consentability framework recognizes the importance of ensuring careful decision making on the part of the consenters to

38. See NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 215 (2019) ("The presumption of defective consent may be overcome by evidence that the consenters initiated the activity, the terms were fair and reasonable, and the procedures were performed in accordance with professional norms and standards.")

39. Philip J. Cook & Kimberly D. Krawiec, *Kidney Donation and the Consent of the Poor*, 66 *LOY. L. REV.* 23, 32 (2020).

40. *Id.* at 28.

41. I also propose a presumption of defective consent in other situations, such as for those undergoing novel procedures. See NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 162-67 (2019).

minimize regret (the Regret Principle), but it is also guided by the Opportunism Corollary and recognizes the reality of opportunism and those who would take advantage of another's desperation, cognitive limitations, and vulnerabilities. A defective consent presumption does not punish the consentor by taking away the consentor's ability to make decisions, but it puts a check upon opportunism and exploitation by shifting the burden on the consent-seeker to establish that the transaction was equitable. It also deters hard-selling tactics by presuming that efforts to solicit participation are predatory. This does not seem like an unreasonable or unworkable proposal. It is also not a direct restraint on individual autonomy because it doesn't limit the ability to enter into bodily integrity exchanges. Rather, it may make the poor less-desirable targets for opportunism. The presumption does not invalidate the transaction; it only shifts the burden of proving invalidity. Consequently, it is only relevant if the consentor felt aggrieved (cheated, exploited, tricked) after the transaction.⁴² As Cook and Krawiec state, it is "ethically important" to consider the welfare of the recipient.⁴³ Many lives could be saved by permitting paid organ transfers. But the potential benefit to society of allowing these transactions should not obscure their potential for exploitation.⁴⁴ Rather, it is important to carefully consider the type of regulations that might limit such exploitation.

Some might object that my proposal of a defective consent presumption for high-risk level bodily transactions will leave consent-seekers at the mercy of bad-faith consentors who got what

42. Tess Wilkinson-Ryan and David Hoffman describe well the scenario and the psychological state that accompanies being aggrieved as a result of an unfair contract:

The sucker must consent to the transaction, but the actual exchange must not be in line with the agreed-upon bargain. . . . A sucker must be somewhat *complicit* in his own victimization: he must either consent explicitly to some stage of the transaction or consent implicitly to the form of unwarranted trust. When a person is exploited, he is not only angry at the perpetrator, but he is also humiliated and self-conscious. A sucker feels some sort of self-blame for having voluntarily engaged in a transaction with a scoundrel.

Tess Wilkinson-Ryan & David A. Hoffman, *Breach is for Suckers*, 63 VAND. L. REV. 1003, 1018 (2010).

43. Philip J. Cook & Kimberly D. Krawiec, *Kidney Donation and the Consent of the Poor*, 66 LOY. L. REV. 23, 32 (2020).

44. See NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 195-96 (2019) (noting that some may be reluctant to admit the potentially exploitative nature of bodily integrity transaction but that a "counterbalancing benefit . . . should not obscure the potential for exploitation. On the other hand, the act should not be prohibited simply because it has the *potential* to be exploitative. . . . We should, however, carefully regulate them in light of their potential for exploitation.").

they bargained for but then opportunistically seek more. Even in these cases, however, the consent-seeker must only prove that the terms of the transaction were fair. There may be concern that the determination of fair terms would be arbitrary and result in unpredictability. Under my proposal, “fair” terms would be determined by a judge or jury, but they could also be established by regulations or legislation setting forth rules or guidelines on minimal payment amounts, qualifications, and other details. It would only be in the absence of mandatory minimum terms established by regulations or legislation that the determination of “fair” would be subject to the arbitrariness and discretion of a judge or jury.

The legal effect of a defective consent presumption is to take transactions with a high probability of exploitation out of the realm of contract law—with its assumptions about equal bargaining power and its reluctance to examine the terms of the bargain—and into the realm of tort with its focus on fairness, policy, and social norms. The practical effect of a defective consent presumption is that it would accelerate the regulatory and legislative process by providing an incentive for policy makers and legislators to produce standard minimum “fair” terms. Bodily integrity transactions are ill-suited for private ordering given the likelihood of exploitation, and a free market in organ sales is bound to lead to abuses. The burden shifting of defective consent incentivizes those who have the political capital to lobby for legislative actions. The desperately poor and those willing to sell their organs for money typically lack political power and the resources necessary to get lawmakers to act. On the other hand, those who need organs and can pay for them may be in a better position to harness their social and economic power to initiate political action.⁴⁵

Cook and Krawiec discuss a “radical reframing” of “paid kidney donation” as a “duty” for those who are healthy.⁴⁶ This is a reframing which they note has been suggested by others, even

45. There may be some concern that the legislated minimum terms may reflect the power imbalance between consenters and consent seekers. The legislative process should, but does not always, consider equally all affected parties, regardless of lobbying power. The terms would be subject to public discussion and scrutiny and so would be more likely to be fair than terms which are subject only to private negotiations. Once political action has commenced, non-profit groups and other interested parties may advocate for the interests of potential consenters. Furthermore, the terms would not be mandatory terms, but mandatory *minimum* terms, meaning that they would provide a floor from which parties could start negotiations.

46. Philip J. Cook & Kimberly D. Krawiec, *Kidney Donation and the Consent of the Poor*, 66 LOY. L. REV. 23, 25 (2020).

though it is not one that they endorse. They state that “[t]he issue of consent is transformed in this framing; the relevant question is not who should be allowed to consent to donate a kidney, but rather who should be allowed to opt out of the duty to donate a kidney.”⁴⁷ This reframing is helpful as an opportunity to consider when the state should act—and when state action amounts to coercion.

Generally, free societies adopt the approach that the state should refrain from intervening in individual affairs unless they harm others. Yet, sometimes, the state does require individuals to act against their will, often for their own good but also for the good of others. Mandatory seat belt laws and vaccination requirements for school-aged children are two that I discuss in my book.⁴⁸ I argue that state intervention is “justified to prevent the exercise of an individual’s agency in order to protect another individual’s greater autonomy interest or to mediate where there are conflicting autonomy interests.”⁴⁹ This approach “privileges *collective* autonomy over individual autonomy where autonomy interests are equivalent.”⁵⁰ In other words, where interests conflict, the individual with the greater autonomy interest prevails over the other. In the scenario where one person would survive if another donated her kidney, the dying person is not dying *because* the other has done anything. The interests of the two are not in conflict, and the dying person has no right to force another to undergo surgery to extract an organ even if doing so would save the dying person’s life.

Consent is what distinguishes a free society from a coercive one. The radical reframing that Cook and Krawiec discuss characterizes a coercive society where other people (or the state) make decisions about our body for us; it is not a world where autonomy is a core value. Consent is what differentiates our society from Margaret Atwood’s Gilead⁵¹ or Kazuo Ishiguro’s society in *Never Let Me Go*⁵² where children are cloned and raised to be organ donors. It is precisely these fictional examples that are, in part, responsible for the public sentiment against organ selling despite the societal benefits.

47. Philip J. Cook & Kimberly D. Krawiec, *Kidney Donation and the Consent of the Poor*, 66 LOY. L. REV. 23, 25-26 (2020).

48. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 88-89 (2019).

49. *Id.* at 84.

50. *Id.* at 84.

51. The Republic of Gilead is the totalitarian state in Margaret Atwood’s novel, *The Handmaid’s Tale*. MARGARET ATWOOD, *THE HANDMAID’S TALE* (1985).

52. KAZUO ISHIGURO, *NEVER LET ME GO* (2005).

It is unlikely that even those who argue that one has a moral “duty” to donate a kidney would transform that into a legal duty. One of the most outspoken proponents of paid organ transfers, philosopher Peter Singer, has himself publicly stated that he has not donated any organs despite his “duty” to do so.⁵³ His stated reason was that he gives “greater weight” to his own interests, “and to those of my family and others close to me, than I should. . . . But I know that I am not doing what I ought to do.”⁵⁴ A free society recognizes that one does not always act in accordance with one’s highest ideals and that individuals may have different moral beliefs. A legal duty, however, would extend to everyone regardless of personal beliefs and should not be imposed except in the case of conflicting autonomy interests.

CONTRACTIBILITY

Closely related to the issue of consentability is that of contractibility.⁵⁵ If paid organ transfers are consentable then should they also be contractible? Contractibility raises disturbing questions where the subject matter of the contract involves a bodily intrusive activity, such as a paid organ transfer. How would such a contract be enforced? If, for example, X agrees to sell her kidney to Y, and then later changes her mind, can Y specifically enforce the contract? Could Y sue X for monetary damages? The answer to the first question is obviously no. Courts generally do not specifically enforce services contracts because doing so raises the specter of involuntary servitude. The law does, however, permit monetary damages for their breach. But the idea of allowing Y to sue X—someone who was willing to sell her kidney for money—for monetary damages seems distasteful, even coercive. One might think that paid kidney transfers should be consentable but not contractible. Yet, refusing to recognize a contract—and the legal protection that it provides—would leave the consentor too vulnerable given the acts that must be performed.⁵⁶

53. Peter Singer, *Twenty Questions*, 4 J. PRAC. ETHICS 67, 73 (2016) (in response to a question about why he hasn’t given a kidney to someone who needs it, Singer replied that his failure to donate was not “ethically defensible”).

54. *Id.*

55. I discuss the difference between consent and contracts in Chapter 4 of *Consentability*. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 91-116 (2019).

56. In the book, I proposed that the way to address issues raised by contractibility should be by assessing enforceability (for example, if the contract was made under duress) and through limiting available remedies (specifically, permitting only restitution and other remedies in some cases), and not by rendering such contracts

While consent is a prerequisite for all contracts, a contract is not a prerequisite for consentable activities. Consent is dynamic and may shift when the context and the relationship changes. Consent can usually be withdrawn freely. For example, X may consent to engage in an activity with Y but may withdraw such consent at any time typically without repercussions. The exception is where X has signed a contract with Y to engage in the activity.

It is contractibility that is at the heart of the concerns raised by Dr. Sharon Thompson who, in her contribution, questions how to address the gendered power imbalance in prenuptial agreements given “different issues of power, involving factors like unpaid care, domestic labour, changing circumstances, and career sacrifice.”⁵⁷ Because of the gendered nature of power in marriages, she states that “prenups are ripe for reanalysis” through a consentability framework.⁵⁸

Prenuptial agreements raise many of the same consent-related concerns as bodily integrity contracts and the same types of safeguards could alleviate or diminish many of the concerns about exploitation by fortifying the conditions of consent and limiting the effect of the agreement. For example, the California Premarital Agreement Act (CPAA)⁵⁹ specifically provides that premarital agreements be executed in writing,⁶⁰ voluntarily,⁶¹ and that the parties be fully informed.⁶² Interestingly, the statute presumes that a prenuptial agreement was entered into involuntarily if a party was unrepresented by legal counsel.⁶³ A lawyer would likely strengthen the knowledge condition by explaining the consequences of signing the agreement. A party may waive the right to representation by legal counsel, but there are additional requirements then, such as a separately delivered written agreement which explains the rights that will be

void ab initio. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 156-62 (2019).

57. Dr. Sharon Thompson, *Using Feminist Relational Contract Theory to Build Upon Consentability: A Case Study of Prenups*, 66 LOY. L. REV. 55, 58 (2020).

58. *Id.*

59. CA. FAM. CODE §§ 1610-1617.

60. CA. FAM. CODE § 1611 (“A premarital agreement shall be in writing and signed by both parties.”).

61. CA. FAM. CODE § 1615(a)(1).

62. CA. FAM. CODE § 1615(a)(2)(A) (stating that a premarital agreement is unconscionable if the party was not provided with “a fair, reasonable, and full disclosure” of the other party’s property or financial obligations).

63. CA. FAM. CODE § 1615(c)(1).

relinquished in the prenuptial agreement.⁶⁴ The statute also provides that a premarital agreement is unenforceable if a party proves it is “unconscionable” by showing an absence of reasonable disclosure of financial information.⁶⁵ The standard contract defenses, such as fraud, duress, lack of capacity, and undue influence, are also available.⁶⁶

Thompson notes that “prenups are often conceived on an unlevel playing field” because the male is typically the wealthy spouse and the female typically makes nonfinancial contributions to the household, such as caregiving.⁶⁷ Furthermore, prenuptial agreements are signed before marriage when the parties are “unrealistic about the probability of divorce”⁶⁸ and that circumstances may change “frequently to the detriment of the spouse undertaking the domestic and reproductive labour in the relationship.”⁶⁹ Thompson argues that “[t]here must be a way for contract to accommodate an individual’s changing circumstances and choices over time.”⁷⁰

Thompson suggests going further than considering the validity of consent by “widening the frame” to explicitly consider the gender dimension to prenuptial contracts, an approach which she refers to as “Feminist Relational Contract Theory” (FRCT).⁷¹ She discusses two ways that her approach could be put into practice. The first is by adopting a “more expansive interpretation of vitiating factors like undue influence” which would take “specific relationship dynamics into account” rather than accepting what is considered normal based on some external or objective criteria.⁷² The second way to implement FRCT would be by adopting a “non-bargain” approach which takes into account the dynamic nature of marriages.⁷³ This non-bargain approach would focus on the parties’ relationship rather than the bargaining process at the time

64. CA. FAM. CODE § 1615(c)(3).

65. CA. FAM. CODE § 1615(a)(2).

66. CA. FAM. CODE § 1615(c)(4).

67. Dr. Sharon Thompson, *Using Feminist Relational Contract Theory to Build Upon Consentability: A Case Study of Prenups*, 66 LOY. L. REV. 55, 61 (2020).

68. *Id.* at 63.

69. *Id.*

70. *Id.* at 64.

71. *Id.* at 62.

72. Dr. Sharon Thompson, *Using Feminist Relational Contract Theory to Build Upon Consentability: A Case Study of Prenups*, 66 LOY. L. REV. 55, 71 (2020).

73. *Id.* at 72.

of contract formation.⁷⁴ She discusses a case involving a prenuptial agreement where the wife left her job during the marriage to work without pay for her husband's business and paid for his debts using her separate assets. She explains that rather than simply considering the circumstances at the time the contract was entered, the court considered the wife's conduct subsequent to signing the agreement which exemplifies how FRCT would be applied.

Thompson's approach captures the dynamic nature of consent to a contract and in this way, shares similarities with Deborah Zalesne's proposal. In her article, Zalesne tackles the problem of mandatory arbitration clauses in employment contracts.⁷⁵ These clauses require the employee to give up the right to sue in the event of a dispute with the employer and to instead, seek redress in a private hearing. As Zalesne explains, these clauses, especially when combined with class action waivers, often leave employees without effective legal remedies for their grievances.⁷⁶ Zalesne's article asks whether "a modern employee can truly consent to an arbitration clause in an employment contract."⁷⁷ She applies the consentability framework to answer that question.

In order to determine consentability, an assessment must be made of the type of harm the proposed activity poses to the consentor's autonomy. Mandatory arbitration clauses are effectively waivers of the right to a trial by jury and assessing the threat that they pose requires considering multiple factors, such as the duration of the waiver and the type and importance of the right waived.⁷⁸ The type (degree, character, and duration) of potential harm to autonomy posed by the activity affects how robust each of the conditions of consent must be in order for one to conclude there was valid consent to the activity. Zalesne explains how these two parts—the threat level to autonomy and the robustness of the consent conditions—work in relation to each

74. Dr. Sharon Thompson, *Using Feminist Relational Contract Theory to Build Upon Consentability: A Case Study of Prenups*, 66 LOY. L. REV. 55, 72 (2020).

75. Deborah Zalesne, *The Consentability of Mandatory Employment Arbitration Clauses*, 66 LOY. L. REV. 115 (2020).

76. *Id.* at 115 ("These clauses require that employees forego their constitutional right to a day in court should a grievance or dispute arise, both directly, by mandating arbitration as the only avenue of redress, and indirectly, by eliminating (in many cases) the only financially realistic option of class action.").

77. *Id.* at 116.

78. See Figure 3.5. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 74 (2019).

other: “As long as the scale tips in favor of the consent conditions, or there is equipoise between the two, valid consent exists.”⁷⁹ Her article argues that although giving up the right to a jury trial in exchange for employment does not pose as great a threat to autonomy as a bodily integrity contract, the consent conditions are “nonetheless 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.”⁸⁰

She makes this argument, first, by analyzing the “degree to which mandatory arbitration clauses threaten a consenter’s autonomy.”⁸¹ She concludes that “based on the likely long duration of the waiver, the importance of the constitutional rights being waived, the high likelihood of an employee exercising the right to sue but for the arbitration clause, and the lack of availability of alternate contract terms, the threat to autonomy is significant.”⁸²

Next, Zalesne assesses whether the three consent conditions—the manifestation of consent, knowledge, and voluntariness—are sufficiently robust given the threat that mandatory arbitration clauses pose to autonomy and does so by reference to two examples. The first involves the real-life case of John Morgan, a Walmart employee who was shot and killed while at work. When his family tried to sue the Walmart corporation for negligence, they learned that they were bound by a mandatory arbitration clause. The second example involves “Terry Jones,” a hypothetical 24-year-old employee of a Fortune 100 information technology firm who is subjected to sex discrimination and a hostile work environment by her co-workers and supervisor. She states that given the significant threat to autonomy, the “requisite robustness of each consent condition must be high,” although it often is quite low.⁸³

Zalesne states, “Given the importance of the right, the manifestation of consent should be specific to a waiver of that right, and not bundled with agreement to other terms.”⁸⁴ The reason is

79. Deborah Zalesne, *The Consentability of Mandatory Employment Arbitration Clauses*, 66 LOY. L. REV. 115, 117 (2020).

80. *Id.* at 117-18.

81. *Id.* at 118.

82. *Id.* at 129.

83. *Id.* at 132.

84. Deborah Zalesne, *The Consentability of Mandatory Employment Arbitration Clauses*, 66 LOY. L. REV. 115, 134 (2020).

obvious to anyone who has ever been handed a stack of documents to sign without the time to read them or “clicked to agree” to digital terms of use. Even in the example involving Morgan, who clicked multiple times, it is highly unlikely that he—or anyone in his situation—would have read the notice. Digital terms have become ubiquitous in today’s society which has made us, by necessity, more likely to ignore them.⁸⁵ Similarly, the overwhelmingly adhesive nature of most form contracts has conditioned us to simply sign without reading them.⁸⁶ The manifestation of consent condition must be intentional, but in most cases involving click agreements, the user’s response is reflexive rather than intentional or deliberate. Even signing an agreement with a pen may be automatic if it is done as part of signing a stack of other documents. Zalesne notes, “Because of the way the arbitration terms were presented, it is not clear that their manifestations of consent were specific to arbitration (rather than to the general terms of the employment)” and, given the importance of the rights being waived, the manifestation of consent condition was deficient.⁸⁷

The knowledge condition is also deficient, in part because of the role that the consent-seeker’s behavior plays in assessing the conditions of consent. The Opportunism Corollary informs the assessment of the consent conditions and in Zalesne’s examples “there does not seem to be a good faith effort on the part of the employers to ensure the applicants understood the meaning of agreeing to arbitration.”⁸⁸ She notes that the employers could have done more than simply furnishing information; for example, it

85. See BRETT FRISHMANN & EVAN SELINGER, RE-ENGINEERING HUMANITY 60-80 (2018) (arguing that the electronic contracting environment has resulted in “engineering human beings to behave automatically, like simple machines” and that electronic contracts “condition us to devalue our own autonomy.”).

86. I have explored at length the unique problems of contracting form, such as ubiquity and intangibility, elsewhere. See NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 59 (2013) (“Due to the ubiquitous nature of wrap agreements, consumers may become habituated to them and take less notice or care of their terms. Not surprisingly, consumers may manifest assent without being aware of what they are doing.”); Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265, 272 (2014) (“The weightlessness of electronic contracts means that the consumer often fails to notice them. Even when capitalized and in bold, terms can only be viewed behind a hyperlink if the hyperlink is clicked upon. The malleability of electronic contracts means that the burden is on the consumer to track down terms and reconcile conflicting provisions, a difficult task when every online transaction is governed by one or more electronic contracts and when a single contract often contains several hyperlinks to different web pages.”).

87. Deborah Zalesne, *The Consentability of Mandatory Employment Arbitration Clauses*, 66 LOY. L. REV. 115, 134 (2020).

88. *Id.* at 136.

could have provided a short video. In most cases, disclosure alone is insufficient to satisfy the knowledge condition.⁸⁹ In the two cases Zalesne mentions, neither employee was a lawyer, and they did not understand “the extent and significance of the rights being waived.”⁹⁰

The third condition, voluntariness, is also deficient. As Zalesne notes, “employees rarely choose arbitration clauses but are required to sign them as part of their employment contract.”⁹¹ Rather than simply focusing on the proximate individual circumstances when the manifestation occurred, she points out the importance of considering the broader societal context and whether the employee would realistically be able to obtain employment with an employer that did not require such clauses. The employee’s constrained sources as a result of the marketplace is aggravated by the employers who present the arbitration terms only after the employees have invested time and energy in the application process.⁹² These sunk costs combined with the marketplace power of these employers create a coercive contracting environment which makes the voluntariness condition deficient given the nature of the rights being relinquished.

Like Thompson’s contribution, Zalesne’s article reminds us of the failing of the objective standard of contract law. A fictional reasonable person may make a rational decision regarding whether the potential cost of mandatory arbitration outweighs the potential benefits, but an actual person is not usually driven by reason—often she is driven by fear or her rationality may be impeded by scarcity. She may click to agree because she really needs the job to pay the bills or to get health insurance; she might

89. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 124 (2019) (“Access to information is not enough to satisfy the knowledge condition. The consenting party must have access to the information in a form and at a time which helps that party *understand* material and relevant information and the consequences of consent.”).

90. Deborah Zalesne, *The Consentability of Mandatory Employment Arbitration Clauses*, 66 *LOY. L. REV.* 115, 137 (2020).

91. *Id.*

92. *Id.* at 140 (“Both companies seem to be taking advantage of their drafting power when they introduce an arbitration clause after someone has already invested so much time in the job application process.”). See also Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, *FLA. L. REV.* (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468939 (arguing that an “emotional state of powerlessness” is a “severe consequence of the arbitration revolution” which has been “strategically produced to serve the interests of neoliberals and corporations” which ultimately destroys the urge to “band together and act collectively”).

be hungry or exhausted after a day of intensive training and she is willing to agree to just about anything under those circumstances. Finally, there are no collective autonomy interests that outweigh imposing such clauses without valid consent. To the contrary, as Zalesne points out, there are “significant social harms associated with arbitration clauses.”⁹³ Even if the individual employer may benefit from reduced transaction costs, the “harm to collective autonomy” would outweigh that interest.⁹⁴

Zalesne proposes a presumption which essentially makes good on the promise of contract law to recognize only those agreements to which the parties have consented. Under her proposal, a “manifestation of consent” would not result in a finding of contract formation.⁹⁵ Rather, the burden would be on the employer to *also* prove that the other conditions of consent—knowledge and voluntariness—were sufficiently robust. The employer could do this, for example, by showing that there were other employment opportunities available to the employee that did not mandate arbitration in the event of disputes.

The solutions proposed by both Thompson and Zalesne preserve the contractibility of these often one-sided contracts while promoting a certain vision of contract law, which contracts scholar Melvin Eisenberg has referred to as “dynamic contract” law.⁹⁶ This vision of contract law is a dynamic, contextual, and adaptive one, rather than a static, formalistic, and binary one.⁹⁷ Rather than the vision championed by those focused on efficiency and transaction costs, this vision also considers social outcomes and fairness.⁹⁸ It recognizes that the purpose of contract law is to “effectuate the objectives of parties” to a contract according to rules for the “best content of contract law over the long run.”

93. Deborah Zalesne, *The Consentability of Mandatory Employment Arbitration Clauses*, 66 LOY. L. REV. 115, 142 (2020).

94. *Id.* at 143.

95. *Id.*

96. Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743 (2000).

97. *Id.* at 1745.

98. As Melvin Eisenberg writes, contract law “cannot escape . . . moral and social conditions. Monistic theories fail because they deny the complexity of life. In contract law, as in life, all applicable meritorious policy goals and moral values should be taken into account, even if those values and goals may sometimes conflict, even if one value or goal trumps another in given cases, and even at the expense of complete determinacy.” MELVIN A. EISENBERG, *FOUNDATIONAL PRINCIPLES OF CONTRACT LAW* (2018).

Thompson's proposal considers opportunistic conduct, such as in her example where the husband seeks to enforce an agreement which did not contemplate his wife's contributions to his business. Rather than applying an unrealistic "objective" standard, her approach considers contextual factors. It considers what the parties would have done if they had thought about the subsequent event—for example, would the wife have agreed to the original prenuptial agreement if she had known she would be making the sacrifices she did? Thompson's approach, in other words, doesn't change the doctrine so much as change the way the doctrine is often applied.

Similarly, Zalesne's proposal fulfills contract law's promise of furthering autonomy. By shifting the burden of formation on to the party with greater resources, she is not invalidating contracts so much as requiring what has always been theoretically required—that a party seeking to enforce a contract show that a contract was in fact formed. Zalesne's proposal recognizes that in some cases, a manifestation of consent does not actually manifest consent.

Both Zalesne and Thompson propose reconfiguring traditional doctrinal rules but preserving contractibility. Their proposals promote the stated purpose of contract law—to fulfill the intent of the parties and promote their reasonable expectations. Unfortunately, that purpose is too often ignored in favor of goals such as efficiency and certainty.⁹⁹

CONSENT AND PRIVACY

In some cases, an activity is truly incontestable, not just incontractible. This may be because consent is impossible (for example, because there is not enough information given the high level threat to autonomy) or it can be because the societal consequences—the negative externalities—justify prohibiting individuals from engaging in the activity *regardless* of whether that particular individual's consent was valid. Activities which threaten privacy implicate both concerns. Privacy is an integral part of autonomy yet, like autonomy, it is an amorphous concept

99. *But cf.* Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 506 (2002) (stating that "contracts people recite how contract formation and interpretation focus on the parties' actual intentions and assent, when in reality contract enforcement does not depend on these at all. Instead, enforcement focuses on whether a promisee reasonably believed the promisor intended to contract and what constitutes a reasonable interpretation of the language of a contract.").

with many meanings. Privacy is an umbrella term by necessity, capturing the multi-faceted, ill-definable concept and the broad array of interests that it covers. But this is precisely why any purported effort to allow one to relinquish it must be clearly defined and cabined. Because privacy captures so much, consent to trade or relinquish it must be explicit, specific, and narrowly defined to prevent overreaching or giving away “too much.”

Yet, this is not what is happening. Privacy policies use vague, blanket definitions that give companies broad rights to do pretty much whatever they want with a user’s personal information. Personal information is more than just disconnected pieces of data. Information about our name and age and what we purchase can, in the aggregate, reveal who we are—our identities and our personalities, our desires and fears.

In her contribution, Lori Andrews describes the feeling of being locked out of her iPhone which contains valuable personal information, including photos (poignantly, of the last pictures of her younger sister before she died), texts, and numbers that she doesn’t have memorialized elsewhere. She is locked out until she “agrees” to Apple’s updated terms and conditions. I have referred to this all-too familiar scenario elsewhere as “situational duress,”¹⁰⁰ because the user is forced to agree to the updated terms or risk losing access to content which has been taken hostage by the service provider—an “or-else” situation that leaves the user with no reasonable alternative but to click “agree.” But to “agree” in this scenario does not mean “consent” because the user is locked-in to the service and has no alternative if she wants to maintain access to her own data.

Even where a user is installing a *new* program or app, clicking “agree” may not be enough to establish consent—it depends upon what is at stake. Agreeing to a company’s anti-bullying policy does not pose the same autonomy threat as agreeing to a company’s (anti) privacy policy—especially where the company is in the business of collecting sensitive information about its users. Andrews analyzed hundreds of medical and psychiatric apps which collected sensitive personal information, such as “treatment regimes, AIDS status, suicidal thoughts, sexual practices, illegal drug use, and credit card numbers” and other information.¹⁰¹ She

100. Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265, 278-79 (2014).

101. Lori Andrews, *The Fragility of Consent*, 66 LOY. L. REV. 11, 13 (2020).

assessed the three consent conditions to determine whether users consented to the ways their information was used. The claim that a user manifested consent merely by using the app is “extremely weak,” and even where the user clicks “agree,” the manifestation does not clearly indicate consent to collection and use of data which is not clearly and specifically identified.¹⁰²

Andrews discovered that “[o]nly 19% of medical apps and 38% of psychiatric apps even had privacy policies.”¹⁰³ Those that did have privacy policies made it difficult to find them, placing the burden on the user to track down the identity of the developer and find the policy on the developer’s website. Even if the user did manage to find a privacy policy, the language used was “difficult to understand or even incomprehensible.”¹⁰⁴ Andrews notes that consumers may incorrectly make certain assumptions given the extremely personal nature of the information. For example, a consumer “might assume that the app would transmit her information encrypted, yet twenty-five percent of the bipolar apps we studied sent out information unencrypted.”¹⁰⁵ A user might believe that a “privacy policy” contains the company’s policy for *protecting* privacy, but Andrews found that “apps with privacy policies were slightly more likely to disclose information to third parties than those without privacy policies.”¹⁰⁶ The lack of knowledge is especially disconcerting given that a Pew Research Center report found that 90% of app downloaders said it was “very” or “somewhat” important to them how their personal data will be used.¹⁰⁷

The condition of voluntariness is also deficient, at least in some cases. Andrews states that physicians may prescribe use of an app to a user and that employers and insurers may encourage app use in a way that makes it difficult for the user to decline. Furthermore, there are certain “social pressures” that make the use of apps coercive rather than voluntary.¹⁰⁸ She cites the example of scholarships that only accept applications through Facebook or newspapers that consider for publication only letters

102. Lori Andrews, *The Fragility of Consent*, 66 LOY. L. REV. 11, 17 (2020).

103. *Id.*

104. *Id.* at 14.

105. *Id.* at 15.

106. *Id.* at 16.

107. Michelle Atkinson, *Apps Permissions in the Google Play Store*, PEW RES. CTR.: INTERNET & TECH. (Nov. 10, 2015), <http://www.pewinternet.org/2015/11/10/apps-permissions-in-the-google-play-store/n>.

108. Lori Andrews, *The Fragility of Consent*, 66 LOY. L. REV. 11, 16 (2020).

submitted through social media. People may also feel pressured by friends and families or by the nature of their jobs to join social media. Unilateral modification clauses further dilute all three consent conditions, placing an undue burden on the user to continuously check and read updated policies, and forcing the user to click “Agree” in order to maintain access to services.

Andrews concludes that it is “impossible” to protect consumers with this type of broken consent process and suggests that the sharing of certain types of health information be made incontestable.¹⁰⁹ She also suggests enhancing the knowledge condition by requiring “greater understandability and uniformity in privacy policies” by, for example, using common icons to communicate what the apps do with personal information.¹¹⁰ There is research to support that Andrews’s proposals would be effective. A recent report found that promising techniques to increase comprehension of online contracts and privacy policies included “standardized summary tables” and “visual icons and graphics.”¹¹¹ Her third suggestion, that app developers be prohibited from changing promises enhances the voluntariness condition by recognizing the situational duress that forces a user to “agree” to terms in order to continue a relied-upon service.¹¹² Her fourth proposal—that “severe penalties” be imposed upon app developers who breach their promises or put consumer data at risk—would deter bad faith behavior.¹¹³

Evan Selinger and Woodrow Hartzog also discuss consentability within the context of harms created by privacy-erasing technologies. They are particularly concerned with the loss of “obscurity,” a concept which is related to transaction costs.¹¹⁴ The wide reach of the Internet, the reams of data collected from online activities, and improved computational capacities to sort, quantify and assess this data have minimized the protections to autonomy that obscurity traditionally provided. While information contained in public records has always been available

109. Lori Andrews, *The Fragility of Consent*, 66 LOY. L. REV. 11, 20-21 (2020).

110. *Id.* at 21.

111. *Literature review: Improving Consumer Comprehension of Online Contractual Terms and Privacy Policies*, THE BEHAVIOURAL INSIGHTS TEAM FOR THE DEPT. OF BUSINESS, ENERGY AND INDUSTRIAL STRATEGY (July 2019).

112. Lori Andrews, *The Fragility of Consent*, 66 LOY. L. REV. 11, 21 (2020).

113. *Id.*

114. Selinger and Hartzog have written about the effect of surveillance on obscurity in greater detail elsewhere. See Woodrow Hartzog & Evan Selinger, *Surveillance as Loss of Obscurity*, 72 WASH. & LEE L. REV. 1343 (2015).

in theory, it often took time and determination to uncover it; now, such information is available with a few keystrokes. Private information was traditionally available only to those who were granted special permission to access it. Now, intensely private information can be leaked to millions of strangers with one click. The loss of obscurity associated with facial surveillance may aggravate the loss of privacy that we have already experienced with the rise of the Internet and online surveillance. The ubiquity of high-resolution camera phones and other image-capturing devices means that one's image may be associated with one's identity in ever more invasive ways.

Those who think that only criminals should be concerned about facial surveillance might want to consider all the activities that they engage in which are legal but private. Using the restroom, flossing teeth, or readjusting one's undergarments fall into this category, as do most activities that one engages in while nude. Currently, these types of images are captured and uploaded to various websites, but the identity of the subject is unknown, and the subject may be unaware that this online image exists.¹¹⁵ In this case, ignorance is bliss. Facial scanning, however, may make it easier to conduct image searches and connect an image with a name, diminishing further our right to be left alone. Then the loss of anonymity and obscurity will be complete. We—and everyone we know—will be able to conduct a Google search with our name or image and pull up images surreptitiously captured by strangers who enjoy creating websites of people who are “fashion don'ts,” who fight with their significant others in public, who think they are alone in an elevator, or who fall asleep on planes with their mouths open. Even if these activities are perfectly legal and ordinary, we may not want potential job interviewers, friends, colleagues, or *anyone* to see us engaging in them. An individual's facial images may be used in even more nefarious ways. They can be used to create “deep fakes” which pose risks to our reputation or they can be exploited by artificial intelligence technologies to discern and anticipate our emotions in order to manipulate us. Given the prevalence of false and deceptive information online, these fears are not unrealistic or far-fetched.

As Selinger and Hartzog explain, there are many reasons individuals cannot be said to have consented to facial surveillance. The normalization of such technologies and their function creep

115. These websites are typically protected from liability under Section 230 of the Communications Decency Act.

(the term they use to refer to incremental expansion of such technologies) make it easy for users to underestimate or ignore the potential harms. The lack of alternatives makes it harder for people to opt-out—and those who do are viewed with suspicion or excluded from important interactions altogether. Furthermore, there are few limits on what can be done with the images, making an informed decision impossible. When consent is drafted broadly, the company can use the images in an unrestricted manner, and the user is not able to predict how they may be used. Even when the uses are specified, the company may reserve the right to change the terms, essentially giving itself the right to use the collected images for additional purposes at a later date when new technologies present new opportunities to do so.

Despite a company's assurances in its terms of service that the data will not be shared, the public cannot rely on private companies to keep their promises of privacy or restrict control over facial images. The previously mentioned modification at-will clauses essentially permit a company to retract those assurances after it has ensnared the user into its services, making it much more difficult for the user to reject the terms. In addition, the company's computer systems may be breached, and the images stolen and used in unintended or unexpected ways. A company cannot adequately redress the harms from a breach and the meager monetary awards that are granted in the rare cases the plaintiff is successful fail to compensate for a lifetime of worry about identity theft and public humiliation.¹¹⁶

When it comes to privacy, it is important to recognize the way that private company surveillance can be used by state actors and vice versa, rendering the public/private surveillance distinction moot.¹¹⁷ Companies may be compelled to comply with the government despite their efforts to keep information private. When compelled by a court order, private companies are themselves subject to coercion and have no real choice but to release collected data. Images collected by public or private

116. See Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737, 741 (2018) (noting that “the majority of courts have ruled that injuries from data breaches are too speculative and hypothetical, too reliant on subjective fears and anxieties, and not concrete or significant enough to warrant recognition.”).

117. See Nancy S. Kim & D.A. Jeremy Telman, *Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent*, 80 MO. L. REV. 723, 723 (2015) (questioning “the distinction between governmental actors and private actors” in the area of data mining).

entities are vulnerable to being misused by public or private actors. The Australian government's announcement that it may require that viewers of online pornography upload photo IDs for "age verification" purposes¹¹⁸ illustrates the interplay between public and private surveillance. These images, once collected, may be misused and publicly disseminated by government officials acting within their authority, rogue government employees acting outside their authority, and private actors with no authority who are capable of breaching government computer systems. Once released, the images likely cannot be recaptured or contained. The public reaction to images is unpredictable and images are often viewed acontextually. The public dissemination of images may not happen until decades into the future, and how the images are perceived (and the subject judged) depends upon evolving social norms regarding acceptable behavior.¹¹⁹

It may be that even the *absence* of one's facial image in a database incriminates. Consider a government program that requires facial identification, like one of the Trusted Traveler programs which allow members to use expedited screening lanes at airports.¹²⁰ People do not know (and cannot know given the way digital images are stored, reused and repurposed) how their images may be used in ways *other* than to allow their participation in the government program. Although no one is required to join, as more people participate in the program, the government may allocate greater resources to the expedited screening lanes. Consequently, the other lanes become even longer, taking much more time than the expedited lanes. Those who opt-out based on principle may soon find themselves lumped in with ex-felons and others who are unable to participate in the program because of their criminal background.

Selinger and Hartzog introduce "pre-conditions for meaningful decision-making."¹²¹ These preconditions assess

118. Jamie Tarabay, *Australia Proposes Face Scans for Watching Online Pornography*, N.Y. TIMES (Oct. 29, 2019) <https://www.nytimes.com/2019/10/29/world/australia/pornography-facial-recognition.html>.

119. This is a problem with the Internet generally. One's youthful indiscretions may come back to haunt someone in middle-age. But just because the harms of facial surveillance are not harms exclusive to facial surveillance does not mean they are or should be acceptable.

120. See *Trusted Traveler Programs*, HOMELAND SECURITY, <https://ttp.cbp.dhs.gov/> (last visited Apr. 11, 2020).

121. These three pre-conditions to the conditions of voluntariness and knowledge are (1) the request must be infrequent, (2) the harms to be weighed must be vivid, and (3) there should be incentives to take each request for consent seriously. See Evan

whether the conditions of knowledge and voluntariness can be met. For example, the first precondition is that “a request should be infrequent” because too frequent requests will cause people to become “overwhelmed and desensitized” which may result in diluting the knowledge condition.¹²² They argue that facial surveillance is incontestable both because consent is not possible and because of its harms to collective autonomy. Facial technology is imperfect, and its flaws may have a disproportionately negative impact upon people of color. But, they note, even if the technology were improved, resulting in fewer errors, their uses may erode important rights such as the constitutional right to engage in protected activities. More chilling, is that it could “gradually erode due process ideals by facilitating a shift to a world where citizens are not presumed innocent but are codified as risk profiles with varying potentials to commit a crime.”¹²³ In this dystopian world, facial images would be added to already vast databases, tying expressions to “emotional states, private thoughts, and behavioral predictions” and expanding surveillance capabilities, causing people to “lose more and more control over their identities.”¹²⁴ The harms of facial surveillance are contagious, networked, and compound as they multiply. The more people who participate, the harder it is for any one individual to refuse. As the number of images increases, their potential uses grow exponentially as each image may be improved by, or allow insights to, another. The harms are largely invisible until they reach a critical tipping point, at which point it is too late to turn back. As Selinger and Hartzog note, “no single decision represents a significant threat. Instead, society is exposed to death by a thousand cuts, with no particular cut rising to the threat level where substantive and efficacious dissent occurs.”¹²⁵

Selinger and Hartzog argue that facial recognition technologies should be banned. I agree that at least a moratorium is necessary to prevent its proliferation. Without strict rules on how the technology and the data are used—and the technical ability to enforce those rules—companies will push the boundaries of legal and ethical behavior, causing harms to individual and

Selinger & Woodrow Hartzog, *The Incontestability of Facial Surveillance*, 66 LOY. L. REV. 33, 48 (2020).

122. Evan Selinger & Woodrow Hartzog, *The Incontestability of Facial Surveillance*, 66 LOY. L. REV. 33, 48 (2020).

123. *Id.* at 43.

124. *Id.* at 44.

125. *Id.* at 48.

collective autonomy in ways that are currently unforeseeable. Companies should not be permitted to justify their use of facial surveillance technology based upon consent for the simple reason that the knowledge condition is deficient when future uses are unknown. Moreover, as with other types of digital data, the easily replicable and transmissible nature of facial images will make future uses difficult to contain and control. Society will realize the harms from facial surveillance too late and lawmakers will be at a loss regarding how to put the genie back in the bottle.

The government should also refrain from the use of facial surveillance. As I argued in the book, state coercive action is justified only where it is intended to enhance autonomy (by minimizing regret) or where the collective autonomy interest at stake outweighs the individual autonomy interest.¹²⁶ Seat belt laws, for example, are intended to guard against the myopia and optimism bias that make someone give greater weight to convenience over safety, with the assumption that nearly everyone will regret *not* wearing a seat belt in the event of a crash. Furthermore, the relatively minor consequence of not wearing a seat belt (a small fine in most cases) is outweighed by the benefits to the seat belt wearer and by the burden on society caused by *not* wearing a seat belt (increased insurance costs, costs of unpaid medical bills, the emotional trauma of witnessing car accident deaths where drivers and passengers are not wearing seat belts, the suffering of friends and family of the deceased). To put it in terms of the consentability framework, the individual autonomy interest (in not wearing a seat belt) is outweighed by the collective autonomy interest (in not suffering the economic and emotional consequences of an individual's decision not to wear a seat belt).

By contrast, the benefits of facial surveillance are currently speculative and its potential harms to individual and collective autonomy boundless. I don't think this means it should be banned for all times and for all uses. What it does mean is that we as a society must carefully consider the implications of this technology, carefully assessing the benefits and the risks to determine whether we should allow it—and not leave it to the free market and private actors to decide for us.

126. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 89 (2019) (“Coercive actions . . . may be justified in emergency situations to protect the collective autonomy interest even at the risk of harming any one individual's autonomy interest if that collective autonomy interest is greater than or on the same level as the individual's autonomy interest on the hierarchy of autonomy interests.”).

CONCLUSION

At the heart of my book is the question, what is the proper role of the state in regulating individual freedom? My book focused on the role of the state in enhancing the conditions of consent but spent comparatively little time analyzing the other prong of consentability—the societal harms from permitting an activity to be consentable which requires “specific inquiry into the societal effects of the proposed activity” and “empirical data relating to that proposed activity.”¹²⁷ Because of the interconnectedness of society, one individual’s activity may harm another. Private activities may affect communities, norms, and the marketplace; yet, it is important to avoid moral panics that limit individual freedoms, and which are based upon speculative harms.

There are, however, certain activities where the potential benefits are speculative and the potential harms to collective autonomy are profound and irreversible because the activity is generative. The harms from the “hard cases” which were the focus of my book are largely confined to the consentor and proximate third parties; by contrast, harms that are self-replicating can affect many future generations and irreversibly diminish collective autonomy. It makes sense to impose a moratorium upon activities that cause self-replicating harms so they can be carefully evaluated, their benefits weighed against their harms, and their potential abuses anticipated and regulated. Facial surveillance and human germline engineering are two examples of activities which should be inconsentable because consent is likely to be invalid and, more importantly, because their self-replicating nature has the potential to unleash irreversible viral harms. Consequently, activities that cause self-replicating, viral harms should be banned until—and unless—there is a way to contain and limit their effects and usage.

The question of consentability and the limits of consent will grow in significance as businesses encourage members of the public to participate in novel ventures and experiments, such as space travel and longevity trials. Too often, the rhetoric of consent serves only to assign blame to the consentor and so compounds the sting of regrettable decisions. Decisions, however, are not made in a vacuum. Unfortunately, a finding that one party manifested consent usually shields the other party from liability for opportunistic conduct. My proposal of a presumption of defective

127. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 49 (2019).

consent essentially takes certain interactions out of the realm of contract and private ordering. In so doing, it recognizes the accountability of the consent-seeker in the consenting process—an accountability that is too often overlooked or discounted in discussions of consent.

The consentability framework is not foolproof in the sense that it will not always be successful in helping the consenter avoid regret. Even the most robust consent conditions cannot account for our future selves and how we may change over time.¹²⁸ Yet, it is clear that our current system of consent—and in particular, contractual consent—is not made for humans. Human beings are fallible and manipulable, emotional and impulsive. Our institutions and governance systems should make laws and regulations for human beings. In order to function properly, consent regimes must incorporate a better understanding of consent. They are destined to fail if they substitute a manifestation of consent for consent itself. The consentability framework demands more, and so should we.

128. Although many studies suggest that one's personality remains stable over time, at least one long-term study suggests otherwise. See Mathew A. Harris & Caroline E. Brett, *Personality Stability From Age 14 to Age 77 Years*, 31 PSYCHOL. & AGING 862 (2016) (finding that a study rating six personality characteristic of participants 14 to 77 years of age found that "lifelong differential stability of personality is generally quite low, but that some aspects of personality in older age may relate to personality in childhood.").