Chapman University Dale E. Fowler School of Law

From the SelectedWorks of Tom W. Bell

January 1, 2009

The Scale of Consent

Tom W. Bell

Available at: https://works.bepress.com/tom_bell/13/
The Scale of Consent

Abstract

We often speak of consent in binary terms, boiling it down to "yes" or "no." In practice, however, consent varies by degrees. We tend to afford expressly consensual transactions more respect than transactions backed by only implied consent, for instance, which we in turn regard as more meaningful than transactions justified by merely hypothetical consent. A mirror of that ordinal ranking appears in our judgments about unconsensual transactions. This working paper reviews how legal and other authorities regard consent, revealing that they treat consent as a matter of degree and a measure of justification. The scale described here plays a vital role in a larger project, one that will also explain consent's importance and apply graduated consent theory to such longstanding puzzles as the enforceability of standard form agreements, the justifiability of political coercion, and the meaning of a constitution. As a preliminary to that project, this working paper explains how consent and justification vary by degree and covary in value.
The Scale of Consent

Outline

Abstract

Introduction

The Scale of Consent
   A. Gradations of Consent
      1. Express Consent
      2. Implied Consent
      3. Hypothetical Consent
      4. Varieties of Unconsent
   B. Evaluating the Justificatory Force of Different Types of Consent

Conclusion
The Scale of Consent

Tom W. Bell*

Introduction

We often speak of consent in binary terms, boiling it down to "yes" or "no." That reflects a fundamental structure of our social word: We smile on consensual transactions and frown on unconsensual ones. Though it speaks in rather less poetic terms, the common law reveals a similar view of consent. Contract law enforces expressly consensual agreements, whereas tort law aims to rectify unconsensual transactions.¹ In very basic terms, consent exhibits a binary nature. Figure 1 offers that, a very low-resolution portrait of consent.

Figure 1: The Basic, Binary Nature of Consent

*Professor, Chapman University School of Law. I thank Keith A. Rowley, Stephen J. Werber, Margaret Knifﬁn, Lawrence B. Solum, and Larry Rosenthal for helpful comments and Chapman University School of Law for supporting my research. Copyright 2008 Tom W. Bell.

¹ In both areas of law, property rights provide the essential res. Parties to contracts must exchange consideration—typically, valuable property or a promise of such—while victims of torts suffer violations of their rights. The institutions of property do not require our express consent for their justification, though they may well earn it. At least impliedly and hypothetically, we afford property rights great respect. Some few people expressly object to property in general or, more often, some particular feature of the law of property. Still, most people quietly accept, enjoy, and respect exclusive rights to tangible goods.
When we turn a sharper eye to consent, however, studying how it works in practice, we see that consent rises and falls by degrees.\(^2\) We tend to afford expressly consensual transactions more respect than transactions backed by only implied consent, for instance, which we in turn regard as more meaningful than transactions justified by mere hypothetical consent. A similar ordinal ranking—a mirror of our judgments about expressly consensual transactions—in our judgments about unconsensual transactions. We thus find, when we paint in the details of consent, a graduated scale. That scale of graduated consent offers a useful framework for legal, ethical, and economic reasoning.

This working paper offers but one part of a larger planned work, one that will offer a more comprehensive explanation of gradated consent theory. That larger project will advance in three basic steps: first establishing consent's value; second, its qualities; and third, its power to solve social problems. Here, we find the core of graduated consent theory: The observation that consent comes in degrees and measures justification.

This working paper describes the many gradations of consent and their order on a scale of justification. In the positive range, the scale drops from express consent, through implied consent, and down to hypothetical consent. A similar scale of consent repeats, though in mirror form, in justification's negative range. There, unconsent\(^3\) increases in the slide from hypothetical unconsent, through implied unconsent, and down to express unconsent.\(^4\)

\(^2\) That gap between how we speak and how we act probably reflects the still relatively under-theorized nature of consent. As Scott Anderson has observed, "coercion is a matter of longstanding political and ethical concern. Nonetheless, there has been little sustained scholarly attention to its nature until recently; historically, many seem to have been willing to accept the concept of coercion as a primitive." SCOTT ANDERSON, Coercion, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY at http://plato.stanford.edu/entries/coercion/ (February 10, 2006).

\(^3\) "Unconsent" herein means, as the suffix "un-" suggests, the negative of consent. This paper reserves "nonconsent," in contrast, to describe conditions in which consent may, far from suffering negation, simply play no role. On that usage, battery would qualify as unconsensual, whereas objectionable weather would (absent extraordinary facts) qualify as simply nonconsensual.

\(^4\) Closer scrutiny will reveal still more subtle gradations in the scale of consent, allowing us to subdivide those types into sub-types. See infra, figure 4.
Each type of consent tends to have a particular power to justify social exchanges—whether it evokes our affirmative support, respectful non-interference, skeptical disapproval, or forceful objection. Consent and justification thus come in degrees and vary in step, one with the other. Figure 3, below, illustrates that relationship.
Thus runs a summary, verbal and graphical, of this working paper. The text below adds details, providing a still sharper picture of the scale of consent and its relationship to justification.

The Scale of Consent

Judges, moralists, and political philosophers frequently treat consent as a matter degree, whether they realize it or not. This part reviews and summarizes their deliberations, mapping consent's features and charting through them a path to justification. Subpart A reveals the gradations in and between express consent, implied consent, and hypothetical consent, as well as the distinctions that mark, in mirror form, the differences between various types of unconsent. Refinements in that taxonomy show still further distinctions, such as those that contract law recognizes between implied consent established by prior performance, implied consent established by prior dealings, and implied consent established by usage in trade. Each type of consent includes various sub-types. Subpart B argues that the resulting scale, which runs from the most consensual transaction to the least, marks out degrees of justification.

A. Gradations of Consent

This subpart describes three types of consent—express, implied, and hypothetical—in order. Both of the first two types qualify as actual consent; they differ
primarily in how that consent gets communicated. As section 1 explains, a conscious affirmation, such as signature, "I agree," or a communicative act,² can convey express consent. In the case of implied consent, in contrast, a person may show acceptance of a default term by declining to expressly object to it.⁶ Section 2 explains. Hypothetical consent, covered in section 3, differs from its express or implied counterparts it that it ignores facts about what any given party does or does not want, instead relying on a counter-factual supposition about what the party would have wanted. Section 4 finds a mirror of that taxonomy among the varieties of unconsent. Each of type of consent and unconsent includes various subtypes. Figure 4, below, illustrates.

---

Figure 4: Types and Subtypes of Consent and Unconsent

---

⁵ Such as accepting delivery of goods. See, for example, UCC 2-206(1)(b) (specifying that shipment of goods in response to an order constitutes acceptance).
A.1. Express Consent

Express consent plays a vital role in both the law of contracts and the law of torts, though it serves different functions, and operates at different levels of sophistication, in each. Contract law devotes a fair amount of jurisprudential machinery to determining whether express consent to an agreement obtains.\(^7\) Tort law, in contrast, asks simply whether there is "willingness in fact" for some presumptive rights-violation to take place.\(^8\) Absent an expression to the contrary,\(^9\) tort law typically assumes that the violation of a right—such as battery of a person or conversion of goods—evokes the victim's unconsent.\(^10\)

At root, contract law embodies a set of rules defining when express consent justifies the invocation of judicial remedies. Around 53% of the Restatement (2d) of Contracts grapples with consent—how to define it, what effect it has, and how to patch up its absence.\(^11\) Article 2 of the Uniform Commercial Code devotes one of its most powerful, subtle, and controversial sections to the defining consent.\(^12\) In general, contract law will enforce only an agreement established by the express consent of all parties in privity.\(^13\) It also remedies the breach of some mere promises—notably, those marked by strong proofs of express consent.\(^14\) In general, contract law recognizes a distinction

---

\(^7\) See, for example, Restatement (Second) of Contracts (1981) §§ 3-109, 129,139, 148-177, 200-230,250-251, 273-287, 322-323, and 327-330.

\(^8\) Restatement (Second) of Torts § 10A (1965) (defining "consent"); § 892(1) (1979) (offering same definition and adding, "It may be manifested by action or inaction and need not be communicated to the actor.").

\(^9\) Or even with one, if it comes tainted with mistake, misrepresentation, or duress. See id. § 892B.

\(^10\) Unconsent marks a necessary condition of a tort claim, if for no other reason than that some plaintiff must complain. More substantively, because consent operates as a defense, tort claims typically arise out of unconsensual transactions. Unconsent cannot represent a sufficient condition of a tort claim, however, since many things about which people complain—the weather, a competitor, bad luck—do not give rise to legal causes of action.

\(^11\) The Restatement (Second) of Contracts (1981) has 385 sections. Given the extent to which questions of consent pervade contract law, it can prove difficult to separate out those that define consent's meaning and legal function. I count 203 such sections: §§ 3-109, 129,139, 148-177, 200-230,250-251, 273-287, 322-323, and 327-330, inclusive.

\(^12\) See id. § 2-207.

\(^13\) It may enforce such an agreement to the benefit of parties not in privity, however; see Restatement (Second) of Contracts § 302(1) (defining when a party not in privity to a contract can enforce it).

\(^14\) See, for example, id. § 90(1). Plainly, the promisor consents to making the sort of promise at issue in 90(1). The promisee expresses consent to the promisor's offer not by acceptance, and thus not by agreement, but by substantial reliance on the promise. The promisor must reasonably foresee that reliance, however, and injustice must threaten to
between dickered and form agreements, treating negotiated exchanges with more respect than standardized ones.\textsuperscript{15} Express consent thus includes as subtypes consent to negotiated exchange and consent to standardized exchange.

Tort law, because it aims primarily to remedy unconsensual acts, treats express consent almost as an afterthought. Only about 6\% of its provisions grapple with defining the scope or effect of consent.\textsuperscript{16} Express consent nonetheless supports a powerful defense in tort law, one tending to negate a claim for judicial redress. Thus, for instance, the court in \textit{McAdams v. Windham} affirmed the denial of an assault and battery claim on grounds that the plaintiff's intestate had expressly consented to engage the defendant in a boxing match that turned out deadly.\textsuperscript{18} The court explained that "a blow thus inflicted in a friendly, mutual combat—a mere sporting contest—is not unlawfully inflicted, the parties being engaged in the violation of no law."\textsuperscript{19} Absent the deceased's express consent, the defendant's punches would have qualified as intentional torts; excused by consent, they became mere unactionable sporting.\textsuperscript{20} In the guise of assumption of risk, express consent can also negate a claim of negligence.\textsuperscript{21}

We might say that express consent plays a vital role in tort law, albeit in a negative way. Tort law reserves its remedies for those who do not agree to suffer some putative wrongdoing—parties who, in other words, do not face an affirmative defense of express or implied consent. More to the point, though, tort plaintiffs voice the opposite of express consent: Express \textit{un}consent. That, tort law's most overriding concern, receives closer below.\textsuperscript{22}
A.2. Implied Consent

The law of contracts imposes many obligations by implication. An expression of acceptance presumptively takes effect when put out of possession of the offeree, for instance, and an agreement's terms by default hew to usage in the relevant trade. Those implied terms win only contingent respect, however; express unconsent can negate the imposition of obligations justified by only impliedly, by default. A contract's offeror can thus opt out of the presumed contract rules for defining acceptance and instead require, say, a firm handshake, whereas terms of art keep their technical meaning "[u]nless a different intention is manifested" by the parties.

Contract law recognizes subtle shadings within implied consent, distinguishing between terms implied by performance under the agreement, terms implied by past dealings between the parties, and terms implied by usage in the trade. Again, those proofs of consent can rouse judicial action only if not trumped by express consent; the parties to a contract can explicitly agree to terms different from those presumed by prior performance, past dealings, or common custom.

Like contract law, tort law treats respects implied consent. A community's customs establish default presumptions about whether silence or inaction constitutes consent, for instance—a presumption that only express unconsent can trump. More generally, given that the defense of assumption of risk can obtain even in the absence of express consent, implied consent has a powerful effect on the scope of tort law. The common law maxim, "Volenti non fit injuria," speaks to express and implied consent, alike.

Tort law treats implied consent with less precision that contract law does. The Restatement of Contracts (Second) observes, "Courts sometimes speak of implied

---

23 Restatement (Second) of Contracts § 63(a) (1981).
24 Id. § 202(3)(b).
25 Id. § 30(1). See also id. § 63 (conditioning default term that an acceptance takes place when put out of the offeree's possession with, "Unless the offer provides otherwise . . . .").
26 Id. § 202(3).
27 See UCC § 2-208, Restatement (Second) of Contracts §§ 203(b), 202(4).
28 See UCC § 1-205, Restatement (Second) of Contracts § 203(b).
29 See UCC § 1-205, Restatement (Second) of Contracts § 203(b).
30 Express terms "control," UCC §§ 1-205(4), 2-208(2), or have "greater weight than," Restatement (Second) of Contracts § 203(b), course of performance, course of dealing, and usage in trade.
31 See Restatement (Second) of Torts § 892, comment d ("In determining whether conduct would be understood by a reasonable person as indicating consent, the customs of the community are to be taken into account. This is true particularly of silence or inaction.").
32 See id. § 496 (specifying when assumption of risk may be implied).
33 The phrase means, "if one, knowing and comprehending the danger, voluntarily exposes himself to it . . . he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom." Black's Law Dictionary 1088 (abridged 6th ed. 1991)
consent to conduct when the real holding is that the conduct was proper under the circumstances.\textsuperscript{34} In other instances, tort cases blur the lines between express and implied consent, asking simply whether an alleged victim actually consented to an invasion of right.\textsuperscript{35} That rough-and-ready approach to implied consent should surprise no seasoned student of the common law, though; tort law naturally focuses on unconsensual transactions, leaving detailed treatment of consensual ones to contract law.

**A.3. Hypothetical Consent**

Hypothetical consent places little role in contract law proper, but rather tends to fall under the heading of quasi-contract, an area where courts remedy only salient injustices and offer only limited forms of relief.\textsuperscript{36} Thus, for instance, did the plaintiff doctor in *Cotnam v. Wisdom* win restitution for the medical aid he administered to an unconscious man found lying in the street.\textsuperscript{37} Anyone would have agreed to receive—and pay for—medical care in like circumstances. Notably, however, the *Cotnam* court declined to go the further step of allowing the plaintiff to exercise against his unconscious (deceased, and not incidentally, wealthy) patient the same sort of price discrimination that the doctor routinely exercised on his conscious, contracting ones.\textsuperscript{38} Universal hypothetical consent proves easier to establish, and weaker in effect, than hypothetical consent premised on what a particular individual would have done.\textsuperscript{39}

In tort law, physicians rendering emergency care on unconscious victims routinely win a defense against battery on grounds that the alleged victim would have...
consented to treatment if he or she had been conscious.⁴⁰ That represents a species of hypothetical consent, one that courts have carefully distinguished from express or implied consent. Thus, for instance, the court in *Kritzer v. Citron* observed that, "in an emergency situation where a doctor is privileged to proceed with necessary surgery, there is actually no consent whatsoever to an invasion of thepatient's interests. . . . In reality, the person whose right is invaded has not by word or act expressed any actual or apparent assent."⁴¹ Here as generally, however, express unconsent can trump hypothetical consent. An emergency patient who wakes up in the care of a volunteer doctor can rightfully command the doctor to cease rendering aid.

**A.4. Varieties of Unconsent**

All of the sorts of consent detailed above⁴² repeat again in unconsensual form. Thus, for instance, a party might expressly refuse to accept some proposition or transaction, testifying, "I do not consent!" So, too, we might describe an exchange as impliedly unconsensual because it does not conform to established practices. We thus condemn conversion as a matter of course and afford legal remedies even to victims who have never announced, "I object to all conversion of my property, now and after." Lastly, when we postulate that a person would not have agreed to something, we mark it as hypothetically unconsensual. Just as consent comes in express, implied, and hypothetical forms, in other words, so does unconsent.

Consent's subtypes repeat in the negative range, too. We distinguish transactions that would hypothetically evoke protest generally from transactions that would evoke the objections of a particular individual. Even though both refer to hypothetically unconsensual transactions, a statement like, "Most people like peanut butter," influences our judgment differently from one like, "I would never eat a peanut-butter sandwich; it would trigger my allergy." The former speaks universally; the latter individually.⁴³

Just as implied consent divides into three subtypes—per acts under the agreement, per past agreements, and per custom—implied unconsent comprises the subtypes per custom, per past disputes, and per acts under the dispute. Here as generally, unconsent mirrors consent. That should not surprise, given that tort law defines actionable wrongs with an eye to the defense of consent. Observing that "contracts are entered into by the mutual agreement of the interested parties, and are required to be performed in accordance with their letter and spirit," the *Mohr v. Williams* court concluded that, in the

---

⁴⁰ See Restatement (Second) of Torts § 892A, illustration 3 (explaining that if a surgeon performing exploratory surgery on a patient under anesthesia discovers a critical condition that "requires immediate action to save [the patient's] life or to prevent serious harm to him," consent for that action may obtain.).


⁴² See supra, Subpart A.1-3.

⁴³ The latter speaks more powerfully, too. As discussed below, at Subpart B., universal hypothetical unconsent has more justificatory force—or perhaps more clearly, less anti-justificatory force—than individuated hypothetical unconsent does.
tort suit before it, "No reason occurs to us why the same rule should not apply between physician and patient."44

We can thus distinguish between implied contract terms contrary to the parties' performances, contrary to their past dealings, and contrary to usage in trade. Each of those three subtypes of implied unconsent corresponds to a different level of enforceability,45 marking each as a unique and worthy of particularized consideration. Tort courts seldom have occasion to delve into such subtleties, granted; happily, we live in a world where consensual exchanges far exceed unconsensual ones, providing a larger canvas for detailed portraiture. Still, courts made sketched the outlines, in tort law, of implied unconsent, suggesting that it includes some fine distinctions.46

Like express consent, express unconsent contains subtle shadings. Tort law reserves its strongest remedy—punitive damages—for maliciously personal, intentional wrongs.47 Protests to impersonal and unintentional wrongs, in contrast, tend to evoke mere remedies for negligence.48 Though each of those and other forms of express unconsent rouse our righteous indignation, our reactions vary subtly from case to case. Most of us would ordinarily object more strongly to suffering a gunshot aimed and fired by a vicious criminal than we would to the same wound caused accidentally, by a police officer.49

---

44 95 Minn. 261, 268-69, 104 N.W. 12, 15 (1905).
45 As discussed below, at Subpart B., those distinctions order those three types of unconsent along a scale of justification.
46 The court in Curtis v. Jaskey, 326 Ill. App. 3d 90, 97, 759 N.E.2d 962, 967 (2nd Dist. 2001), for instance, held that "under usual circumstances, the emergency exception may not be used to override the express wishes of a patient who withholds consent to a medical procedure." The court, also allowed, however, that "it is possible to imply consent despite an earlier refusal to assent to a particular procedure. The key consideration here is whether the patient intended the refusal to apply in the circumstances under which the treatment was rendered. If the circumstances under which the procedure was performed were known to the patient, it is likely that the patient intended the refusal to apply." Id. at 326 Ill. App. 97, 759 N.E.2d 968. In effect, the court held that the plaintiff's express unconsent to an episiotomy would trump the consent implied under the doctrine of medical emergency, but if in the context of customary usage and the relationship between the parties her refusal extended to the treatment given.
47 See RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.").
48 See id. § 901 (describing general principles of tort law damages).

Torts such as innocent trespass or nuisance may also evoke injunctive relief, of course; see id. Ch. 48, Injunction, Scope Note. But that also proves true of such intentional torts as "assault and battery; false imprisonment; wrongful arrest; [and] . . . malicious prosecution and abuse of process," which though "less frequently the subject of suit for injunction," prove especially apt to merit injunctive relief where otherwise the wrong would threaten to recur. Id. See also id. § 936(1) (including among the primary factors to be considered in determining the appropriateness of injunctive relief, "(a) the nature of the interest to be protected" and "(b) the relative adequacy to the plaintiff of injunction and of other remedies.").
officer trying to stop the crime. Express unconsent thus mirrors express consent, copying its structure in negative form.\textsuperscript{49}

Unconsent here stands for something distinct from non-consent. For much of what we observe, the label "consent" simply does not apply. Someone who describes sunshine as "consensual" (excepting, of course, someone taking poetic license) commits a category error. We would do best to think of all such phenomena as "nonconsensual," reserving other consent-talk for descriptions of social exchanges.\textsuperscript{50} Only a person can consent, after all. And only that power to consent makes it worth our while to consider what it means when a person \emph{un}consents.

**B. Evaluating the Justificatory Force of Different Types of Consent**

As the prior part demonstrates, the language of legal, ethical, and economic reasoning evidently recognizes many different types of consent. How the literature relates those different sorts of consent to one another proves a bit more difficult to discern, however. Here, merely quoting the authorities will not suffice. Rather, we must seek out a hidden order, a ranking of consent implicit in practice and confirmed by theory. This section takes up that project, and posits a scale of running from express consent, through implicit consent, and down to hypothetical consent. The scale continues into the negative range—"below the x-axis," one might say—running from hypothetical, through implicit, and down to express unconsent. Figure 5, below, illustrates.

\textsuperscript{49} Like hypothetical and implied unconsent, the subtypes of express consent also range along a scale of justification. \textit{Infra} Part II.B.

\textsuperscript{50} I recognize that not everyone hews to that suggested usage. I explain and use it here, though, hoping that more will.
What does the scale in Figure 5 measure? To put it most simply, it measures not simply different types of consent but their amounts. An expressly consensual transaction claims the backing of more consent than a hypothetically consensual one can claim, for instance, while both rest on more consent than a transaction that, because someone would or did object to it, falls into the negative range. To describe consent in those terms perhaps suggests that we can measure it in precise units. In fact, however, consent proves too complicated and context-dependent to submit to reliable quantification. In fuzzier but more practical terms, the scale of consent affords a rough measure of how justified we regard a particular transaction. For instance, we typically treat an expressly consensual transaction as justified, not only respecting its terms, as when tort law treats consent as a defense to battery, but often even helping to enforce its terms, as when contract law imposes expectation damages for breach. Other types of consent follow in succession, each marking less consent than the one before. The scale of consent measures justification, in other words, and express consent sets the standard.

---

51 The economic justification for valuing consent does suggest, however, that we might move towards more exact measures of consent by applying information theory to it. See, for example, CLAUDE E. SHANNON & WARREN WEAVER, THE MATHEMATICAL THEORY OF COMMUNICATION (Univ. Ill. Press 1963).
Courts and commentators distinguish between different levels of justification even within the bounds of express consent. In contract law, for instance, an agreement between fully informed parties having equal bargaining power—as when a shopper strikes a bargain at an open-air market, for instance, or when a corporation signs a negotiated commercial lease—sets the bar for express consent.\(^5\) We afford those sorts of transactions the greatest respect. In comparison, a party's express consent to a standard form agreement strikes us as more susceptible to second-guessing.\(^5\) Thus, for instance, might a court decline to enforce such an agreement if convinced that a more knowledgeable party would not have agreed to it (showing hypothetical unconsent) and that people customarily do not agree to it (showing implied unconsent).\(^5\)

Even when circumstances preclude obtaining express consent, it continues to set the standard for judging such surrogates as hypothetical and implied consent. The closer they come to mirroring express consent, the better claim they have to our respect. When interpreting a contract, for instance, courts begin with the language to which the parties expressly agreed.\(^5\) If vagueness persists, courts try to fill the interpretative gap with evidence of how the parties interpreted the same contract on prior occasions.\(^5\) If failing that, courts favor evidence of how the parties acted in prior dealings under other contracts.\(^5\) Should those interpretive tools still prove inadequate, courts fall back on usage in trade—evidence of how similarly situated parties customarily interpret the language in question.\(^5\) As they offer progressively weaker proofs of the parties' agreement, the subtypes of implied consent based on prior performances, prior dealings, and uses in trade likewise offer progressively weaker justifications for invoking relief at contract law.

A similar gradation appears in the subtypes of hypothetical consent. A court's interpretation of an agreement might involve consideration of what a particular party would have agreed on, for instance. Where one party to a standard form agreement has reason to believe

---

\(^5\) See RESTATEMENT (SECOND) OF CONTRACTS § 1 (defining "contract"); § 71 (describing types of bargained for exchange); § 344 (listing interests served by judicial enforcement of contracts).

\(^5\) See id. § 211(3) (limiting enforceability of standardized agreements where one party "has reason to believe that the party manifesting [] assent would not do so if he knew that the writing contained a particular term . . . ").

\(^5\) See, for example, Williams v. Walker-Thomas Furniture, 350 F.2d 445, 449 (D.C. Cir. 1965) ("[W]hen a party . . . signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."); id. at 450 (explaining that a court should examine procedurally suspect terms "are 'so extreme as to appear unconscionable according to the mores and business practices of the time and place.'") (quoting 1 CORBIN, CONTRACTS, § 128 (1963)).

\(^5\) Express terms "control," UCC §§ 1-205(4), 2-208(2), or have "greater weight than," RESTATEMENT (SECOND) OF CONTRACTS § 203(b), course of performance, course of dealing, and usage in trade.

\(^5\) See UCC § 2-208, RESTATEMENT (SECOND) OF CONTRACTS §§ 203(b), 202(4).

\(^5\) See UCC § 1-205, RESTATEMENT (SECOND) OF CONTRACTS § 203(b).

\(^5\) See UCC § 1-205, RESTATEMENT (SECOND) OF CONTRACTS § 203(b).

\(^5\) See UCC 1-205 (defining "usage of trade").
what the other party would have agreed to, a court may enforce only those terms to which the 
other party would have hypothetically accepted, letting terms that would have evoked the other 
party's disagreement drop from the contract. Individuated hypothetical consent likewise plays 
a role in validating contracts suspected of relying on one party's intentional failure to disclose 
facts that would have, had they been known to the other party, discouraged assent.

In extreme cases, a court may lack recourse to any sort of actual agreement at all. A court might then invent a hypothetical quasi-contract to determine the rights of 
contesting parties. Courts do so hesitantly, however—only when no stronger form of 
consent can resolve the issue and to compensate only vital aid. In so doing, courts 
distinguish between what any reasonable person would have accepted and what the 
particular person in question would have accepted, favoring the latter, individuated 
hypothetical consent over the former, universal sort.

Contract law thus places the three main types of consent—express, implied, and 
hypothetical—into an ordered ranking, ranging from most consent-rich to the least. Those types include various subtypes, likewise ranged along a scale of justification. Figure 5, above, illustrates.

Although it understandably treats consent with rather less detail than contract law 
does, tort law likewise recognizes the different justificatory power of different types of 
consent. Someone who has expressly agreed to suffer an offensive touching, as in a 
boxing match, thereby forfeits his battery claim. Even though by default we do not 
consent to being struck, express consent outweighs implied or hypothetical unconsent in 
such cases.

Tort law, more than contract law, illuminates the dark territory of unconsent, 
showing how its various types and sub-types rang along a scale of justification. Express 
unconsent—such as the cry, "Stop hitting me!"—evokes tort remedies more readily than 
does mere implied or hypothetical unconsent. The latter two types of unconsent might,

---

60 See Restatement (Second) of Contracts § 211(3) (explaining that such a "term is not part of the agreement.').
61 See Restatement (Second) of Contracts §§161(a)-(c); 162; 163.
62 See, Restatement (First) of Restitution § 116 (1937) (allowing restitution for vital aid rendered to a party unable to give consent).
63 See id. § 116(d) (allowing restitution only if "it was impossible for the other to give consent or, because of extreme youth or mental impairment, the other's consent would have been immaterial.").
64 See id. § 116(b) (allowing restitution only for "things or services [] necessary to prevent the other from suffering serious bodily harm or pain.").
65 See Restatement (Second) of Torts § 49, illustration 2 (1965) (explaining that a doctor suffers no liability for performing a tonsillectomy on an unconscious patient without that patient's permission—a non-emergency procedure that generic, universal hypothetical consent cannot excuse—if the patient "has had trouble with his tonsils and desires that [the doctor] remove them," because even though the patient "has not assented to the tonsillectomy, his actual willingness to submit to that operation constitutes consent to it . . . .").
66 Hart v. Geysel, 159 Wash. 632 (1930).
after all, face countervailing defenses based in express consent. Similarly, despite the fact that most people would object to suffering bodily injury, courts sometimes excuse hypothetically unconsensual harms as impliedly assumed risks. Tort law thus ranks express unconsent as less justifiable than implied unconsent, and implied consent as less justifiable than hypothetical.

Though tort law does not portray unconsent with as much detail as contract law devotes to consent, leaving the exact contours of unconsent's subtypes a less distinct, each feature of consent necessarily casts a unique shadow in unconsent. Just as hypothetical consent based on the particular preferences of an unconscious patient can excuse an elective operation, so too can the individuated hypothetical unconsent of an unconscious patient known to disfavor a particular doctor bar that doctor from rendering the sort of emergency care that universal hypothetical consent would ordinarily excuse. Parallels likewise appear when we compare the details of implied consent with those of implied unconsent. Since they accord less respect to consent implied by customarily agreed-on terms than they do to consent implied to past agreements, for instance, courts of necessity regard implied unconsent to customarily objectionable terms as less objectionable than the sort of unconsent implied by past disagreements between the parties. In express unconsent, too, we see echoes of consent's subtypes. Rights violations inflicted bureaucratically rouse less indignation—indeed, in some cases carry a legal imprimatur—than wrongs inflicted with malicious regard to a particular individual. As Joseph Stalin, that master of unconsent, allegedly observed, "A single death is a tragedy, a million deaths is a statistic."

Though they naturally tend to address the issue in theoretical terms, moral and political philosophy join the law in ranging various types of consent along a spectrum of justification. Thus, for instance, does Locke offer implied consent ("tacit consent," in his usage) to government only as a second-best alternative to express consent, which "no

---

67 See, Restatement (Second) of Torts § 496B (1965).
68 See id. § 496C.
69 See id. § 49, illustration 2.
70 See, Restatement (First) of Restitution § 116, comment b ("[A] physician who has been summoned to attend an unconscious sick person and who, from his knowledge of the patient, knows that his own services or the services of any physician would not be acceptable, cannot recover for his services.").
71 See, for example, Restatement (Second) of Torts § 892D(b) (1979) (affording an actor a defense for injuring another in an emergency situation, but only if there is no opportunity to obtain consent and "the actor has no reason to believe that the other, if he had the opportunity to consent, would decline."). Past disagreements can provide sufficient "reason to believe" another would unconsent, but so can other proofs. See id. comment a (explaining that the excused "conduct must be so clearly and manifestly to the other's advantage that there is no reason to believe that the consent would not be given. If the actor knows or has reason to know, because of past refusals or other circumstances, that the consent would not be given, he is not privileged to act.").
body doubts" creates very strong obligations. That Locke—discounts the possibility that governments can claim to rule by the express consent of their subjects. Those who would justify the State thus face a trade-off between the sort of consent that can be had and the sort of consent that matters. That sort of calculation impliedly recognizes that express consent matters more than implied consent.

Despite their appealing clarity, therefore, attempts to cast justification in black-and-white terms run the risk of obscuring important distinctions. Setting up express consent as a necessary and sufficient condition for justification would naively gloss over the complexity of the real world. In borderline cases, express consent proves hard to define. Can a child give express consent? How about someone desperately seeking protection from a murderous assailant following just steps behind? Can a person who suffers multiple personality disorder bind all her selves with a single promise? In still other cases, express consent cannot be had. A dispute over an ambiguous contract might require a judgment based on the parties' implied consent to default terms, for instance, while protecting an unconscious patient's rights may call for the invocation of hypothetical consent.

---


74 That Locke harbors such doubts appears evident from the effort he expends addressing the "difficulty" of determining "how far any one shall be looked on to have consented, and thereby submitted to any Government, where he has made no Expressions of it at all." *Id.* That would hardly be necessary if express consent obtained. See also, DAVID SCHMIDTZ, *THE LIMITS OF GOVERNMENT* 13 (Westview Press, 1991) (saying of express consent, "we do not observe this sort of consent on a scale large enough to justify the state."). Even Hobbes, despite claiming that the State arises "when a multitude of men do agree" to form it, THOMAS HOBBES, *LEVIATHAN* ch. XVIII, p. 159 (1651) in III *THE ENGLISH WORKS OF THOMAS HOBBES OF MALMESBURY* (Sir William Molesworth, ed., Bohn 1839-45) (emphasis in the original), recognizes the impossibility of universal express consent when he argues that implied consent binds dissenters. *Id.* at 162-63.

75 See, for example, DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 185 (U. Chicago Press, 1989) ("Consent theorists face an imposing structural dilemma . . . . [T]hey need a conception of consent that is descriptively plausible . . . . But that description also needs to be normatively robust . . . . [T]hese two requirements pull in two different directions.").

76 Perhaps that explains why Barnett has argued for viewing the inconsistent application of a State's laws, as when, in particular, the State asserts a monopoly on the initiation of coercion, as no more than one of many factors that should go into determining whether or not a State is justified. Randy E. Barnett, *The Virtues of Redundancy in Legal Thought* 38 CLEV. ST. L. REV. 153 (1990). The approach here, in contrast, treats unconsensual exchanges, such as those marred by coercion, as especially probative of justification.

77 See, for example, *RESTATEMENT (SECOND) OF CONTRACTS* § 202(3)(b).

78 See, for example, *RESTATEMENT (SECOND) OF TORTS* § 892D (1979) (explaining scope of defense of consent in emergency situations).
In these and other cases using express consent as an either/or test of justification would leave one unable to choose between a wide spectrum of less-than-perfect circumstances. But no adequate theory of justification can turn a blind eye to the messiness of the real world. Express consent still has a role to play, but not as a threshold test. Rather, it should serve as an ideal standard for ranking surrogates such as implied and hypothetical consent. The nearer these substitutes come to obtaining a person's express consent, the better they justify the obligations that they allegedly create.

Conclusion

This working paper has reviewed a variety of sources supporting the proposition that consent varies by degrees and covaries with justification. From that evidence, the paper has derived taxonomy of consent's many types and sub-types. That result alone should prove interesting, given the important role that consent plays in legal, moral, and economic reasoning. The scale of consent developed here promises to generate even more interesting results, however, when plugged into a more comprehensive theory of graduated consent, a theory that can shed new light on such old puzzles as the enforceability of standard form agreements, the justification of political coercion, and the interpretation of constitutional language.