SUMMARY: Kleinig, John; ‘The Nature of Consent’

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Thesis

Kleinig offers an overview of what is meant by consent and consenting, arguing that consent is a three-part relation and, at least in part, a communicative act. He discusses what gives consent its ‘moral magic’, its relationship with responsibility, and looks briefly at what are the limits of consent.

Introduction

Consent, in the contexts in which it is given, can be morally transformative, altering the relations between people and groups. Kleinig compares consent to a “proprietary gate”, providing access, which would be impermissible without the voluntary opening of the gate by the consenting agent. \[4\]

In another sense, Kleinig says that consent can be like a “normative rope”, where the consenting agent binds herself to another. In each instance, consent functions to sanction an act or outcome that would otherwise be morally proscribed (though this is not necessarily sufficient to justify all acts and outcomes). \[4\]

Although there may be instances in which the word ‘consent’ is used differently, Kleinig is explicit that his concern in this paper will be exclusively that which is called ‘genuine’ or ‘valid’ consent – the transformative moral notion. \[4-5\]

The Grammar of Consent

To begin, Kleinig notes that the phrase, ‘A consented to x’ is incomplete. Consent requires someone to whom consent is given. Therefore, for consent to occur, it must be the case that ‘A consented (to B) to x’. He explicitly rejects the notion that consent might occur internally, as version of internal consent will serve to morally alter the relations between persons or groups. \[5\]

What needs to be true of A, B and x in order that ‘A consented (to B) to x’ be a true statement?

1. A
   a. A must be an agent who has reached a certain level of maturity.
   b. A may refer to individuals, collective persons, and quasi-persons (such as organisations or companies). \[5-6\]

2. B
   a. B must also be a person, group of persons or quasi-person.
   b. B seeks either permission or agreement from A, to do something which would otherwise be morally proscribed.
      i. Kleinig also notes that it is not necessarily the case that B seeks out A's permission, or initiates the process whereby consent is sought and given. \[6\]
3. X

a. X is typically an action which requires A's authorization, permission or agreement in order to be morally acceptable.

b. Though consent alters the relations between A and B with respect to x, Kleinig does not think that this is of morally determinative importance. Meaning that consent may not be sufficient to render the action x morally permissible.

i. He provides examples of sexual relations with prostitutes and therapists, as well as the case of a mob hitman. Consent in these cases may not be enough to render the action involved as moral.

c. It is also worth noting that consent and approval are able to come apart, and that disapproval does not constitute a refusal to consent. In fact, one can consent to something that one disapproves with.

d. The action x may be conclusive or continuous. This means that withdrawal of consent may or may not be possible after it has been given. It should be noted, however, that the withdrawal of consent may have significant associated costs. [8-9]

The Ontology of Consent

Kleinig's position is:

“[T]hat there is always an expressive dimension to consent – that consent must be signified – and that only if consent takes the form of a communicative act can the moral relations between A and B be transformed. Absent such communication, B has no business doing that for which A's consent is needed even if A condones or would acquiesce to it. Consent is a social act in which A conveys something to B – something that, once communicated [...] now gives B a moral right or entitlement that B previously lacked.” [10]

There are, however, alternative accounts of consent that are called ‘mental state accounts’. These state, broadly, that consent fully determined internally, by A's mental state or a “willingness that others do as they request”. Kleining seeks to differentiate between approval and consent. One may approve of an action, or internally will the action of another, but for consent to be given, it requires an action of its own. [10]

What Kleinig is not arguing is that consent is purely demonstrative. Consent may yet have some mental component. What is of critical importance, however, is that consent is signified, such that B knows she has A’s permission to do x. Absent this signification, B cannot be said to have been authorised by A. The same is true for the withdrawal of consent. It is not enough to change one’s mind, communication must occur between the relevant parties. [10-11]
Signification

Because, as has been seen, consent is a communicative act, there must some mechanism whereby it can be recognised as having been given or withdrawn. Though there is no single act that universally signifies consent, context and convention together will determine which acts grant, withhold or withdraw consent. Kleinig notes also that even a negative act (silence when objections are invited) can qualify as consent. [11]

However, it is not the case that consent is simply a matter of displaying signifying behaviours or actions. One may act in such a way that is conventionally considered to grant consent without doing so if, for example, one may is being coerced. [12]

“When Joel Valdez broke into Elizabeth Wilson’s apartment and sought to rape her at knife point, she agreed to submit if he wore a condom. He had sex with her for an hour until she was able to flee to a neighbour’s apartment. But a Texas grand jury decided that her agreement to have sex if Valdez wore a condom constituted consent to intercourse and therefore that she was not sexually assaulted.” [12]

Clearly, this is an incorrect finding on behalf of the jury. Simply because she made a strategic choice to submit, this does not constitute voluntary or valid consent.

Kleinig notes that context is key when it comes to consent. Certain behaviours may look non-consensual when taken out of context (he gives the example of actors in a pornographic movie). In general, consent in sexual relations is a particularly difficult topic, where misunderstandings regarding consent are much more prevalent due to social attitudes and the progressive manner in which sexual activity generally proceeds. [12]

Consent and Responsibility

In this section, Kleinig looks at the relationship between consent and responsibility. In general, consent must have three key features in order that it conveys the appropriate level of responsibility to the agent who grants it. It must (i) be the act of an agent who is competent, (ii) it must be voluntary (uncoerced), and (iii) it must be based upon understanding (the agents involved are appropriately informed). This is not to say that one cannot be irresponsible in consenting, but that one can be held responsible for one’s irresponsible conduct. [13]

We can look at the three responsibility conditions in turn:

1. The Competence Condition
   a. Young children are not capable of consenting, and a guardian will typically consent in their place.
   b. Developmentally challenged adults may, in some areas of life, never be capable of providing valid consent.
c. Intoxication may impair one’s ability to consent, though we may or may not hold an intoxicated person responsible for irresponsible action.
d. Mental illness is another way in which an individual may be incompetent in providing consent.
e. Finally, acute or chronic pain may impair one’s abilities to consent. Kleinig makes specific reference to consent acquired under conditions of torture.
   i. In each of these cases, if another provides consent for an incompetent individual, an argument must be made for the transferral of that responsibility to the third party. [13-14]

2. The Voluntariness Condition
   a. Kleinig beings by rejecting the notion that coercion will produce invalid consent. Rather, he states that it is ‘assent’ and that consent must be voluntary.
   b. It is generally agreed that physical threat constitutes coercion. However, there is some debate over the status of moral and societal pressures.
   c. Even more contentious is the idea that ‘inner forces’ nullify voluntariness and, therefore, responsibility.
   d. Some problem cases:
      i. Prisoners who sign up to medical trials in exchange for preferential treatment.
      ii. Plea bargains offered in accordance with the knowledge that losing a case in court will carry a much heavier sentence. [14-15]

3. The Knowledge Condition
   a. In order for consent to be valid and responsible, without further qualification, then it must be knowledgeable.
   b. However, it may be wilfully uninformed, or irresponsible, yet still valid, if one is responsible for refusing to become knowledgeable and responsible for one’s responsibility.
   c. Kleinig draws attention to the problems associated with deception and our laws regarding ‘fraud in factum’ and ‘fraud in inducement’. He provides some cases:
      i. A consents to gynaecological examination by B, who, she believes, inserts a vaginal speculum; in fact, he inserts his penis.
         1. In this case, consent is negated by B’s deception. This is a clear case of a sexual assault.
      ii. A consents to intercourse with her doctor B after he has deceptively induced her to believe that it will be therapeutically beneficial.
         1. In this case, consent to sex is not invalidated, as A did consent to intercourse.
iii. A consents to intercourse with B, falsely believing that the man who (in the dark) has slipped into bed beside her is her husband.

iv. A consents to (her first) intercourse with B having been deceptively induced to believe that the papers she recently signed were marriage documents.
   1. These cases seem to be more difficult to qualify.

v. A, a prostitute, consented to intercourse with B after he deceptively led her to believe that he would pay.
   1. Kleinig thinks that we may view this as a case of economic fraud rather than sexual assault.

[16-17]

4. The Intention Condition
   a. One further condition Kleinig places upon responsible consent is that of intention. When ‘A consents (to B) to x’, she does so under a certain description.
   b. What is consented to is generally determined by convention and context, though additional specification will be necessary in some circumstances.
   c. Kleinig provides some problem cases:
      i. Carte-Blanche consent
      ii. Sex, especially when one partner has contracted an STD.
      iii. Contact Sports
      iv. Political Consent
      v. Tacit Consent (see Locke’s political theory)
      vi. Policing and the War on Drugs [17-20]

Limits to Consent’s Moral Magic

Finally, Kleinig looks to the limits of the ability of consent to alter moral relations. In one case, mentioned earlier, we can imagine a mob hitman. The consent of his superiors to some killing makes no difference to the moral character of the action. [21]

Additionally, an ongoing philosophical problem for consent is that of consent to self-harm. Can I consent to your harming me or killing me? Kleinig does not provide an answer to this question, but does believe it to be more problematic if B initiates the request to harm A, than if A requests that B harm her. [21]

Regarding this problem, Kleinig’s closing remarks are as follows:

“Our reservations may ultimately go back to the view that the value of consent is rooted in a conception of the social conditions under which humans may best flourish, conditions that will ordinarily support the magical power that consent is able to display. When consent functions otherwise, it seems to have uprooted itself from that which sustains it.” [22]
References