Review of Goodin, *Consent Matters*

October 26, 2025

Bob Goodin's far reaching and original *Consent Matters* is an outstanding contribution to contemporary work on consent. It offers a novel, insightful theory of consent—both what it *is* and what it *does*. Among the book's most striking claims is that consent's ontology and function should be treated with far greater independence than they have been. In this review, I want to bring out the distinctiveness of this approach, arguing that while it has much to commend it, it fails to take sufficiently seriously morality's, and so consent's, relational character.

Before jumping fully into Goodin's picture, two short notes. First, inasmuch as you are looking for a quick verdict: the book is excellent. It is essential reading for anyone working on the topic, is extremely stimulating, and is easily excerpt-able for those teaching advanced undergraduates or graduate students. Second, though not the focus of this review, I want to highlight one of the book's most significant virtues: its (genuinely extraordinary) breadth of scholarly engagement. Goodin engages a full array of historical, especially Early Modern, and contemporary literature in ethics, bioethics, and the law. Grotius, the American Legal Institute's Restatement of Torts, and the latest philosophical literature all make helpful appearances in the main text as resources and foils; and alongside the tightly constructed argumentative arc of the book's main text, the footnotes manage to draw a wealth of resources together into conversation. I cannot overstate how rich—and useful—the footnotes are. *Consent Matters* left me with a brimming to-do list of further readings, much of which (especially historical and legal) I may not have found on my own. This alone makes Goodin's book an outstanding resource.

Now, on to the arguments. For decades, one of the central debates among theorists of consent has been an ontological one: what *is* consent? A (private) mental attitude or mental act which is *evidenced* by our (public) communication? Or something essentially (public and) communicative? To caricature just a bit, the essential

question in such a debate is whether, in some tough case, there really was consent—whether the case features "moral transformation" where a right is waived and what would otherwise be forbidden was rendered permissible (all else equal). On this way of thinking, the main issue is the ontological question, which in turn settles the deontic one. Of course, our first-order moral judgments can drive our ontological theorizing (from "ϕ-ing is wrong" we can infer "S didn't consent to ϕ-ing"), but the order of explanation is the other way around, with ontology first and morality second.

Goodin argues for a different approach. Among the main theoretical maneuvers of the book is Ch. 1's separation of what, for Goodin, turn out to be two distinct parts of a theory of consent: an account of, first, its ontology and, second, its social function. Goodin's ontology is a more-or-less standard hybrid position: consent is constituted in part by an internal (private) mental commitment, and in part by an external performative act.[1] Because an internal commitment is necessary for consent, unintentionally, or even fraudulently, signaling consent is not, he argues, consenting.

But Goodin doesn't stop with ontology, offering what he calls a "social functionalist account of consent" (19). Goodin argues the conditions of consent's social functioning—to guide others' actions—come apart from its ontology. Socially functional consent must be communicated. On Goodin's way of thinking, if I fraudulently, negligently, or innocently signal consent when I do not have the requisite mental state, we should say that though consent did not in fact occur (an ontological claim), my speech was nevertheless "socially efficacious" (27), and so should be treated as initiating a "consent-like transaction" or an instance of "as if consent." On this bifrucated way of seeing things, "socially [I] consented, but mentally [I] did not" (103); or as Goodin also puts it, "from a *moral* point of view," I did not consent,

[1] "More or less" because Goodin offers novel accounts of both the internal and external elements. Most interesting, and I think mistaken, is his insistence that the external act is "performative, not (necessarily) communicative" (13). If I sign a medical consent form and seal it in an envelope, I have consented to the procedure without having communicated my consent to the doctor herself. Therefore, Goodin argues, that the externally necessary component, ontologically speaking, is some kind of performance, e.g., signing a document, but needn't be *communicative*. I agree with Goodin that consent occurs in such cases; but my signing a consent form is still a communica*tive*, linguistic act, even if it is not communicat*ed* to anyone yet. My signature is, by its nature, something that is in the business of communicating—it is a linguistic token with communicative function. Whether or not it has fulfilled its function, is on the way to doing so, or merely *could be* once an impedement (the envelop) is removed doesn't change the kind of thing it is.

but "from a *social* point of view," I did (6). Goodin's contention is that we should theorize about the social upshot of consent-like transactions in a manner that isn't so *beholden* to our ontology.

I have trouble making sense of this in two ways. First, I am not sure Goodin's "social functionalist" account of consent really is functionalist; a genuinely functionalist account of consent would not have ontology float free of function, but would rather understand the ontology *in terms of* its function. Indeed, I have trouble pinning down Goodin's contrast between others' putatively ontological approach and his functionalist one. Contemporary theorists like Dougherty and Jørgensen argue for ontological conclusions from premises about consent's social function (2019; 2015). Second, I don't know what "the moral point of view" is divorced from "a social point of view," especially when dealing with interpersonal matters. Interpersonal morality just is the system of norms governing the social world—so what is the non-social, moral point of view one can take on interpersonal interactions of the kind consent governs?[2]

But let's set aside the view's functionalist credentials and the labeling of various parts as "social" or "moral" and turn to the substance of the view. Goodin's approach is distinct, offering an intriguing approach to what we might loosely call "tough cases," including those involving non-explicit consent, mistakes and misunderstandings, ignorance, and (attempted) revocation. Goodin is not preoccupied with the question of whether, in such tough cases, consent was validly given or whether the (putatively) consented to action was permissible. In tough cases, Goodin thinks *someone* is going to be stuck with the short end of the stick; the important questions for him are, roughly, *who* will bear the costs involved in the tough case, and by *how much*.

When, for instance, a party mistakenly signals consent or mistakenly interprets someone as consenting, Goodin's central question is "who should bear the burdens

[2] What Goodin argues (more on this in moment) is that in many cases of as-if consent, the right in question is retained (that's the "moral" bit), but because consent was signaled and engendered reliance on the part of the receiver, the false consenter needs to *compensate* the other party in order to invoke the right. So I think that in some sense, the distinctively *moral* claim is that the right is retained and the (extra-moral?) social claim is that it has to be paid for in order to be invoked. But the claim that someone retains a right but must pay for its use sounds *moral* to me.

of such mistakes concerning consent"? (101). Goodin urges us to recognize that any theory of consent will bestow burdens and benefits, and we should theorize first about *those*, not just narrowly about *whether consent occurred*. That spirit animates his treatment of a range of issues: of non-express forms of (putative) consent (Ch. 3), a wide variety of kinds of mistake in consenting (Ch. 4), consent under various degrees and scope of ignorance (Ch. 5), revoking consent (Ch. 7), and difficult applied cases of hunger-strikes, kinky sex, and consent to political rule (Ch. 8–10). (Ch. 2 compares assent, consent, and promise; 6 considers the ethics of invoking or requesting consent.)

To really get a flavor for Goodin's way of thinking, I'll sacrifice breadth for depth and zoom in quite closely on his treatment of one kind of case—that in which an agent is (culpably) negligent and mistakenly signals his consent when he did not intend to. In doing so, I'll be able to bring out both the power of Goodin's view and, I'll argue, its limitations.

Suppose that my friend is coming to town and asks, "can I crash at your place?" I explicitly respond "yes, of course!" While virtually everyone in our shared social space understands "crashing at one's place" to mean staying in a guest room or couch, in a moment of perhaps wishful thinking, I think that my friend just wants to pop by for dinner and drinks. He shows up, suitcase in tow, and it's immediately clear there has been a misunderstanding. Stipulatively, it's my fault. What should we make of this mishap?

I did not intend to consent, and so for Goodin, I didn't; yet in signaling, my "as-if consent" was "socially efficacious." So Goodin thinks this is a case that calls for nuance; if we just ask "consent—yes or no?" he fears we'll miss out on the fact that it seems like the best answer will in some way straddle the line.[3] Recall that Goodin's

[3] His argument against rival views is that they will be unable to capture the nuance his own can. I'm not so sure. A view, e.g., Jorgensen's communicationism, that straightforwardly treats this as a case of consent can supplement *that* deontic verdict with further moral claims about the case. For instance, though I consented, I might still be able to *revoke* that consent. And either way, the facts that a) I don't want my friend to stay, and b) that my friend relied on my consent, might both (independently and together) ground further facts about what we should do, e.g., perhaps my friend ought not to avail himself of his right to stay and I ought to help compensate him for his troubles. All of this can come *on top of* the claim that consent occurred. Views that claim consent straightforwardly failed in this case can make similarly nuancing manuevers.

point of departure is asking *who should bear the burdens* of the mistake. The mistake is my fault; so I should. What follows? I should have to compensate my friend if I exercise my right to refuse to let him stay. Put another way, though I retain my right against my friend's staying in my apartment, my right is "fully encumbered." That is, to exercise my right, I must fully compensate my friend for the harm to his interests stemming from his reliance on my consent. Suppose that had he booked a hotel room when he first planned his trip, he'd have to pay $200; prices have since gone up, and now he'll have to pay $300. Goodin thinks I *may* stand on my rights and refuse to board him, but I owe him the $100 difference.

Things would be different if my mistaken signal were not negligent but fraudulent or non-negligently innocent. My degree of responsibility for the mistake doesn't ground or defeat the existence of consent; rather, it guides the ethics of burden-distribution, i.e., shaping the non-ontological, social functional part of a theory of consent. In fashioning the right kind of burden-distribution in such tough cases, "the aim is restore the (putative) consent-receiver to the same position as she would have enjoyed had the (putative) consent never been (purportedly) given" (33, cf. 101 ff.).

One can easily imagine how powerful and flexible an approach this winds up being across a diversity of tough cases. For example, the same basic story applies in a case where I successfully consent but then *revoke* that consent. (Imagine my friend is about to board his flight when he gets a text from me saying "I've changed my mind. You can't stay after all." I can do so, regaining my right to refuse entry, if (but only if!) I fully compensate my friend.) And it's not only powerful; this *compensatory* model makes good sense. While it yields deontic verdicts (conditional on my compensating, refusing entry is permissible on my part and my friend's staying is impermissible) which cohere with the ontological story, the ontology is neither the whole story nor even the starting point. The question is who should bear the costs of this case's toughness.

Though not exactly how he puts it, I think we can helpfully think of Goodin's model of tough cases as having two parts: first, the end or ideal to which he holds his theory of consent and second, the means in the theory that he uses to achieve it. Goodin's end is *restorative*, and the means he proposes to achieve that restoration is about locating or shifting the right bearer of costs, often by means of *compensation*.

His approach (explicitly) parallels and critically draws upon that taken in tort law; one of tort's primary aims is to make injured parties *whole* (as much as possible), and it achieves its restorative aspirations typically by means of imposing compensatory damages.

The tight analogy to tort law is in many ways appealing. Philosophers often treat directed duties, obligations and wrongings, i.e., the phenomena to which consent is relevant, as analogous to private law and dis-analogous to criminal law. (Where a *crime* is prosecuted by the state on behalf of all people, not just the victim, the normative phenomena at issue in tort claims are more narrowly directed. Only the harmed party can bring suit, and she (typically) does so on her behalf alone, not on behalf of the moral community at large.) That directed moral phenomena, and so consent, should be seen as via the logic of tort makes good sense.

But at the same time, the analogy to tort law raises red flags. By the time parties meet in civil court, things have gone badly wrong. Tort law is a matter of last resort and is not a model for handling tough issues in interpersonal morality in general. If my friend literally sued me for damages related to my miscommunication, we probably wouldn't be friends any more! Why? Not only because courts' judgments are backed by coercive power of the state, but also because of the very logic of tort law—the logic of restoration by way of compensation. Tort stands as a kind of *backstop*, a mechanism of *second-best* solutions when other attempts at resolution fail. Its tools are, by the nature of the job, limited. Courts cannot enforce affective requirements of genuine remorse, nor is it their function (at least in traditional legal practice) to facilitate any kind of moral repair or relational healing between the parties. So instead they stick to what they *can* do: quasi-restoration via damages. In our interpersonal relations with others, however, we are not so constrained, and our theory of consent shouldn't be either.

To see what I mean, imagine morally sensitive and caring sexual partners get their wires crossed; where each was trying earnestly to communicate clearly about what sexual activities she was consenting to, one person negligently, mistakenly signaled that she consented to an act that she did not intend to permit. Almost immediately, both parties realize a mistake was made. Feelings are hurt, each feels resentment (at the negligent signaling, at the accidental transgression), embarrassment, and shame;

the trust between them has been damaged.

How should we think of such a case? In terms of a fully encumbered right, retained but requiring compensation? That is a bit ghoulish—and to be clear, Goodin, who is sensitive to the fact that not all costs *can* be compensated, would likely agree. He might well treat this case as exceptional exactly because the various costs born cannot be compensated (cf. 172–73). But the problem runs deeper than that. Consider the two parts of Goodin's theory of mistaken consent: the aim is restoration, and the means is burden shifting. But that very aim and and choice of means seems misplaced here. In the wake of embarrassment, shame, broken (or shattered) trust, resentment—all the messiness of intimacy gone awry—there is often no way to go *back* to how things were, and more importantly, it is a mistake to try. The aim instead should be for parties to move *forward* by, at a minimum, taking responsibility for the mistake, and ideally embarking in a process of moral repair. The tools for achieving the ends of accountability and repair in this context are (obviously) not compensation. It will involve apology, accountability, communication, acceptance, forms of emotional engagement and expression, perhaps forgiveness. Much of the work will be a matter of affective expression and exchange (of remorse, anger, acceptance, etc.). The restoration/compensation model leaves all this out of view.

One might worry I'm making a common mistake in debates about consent—invoking sexual consent, which is in many ways *special*, in defense of a general claim. But I think this sexual context makes vivid a general shortcoming of his approach. Go back to the original case of my friend showing up on my doorstep, suitcase in hand. Put yourself in my friend's shoes; how would you feel if I wrote you a check and sent you on your way, my fully encumbered right now paid for?

One might worry this isn't fair to Goodin. In making claims about consent, he isn't exhausting the ethical terrain (cf. Epilogue). He can, of course, say that whatever fully encumbered rights do or don't remain in play, there is more to be said. In addition to defraying your now-increased hotel costs, Goodin might claim I should also apologize, ideally feel and express remorse, attend to your hurt, and look to heal whatever rupture emerges in our friendship. All of that extra texture and nuance can sit alongside the core claims about consent he is making. [4]

[4] It is worth noting, all of those *further* normative claims that go beyond the deontic verdicts can

But this doesn't address the heart of my worry. I am not so much concerned with the verdict in these cases (although I do think they are a bit bizarre). Instead, my disagreement is about consent's social function. Goodin is completely right to insist that consent's function should play the starring role in our theorizing; moreover, Goodin's basic functionalist approach to mistakes, ignorance, revocation, non-express forms of consent, and the tough applied cases in the final three chapters are likewise deeply compelling. But Goodin sees consent's function too narrowly.

Though Goodin doesn't put it in these terms, I submit that at bottom, he sees consent as a social tool for shifting the burdens and benefits related to a special domain of personal authority, i.e., that over which we have rights. That's why the theorizing of tough cases is conducted in those terms—by thinking through how various practices of consent would best realize the social distribution of burdens. But that leaves so much of consent's social function out of view, namely the broader role that permissions and permitting play in interpersonal life.

In consenting, we can let another into our lives, thereby shaping who we are to one another. Someone becomes not just an friend but a house-guest, not just an acquaintance but a sexual partner. Those relational changes wrought by consent involve more than a shift in burdens and benefits, but changes in accountability, intimacy, emotional vulnerability, and trust; those aren't just a matter of costs. These are essentially *relational* notions—a shift in who I am to you, and you to me. That relational dimension is not something that is in the business of being compensated or restored—at least when restoration is understood as a matter of "restor[ing] the (putative) consent-receiver to the same position as she would have enjoyed had the (putative) consent never been (purportedly) given" (ibid.). Damage to trust isn't compensated, its rebuilt; accountability isn't realized by mere payment but by *taking* responsibility *to* the wronged person via apology; the hurt of emotional vulnerability is not to be compensated but tended to. Moreover, all of these relational phenomena have affective dimensions. One needn't follow Darwall, Wallace, and others in understanding morality *in terms* of reactive attitudes to think that our moral sentiments play some kind of central role in relations of accountability, trust, intimacy,

also be made by rival views, including even a stark communicationist view on which mistaken signaling can constitute consent.

and thereby consent. All of these phenomena resist a framework of restoration via compensation. And they are not features of funny edge cases found at the periphery of a practice of consent; their centrality follows from consent's function: to let others into our lives, to in some way bring another closer and thereby reshape our relations with them, relations which are in no small part a matter of trust, intimacy, accountability, and attendant emotions.

A social functionalist way of thinking about consent and the tough cases that arise in its wake—mistakes, revocation, ignorance, non-express consent, and the rest—must do justice to consent's broader role in shaping who we are to one another.

In a sense none of this should surprise someone familiar with Goodin's work. Goodin is a consequentialist, and has argued against relational approaches to morality throughout his career. While *Consent Matters* presents a "middle-range theory" that is meant to float more or less free of any particular foundations (xii), Goodin's aversion to relationality deeply shapes the resulting account.

By looking in detail at one part of Goodin's view, I've tried to argue that this approach fails to take account of morality's, and so consent's, relational dimensions. But in closing I want to make clear this is a criticism born of deep appreciation of *Consent Matters*. It raises excellent questions, sharp answers, and powerful arguments, opening new avenues for further work, both that which is broadly sympathetic and critical. Moreover, it shows how far a tort-style approach can take us. And in doing so, it lays down a challenge well worth taking up for those of us who want to situate consent in a more thoroughgoingly relational understanding of morality.

References

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