CLICKING THROUGH CONSENT

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I. INTRODUCTION

The idea of consent seems clearly established as central to many dimensions of the law.[1] But consent has of late become increasingly problematic in theory and unmanageable in practice. Courts and legislatures should, in consequence, reduce their reliance on the now disintegrating idea of consent, and instead focus more consciously on the ideas of basic interests and of widely acknowledged basic goods.

This Article presents evidence for the increasingly problematic character of consent in a number of legal contexts.[2] The Article begins

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1. *See, e.g.*, DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 215 (1989) ("Consent theory has an extraordinarily firm hold on our imagination. It provides perhaps the single most prevalent paradigm structuring our thinking about law, society, morality, and politics"); Larry Alexander, *The Ontology of Consent*, 55 ANALYTIC PHIL. 102, 102 (2014) ("Consent is one of the most important concepts in both morality and the law."); Kimberly Kessler Ferzan, *Clarifying Consent: Peter Westen's The Logic of Consent*, 25 L. & PHIL. 193, 194 (2006).

2. Without, of course, exhausting the range of legal contexts in which the idea of consent currently plays a significant role. For an exceptionally valuable survey, see the contributions to THE ETHICS OF CONSENT: THEORY AND PRACTICE (Franklin G. Miller & Alan Wertheimer eds., 2010). For discussion of the narrow, literal problem of click-through processes and meaningful consent, contrast Pratt v. Everalbum, Inc., 283 F. Supp. 3d 664, 669 (E.D. Ill. 2017) (finding sufficient consent to dissemination of the plaintiff's name through an on-screen click-through process) with Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090, 1095 (N.D. Cal. 2011) (finding insufficient user consent because of the breadth and complexity of the click-through user agreement).

with a brief discussion of consent-based theories of political and legal obligation in general.[3] These consent theories are, by a justified near consensus, defective.[4] Reference is then made to the role of consent in the private law of contracts,[5] including in medical informed consent contexts,[6] and in a sampling of the wide range of other legal contexts in which daunting questions of consent commonly arise.[7]

The Article then briefly addresses the idea of consent as a defense to criminal charges in general,[8] and in sexual assault cases in particular,[9] with some attention to current disputes over age of sexual consent rules.[10] The focus then turns to some illuminating cases involving unemancipated minors who seek a judicial bypass of parental notification and consent requirements in the context of access to abortion.[11]

On the basis of this survey of the law of consent, the Article confronts fundamental problems regarding the meaning and value of the consent inquiry in the law.[12] The contrasting idea of interests, in the relevant sense, is then introduced.[13] The contemporary conflict between "will" theories and "interest" theories of rights in general is then addressed,[14] furthering the defense of an enhanced legal role for the idea of basic interests and basic goods, as distinct from that of consent.[15] An account of how current thinking on questions of autonomy and paternalism distinctively impeaches consent theory brings the Article to a close.[16]

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3. *See infra* Section II.
4. *See infra* Section II.
5. *See infra* Section III.
6. *See infra* Section III and the sources cited *infra* note 60.
7. *See infra* Section III.
8. *See infra* Section III and the sources cited *infra* note 61.
9. *See infra* Section IV.
10. *See infra* Section IV.
11. *See infra* Section IV.
12. *See infra* Sections V–VI.
13. *See infra* Section V.
14. *See infra* Section V.
15. *See infra* Section V.
16. *See infra* Section VI.

II. THE DUBIOUS STATE OF CONSENT THEORIES OF POLITICAL OBLIGATION

The idea of consent has long been central to accounts of the legitimacy and authority of political regimes.[17] At the broadest level, it is thought that consent is essential to our having some appropriate degree of control over our lives, given that we need the assistance and forbearance of others.[18] Consent is thus linked to something like autonomy or self-direction, perhaps along with a belief that competent persons will typically understand their own interests better than others.

There is no single canonical formulation of the idea of consent in the broad political context. We may, however, merely for the sake of convenience, consider the formulation offered by Professor Richard Flathman:

> Assuming the circumstances are right for the question of consent to arise, for B to consent he must: (a) know what he consents to, (b) intend to consent to it, (c) communicate his knowledge of what he is consenting to and his intention to consent (that is, communicate his consent) [directly or indirectly] to the person or persons to whom the consent is given.[19]

On some such basis, it has then been argued that "[n]aturalized citizens explicitly agree to obey the state in the naturalization ceremony."[20] More problematically, "[n]ative-born citizens implicitly [or tacitly] agree to obey when they cease to be political minors and accept adult status, that is, full membership, in the state."[21]

Consent theories of political obligation have, quite understandably, been challenged on several grounds. Most obviously, unless the consent

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17. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 4–226 (Peter Laslett ed., Cambridge Univ. Press Student ed. 1988) (1690). For the rudiments of a consent-based social contract approach, see PLATO, *Crito, in* EUTHYPHRO, APOLOGY, CRITO (F.J. Church trans., Bobbs-Merrill Co. 2d rev. ed. 1956) (c. 360 B.C.E.). In the American judicial context, see Chisholm v. Georgia, 2 U.S. 419, 455 (1793) for the assertion by Justice Wilson that "[t]he only reason, I believe, why a free man is bound by human laws, is, that he binds himself."

18. *See* JEREMY WALDRON, *Theoretical Foundations of Liberalism, in* LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991 35, 47 (1993).

19. RICHARD E. FLATHMAN, POLITICAL OBLIGATION 220 (1972); *see also* Hanna Pitkin, *Obligation and Consent—I*, 59 AM. POL. SCI. REV. 990 (1965); Hanna Pitkin, *Obligation and Consent—II*, 60 AM. POL. SCI. REV. 39 (1966).

20. Harry Beran, *In Defense of the Consent Theory of Political Obligation and Authority*, 87 ETHICS 260, 262 (1977).

21. *Id.*

theorist wishes to conclude that few persons are morally bound to even the best regime, there is the problem that few persons have meaningfully consented to a political regime.[22] As David Hume classically observed, regardless of the method of consent, individuals typically cannot consent without knowing that they are consenting and intending to consent.[23] If most people do not believe that they have relevantly consented, then consent will typically not have taken place.[24]

Specifically, voting in an election will not typically amount to consent to the resulting regime. One might vote, for example, for the least among various evils, to fend off the gravest moral evil. Or one may simply not consciously intend to consent by voting, in the absence of any clear social convention to the contrary. It would also seem that the character, authority, and legitimacy of a gravely evil political regime does not change because it has been widely consented to.[25] And even if voting implied some elements of consent, there would then be the further problem of determining to what various voters had intended to consent. One might vote while thinking primarily of a candidate, a particular office, a term of that office, one or more policies, a regime, an underlying constitution, or a desire to express a particular mood or general attitude. One cannot consent merely in general.[26] On the basis of these and other problems,[27] one could reasonably conclude that attempts

22. *See, e.g.*, FLATHMAN, *supra* note 19, at 231 (considering both tacit, or implied, consent as well as express consent); GEORGE KLOSKO, POLITICAL OBLIGATIONS 151 (2005) ("few citizens have actually consented to their government."); JOSEPH TUSSMAN, OBLIGATION AND THE BODY POLITIC 36–37 (1960) ("many native 'citizens' have in no meaningful sense agreed to anything."); CHRISTOPHER HEATH WELLMAN & A. JOHN SIMMONS, IS THERE A DUTY TO OBEY THE LAW? 93, 118 (2005) (discussing typical citizens as rarely freely committing to obey the law, tacitly or otherwise); David Enoch, *Against Public Reason* 3, CENTRAL EUROPEAN UNIV., https://www.ceu.edu/sites/defaul /files/attachment/event/13116/enoch-against-public-reason.pdf ("For all modern states, there is no normatively relevant sense of consent such that each and every one of those subject to their authority has given her consent.").

23. *See* DAVID HUME, A TREATISE OF HUMAN NATURE bk. III, pt. II, § VIII, at 549 (L.A. Selby-Bigge ed., Oxford: Clarendon Press 1967) (1739) ("[W]e do not commonly esteem our allegiance to be deriv'd from our consent or promise.").

24. *See* J.L. MACKIE, HUME'S MORAL THEORY 110 (1980) ("If present-day allegiance rested on a promise, even a tacit one, people generally could not fail to know this.").

25. *See* 1 DEREK PARFIT, ON WHAT MATTERS 211 (Samuel Scheffler ed., 2011) ("The Consent Principle cannot . . . be . . . the supreme principle of morality. Some acts are wrong even though everyone could rationally consent to them.").

26. For background, see Loren E. Lomasky, *Contract, Covenant, Constitution*, 28 SOCIAL PHIL. & POL'Y 50, 53 (2011).

27. For further critique, see MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS ch. 4 (2006).

to ground ordinary political authority and obligation in consent are likely to be unsuccessful.[28]

It is possible to advance a theory of political authority based not on actual—either express or tacit—consent, but instead on some theory of 'hypothetical' consent.[29] From our perspective, though, the issue is not whether hypothetical consent theories are attractive.[30] Theories of hypothetical consent to a regime—roughly, that persons would in fact consent if they were reasonable, well-informed, and fair-minded—are, on their face, not really theories of consent as the term is used herein. As Ronald Dworkin observed, "[a] hypothetical contract is not simply a pale form of an actual contract; it is no contract at all."[31]

Whether one then chooses to endorse a theory of merely hypothetical consent to a regime or not, one is left with more than ample grounds for doubting the viability of a consent theory of political obligation. The point of our brief discussion is certainly not to conclusively refute consent theories of political obligation. Instead, the point is more modestly to suggest some of the serious defects of classic and contemporary consent theories of political obligation, and to begin to lay the groundwork for an alternative approach focusing more fundamentally on interests and on basic goods.[32]

After all, political consent is given, presumably, with the expectation of thereby promoting some substantial interests.[33] It should not surprise us if beneath, or indeed instead of, consent theories, we find the pursuit of basic interests.[34] But even where something approaching genuine

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28. *See, e.g.*, William A. Edmundson, *Consent and Its Cousins*, 121 ETHICS 335, 353 (2011) ("An inductive inference that all further attempts [to justify political authority via consent] will fail seems warranted.").

29. *See, e.g.*, WELLMAN & SIMMONS, *supra* note 22, at 117; WALDRON, *supra* note 18, at 51.

30. For discussion, see David Enoch, *Hypothetical Consent and the Value(s) of Autonomy*, 128 ETHICS 6 (2017); David Zimmerman, *The Force of Hypothetical Commitment*, 93 ETHICS 467 (1983).

31. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 151 (1978); *see also* WELLMAN & SIMMONS, *supra* note 22, at 117; WALDRON, *supra* note 18, at 51.

32. *See infra* Sections V–VI.

33. *See, e.g.*, Michael Davis, *Locke On Consent: The Two Treatises as Practical Ethics*, 62 PHIL. Q. 464, 479 (2012) (referring to social contract conscionability in light of the significant benefits accruing therefrom).

34. The classic exponent of a focus on basic interests, as opposed to the mystifications of general consent theory, is David Hume. *See* HUME, *supra* note 23, § IX, at 550–51 ("[A] promise itself . . . is invested with a view to a certain interest. . . . This interest I find to consist in the security and protection, which we enjoy in political society"); DAVID HUME, *An Enquiry Concerning the Principles of Morals*, *in* AN ENQUIRY CONCERNING THE HUMAN UNDERSTANDING § 7, at 205 (L.A. Selby-Bigge ed., 1894) (1777) ("[T]he sole foundation of the duty of allegiance is the advantage, which it

consent obtains throughout the range of the law, we should place greater emphasis on the fundamental interests and basic goods underlying such cases.

III. THE DUBIOUS STATE OF CONSENT IN CONTRACT LAW

The idea of consent is central to the subject of contract law. It has been argued that the idea of consent is fundamental to explaining, as well as to justifying, contract law.[35] Consent theory in this sense seeks to distinguish itself[36] from theories of contract that are based on the idea of promise[37] or on the idea of choice.[38] We should assume, though, that there can be consent theories that are broad enough to include theories of contract law that emphasize the will, or volition, or subjectivity or broad ranges of valuable eligible choices, along with consent in any narrow sense.[39]

In a broad sense of the idea of consent, we may say that "all contracts require consent as a prerequisite, [but] the meaning of consent is obscure."[40] To some degree, the meaning of consent in various contractual contexts may always have been obscure. Of late, though, the obscurity, if not the utter fragmentation, of the idea of contractual consent has become increasingly evident. Competent persons "often agree to contracts with only the haziest notion of what terms they include,"[41] with contract formation being "routinely beset with threats[42]

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procures to society, by preserving peace and order among mankind."); DAVID HUME, ON THE ORIGINAL CONTRACT (1752) *reprinted in* DAVID HUME'S POLITICAL ESSAYS 43, 60 (Charles W. Hendel ed., 1953) ("The general obligation which binds us to government is the interest and necessities of society.").

35. *See, e.g.*, Randy E. Barnett, *Contract is Not Promise; Contract is Consent*, 45 SUFFOLK U.L. REV. 647, 649 (2012); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (seeking to distinguish promise-oriented theories of contract emphasizing will, free volition, and subjectivity).

36. *See* Barnett, *supra* note 35, at 655.

37. *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 150–53 (2d ed. 2015) (distinguishing Barnett's approach).

38. *See, e.g.*, HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017) (emphasizing autonomy, along with utility and community, as manifested in meaningful choices from among a range of varied and attractive types of contract, rather than mere bargaining over possible contractual terms in any given contractual context).

39. *See supra* notes 34–37.

40. Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165, 168 (2017).

41. Nathan B. Oman, *Reconsidering Contractual Consent*, 83 BROOK. L. REV. 215, 215 (2017).

42. For a sense of the fragmentation and generally muddled state of the related idea of coercion, see R. George Wright, *Why the Coercion Test Is of No Use in Establishment Clause Cases*, 41 CUMB. L. REV. 93 (2011).

and pressures that seem removed from the freely consenting parties envisioned" by standard contract doctrine.[43]

As a matter of everyday experience, familiar ideas of consent seem increasingly remote from routine contractual transactions. Thus "signatures, clicking buttons, browsing websites . . . do not necessarily mean that the party consented to the business terms. Many consumers do not read the agreements when they sign or when they click 'I accept,' and with good reason."[44] It has long been true that actually reading standardized contracts of adhesion is practically pointless, if not irrational.[45] But the role of consent is of late becoming increasingly dubious in a broad range of ordinary contractual settings. To these complications, we might add further considerations, including those of substantive or procedural unconscionability;[46] the purported inalienability of certain rights that, as a result, cannot be transferred even by consent;[47] the role of morally questionable rationalizing and adaptive preferences in choosing;[48] the role of framing effects and other important cognitive biases in consenting;[49] and even the role of emotions and

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43. Oman, *supra* note 41, at 215.

44. Chunlin Leonhard, *Dangerous Or Benign Legal Fictions, Cognitive Biases, and Consent in Contract Law*, 91 ST. JOHN'S L. REV. 385, 406 (2017); *see also* Pratt v. Everalbum, Inc., 283 F. Supp. 2d 664, 669 (E.D. Ill. 2017); Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090, 1095 (N.D. Cal. 2011).

45. *See* Sierra David Sterkin, *Challenging Adhesion Contracts in California: A Consumer's Guide*, 34 GOLDEN GATE UNIV. L. REV. 285, 287 (2004) ("Many times, consumer neither understand nor read adhesion contracts. Even if a consumer reads and understands an adhesion contract, there is no room for negotiation.").

46. *See* U.C.C. § 2–302 (AM. LAW INST. & UNIF. LAW COMM'N 1977); Arthur Alan Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); *see also* Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor"*, 102 GEO. L.J. 1383 (2014); Hila Keren, *Guilt-Free Markets?: Unconscionability, Conscience, and Emotions*, 2016 BYU L. REV. 427 (2016); Colleen McCullough, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779, 781–82 (2016); Jennifer Nadler, *Unconscionability, Freedom, and The Portrait of a Lady*, 27 YALE J.L. & HUMAN. 213, 214 (2015).

47. For examples of further discussion, see, TERRANCE MCCONNELL, INALIENABLE RIGHTS: THE LIMITS OF CONSENT IN MEDICINE AND THE LAW (2000); Barnett, *A Consent Theory*, *supra* note 35, at 321; Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931 (1985) (noting legal limitations on the consensual alienation of some rights, presumably for the sake of protecting certain fundamental interests).

48. For an example, see, John D. Walker, *Liberalism, Consent, and the Problem of Adaptive Preferences*, 21 SOC. THEORY & PRAC. 457, 459 (1995). For an even broader example, see Jon Elster, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 110 (1983).

49. *See* Jason Hanna, *Consent and the Problems of Framing Effects*, 14 ETHICAL THEORY & MORAL PRAC. 517 (2011) (noting the possibility of consenting under a general description of a transaction, while dissenting under other equally reasonable descriptions

psychological disabilities.[50] In view of these crucial complications, one might emphasize the role of context in establishing the basic meanings of contractual consent.[51] Or, one might try to abandon the idea of consent as a binary category, in favor of some sort of graduated continuum or degrees of consent.[52] We need take no side in these controversies, other than to note their own further contribution to the instability, murkiness, and equivocality of the idea of legal consent. Anyone who still wishes to attempt a consistent account of the role of consent in contracts in general, and in matters such as police searches,[53] consenting to kidnapping,[54] marital consent,[55] credit card issuance,[56] door-to-door sales contracts,[57]

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of the transaction. Much more broadly, see the essays collected in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002). In the medical informed consent area, see TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOETHICS 125 (7th ed. 2013).

50. Classically, note the arguably consensually bargained exchange, in which depression-like symptoms may play a causal role, in JOHANN WOLFGANG VON GOETHE, FAUST, pt. I, at 183–85 (Walter Kauffman trans., 1990) (1808).

51. *See, e.g.*, Brian H. Bix, *Consent and Contracts, in* THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT (Andreas Muller & Peter Schaber eds., Routledge 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3031183. For a broader sense of the role of context in addressing basic questions, see CONTEXTUALISM IN PHILOSOPHY: KNOWLEDGE, MEANING, AND TRUTH (Gerhard Preyer & Georg Peter eds., 2005). *See also* Steward Cohen, *Knowledge and Context*, 83 J. PHIL. 574 (1986); Keith DeRose, *Contextualism: An Explanation and Defense*, FITELSON (1999), https://fitelson.org/epistemology/derose.pdf; Patrick Ryskiew, *Epistemic Contextualism*, STAN. ENCYCLOPEDIA OF PHIL. Mar. 29, 2016), https://plato.stanford.edu/entries/contextualism-epistemology.

52. *See, e.g.*, Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615 (2017) (explicitly borrowing the title from William N. Eskridge, Jr., THE MANY FACES OF SEXUAL CONSENT, 37 WM. & MARY L. REV. 47 (1995)). Of course, "consent" often means something like "legally sufficient consent," as distinct from a greater or lesser degree of factual consent.

53. *See* James C. McGlinchy, Note, *"Was That a Yes or a No?": Reviewing Voluntariness in Consent Searches*, 104 VA. L. REV. 301 (2018) (noting the complicating roles of subtle coercion and intimidation, pressure, cultural fears, and discrimination with regard to police search consent).

54. *See* Commonwealth v. Colon, 726 N.E.2d 909 (Mass. 2000) (holding twelve-year-old child incapable of consenting to kidnapping).

55. *See* Mims v. Hardware Mut. Cas. Co., 60 S.E.2d 501 (Ga. Ct. App. 1950) ("ratification" of marriage upon reaching the legal age of consent to marry). Query how long the window of opportunity to consent, or not consent, to one's underage marriage should remain open thereafter.

56. *See* Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L No. 111-24, 123 Stat. 1734 (2009) (codified in relevant part at 15 U.S.C. § 1601 et. seq. and § 1637(c)(8)) (extending credit to underage consumers).

57. For the non-waivable, if not inalienable, right to a three-day cooling-off period with respect to door-to-door sales transactions conferred by federal regulation, see 16 C.F.R. §§ 429.1,429.1(d) (1995).

personal name changes,[58] tattooing procedures,[59] voting in local elections,[60] health care informed consent contexts,[61] and as a general defense in criminal cases,[62] is welcome to try.

IV. AT THE FRONT LINES OF CONSENT: UNEMANCIPATED MINORS AND CONSENT IN THE ABORTION ACCESS CASES

For the sake of concreteness, let us turn to a particular area of the law in which the deficiencies of consent theory, and the often

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58. *See, e.g.*, IOWA CODE § 674.6 (2016) (allowing 14-year-old children, but not a 13-year olds, to change their names without parental consent).

59. *See, e.g.*, S.D. CODIFIED LAWS § 26-10-19 (2018) (tattooing a minor is a misdemeanor unless signed parental consent is obtained); Burns by Burns v. Adler, 653 N.Y.S.2d 814 (White Plains City Ct. 1996) (discussing the scope of a New York State statute criminalizing the tattooing of any child under the age of 18).

60. *See, e.g.*, Fenit Nirappil, *Youthful March For Our Lives Revives Push to Lower Voting Age to 16 in D.C.*, WASH. POST (April 10, 2018), www.washingtonpost.com/local/dc-politics/youth-drive-march.

61. *See* BEAUCHAMP & CHILDRESS, *supra* note 49, at 125, 138 (defining "voluntary" action as broader and more inclusive than "autonomous" action); NEIL MANSON & ONORA O'NEILL, RETHINKING INFORMED CONSENT IN BIOETHICS (2007); Wendy Netter Epstein, *Nudging Patient Decision-Making*, 92 WASH. L. REV. 1255, 1255 (2017) (noting the lack of stable preferences among patients, the presence of decision-making biases, and advocating a greater emphasis on patient well-being, as distinct from a dubious patient autonomy focus); Eleanor Milligan & Jennifer Jones, *Rethinking Autonomy and Consent in Healthcare Ethics, in* BIOETHICS: MEDICAL, ETHICAL AND LEGAL PERSPECTIVES (Peter A. Clark, ed. 2016) (noting a lack of patient understanding, as well as basic interdependence, vulnerability, and the necessity of trust); Onora O'Neill, *Some Limits of Informed Consent*, 29 J. MED. ETHICS 4 (2002) (noting in particular the variety of concepts of 'autonomy' in circulation); Nir Eyal, *Informed Consent*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 20, 2011), https://plato.stanford.edu/entries/informed-consent (noting the possible conflicts between requiring informed consent and promoting patient well-being).

62. For a comprehensive and careful account, see PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 3–9, 307 (2004); *id.* at 122 (the law as imputing consent, in the form of a legal fiction, depending upon "the person's legitimate interests in the matter"); Dennis J. Baker, *The Moral Limits of Consent as a Defense in the Criminal Law*, 12 NEW CRIM. L. REV. 93 (2009) (consent as sometimes overridable by weightier considerations); Gerald Dworkin, *Harm and the Volenti Principle*, 29 SOC. PHIL. & POL'Y 309 (2012); John Kleinig & North Ryde, *Consent as a Defense in Criminal Law*, 65 ARCHIVES FOR PHIL. OF L. & SOC. PHIL. 329–31 (1979) (the quality and weight of consent as variable, particularly as the gravity of the harm to affected interests increases); Jonathan Parry, *Defensive Harm, Consent and Intervention*, 35 PHIL. & PUB. AFF. 356 (2017); Marc Ramsay, *Slaves, Gladiators, and Death: Kantian Liberalism and the Moral Limits of Consent*, 23 LEGAL THEORY 96 (2017) (not all gruesome and degrading consensual activities as equivalent to voluntary slavery); Victor Tadros, *Consent to Harm*, 64 CURRENT LEGAL PROBS. 23, 23 (2011) ("[T]here are . . . circumstances in which it has been regarded wrong for one person to harm another even though the other consented to be harmed").

underacknowledged role of the most basic interests and goods, may be brought into focus. Consider the current law regarding parental consent or parental notification requirements, and the possible judicial bypass thereof, imposed upon minors who seek access to abortion. As it turns out, consent inquiries in this area of the law introduce more arbitrariness and subjectivity than would be associated with focus on the relevant basic goods and interests.

The role of consent in the related area of sexual harassment and sexual assault cases is deeply contested,[63] and in ways that call the value of the consent inquiry itself into serious question. The tangled issues attending sexual age of consent laws[64] further impeach the distinctive value of any consent inquiry,[65] apart from a more substantive consideration of the basic interests and goods at stake.

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63. *See, e.g.*, Vera Bergelson, *The Meaning of Consent*, 12 OHIO ST. J. CRIM. L. 171, 171 (2014) ("Numerous limitations curtail the magical powers of consent."); *id.* at 177 ("[D]ifferent models of consent should be used depending on whether the role of consent in a particular case is inculpatory or exculpatory."); Tom Dougherty, *Yes Means Yes: Consent as Communication*, 43 PHIL. & PUB. AFF. 224 (2015); Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 417 (2016) ("Consent is a liberal contractarian principle that seems a peculiar basis for the criminal regulation of sex. The contractual framework is both over-and under-inclusive."); Robert Jubb, *Consent and Deception*, 12 J. ETHICS & SOC. PHIL. 223, 223 (2017) ("If we deceive someone about a feature of a sexual encounter we have with her or him she or he would be 'all things considered unwilling to engage in' if she or he knew it has this feature, that sex is nonconsensual."); Carole Pateman, *Women and Consent*, 8 POL. THEORY 149, 162 (1980) ("Writers on consent link 'consent,' 'freedom,' and 'equality,' but the realities of power and domination in our sexual and political lives are ignored."); Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665, 669 (2016) ("While silence and passivity cannot by themselves be treated as consent, they are forms of *conduct*, and all of a person's conduct should be taken into account"). For administrative and legislative examples, see, DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, TITLE IX (2001), https://www2.ed.gov./about/offices/list /ocr/docs/shguide.html, as well as California's "affirmative consent standard" embodied in CAL EDUC. CODE § 67386 (2014). *See also id.* § (a)(1) ("Lack of protest or resistance does not mean consent, nor does silence mean consent.").

64. *See generally From 11 to 21: Ages of Consent Around the World*, THE WEEK (March 6, 2018), http://www.theweek.co.uk/92121/ages-of-consent-around-the-world; Valentine Faure, Opinion, *Can an 11-Year-Old-Girl Consent to Sex?*, N.Y. TIMES (Oct. 5, 2017), www.nytimes.com/2017/10/05/opinion/sex-consent-france.html; Marie Doezema, *France, Where the Age of Consent Is Up For Debate*, THE ATLANTIC (Mar. 10, 2018), www.theatlantic.com/international/archive/2018/03/frances-existential-crisis; Alissa J. Rubin & Elian Pettier, *In the #MeToo Era, France Struggles With Sexual Crimes Involving Minors*, N.Y. TIMES (Apr. 13, 2018), www.nytimes.com/2018/04/13/world/ europe/france-minors-sex-consent-rape.html; *France to Set Legal Age of Consent at 15*, BBC NEWS (Mar. 6, 2018), www.bbc.com/news/world-europe-43300313.

65. For an exceptionally lucid and well-researched account of the neurological and cognitive development science applying crucially to adolescents' choices, see JENNIFER

The law of parental consent or notification requirements, and the possible judicial bypass thereof, in cases of minors seeking abortion access has developed over time. Perhaps the most crucial case, featuring several separate opinions, is that of *Bellotti v. Baird*.[66] The Court in Bellotti observed that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[67] In particular, "immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences."[68]

Thus, there is often an entirely sensible shift to considering at least some of the interests at stake. Partly on these assumptions, the courts have settled on some version of the idea that the Constitution requires that a minor be able to bypass a parental consent requirement when she can establish that "either: (1) she is mature enough and well-informed enough to make her abortion decision . . . independently of her parents' wishes; or (2) even if she is not able to make this decision independently, the desired abortion would be in her best interests."[69]

Answering the first question—whether the minor is sufficiently mature and informed to meaningfully consent, independently, to an abortion—is a deeply murky and contested inquiry. *Bellotti* itself recognizes that it is "difficult to define, let alone determine, maturity."[70] The courts have attempted to somehow judicially consider not only the woman's substantive testimony,[71] but her "carriage, demeanor, [and]

ANN DROBAC, SEXUAL EXPLOITATION OF TEENAGERS: ADOLESCENT DEVELOPMENT, DISCRIMINATION, AND CONSENT LAW 43–54 (2016). Professor Drobac has proposed that a minor's assent to sex should be legally revocable, on grounds of exploitation, at the initiative of the minor, before reaching some specified age, after a judicial hearing focused on the minor's best interests. *See* Jennifer A. Drobac, *Age-of-Consent Laws Don't Reflect Teenage Psychology. Here's How to Fix Them*, VOX (Nov. 20, 2017), www.vox.com/the-big-idea/2017/11/20/16677180/age-consent-teenage-psychology.

66. Bellotti v. Baird, 443 U.S. 622 (1979) (requiring statutory permission for the minor child to petition the court directly without first consulting with a parent).

67. *Id.* at 635 (plurality opinion).

68. *Id.* at 640; *see also* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, 258 F. Supp. 3d 929 (S.D. Ind. 2017), *appeal filed*, no. 17–2428 (7th Cir. Jul. 14, 2017); Commonwealth v. Weston, 913 N.E.2d 832 (Mass. 2009).

69. Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 922 (9th Cir. 2004) (internal quotations omitted).

70. *Bellotti*, 443 U.S. at 643, n.23 (plurality opinion); *see, e.g.*, *Ex parte* Anonymous, 806 So. 2d 1269, 1273–74 (Ala. 2001).

71. *In re* Doe, 166 P.3d 293, 295 (Colo. Ct. App. 2007); *Ex parte* Anonymous, 806 So. 2d at 1272.

deportment,"[72] her "background,"[73] and "sundry other circumstances."[74] The door to judicial subjectivity, fallacy, and bias is thus further opened. One might think of the court's admission that "[n]o definitive list of criteria can be adopted to determine maturity"[75] as an indication of judicial modesty, if not humility. But as it turns out, courts often treat the openness of the question of sufficient maturity to consent as licensing not just gross subjectivity but arbitrary judicial politics.[76]

In one formulation, courts are encouraged to consider the minor's "experience, perspective, and judgment."[77] More elaborately, courts may choose to attend to the minor's information level and understanding, as supplied by a health-care provider, regarding her own health risks,[78] along with her understanding of the ramifications of alternatives to abortion,[79] and her awareness "of the emotional and psychological aspects of undergoing an abortion."[80] Whether we choose to regard these criteria as somehow justified, they are open to being interpreted laxly or rigorously within a broad range, and can be balanced in one political direction or another, as the court may be so inclined.

Unfortunately, any attempt at greater elaboration of what is required for meaningful consent under these circumstances adds less to judicial determinacy and judicial constraint than to the opportunities to further indulge judicial biases. To all the above, further add considerations such as the minor's age,[81] school performance,[82] school and career aspirations,[83] medical contingency plans,[84] plans for making any necessary medical care payments,[85] or the insufficiency thereof. Courts may also consider, with whatever degree of weight in any given case, further social skills,; intelligence,; verbal skills,; experience (as a minor)

72. *Ex parte* Anonymous, 806 So. 2d at 1272; *In re* Anonymous, 650 So. 2d 919, 920 (Ala. 1994); *see also In re* Anonymous, 888 So. 2d 1265, 1272 (Ala. Civ. App. 2004) (per curiam).

73. *Ex parte* Anonymous, 806 So. 2d at 1274.

74. *Id.*; *In re* Doe, 166 P.3d at 295.

75. *In re* Doe, 166 P.3d at 295.

76. *See infra* notes 79-81.

77. R.B. *ex rel.* V.D. v. State, 790 So. 2d 830, 833 (Miss. 2001) (en banc).

78. *See In re* Doe, 19 S.W.3d 346, 358 (Tex. 2000).

79. *See id.*

80. *Id.*

81. *See In re* Doe, 113 So. 3d 882, 885–86 (Fla. Dist. Ct. App. 2012); *In re* Doe, 36 So. 3d 164, 165 (Fla. Dist. Ct. App. 2010).

82. *See In re* Doe, 113 So. 3d 882 (Fla. Dist. Ct. App. 2012); *In re* Doe, 36 So. 3d 164 (Fla. Dist. Ct. App. 2010). Should abortion access, all else equal, really be a function of class rank, GPA, AP classes, etc.?

83. *See id.*

84. *See id.*

85. *See id.*

in living away from home,; handling any personal, family, or job finances,; conduct in general,, and any currently experienced level of stress, all as implicating the minor's capacity to consent.[86] The sheer proliferation of arguably relevant — if unweighted — considerations going to the minor's capacity to meaningfully consent again adds to the overall unfettered subjective discretion of the trial courts as well as that of any court reviewing the record on appeal.

Part of the problem in this context is that some of the relevant considerations, at the hearing and on appeal, straddle the familiar line between "adjudicative facts" and "legislative facts,"[87] involving substantially different kinds of evidence.[88] Sufficiency of a capacity for consent may even involve some elements of a question of law, of social policy, or of philosophy, which is beyond the realm of even typical legislative facts.[89]

Typically, the parental consent or notification bypass cases involve opposing ideologies and moral sentiments intertwined with a conceptual and empirical dispute over the presence or absence of a sufficient capacity to consent.[90] As an illuminating example, consider the Alabama Supreme Court opinion in *Ex Parte Anonymous*.[91] In this case, the trial court judge conducting the parental bypass hearing reportedly remarked, "This is a beautiful young girl with a bright future and she does not need to have a butcher get a hold of her."[92]

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86. *See In re* Doe, 113 So. 3d 882, 885 (Fla. Dist. Ct. App. 2012); *In re* Doe, 973 So. 2d 548, 551 (Fla. Dist. Ct. App. 2008). These considerations, however unwieldy they may be, are taken up under the consent inquiry. It is certainly true that some or all might also be relevant if we were to ask, as these courts sometimes do, about the interests of the minor. Our key point is that emphasizing basic interests, and basic goods, allows for greater consensus and determinacy than other approaches.

87. For discussion of this distinction, see KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW § 7.02 (1959); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111 (1988). As an example of an adjudicative fact, consider the question of whether the plaintiff or the defendant entered the particular intersection first, or against a red light. As an example of a legislative fact, consider whether consumption of a particular drug, or texting, or talking on the phone, tends to impair driving ability.

88. Consider, for example, whether the outcomes of the judicial bypass cases might tend to be better, in any relevant sense, if the judges conducting the hearings had a clear grasp of the relevant biological, psychological, and social science. *See, e.g.*, DROBAC, SEXUAL EXPLOITATION OF TEENAGERS, *supra* note 65, at 43–54.

89. But consider the emphasis on the role of the hearing court's findings of "fact" in *In re* Anonymous, 833 So. 2d 75, 81 (Ala. Civ. App. 2002); *Ex parte* Anonymous, 806 So. 2d 1269, 1273 (Ala. 2001); *In re* Doe, 932 So. 2d 278, 282–83 (Fla. Dist. Ct. App. 2005).

90. *See, e.g.*, *Ex parte* Anonymous, 803 So. 2d 542 (Ala. 2001) (per curiam).

91. 803 So. 2d 542 (Ala. 2001) (per curiam).

92. *Id.* at 554 (See, J., concurring specially); *id.* at 561 (Johnstone, J., dissenting).

While we might profitably consider nearly every element of this judicial declaration, the explicit reference herein to a "butcher"[93] invites special consideration. This reference to "butchery," without clarification, is ambiguous as to its intended scope of application. The reference might well be to a merely hypothetical physician.

But whatever the trial judge's intention, it is, or should be, common ground that:

> [I]t is not the [trial] court's responsibility to superimpose its judgment or its moral convictions on the minor in regard to what course of action she should take with reference to her own body. It is not a question of whether she is making a decision that we would approve of, but whether she is making a mature decision or one in her best interest.[94]

More formally, if the state has adopted a position of neutrality with respect to how the choice of the minor's abortion access choice is ultimately exercised,[95] a judge's own dispositions in this regard should be irrelevant. But the largely unnecessary—and in any event multi-faceted unmanageably complex, and open-ended—inquiry into the minor's supposed degree of maturity and capacity to consent again invites largely unconstrained judicial subjectivity.

A simpler, more transparent, and more directly relevant approach would focus more thoroughly on the basic underlying interests, as distinct especially from the supposed quality of the minor's capacity to consent. The current statutory and case law does refer to the interests, or lack thereof, on the part of the state,[96] the minor in question,[97] and

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93. Judge Johnstone notes the apparent absence of record evidence "that the medical provider would butcher the petitioner." *Id.* at 561 (Johnstone, J., dissenting).

94. *In re* Anonymous, 905 So. 2d 845, 850–51 (Ala. Civ. App. 2005) (quoting *Ex parte* Anonymous, 618 So. 2d 722, 725 (Ala. 1993)), *overruled by Ex parte* Anonymous, 803 So. 2d 542 (Ala. 2001). Note the understandable tendency to look to interests in general when the issues of consent become daunting.

95. *See, e.g.*, Planned Parenthood of Idaho, Inc. v. Wasden, 376 F. Supp. 2d 1012, 1019 (D. Idaho 2005) (quoting Planned Parenthood v. Miller, 63 F.3d 1452, 1460 (8th Cir. 1995)); Planned Parenthood of the Great Nw. v. State, 375 P.3d 1122, 1144–45 (Alaska 2016).

96. *See, e.g.*, Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990); Planned Parenthood of Idaho, Inc. v. Wasden, 376 F. Supp. 2d 1012, 1019 (D. Idaho 2005) (quoting Planned Parenthood v. Miller, 63 F.3d 1452, 1460 (8th Cir. 1995)); Planned Parenthood of the Great Nw. v. State, 375 P.3d 1122, 1144–45 (Alaska 2016)..

97. *See, e.g.*, Lambert v. Wicklund, 520 U.S. 292, 295 (1997); Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion); Hope Clinic for Women, Ltd. v. Flores, 991

sometimes the minor's family relationships.[98] Doubtless the idea of interests in general, as distinct from basic interests or basic goods, has its complications.[99] But the idea of consent, even at its core, is for our purposes both remarkably unclear, subjective, deeply controversial,[100] and of largely secondary importance.

Broadening the focus, then, let us consider the alternative ideas of interests, basic interests, and basic goods as a way of largely avoiding the law's often dubious pursuit of the idea of consent.[101]

V. INTERESTS, BASIC INTERESTS, AND BASIC GOODS

The idea of interests, as when some choice is said to be in the interests of a person or group, is clearly distinguishable from most understandings of consent. One thus might not consent to a transaction that is in one's interests, and one might consent to a transaction that

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N.E.2d 745, 766–67 (Ill. 2013); *In re* Doe, 932 So. 2d 278, 285–86 (Fla. Dist. Ct. App. 2005).

98. *See, e.g.*, Hope Clinic, 991 N.E.2d at 766–67; *In re Doe*, 932 So. 2d at 285–86.

99. *See infra* Section V.

100. *See supra* Sections II–IV. It is fair to say that the nature of consent is fundamentally contested. *See, e.g.*, HEIDI M. HURD, THE NORMATIVE FORCE OF CONSENT, IN THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT (Andreas Muller & Peter Schaber eds., 2018) (examining "eight possible accounts of the normative force of consent"); Larry Alexander, *The Ontology of Consent*, 55 ANALYTIC PHIL. 102, 102 (2014) ("Consent cannot be a . . . mere outward behavior. Nor can it be a combination of some mental state and an outward signification of that mental state. Rather, consent *is* a mental state, and its signification is merely evidence of its existence."); *id.* at 103 ("One can consent in an indefinite number of ways."); *id.* at 107 (the relevant mental state amounting to consent is neither intending that conduct by someone else actually take place, nor acquiescing in that conduct, but instead, is waiving one's otherwise viable right that the conduct in question not occur); *id.* at 113 ("The informational requirements for successfully consenting—the degree to which one must understand the nature and consequences of the act to which one is attempting to consent—is quite undertheorized."); Larry Alexander, Heidi Hurd & Peter Westen, *Consent Does Not Require Communication: A Reply to Dougherty*, 44 L. & PHIL. 1, 1 (2016) ("Although each of us gives a slightly different account of the attitude that constitutes consent, we all agree that consent is constituted by that attitude and need not be communicated in order to alter the morality of another's conduct."); Gerald Dworkin, *Harm and the Volenti Principle*, 29 SOC. PHIL. & Pol'y 309, 318 (2012) (discussing three separate models of consent emphasizing, respectively, transfer, uniting of wills, and a surrender of a right to complain); Ferzan, *supra* note 1, at 196 (Professor Westen as distinguishing "factual attitudinal consent, factual expressive consent, prescriptive attitudinal (or expressive) consent, and imputed consent"); David Owens, *The Possibility of Consent*, 24 RATIO 402, 411 (2011) ("Consent needs to be communicated to be valid."). *See generally* Symposium, *Sex and Consent, I & II*, in 2 LEGAL THEORY 87 (1996).

101. *See infra* Sections V–VI.

impairs one's basic interests.[102] This may be especially clear once we set aside the sense of 'interest' in which a person might happen to be subjectively interested in something,[103] as perhaps in the possible planetary status of Pluto.[104]

Thus, even when someone has fully and freely consented to some policy, we can ask the deeper, more basic, question of whether that policy is really in the consenting party's interests, or in anyone else's interests. The idea of being in the interests of some person or group clearly involves a basic normative element.[105] The idea of an interest can operate in a fundamentally critical way,[106] and not merely to legitimize an established regime.[107]

If we turn our attention from interests in general to basic or fundamental interests, we discover—amidst the unavoidable disagreements—a surprising degree of determinacy and practical consensus.[108] At a basic level, lists of fundamental interests even for a richly pluralistic and diverse society display far more concurrence than contention. Basic interests are often formulated in terms of primary[109] or

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102. *See, e.g.*, Theodore M. Benditt, *Law and the Balancing of Interests*, 3 SOC. THEORY & PRAC. 321, 323 (1975); R.N. Berki, *Interests and Moral Ideals*, 49 PHIL. 265, 269 (1974) ("'What people actually want' is logically independent of any concept I may have of their 'interests.'").

103. *See, e.g.*, R.G. Frey, *Rights, Interests, Desires, and Beliefs*, 16 AM. PHIL. Q. 233, 234 (1979).

104. *See, e.g.*, Mike Wall, *Welcome Back, Pluto? Planethood Debate Reignites*, SPACE.COM (May 11, 2018), www.space.com/40550-pluto-planet-debate-flares-up-again.html.

105. *See, e.g.*, WILLIAM E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 46 (1974) (being in someone's interests as involving some sort of benefit to that person or group, thus providing a prima facie reason for supporting the policy); Richard E. Flathman, *Some Familiar But False Dichotomies Concerning "Interests": A Comment on Benditt and Oppenheim*, 3 POL. THEORY 277, 280 (1975) (noting the normative character of interests).

106. *See, e.g.*, S.I. Benn, *'Interests' in Politics*, 60 PROC. ARISTOTELIAN SOC'Y 123, 130 (1960) ("Why should we not say that the slave's interests were not recognized by Greek society, but were morally legitimate none the less?").

107. *See id.*

108. For a sense of the reasonable determinacy of prominent accounts of basic human interests and goods, see, Christopher M. Rice, *Defending the Objective List Theory of Well-Being*, 26 RATIO 196 (2013).

109. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 63 (1971) (discussing "primary goods" as "things that every rational man is presumed to want," and which "normally have a use whatever a person's rational plan of life"). Rawls separates, to some degree, the primary "natural" goods including "health and vigor, intelligence and imagination," from the primary "social" goods of "self-respect" and relevant "rights and liberties, powers and opportunities, income and wealth." *Id.* It should be emphasized that in Rawls's formulation, income and wealth should be understood in a relatively broad sense. Rawls's colleague Samuel Freeman has thus observed that "[a] mendicant monk with no

fundamental goods,[110] basic needs,[111] basic capacities or capabilities,[112] or basic well-being.[113] Regardless of these largely interchangeable characterizations, our judgments as to what constitutes a basic interest tend toward a meaningfully determinate consensus.

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visible income still has access to far more wealth than a poor person if the monk lives in a monastery with access to a library, a private room, an elaborate chapel, and tranquil cloisters or gardens in which to relax, stroll, and meditate." SAMUEL FREEMAN, RAWLS 153 (2007).

110. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 85–97 (Paul Craig ed., 2d ed. 2011) (including knowledge, life itself, 'play' in a broad sense, aesthetic experience, sociability or friendship, practical reasonableness in decision making, and religion in the broad sense of reasonably reflecting on ultimate questions, including origins, and the possibility of transcendence). For further discussion of Finnis's list, see MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS 5–6, 66 nn.5–6 (2006). W.D. Ross focuses on what he takes to be "intrinsic" goods, including "virtue, pleasure, the allocation of pleasure to the virtuous, and knowledge (and in a lesser degree right opinion)." For discussion of Ross' list, see RICHARD KRAUT, WHAT IS GOOD AND WHY: THE ETHICS OF WELL-BEING 91–92 (2007). For further examination of basic goods, see PHILIPPA FOOT, NATURAL GOODNESS 88 (2001); DEREK PARFIT, REASONS AND PERSONS 4, 467, 499 (1984).

111. *See* A.H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 37–39 (1943) (focusing more descriptively on psychological needs, safety needs, love needs, esteem needs, self-actualization needs, and "the desires to know and understand"). Maslow disclaims any rigidly invariant hierarchy of these basic needs. *Id.* at 386; *see also* DAVID BRAYBROOKE, MEETING NEEDS 36 (1987) (referring to basic course-of-life needs, including a life-supporting environment, food and water, exercise and rest, companionship and sexuality, education, social acceptance and recognition, and freedom from continual fear).

112. *See, e.g.*, MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 18–36 (2011). Professor Nussbaum's particularized list encompasses ten central capabilities including life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; relation to other species; play or recreation; and some control over one's political and material environment. *See id.* at 33–34; *see also* AMARTYA SEN, THE IDEA OF JUSTICE 231 (2011) (referring to "a person's capability to do things he or she has reason to value"). For a broad but concise survey, see Ingrid Robeyns, *The Capability Approach*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 3, 2016), https://plato.stanford.edu/entries/capability-approach. For analyses of Professor Nussbaum's approach, see Roger Claassen & Marcus Duwell, *The Foundations of Capability Theory: Comparing Nussbaum and Gewirth*, 16 ETHICAL THEORY & MORAL PRAC. 493 (2013); Alison M. Jaggar, *Reasoning About Well-Being: Nussbaum's Methods of Justifying the Capabilities Approach*, 14 J. POL. PHIL. 301 (2006).

113. This formulation may reflect largely terminological differences. *See* Guy Fletcher, *Objective List Theories, in* THE ROUTLEDGE HANDBOOK OF PHILOSOPHY OF WELL-BEING ch. 12 (Guy Fletcher ed., 2016); *id.* at 152 (referring to "health, pleasure, friendship, knowledge, achievement"); Guy Fletcher, *A Fresh Start for the Objective-List Theory of Well-Being*, 25 UTILITAS 206, 214 (2013) (referring to "Achievement, Friendship, Happiness, Pleasure, Self-Respect, Virtue"); Rice, *supra* note 108, at 196 (referring to "loving relationships, meaningful knowledge, autonomy, achievement, and pleasure").

Concretely, it is difficult to argue against some recognizable version of, say, health,[114] practical reasonableness,[115] meaningful knowledge,[116] safety,[117] food and water,[118] and bodily integrity[119] as typically basic or fundamental goods. Of course, recognizing basic interests themselves hardly dictates the resolution of concrete legal and policy controversies. In any given case, basic interests may well appear, to one degree or another, on both sides of the controversy. Consensual gladiators,[120] for example, might seek to promote their interest in basic wealth[121] at the risk of their basic interest in health[122] or physical safety[123] and bodily integrity.[124] Any approach to jurisprudence, whether focused on consent or on crucial basic interests, must somehow address the problems associated with that particular approach.[125] The chief advantage of focusing on largely uncontroversial basic interests is the possibility of largely bypassing the wide variety of serious and deeply contested issues, including psychology and metaphysics, currently confronting ideas of consent.

Consent theories are not normally thought of as rivals to interest-based theories as attempts to account specifically for the various rights we are thought to possess. But if we broaden the focus beyond consent to encompass a wide range of exercises of the will, then so- called will theories can indeed rival interest-based theories in accounting for rights. To the substantial extent that will theories of rights inherit any of the problems associated with consent, will theories unfortunately remain burdened by the problems discussed above.[126]

It is certainly not surprising to see moral and legal rights as associated with, and largely explained and justified in terms of, the most

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114. *See supra* note 109.
115. *See supra* note 110.
116. *See supra* note 110.
117. *See supra* note 111.
118. *See supra* note 111.
119. *See supra* note 112.
120. *See, e.g.*, Ramsay, *supra* note 62.
121. *See supra* note 109.
122. *See* NUSSBAUM, *supra* note 112, at 33–34.
123. *See* BRAYBROOKE, *supra* note 111, at 36.
124. *See id.*; NUSSBAUM, *supra* note 112, at 33–34.
125. For consideration of the "proportionalist" balancing of various interests, basic and otherwise, see R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207 (2017); Robert Alexy, *Constitutional Rights, Balancing and Rationality*, 16 RATIO JURIS 131 (2003); Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174 (2006).
126. *See supra* Sections II–IV.

basic interests.[127] On interest-based theories, rights are normally, but not always, reflective of private or public interests.[128] It is possible to hold legal rights that undermine one's interests, basic or otherwise,[129] but this is not the typical pattern.

Interest theories of rights thus focus primarily on whose interests are benefitted by recognizing the right in question.[130] In contrast, will theories of rights focus primarily not on interests, but on who has the competence and authority to insist upon or else to waive the right in question.[131]

The obvious challenge to will theories of rights that emphasize the competent invoking or waiver of rights is to account for the popular sense that minor children, incompetent persons, and perhaps animals can have interests, or genuine legal and moral rights, even if they are not themselves competent to waive or consent to the waiver of such rights.[132] Will theorists in particular would also have to offer a satisfactory account of non-waivable, or inalienable, rights.[133] And there is of course the problem of moral and legal limits of even assumedly valid consent and other expressions of will.[134]

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127. *See, e.g.*, VIRGINIA HELD, THE PUBLIC INTEREST AND INDIVIDUAL INTERESTS (1970) (discussing interests as mediating between a person or group's wants and their rights); MATTHEW H. KRAMER, LIBERALISM WITH EXCELLENCE 141–44 (2017) (elaborating on Ronald Dworkin's strong linkage of rights to their underlying justifying interests); JOSEPH RAZ, THE MORALITY OF FREEDOM 165–92 (1986) (discussing some interests as a sufficient justification for recognizing moral or legal rights); Frey, *supra* note 103, at 223 (noting the popular view that "all and only beings which have interests can have rights"); T.M. Scanlon, *Rights and Interests, in* 1 ARGUMENTS FOR A BETTER WORLD: ESSAYS IN HONOR OF AMARTYA SEN 68, 70 (Kaushik Basu & Ravi Kanbur eds., 2008) (discussing rights as justified by their role in protecting important interests).

128. *See, e.g.*, Visa A.J. Kurki, *Rights, Harming and Wrongdoing: A Restatement of the Interest Theory*, 38 OX. J. LEGAL STUD. 430 (2018).

129. A person might have a legal and moral right to a certain tract of land that is, unfortunately, burdened with toxic chemicals and subject to costly remediation, where the rights-holder is the only solvent defendant. Such a right might, paradoxically, undermine the right-holder's overall interests. *See* Matthew H. Kramer, *Rights Without Trimmings, in* MATTHEW H. KRAMER, ET AL., A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES 7, 93 (1998).

130. *See* KRAMER, ET AL., *supra* note 129, at 62; Matthew H. Kramer & Hillel Steiner, *Theories of Rights: Is There a Third Way?*, 27 OX. J. LEGAL STUD. 281, 298 (2007).

131. *See* KRAMER, ET AL., *supra* note 129, at 62; Kramer & Steiner, *supra* note 130, at 298.

132. For the debate among Kramer, Simmonds, and Steiner, see KRAMER, ET AL., *supra* note 129.

133. *See supra* note 47 and accompanying text.

134. *See* Ramsay, *supra* note 62; R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397, 1418 (1995) (contemplating a televised fully consensual spousal death-hunt).

For our purposes, though, we can set aside many of the arguments involved in debates between interest-based and will theories of rights. The key point is that the will theory's emphasis on locating an authorized person who can legitimately consent to exercise or waive a right does not address, let alone resolve, the basic problems associated with the idea of valid consent posed above.[135] Unless a will theory can address these problems, will theory cannot undermine the judgment that the severe problems associated with the idea of consent should encourage a greater focus on the underlying basic interests and basic goods at stake in a given case.

VI. CONSENT, BASIC INTERESTS, AND RECENT TRENDS IN THINKING ABOUT AUTONOMY AND PATERNALISM

The cultural currents are, in general, running in such a way as to increase the meaningfulness and viability of ideas of basic interests relative to ideas of meaningful consent. Briefly put, in an age that is increasingly suspicious of metaphysics, the metaphysical commitments of the idea of basic interests or basic goods are less ambitious, less controversial, and thus, less vulnerable to increasing skepticism than are traditional ideas of valid consent. Consider the difference in metaphysical ambition between claiming that someone has an interest in their basic health, and instead claiming, far more ambitiously, that someone has displayed genuine agency in exercising genuinely autonomous consent.

Attitudes toward metaphysically ambitious and controversial ideas of autonomy, free choice, consent, and even paternalism have evolved in recent decades. These trends operate at a more fundamental level than familiar legal qualms over the effects of "ignorance, duress, misrepresentation, pressure, or the like"[136] on consent. At the extreme, rejection of the ambitious metaphysics of freely expressed consent takes the form of a reductionist view of the person.[137] The "choosing" person is, in these increasingly influential views, reduced to an entity incapable of meaningful choosing. Persons are taken to amount to something

135. *See supra* Sections II–IV.

136. Onora O'Neill, *Between Consenting Adults*, 14 PHIL. & PUB. AFF. 252, 254 (1985); *see also id.* at 255 ("Consent may not extend to the logical implications, likely results, or the indispensable presuppositions of that which is explicitly consented to."); *id.* ("A choice between marriage partners does not show that the married life has been chosen."); *id.* at 256 (referring to "problems of the defeasibility and indeterminacy of consent, of ideological distortions and self-deception, and of impaired capacities to consent," along with "the opacity of intentionality").

137. *See infra notes* 148–150.

vaguely like "a chemical scum"[138] a "bag of chemicals,"[139] or a "pack of neurons."[140]

The problem with these latter views is that, while chemical scum and the like cannot meaningfully consent to anything, it is also reasonably uncontroversial[141] that chemical scum and other such entities cannot have interests or basic goods. If, on the other hand, the contemporary reductionist impulse can settle for less extreme outcomes, some genuine progress may be possible.

Consider, for example, the view that humans can be reduced to "a particular sort of ape infested with memes."[142] On the one hand, we do not typically assume that apes are capable of free and informed consent regarding experimentation or conditions of confinement. But most of us would say, on the other hand, that apes can have basic interests, or fundamental goods, as in the case of health versus serious disease, avoiding starvation, or avoiding continuous narrow confinement.[143] The life of an ape can go better, or worse, in this sense, unlike that of a mere combination of chemicals, or a collection of neurons.

In general, as we increasingly think of human behavior in materialist[144] or narrowly naturalist[145] terms, the idea of human

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138. Stephen Hawking is quoted to that effect in DAVID DEUTSCH, THE FABRIC OF REALITY: THE SCIENCE OF PARALLEL UNIVERSES AND ITS IMPLICATIONS 177 (1998) and in PAUL DAVIS, THE GOLDILOCKS ENIGMA: WHY IS THE UNIVERSE JUST RIGHT FOR LIFE? 222 (2008).

139. Anthony R. Cashmore, *The Lucretian Swerve: The Biological Basis of Human Behavior and the Criminal Justice System*, PNAS (Mar. 9, 2010), www.pnas.org/cgi/doi /10.1073/pnas.0915161107.

140. FRANCIS CRICK, THE ASTONISHING HYPOTHESIS: THE SCIENTIFIC SEARCH FOR THE SOUL 3 (1995).

141. But see the broad scope of having a good, encompassing the good even of inanimate substances, in THOMAS AQUINAS, SUMMA THEOLOGICA pt. I of pt. II, qu. 94, art. 2, respondio, (2017) (1485), https://www/newadvent.org/summa.

142. Susan Blackmore, *The Evolution of Meme Machines*, SUSANBLACKMORE.UK (2002), www.susandblackmore.co.uk/conferences/Ontopsych.htm (quoting the renowned philosopher Daniel Dennett).

143. *See generally In re* Nonhuman Rights Project, Inc. v. Lavery, 152 A.D.3d 73, (N.Y. App. Div. 2017) (denying habeas corpus petition filed on behalf of chimpanzees).

144. *See, e.g.*, William Ramsey, *Eliminative Materialism*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 16, 2013), https://plato.stanford.edu/entries/materialism-eliminative/; *see also* DANIEL DENNETT, FREEDOM EVOLVES 2–3 (2003) ("We are each made of mindless robots and nothing else, no non-physical, non-robotic ingredients at all.").

145. *See, e.g.*, David Papineau, *Naturalism*, STAN. ENCYCLOPEDIA OF PHIL. (rev. ed. Sept. 15, 2015), https://plato/stanford.edu/entries/naturalism; *see also* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 387 (1980) (discussing a naturalism of atoms-and-the-void as exhausting all there is).

decisionmakers as exercising free[146] and informed, autonomous,[147] genuine consent becomes far less plausible. The absence of genuine free will may eventually require that we abandon[148] classical ideas of autonomy[149] in favor of thinned out, evacuated, metaphysically attenuated, minimalist senses of autonomy.[150]

And as conceptions of freedom of the will and autonomy gradually erode, we should naturally expect that the classic opposition between free consent on the one hand and paternalism[151] on the other will increasingly lose clarity, meaningfulness, and overall significance. As we become increasingly conscious of our decision making irrationalities,[152] and especially as we lose faith in the deeper, ambitious, most robust senses of autonomy, the natural move is to focus less on dubious questions of consent, and more on the pragmatic, less controversial, largely observable costs of a decision in terms of obvious basic interests and fundamental goods.[153]

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146. For a sense of contemporary doubts as to the meaningfulness of free will, and those activities that would seem to depend upon free will, see JOHN MARTIN FISCHER, ROBERT KANE, DERK PEREBOOM & MANUEL VARGAS, FOUR VIEWS ON FREE WILL (2009) and especially SAUL SMILANSKY, FREE WILL AND ILLUSION (2002). *See also* RICHARD DOUBLE, THE NON-REALITY OF FREE WILL (1990).

147. *See generally* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988); Joel Feinberg, *Autonomy, in* THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 27 (John Christman ed., 2014).

148. *See, e.g.*, ROBERT KANE, THE SIGNIFICANCE OF FREE WILL 80 (1996) (discussing meaningful free will as arguably necessary for autonomy in the sense of self-creation); Goran Duus-Otterstrom, *Freedom of Will and the Value of Choice*, 37 SOC. THEORY & PRAC. 256, 256 (2011) ("the reasons to value choice depend on our having (libertarian) free will."). *See generally* ROBERT LOCKIE, FREE WILL AND EPISTEMOLOGY: A DEFENSE OF THE TRANSCENDENTAL ARGUMENT FOR FREEDOM (2018).

149. *See* PICO DELLA MIRANDOLA, ON THE DIGNITY OF MAN 5 (Charles Glenn Wallis trans., Hackett Pub. Co. 1998) (1486); IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 114 (H.J. Paton trans., Harper & Row, Pub. 1964) (1785) (linking freedom or autonomy with rationality, as distinct from any sort of biological or physical causation).

150. Note our willingness to refer to even the humble Roomba© carpet cleaning device, among other machines, as an "autonomous" robot. *See generally* GEORGE A. BEKEY, AUTONOMOUS ROBOTS (reprint ed. 2017).

151. *See* JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 5 (John Gray ed., 2008).; *see also* JULIAN LEGRAND & BILL NEW, GOVERNMENT PATERNALISM: NANNY STATE OR HELPFUL FRIEND? 2 (2015). *See generally* GERALD DWORKIN, *Paternalism*, STAN. ENCYCLOPEDIA OF PHIL. (June 4, 2014), https://plato.stanford.edu/entries/paternalism.

152. For a convenient extensive list of social cognitive and decision making biases affecting competent adults, see *List of Cognitive Biases*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_cognitive_biases (last edited Sep. 27, 2018).

153. *See, e.g.*, SARAH CONLY, AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM 1 (2013) (arguing autonomy is "not valuable enough to offset what we lose

As well, we are often in a position where we might meaningfully consent on our own behalf, but where our supposed consent will entail adverse effects on the basic interests of other people who have not even begun consent.[154] In modern health care and health insurance contexts, increasingly, the effects of everyone's decisions, consensual or not, on the interests of others is increasingly substantial.[155] More broadly, in an interdependent society, we increasingly claim to consent in contexts in which the basic interests of other, clearly non-consenting, third parties may be substantially affected.[156]

VII. CONCLUSION

Far too often, the judicial inquiry into the presence or absence of sufficient consent is more trouble than it is worth. In such cases, courts should focus more substantially or more primarily[157] on the relevant interests at stake, including especially the largely consensual basic goods that might be jeopardized, traded off, or enhanced, through the legislation or adjudication at hand. The centrality of the idea of consent in the law is not matched by any real cogency theory in accounting for our general political obligations, or lack thereof. Nor does the idea of consent pull its weight in the broad area of private contracts, or as a general criminal defense, or in the area of judicial bypass of parental notice or consent requirements in the abortion access context.

As it turns out, though, the idea of basic interests and fundamental goods on the other hand is reasonably determinate and consensually

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by leaving people to their own autonomous choices"); Anthony N. DeMaria, *The Nanny State and 'Coercive Paternalism'*, 61 J. AM. C. OF CARDIOLOGY 2108, 2109 (2013) ("[s]elf-induced disease is common, largely preventable, and at the very least an economic burden to society."). Of course, among our various interests, we may well want to include autonomy, or perceived autonomy, at least in the sense of not continually having unappealing decisions imposed upon us.

154. *See* C.L. TEN, MILL ON LIBERTY 11 (1980) (Mill readily and explicitly admits that "self-regarding conduct affects others").

155. *See* DeMaria, *supra* note 153, at 2109. More broadly, see R. George Wright, *Can Health Care Policy Be Guided by Basic Values?: The Crucial Role of Perfectionist Solidarity*, 86 U. CINN. L. REV. (forthcoming 2018).

156. Our health care and insurance choices at this point clearly affect the interests of other, nonconsenting parties, but so also do many of our risky or ill-advised consumption and lifestyle choices.

157. Considerations of interests and of basic goods should thus displace many discussions of consent. But this does not mean that courts should focus directly, immediately, and explicitly on interests and goods, apart from, any relevant precedent cases, elements, defenses, and statutory priorities. Interest or basic good analysis instead typically works with any precedents, elements, defenses, or statutory priorities that can properly be taken as given

understood. At the very least, the idea of interests contributes as much to our understanding of rights as does the idea of willing as a form of consent. The idea of a basic good does not require controversial metaphysical foundations. Developments in contemporary thinking about autonomy and paternalism further damage the case for emphasizing purported consent more than pursuing basic interests. Thus wherever possible, we are best advised to click through the inherent murkiness of consent issues, and to focus instead on adjudicating among, and promoting, basic interests.