

City University of New York (CUNY)

## CUNY Academic Works

---

Publications and Research

New York City College of Technology

---

2021

### **Must Consent Be Informed? Patient rights, state authority, and the moral basis of the physician's duties of disclosure**

D. Robert MacDougall

*CUNY New York City College of Technology*

[How does access to this work benefit you? Let us know!](#)

More information about this work at: [https://academicworks.cuny.edu/ny\\_pubs/786](https://academicworks.cuny.edu/ny_pubs/786)

Discover additional works at: <https://academicworks.cuny.edu>

---

This work is made publicly available by the City University of New York (CUNY).

Contact: [AcademicWorks@cuny.edu](mailto:AcademicWorks@cuny.edu)

Note: This is the final accepted version, submitted prior to copyediting. The final version is can be found here:

MacDougall, D Robert. 2021. "Must Consent Be Informed? Patient rights, state authority, and the moral basis of the physician's duties of disclosure." *Kennedy Institute of Ethics Journal* 31 (3): 247-270.

## **MUST CONSENT BE INFORMED?**

### **Patient rights, state authority, and the moral basis of the physician's duties of disclosure.<sup>1</sup>**

RH: Moral justification of physicians' duties to inform

KW: informed consent, legal standards of disclosure, Kant, political philosophy, autonomy

Abstract: Legal standards of disclosure in a variety of jurisdictions require physicians to inform patients about the likely consequences of treatment, as a condition for obtaining the patient's consent. Such a duty to inform is special insofar as extensive disclosure of risks and potential benefits is not usually a condition for obtaining consent in non-medical transactions.

What could morally justify the physician's special legal duty to inform? I argue that existing justifications have tried but failed to ground such special duties directly in general and basic rights, such as autonomy rights. As an alternative to such direct justifications, I develop an indirect justification of physicians' special duties from an argument in Kant's political philosophy. Kant argues that pre-legal rights to freedom are the source of a duty to form a state. The state has the authority to conclusively determine what counts as "consent" in various kinds of transactions. The Kantian account can subsequently indirectly justify at least one legal standard imposing a duty to inform, the reasonable person standard, but rules out a competitor, the subjective standard.

Consent is a morally important feature of many of our interactions. We consent when we buy items at a store, enter our personal information on a website, allow others to touch us or use things that belong to us, or enter into an academic program. Consent seemingly requires at least some knowledge about the object of consent. I cannot consent to you doing something unless you have indicated what it is you propose to do. The validity of my consent thus often depends on prior disclosure by others about what it is that they propose to do to or with me.

The legal standard regulating physicians' disclosures varies by jurisdiction. Courts have generally held physicians liable for disclosing either what physicians customarily disclose (i.e.,

---

<sup>1</sup> For helpful comments and suggestions, I would like to thank Sean Aas, Camil Golub, Sari Kisilevsky, Collin O'Neil, Jacob Sparks, Travis Timmerman, and other participants at the NYC Early Career Ethics Workshop; audiences at the MANCEPT Workshops in Political Theory, the American Society of Bioethics and Humanities, and the Dalhousie University Philosophy Department Colloquium; and anonymous reviewers at the *Kennedy Institute of Ethics Journal*.

the professional practice standard); what a reasonable patient would think material to the decision (i.e. the reasonable person standard); or what this particular patient would find material to the decision (the subjective standard) (Beauchamp and Childress 2013, 125-7). The professional practice standard—the legal standard in about half of all U.S. states (Studdert et al. 2007)—is a typical malpractice standard, because it holds physicians accountable for disclosing what physicians customarily disclose. Which is to say, it may or may not require disclosure of risks and potential benefits, depending on whether such disclosures are the usual practice of members of the profession.

The other two standards, however, go beyond requiring mere conformity to the practices of other professionals. Both the reasonable person standard (the standard operative in the other half of US states (Studdert et al. 2007) and Canada) and the subjective standard (operative in the United Kingdom (Sokol 2015)) require disclosure of specific information about the risks and potential benefits—in other words, the consequences—of a proposed treatment, relative to its alternatives. These standards often require disclosing the likely consequences of patient decisions for survival, biological function, pain, comfort, lifestyle, psychology, and even social relationships. They also require informing patients about the relative likelihood and magnitude of the various consequences when these are known. These standards go beyond a duty to behave as a typical professional and impose what we might call a *duty to inform*. This legal duty to inform is a special duty insofar as it is not required of professionals when obtaining consent in most other contexts. Lawyers, car mechanics, engineers, financial advisors, and others all may have duties to inform clients about some specific risks or conflicts of interest, but have no general obligation to inform clients about their options, and the magnitude and likelihood of benefits and

harms associated with each. Bioethicists have generally supported this duty to inform, and jurisdictions have been adopting the associated legal standards since the 1960s.

In this paper I take up the question about the moral justification of legal duties to inform. My main aim will be to offer a new account of the moral justification for legal duties to inform. However, in order to motivate this account, I will have to show some of the problems with existing bioethics accounts that rely on the ethical obligation to obtain informed consent. I will argue that these accounts have failed to morally justify legal duties to inform because they have tried to ground these special duties directly in general and basic rights. I argue it is probably impossible to justify special duties to inform by appealing directly to general and basic rights.

As an alternative to these accounts, I argue that legal duties to inform are best justified by employing an indirect, rather than direct, justification in patients' rights. I will offer an argument, inspired by Kant's political philosophy, to the effect that although individuals have basic rights to consent in matters affecting them, many of the specific details about our rights to consent cannot be determined by abstract moral argument. This basic indeterminacy provides a moral rationale for a state that has the authority to specify what counts as consent in different contexts, and so can indirectly justify physicians' legal duties to inform.

### **DIRECT JUSTIFICATION: GENERAL AND BASIC RIGHTS**

Most authors have traced the justification for duties to inform—ethical or legal—back to general and basic rights. Rights capable of justifying duties to inform need to be *general* in the sense that they are possessed by everyone. They could not simply be the rights created by a contract or specific promise, for example, because then a patient's right to be informed would depend on

whether the patient had reached an understanding with a particular physician. The rights must further be *basic*, in the sense that they are pre-legal. They cannot be rights created by law, because any such rights could not justify the laws on which they depend. Without pre-legal moral rights, it would be difficult to criticize existing legal standards, which has long been an interest of bioethics. Here I consider three different accounts of the relationship between duties to inform and basic and general rights. I argue that they all fail, because none has been able to reconcile physicians' special duties to inform with patients' basic and general rights.

#### *Autonomous Authorization*

The most prominent moral justification for ethical and legal duties of disclosure is the *autonomous authorization* account, defended by Faden and Beauchamp (1986) and Beauchamp and Childress (2013). On this account, the practices and standards surrounding informed consent are justified by their relationship to patient autonomy. An autonomous action, on their account, is one that is characterized by (among other things) "understanding." The understanding necessary for an autonomous action is a substantial understanding of the information material to the decision at hand, i.e. whatever information the patient would consider "important" to the decision (Faden and Beauchamp 1986, 302-4), which generally includes understanding of the risks and potential benefits of a proposed intervention. Without this information, patients cannot understand and so cannot give autonomous authorizations. Because patients have a right to make autonomous decisions (Beauchamp and Childress 2013, 107), physicians must inform patients in order to obtain consent. Legal and ethical duties to inform are both justified in the same way,

namely, by the fact that such duties are effective in producing autonomous authorizations (Faden and Beauchamp 1986, 284).

The autonomous authorization account can plausibly explain the special nature of physicians' duties to inform: it connects them directly to the patient's right to autonomy, which, on this account, requires understanding the risks and benefits of treatment before making a decision. The problem for this account is that it simply isn't clear that patients have a moral right to this kind of autonomy. Certainly, it does not seem like such rights could be considered general and basic in the sense discussed earlier. If they were general and basic, one would think they would apply beyond the patient-physician relationship. But there is no general and basic right to be informed about the risks and benefits of one's decisions in other areas of life, such as getting married, going skydiving, eating deli meat, or having children—despite the fact that many of these have potential for large benefits or pose major risks.

In earlier versions of their work, Beauchamp and Childress made some attempt to root autonomy rights in the general moral principles espoused by Kant and Mill (e.g., Beauchamp and Childress 2001, 63-4). Kant and Mill both provide arguments in defense of basic and general rights to self-rule, there is no doubt. But the problem with tracing informed consent to Kant or Mill is that it isn't clear that either theory requires being informed as a condition for the exercise of self-rule.<sup>2</sup> It would be surprising if either of these thinkers did support this: such a standard is not usually morally or legally required in any sort of decision except in medical decision making.

---

<sup>2</sup> Kristinsson (2007) capably explains why Kantian ethics could not justify informed consent. He does however find in Mill arguments supporting the positive value of informed deliberation, and argues that these could be taken as reasons for supporting something like a duty to inform. Mill however never made this argument (as Kristinsson admits), and it strains the imagination to think that if he had, he would support such duties only for medical decision making.

If there is no general and basic right to this kind of autonomy—and this account provides no good reason for thinking there is—it is not clear that this account has a distinctively moral explanation of duties to inform at all.

*Informed consent as a rights waiver*

Neil Manson and Onora O'Neill argue that instead of protecting autonomy, informed consents should be viewed as waivers of a variety of rights one would otherwise have against health care professionals (2007, 72-77). A full moral justification of informed consent consists, then, in an account of the various rights persons have against others (such as rights against coercion and deception, among other things) combined with an account about the circumstances under which persons can waive these rights.

O'Neill (2003) develops an account of these rights and the duties to which they correspond. O'Neill's account "principled autonomy" draws its inspiration from Kantian moral philosophy. Essentially, principled autonomy requires persons to act on principles they could will everyone to act on (84). To act autonomously, on this view, is to constrain one's actions so that they adhere to the basic tenets of practical reason. On this view then, "autonomy" is a feature of actions (usually the actions of health care professionals or those who regulate or govern health care) that are constrained in the appropriate way, and not a personal characteristic of patients or a reference to the authenticity of their choices.

O'Neill argues that various duties follow from principled autonomy, including negative duties to refrain from deception and coercion, as well as corresponding rights to be free of these

things.<sup>3</sup> These duties and rights are the fundamental basis for the requirements to obtain informed consent (97), as well as being the general basis for laws and policies that create a trustworthy society (123).

O'Neill's account is attractive in part because rights not to be deceived or coerced are both basic and general in a way that patient rights to autonomy are not. As such this account could plausibly be thought to morally justify laws requiring consent. However, it is unclear why these general rights endow patients with a right to be informed about the consequences of their decisions. Even if one conceives the duty of non-deception very broadly, as O'Neill does (she claims it prohibits "lying, false promising, ... manipulation...plagiarism" and more (98)), a positive right to be informed about the likely consequences of one's choices is not plausibly understood as entailed by the duty to avoid deception. This point is easily seen when we consider that a decision to engage in other kinds of similarly risky activities (e.g. skydiving, boxing, driving on the autobahn) without first being fully informed about the risks and benefits would not necessarily mean that the decision was the result of deception, even if others were present who knew about the risks.

O'Neill is aware that there is a gap between very general duties like non-deception and the specific laws and policies governing informed consent. In response, she suggests that moral duties like non-deception function as very general moral constraints on the policies that can be chosen. Specific laws and policies governing consent in medicine should be chosen by considering a large variety of factors, including general moral constraints but also other kinds of practical matters and various non-moral desiderata (for example, "clinical, scientific, financial,

---

<sup>3</sup> O'Neill focuses on duties, not rights, but suggests in numerous instances that she sees patient rights as correlatives to physicians' duties to avoid coercion and deception. For example see O'Neill (2003, 95).



and technical constraints" (125)). However, if duties to inform follow from such practical, non-moral considerations, and not from the moral duties of non-coercion or non-deception themselves, then the problem remains unsolved. The rights-waiver view succeeds, perhaps, in justifying patients' rights to give bare consent, but fails to provide a distinctly moral rationale for the ethical or legal duty to inform associated with *informed* consent.

### *Fair Transactions*

Miller and Wertheimer (2010; 2011) accept some elements of the autonomous authorization view, but argue that an autonomous authorization is not ultimately necessary for successful consent transactions (or what they call "moral transformation"). As they point out, consent transactions are often considered morally transformative even if one party or the other did not fully understand the consequences of the transaction. For example, when judging whether a contract is morally transformative, what is important is that the parties agree to the terms of the contract, not that they understand the consequences of signing the contract. The success of particular consent transactions cannot derive directly from consent, since consent is an internal state that can only be known with certainty by the agent him or herself.

For Miller and Wertheimer, consent transactions are morally transformative when both parties have a chance to token consent under "reasonably favorable" conditions. It is particularly important that neither party treats the other party "unfairly" in the course of the transaction. While either party may be in a difficult situation, as long as both parties to the transaction act reasonably and fairly, the token of consent they give results in moral transformation.

Miller and Wertheimer's view is attractive in part because it offers an explanation about why requirements for medical consent differ from requirements for other kinds of consent: they differ because what counts as "fair" varies according to the context of the transaction. So treating a consenter "fairly" when agreeing to a sexual relationship differs significantly from treating a consenter "fairly" in a business transaction, they say. In a medical transaction, information asymmetries generate unfairness between physician and patient, such that it would be unfair if the physician were to proceed without first fully informing the patient about the various benefits and risks of the proposed treatment.

However, Miller and Wertheimer give no explanation about fairness in general, or when imbalances between parties generate such special duties of fairness. Information asymmetries alone do not always generate special duties to inform: as Miller and Wertheimer themselves discuss, if a long-term student of art history finds a painting that is significantly under-valued by its seller, it is not "unfair" for her to buy the painting without telling the seller what the painting is actually worth. But if such information asymmetries are not unfair in art sales, what makes them unfair in the clinical context? Miller and Wertheimer give no further explanation. They seem to rely on intuitions or social conventions about fairness and unfairness in medical transactions, when a moral argument is needed.

As I have argued, the problem of justifying duties to inform in the medical context requires explaining why physicians' special duties can be justified by general and basic rights, when these rights do not yield similar duties of disclosure in non-medical contexts. Miller and Wertheimer's account responds to the problem by positing a basic right to consent under fair conditions. If what is "fair" is highly context-dependent, as they claim, then perhaps this account

can explain why medical standards might be idiosyncratic compared to the standards that are operative in non-medical contexts. But without some general way of determining when a transaction is fair or unfair, it ultimately does not explain why fair transactions require physicians specifically to *inform* patients—rather than, for example, to offer them treatment at their own risk, under a *caveat emptor* standard, which also could constitute fairness in medical transactions. Miller and Wertheimer thus fail to justify informed consent, because showing that it is possible that medical consent standards could be *different* from standards in other contexts is not yet to show that medical consent must be *informed*, where informed means understanding the possible consequences of one's decision.

#### *The problem with direct justifications*

I have argued so far that bioethicists have tried to defend ethical and legal duties to inform by appealing directly to general and basic rights. But this is problematic: general and basic rights might be the basis for general and basic duties, but it is unclear how they could directly justify physicians' special duties to inform. None of the accounts discussed so far has been able to bridge that gap satisfactorily. These accounts either defend special standards on the basis of putative rights that are not truly general and basic, like autonomy rights; or they defend them on the basis of general and basic rights, such as rights of non-deception, non-coercion, or fairness, that on closer examination do not specifically support duties to inform.

The failure of such direct accounts is, I think, inevitable. The reason for this is bound up in what it would mean to justify special duties directly in general and basic rights. Let us say that a direct justification in general and basic rights would amount to a justification in those rights,

without consideration of additional moral claims not strictly entailed by those rights. If special duties are distinguished from general duties in virtue of the fact that they are not entailed by general and basic rights, then special duties must necessarily rely on moral considerations beyond general and basic rights—in which case they would not be directly justified by these general and basic rights. For example, Miller and Wertheimer's fair transactions account stipulates that there is a general moral right to be treated fairly, but claims that what counts as "fair" differs according to context. Even if we grant them this, they would need additional moral considerations beyond the general right to fairness in order to show why fairness requires a duty to inform in medicine. An account of the special moral requirements of fairness in medicine could provide this, but then their account would no longer ground special duties directly in general and basic rights, since it would make use of an auxiliary moral account of fairness in medicine.

*Giving up on general and basic rights?*

If general and basic rights cannot directly justify special duties of disclosure, we might think it best to stop grounding special legal duties to inform in such rights altogether. Two different responses to such a failure may seem reasonable: we might conclude that special duties to inform are not morally justifiable at all; or we might try to justify such duties on some moral basis not ultimately appealing to rights, such as utilitarianism.

First, it might be tempting to conclude that there simply is no moral justification for ethical or legal duties to inform. General and basic rights can justify mere consent, and nothing

more. Informed consent, and the laws aimed at protecting it, could be a medical custom with no substantive moral basis.

This conclusion should be accepted only hesitantly, and as a last resort, if no convincing moral justification can be found for ethical or legal duties to inform. Few if any ethical requirements are more strongly associated with physician ethics than informed consent. The fact that direct justifications in general and basic rights fail does not by itself show that no moral justification could be successful.

If we continue searching for a moral justification for duties to inform, a second strategy seems promising: perhaps special duties can be grounded in some alternative moral basis to general and basic rights, such as utility. Utility is, for example, arguably the ultimate ethical basis for justifications that refer to information asymmetries between physicians and patients.<sup>4</sup> The basic utilitarian argument for duties to inform might go thus: information asymmetries are an especially prominent feature of medicine, and either an ethical obligation or a public policy (or both) requiring physicians to remedy this asymmetry by informing patients will maximize utility in the long run.

This argument proceeds too quickly, however. First, even if we assume that information asymmetries are more prominent in medicine than in other fields, and further assume that utility can only be maximized by eliminating or reducing such asymmetries, we would still need to show that the best way of reducing asymmetries is a law or ethical obligation requiring physicians to reduce it themselves, by disclosing risks and potential benefits to patients.

---

<sup>4</sup> Arrow (1963) argued that many of the special features of the organization of medicine can be explained as economically rational responses to information asymmetries. But as Arrow himself admits, there is more than one economically rational way of dealing with information asymmetries.

Information asymmetries are known in virtually every industry, but as already discussed, other industries do not solve the problem by simply requiring the more-informed party to systematically disclose the risks, potential benefits, and available options to the less-informed party. Instead, other mechanisms emerge to resolve such disparities. Those who purchase specialized services might become better educated about the product they buy, for example by doing their own research, or they might utilize impartial consultants who are knowledgeable about the services or goods sought (such as potential homeowners do when they hire a home inspector). They might further gain insight into the competence and trustworthiness of specific physicians or practices by obtaining reviews written by experts (such as the reviews published in venues like *Consumer Reports* or the *Kelley Blue Book*) or those found on crowd-sourced websites (such as Zocdoc or Angie's list). In the absence of laws requiring disclosures, such venues would become more valuable and so more robust. A utilitarian justification of a duty to inform—whether legal or ethical—would need to show not merely that such a duty solves problems associated with information asymmetries, but that it provides more utility than these other alternatives, all things considered.

I am not aware of any such account, but even if one exists or could be given, it would likely raise a second problem: difficulty justifying the stringent ethical and legal duties usually associated with informed consent, which have been the object of wide consensus in bioethics. To illustrate this, consider James Stacey Taylor's (2005) argument that the ethical obligation of informed consent is best justified by appeal to patient well-being rather than respect for patient autonomy. Taylor argues that informed consent cannot be based in respect for autonomy because failure to give a patient desired information could only be considered disrespect for patient

autonomy in some cases, such as those involving intentional manipulation. Taylor argues that a duty to inform can instead be justified by its contribution to patient well-being, because it puts patients in a better position to achieve their own preferences, and because patients value having this information even when it doesn't.

However, as Taylor admits, justifying informed consent in terms of patient well-being makes the duty to inform conditional on a prior determination that informed consent is in the patient's (or in some class of patients') interest. This weakens the case for either ethical or legal duties to inform, relative to arguments based in patient rights. As Taylor concedes, if the well-being argument is accepted, "then the case for medical paternalism gains strength" (2005, 391).

This same problem is likely to accompany any effort to justify informed consent from a non-rights-based account. The appeal of general and basic rights such as autonomy rights is, essentially, the unqualified nature of the duties associated with them. On such accounts, a patient's right to informed consent is not conditioned on any other values, and so is presumably stronger than those in which it is.

If special duties to inform cannot be grounded directly in general and basic rights, and alternative ethical bases for these may not justify anything as stringent as an unqualified duty to obtain informed consent, then the problem remains unsolved. In what follows, I present an account that protects the stringency of informed consent requirements by giving them a foundation in general and basic rights. However, in order to solve the problem I argue that legal duties to inform are best understood to follow only *indirectly* from general and basic rights: general and basic rights form the ethical basis for a state with the authority to determine that

special disclosures about the consequences of treatment are a necessary precondition for giving valid consent.

### **INDIRECT JUSTIFICATION: RIGHTS AND THE AUTHORITY OF THE STATE**

The argument I develop here is based on an argument in Kant's political philosophy.<sup>5</sup> I want to argue that Kant's approach offers something of value for anyone attracted to a "rights-based" approach. This is so because Kant shows how legal duties to inform can be justified by referring to general and basic rights. Given the lack of other compelling explanations, and the importance attached to this by bioethics, this by itself is probably sufficient reason for looking at the Kantian approach more carefully. But Kant's approach also has additional value because he clarifies the general nature of the problem with other views we have encountered. Kant's argument explains why it is that general and basic rights are not likely to solve many of the pressing issues in bioethics, particularly where those have to do with questions about the nature and extent of one person's duties towards others.

#### *Basic and general rights in a state of nature*

Like many liberal thinkers, Kant develops his political theory by developing a system of rights that is logically prior to, and independent of, any actual state. It is only by abstracting from particular states that we can address the normative question about the state's authority, and ultimately discover the principles that ought to inform the laws the state promulgates.

---

<sup>5</sup> So many authors have turned to Kant's moral philosophy to support various legal views that appealing to Kant's political philosophy may seem surprising. For a more extensive account about why Kant's political, and not moral, philosophy is the appropriate basis for law, see MacDougall (2019).



The condition in which people interact in abstraction from the authority of any state is a “state of nature.” In such a state, people have one basic right:

Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. (Kant 1996, 6:237)

Kant calls this right to freedom *innate* right, because it belongs to persons simply by virtue of their humanity. It is thus “general,” in the sense described earlier, because it belongs to everyone. And it is also basic, in the sense that it is a pre-legal right that could form the basis for laws, rather than a right that merely follows from them.

The innate right to freedom described here by Kant is a manifestation of the moral equality of human beings in two senses. First, the freedom to which each person is entitled is *external* freedom, which means that one may use those means to which one has a right—for example, one's own body or property—for one's own ends, free of control or constraint by other persons (Ripstein 2009, 14-15). It is thus distinct from autonomy familiar in Kant's moral philosophy, which Kant associates with *internal* freedom, that is, the freedom of the will that is “determined by laws of reason” (6:214). External freedom is also distinct from the bioethics principle of autonomy, which is often analyzed as requiring both “non-control” and “understanding” (Beauchamp and Childress 2013, 104). Although it bears similarity to the non-control condition, it does not explicitly require any specific level of understanding. So, innate right manifests the moral equality of human beings by making each person equally free of control by others in a purely external sense. This kind of freedom does not require any particular internal state, in contrast to the concept of freedom familiar from other contexts.

Second, innate right manifests the equality of persons by the limitation it places on freedom: each person's freedom is limited by the requirement that it must "coexist with the freedom of every other in accordance with a universal law." This qualification is necessary for equality because, if I am free but my freedom is unconstrained by the freedom of others, then others are in a relationship of subjection to me. Because each person's freedom must be able to "coexist" with the freedom of others, freedom has an essentially relational and reciprocal character. Although I am entitled to freedom, my freedom is limited by the freedom of others, just as theirs is limited by mine. The idea that this reciprocal limitation occurs under "universal law" means that their freedom limits mine in the same way mine limits theirs, that is, whatever laws limit our freedom in relationship to each other, these laws are the same for everyone.

The innate right of freedom grounds general rights to refuse the touch or use of one's person. Equality demands that our rights to freedom are limited in cases where they would conflict with others' rights to freedom, described under the same universal law. But a right to refuse to let others touch one's person does not, at least in the general run of cases, provoke such conflicts. Each person can have a right to exclude others from his or her body without thereby producing any conflicts with the similar rights of others. Kant treats this right to exclude others from our bodies as a straightforward implication of the principle of innate right (6:248). To be free in one's person is most basically to have a right to refuse the touch of others.

If persons are free to refuse the touch of others, they are also free to consent to it, by the same argument. Freedom from unwanted touching is possible because such freedom can be a universal law without producing conflict between equally free persons. But consent to such touching can also be consistent with a universal law: if I agree to let someone perform an

operation on me, for example, and the other agrees to do this, no one else is affected by our interaction but the two parties to the agreement. A law universally permitting such consensual transactions would not produce conflicts with the freedom of anyone, so long as the only parties affected are those who have given their consent. This is the general argument for the importance of consent in a state of nature.

As a political theory, Kant's is attractive because it is grounded in the basic idea of equal freedom. Moreover, innate right captures the central idea of a general and basic right of self-determination, and its correlative requirement of consent, that has been important both in bioethics as well as in the western liberal tradition. Prior to any legislation or government, all persons have a right to give or withhold consent from others who would touch their bodies. Because this right is foundational it is an unconditional requirement, meaning that it conditions, or serves as a side-constraint on, all other politically permissible interactions. Consequently, it also distinguishes itself from other ethical systems, such as utilitarianism, which typically make rights to consent conditioned on the ability of these rights to secure other goods.

#### *The problem with general rights in a state of nature*

General rights in a state of nature raise a problem of authority, however, that Kant illustrates by developing two implications of the principle of innate right.

First, if general rights are to be the same for everyone, they must be specified under law—a “universal law,” in Kant's terminology. Even if we specify from the outset that there is a general right to freedom, and that this freedom is a right to be externally free of control by

others, we are left with many questions, because several different laws might be employed to achieve this freedom.

For example, to make it possible for each person to enjoy a right to drive on the road, some law must determine which side of the road persons should drive on. If people had a right to drive on whichever side of the road they wished, it would not be possible to determine who was at fault in the event of a crash between two vehicles driving in opposite directions on the same side of the road<sup>6</sup>: both had a right to do what they were doing. But the idea of universal law itself does not settle which of the two sides is the correct one. Driving on either side of the road is an activity that could be compatible with the freedom of everyone, if everyone else was also bound by the same law.

Similarly, the right to give or withhold consent from those who would touch or use my body is a necessary implication of the original right to freedom, as I have argued. But beyond the simple right not to be touched without consent, we face myriad questions about the laws that will govern medical consent. Who is capable of giving consent? What must a person know, exactly, about a proposed interaction before he can give valid consent? Does consent to medical interventions require more disclosures than other kinds of interactions? What signs indicate that a person has given consent? What must a person do to revoke consent? What kinds of actions—such as fraud or coercion—can undermine consent? And how are these to be defined?

Settling the answers to these questions is not primarily a logistical or practical problem, it is a moral one. Because individual persons are only rightfully free insofar as their freedom can coexist with the freedom of others under universal law, without actual laws governing us our

---

<sup>6</sup> That is, absent some other specific and universal law that could determine responsibility in such events.

exercise of freedom inevitably violates the rights of others, and their exercise of freedom violates our rights as well. This violation of the rights of others happens even if we do not intend to violate them: it is a consequence of the fact that we live on a bounded earth, where any rights claim by one individual must inevitably bump up against the rights claims of others, even "involuntarily" (6:306). In a state of nature, there is no way of resolving rights disputes, and so we inevitably wrong others (as they do us) when there is no settled law or mechanism for resolving the rightful bounds of the freedom of each. The principle of innate right, then, makes a moral demand for universal laws defining the rightful freedom of each, but does not provide these.

A second implication of innate right follows from the fact that people have equal rights as a consequence of being bound under universal law. Given such equal rights, no person has the moral power to unilaterally determine which universal laws will govern others. This is particularly problematic because it seems, at first blush, to make the adoption of a universal law impossible.

Consider once again the driving example. Several ways of resolving the question about which side to drive on might be proposed. For example, we might think that some solutions to the problem will result in better outcomes. Perhaps it could be shown that driving on the right-hand side of the road resulted in slightly fewer deaths than driving on the left-hand side of the road, due to the handedness of drivers or some other fact. Alternatively, we might take a vote to see which side of the road most people prefer to drive on. While either method of resolving the question might seem attractive, people with equal rights in a state of nature would not be required to adopt them, nor could they be forced to do so. On Kant's view this is especially clear:

if people have an innate right to freedom, which is freedom from other people, then people are free to reject the proposals of others about which side of the road to drive on, even if the proposal is one that will lead to the best consequences, and even if everyone else has agreed to it. While innate right makes it impossible for others to restrict my freedom by imposing a law on me to which I do not agree, it also makes it impossible for me to restrict their freedom in the same way. Regardless of who tries to pass such laws—whether it is an individual or a group or even a majority—all such attempts amount to a unilateral imposition of law on equally free others (6:256), which no one has the authority to do.

The same problem likely arises for other views of general rights in a state of nature: if our basic rights are truly general, in the sense that each person enjoys their rights equally, it is not clear how one person or even a group of persons could have the authority to impose their laws on others. The problem is pervasive, and also applies to medical consent. Even if it were possible to show that one particular standard of physician disclosure had better consequences than others, either for individual patients or for society as a whole, this would not by itself establish the authority of this standard. Persons with equal rights are under no obligation to accept such standards, even if they are good for them or good for everyone.

The problem of authority, then, can be summarized in this way: respecting the general or equal rights of others requires coordinated adoption of universal laws that determine the nature and extent of those rights. But general or equal rights also mean that no one has the authority to impose such universal laws.

*The civil condition as solution to the problem*

The problem of authority can be solved by moving from a state of nature into a civil condition. Entering into a civil condition with others means agreeing with them to be governed under a set of public, enforced laws (6:256, 6:312). The civil condition exists when we are governed under a basically just state.

Kant argues that there is a duty to enter a civil condition (6:307-8), because it is the only way of solving the problem of authority. In a civil condition, an institution and process are agreed upon to determine the specific character of the universal laws giving freedom to each. In this way it solves the problem of universal laws, by setting a single standard for everyone. By settling a set of universal laws governing each person it makes them equally free. A civil condition also solves the problem of authority, because it makes it possible for universal laws to govern us that are not the product of a unilateral will. Because everyone consents to the civil condition, the laws that govern us in a civil condition can be understood as the product of an omnilateral, or "united and general," will (6:313).

The consent we give to the civil condition is not *actual* consent, founded in historical or empirical fact, nor is it *hypothetical* consent, offered as a prediction about what persons would consent to under ideal circumstances.<sup>7</sup> Consent is instead a necessary consequence of the duty to treat others as equally free. Because each person has a duty to respect the rights of others, and the civil condition is the only way in which we can do that without unilaterally imposing obligations on others, we have a duty to consent to the civil condition, even if present political arrangements were never the object of actual consent (6:319). We have a duty to consent to it because failure to

---

<sup>7</sup> Because it is not based on actual or hypothetical consent, Kant's contractualism is not subject to some of the serious criticisms leveled at other kinds of social contract theories. See O'Neill (2000) .

do so is a de facto violation of the rights of others, regardless of whether one intends so to violate their rights or not (cf. 6:306).

*Laws and their limits in a civil condition*

The consent we give to the civil condition is the source of the authority of individual laws. Individual laws, like the state from which they proceed, gain their authority from the fact that they are the result of legal and political processes we had a duty to consent to. To disobey the laws of a state that operates within its legitimate limits--even on the premise that one's own preferred laws or policies are ethically superior--is to insist on a merely private understanding of right, and to attempt to impose one's unilateral will on non-consenting others. It thus violates their equal rights to freedom.

While Kant's argument explains the authority of both the state and its laws, it might seem to give too much power to the state. If the state has authority whether or not we actually consent to it, is it even possible for laws passed through the normal political process to be illegitimate?

To understand the limits of the authority of the state, we have to refer to the original purpose of the state. As per Kant's argument, the ultimate purpose of the state and the laws it produces is to secure the equal freedom of each, which means to create what Kant calls a "rightful condition" (6:311). This is all the power that the argument beginning with innate right can authorize for the state: we do not have a duty to join a civil condition because it will make us richer, safer, or solve various kinds of coordination problems. Our duty to enter the civil condition results from the necessity of securing the equal freedom of others (just as their duty is a consequence of securing ours). The state gains a wide variety of powers that are all subservient



to this overall goal--including power over the police and economy, for example--but its authority does not go beyond this. The basic reason it cannot go beyond laws intended to protect the equal freedom of citizens is that other goals cannot be understood as something anyone has a duty to consent to. We have a duty to consent only to laws that are necessary for making others equally free; and so we also have a right to impose only laws that are aimed at this general purpose.

Given this purpose, Kant's general strategy for determining whether a law exceeds the limits of state authority is to ask whether it is something that a people could will for itself,<sup>8</sup> which amounts to the question whether every citizen could consent to it. This is a basic touchstone for legitimacy because a law to which some could not consent also cannot be conceived of as the product of a united and general will, which is the most general basis for state authority. For example, paternalist laws fall into this category. Paternalist laws are by definition those that override the freedom of citizens, *not* because it is necessary for the freedom of others, but instead because it is in some way good for the person being coerced. But because the *only* justification for state power in the first place is the fact that it is necessary to protect the equal freedom of all, paternalist laws basically restrict freedom without any rightful justification. Kant consequently calls the paternalistic state a "despotic" one (6:317).

#### *State authority and legitimate legal standards*

Determining whether legal standards endowing physicians with a duty to inform are legitimate then depends on determining whether they fulfill the purpose of law, by limiting the freedom of each for the purpose of preserving the freedom of everyone. Laws that fulfill this general purpose

---

<sup>8</sup> Kant uses this formulation a number of times when discussing specific laws (6:327-329).

are laws to which everyone *could* consent, i.e. they could be the object of a united and general will and are generally justifiable as a matter of public right. We can now ask whether the duty-to-inform standards serve this purpose, and so could be considered legitimate.

The reasonable person standard, as we said earlier, requires the physician to disclose the information that a hypothetical reasonable person would find material to the decision. This standard limits the freedom of both the patient and the physician, but in both cases it does so for the purpose of protecting the freedom of the other party. First, the reasonable person standard limits the freedom of each party. The physician is limited in the sense that she may only consider the patient to have given valid consent if she has disclosed information up to the level required by the standard—that is, up to the level that a reasonable person would think material to the decision. The patient's freedom, likewise, is limited in the sense that he must consider valid any consent he gave to a physician who fully provided this level of disclosure. He may not claim that his consent was invalid because the physician did not give him some piece of information he later decides he would have liked to have, for example. These limitations stand in contrast to the total lack of limitations in a state of nature. In a state of nature, either party could make a provisionally rightful claim that the other party did not fully satisfy its rights, regardless of what the other party actually did, because there is no single universal standard laid down determining when a valid consent has been given. But once a standard like the reasonable person standard is laid down in a civil condition, the freedom of each is limited: each may complain about a rights violation only in the case that the other does not perform what is required by the standard.

Second, the limitations on freedom posed by the reasonable person standard limit the freedom of each party for the purpose of preserving the freedom of the other. The limits on the

patient serve to preserve the freedom of the physician: the physician knows that, so long as she has met the objective standards for disclosure required by law, she has performed her legal duty and has not violated the patient's rights, even if the patient did not get as much information as he would have liked. The limits on the physician serve to preserve the freedom of the patient: the patient knows that the physician will disclose all the information that a reasonable person would find material to the decision, and the patient will have legal recourse in the case that it turns out that the physician does not achieve this standard. Because the standard is objective, both physician and patient can determine independently that they are complying with the rights of the other party. Both parties can make a free choice about whether or not to participate in the medical intervention, knowing in advance what this will mean for their respective rights. The judgment about whether participation will further their own individual ends is up to each party to judge for themselves.

Because the reasonable person standard can be understood as limiting freedom of each to uphold the equal freedom of others, it could be the object of a united and general will. We can conclude, then, that the Kantian argument succeeds where other theories have failed, and shows how basic and general rights justify a duty to inform, at least in those jurisdictions employing a reasonable person standard.

### *Subjective standards and the limits of legitimacy*

Not all standards requiring physicians to inform are similarly justifiable on the Kantian view, however. The subjective standard differs in important respects from the reasonable person

standard, and on at least one interpretation could not be considered legitimate, even if it were chosen through the normal political process within a civil condition.

On the subjective standard, the adequacy of the information given to the patient is determined by whether it constitutes the information that is “material” to the particular patient (Faden and Beauchamp 1986, 33), i.e. the information that is important to the patient, given his or her ends or values. The subjective standard thus makes the adequacy of the physician's disclosure and the resulting consent a function of the patient's ends. In this way, it is a significant departure from the reasonable person standard, which can be considered an objective standard, because the standard for disclosure is not one chosen by either party to the consent. This shift away from an objective standard determined independently of either party to a subjective standard determined by the ends of one party to the transaction creates three problems with respect to the united and general will.

First, by making the physician accountable to the patient's *ends*, the subjective standard construes the relationship as one in which one private party (the physician) has a duty to aid or help another (the patient) achieve his or her goals or ends, such that the patient cannot give a valid consent to treatment unless the physician offers the required assistance towards the patient's individual aims. This goes beyond the justifiable rationale for law: on the Kantian argument, the purpose of laws is to achieve the freedom of each party, and the only possible basis for limiting one party's freedom of choice is to preserve the freedom of choice of the other. Individuals do not have a fundamental or innate right to help from others in achieving their ends, but only to freedom from others. They also do not have fundamental legal duties to assist others, but only to preserve others' freedom. Because laws limiting one person's freedom to help another

achieve his or her ends are not consistent with the primary rationale of law, which is to preserve the freedom of each, they are such that free and equal persons could not agree to them.

Second, by making the ends of only one party legally significant, the subjective standard necessarily makes the parties unequal. As noted above, the subjective standard makes the validity of consent dependent on whether the information disclosed turns out to be all the information that the patient wanted, i.e. the information that the patient finds useful for achieving his ends. The standard does not reference the ends of the physician, however, and the reason is obvious: a legal standard could make rightfulness a function of the ends of one party, at most, because parties can have different or even mutually exclusive ends. The validity of consent could not depend, for example, on the information that the patient wants to receive, *as well as* the information that the physician wants to give. The kind of disclosure the parties find conducive to their personal ends could be different, and in the event that it was different, there would be no way to determine whether the resulting consent was valid. Because the patient's ends determine the rightfulness of the transaction in a way that the physician's do not, the subjective standard makes the parties unequal. In contrast, objective standards such as the reasonable person standard do not make rightfulness a function of the ends of either party, but only the actions of each; as such, objective standards preserve the equality of both parties.

Third, by making the satisfaction of the physician's legal duty dependent on the patient's ends, the subjective standard essentially permits the patient to determine the law for the physician. Innate right, says Kant, is a right to freedom or "independence from constraint by the choice of another." The subjective standard does not give the patient the right to directly constrain the physician, but the patient does have power to indirectly constrain the choice of the

physician, insofar as the patient has the authority to determine the legal standard to which the physician is held. Objective standards do not raise this problem: even if the standard requires different amounts of effort or places different burdens on the parties, the legal rights of neither party are *determined* by the other party to the transaction. The subjective standard thus legally instantiates a relationship of subjection between interacting parties. On Kant's view, this runs directly counter to the purpose of law, which is to make private parties free and equal relative to each other.

Other commentators have argued that the major problem with the subjective standard is an epistemic one: the physician cannot know whether she has given the patient all the information he would like to know (Beauchamp and Childress 2013, 127; Dranseika, Piasecki, and Waligora 2016). Other standards also raise epistemic problems, however. The reasonable person standard requires the physician to judge what a reasonable person would want to know, but this standard is vague, and the findings of juries in particular cases are thus somewhat unpredictable. Similarly, the professional practice standard requires disclosure of whatever physicians customarily disclose, but accurate information about the customs of other physicians may be unavailable to the physician and/or patient or even non-existent.

The Kantian view shows why the main problem with the subjective standard is not epistemic but relational. Because the subjective standard determines the physician's rights and duties on the basis of the patient's subjective ends, it undermines the physician's freedom, makes the patient and physician unequal, and makes the individual patient lawgiver to the physician. The subjective standard is thus a law that a people could not will for itself. Any justifiable legal standard must, on the Kantian view, be an objective one that both parties can independently

choose to meet, rather than a subjective one that gives one party legal control over the rightfulness of the other's actions.

On a different interpretation of the subjective standard, however, some of these problems may be avoided. As Beauchamp and Childress qualify this standard, it requires disclosure of information material to the particular patient only insofar as "it is reasonable to expect the physician to determine the patient's informational needs" (2013, 127). The crucial point here is who determines what counts as "reasonable." If "reasonable" is understood as, "reasonable from the point of view of the patient," then the standard does not meaningfully preserve the freedom and equality of the physician, as discussed above. If, on the other hand, "reasonable" is determined by what most other prudent physicians would do to determine the patient's needs, or by what most reasonable people would do to determine the patient's needs, then the subjective standard is actually an objective standard, because the standard for disclosure is not set directly by either party's ends.

However, note that these "objective" interpretations of the subjective standard would serve to partially undermine the main argument for adopting the subjective standard in the first place, which is its supposed value for preserving patient autonomy (Beauchamp and Childress 2013, 127; Dranseika, Piasecki, and Waligora 2016). If patients have a right only to a physician who makes a reasonable attempt to determine their needs, where "reasonable" is determined according to some standard independent and outside of the patient, then the ability of the patient to exercise autonomy by making decisions on the basis of completely individualized or idiosyncratic preferences is effectively undermined. Patients are not then entitled to all the

information they want (or would want, if they knew what the physician knew), but only what someone else could reasonably guess they would want.

### **CONCLUSION**

The indirect Kantian approach, I have argued, offers advantages over existing accounts attempting direct justification of duties to inform in general and basic rights. Chief among these advantages is that indirect justification can do what direct justifications have so far failed to: it can explain how special duties to inform might in some sense follow from a patient's general and basic rights. Between patients' general and basic rights and physicians' special duties to inform, Kant inserts a state that has the authority to interpret the content of general and basic rights. It is this extra step that makes Kantian indirect justification plausible where other theories are not. In the case that the state chooses a standard endowing physicians with a duty to inform that also serves the general purpose of law—such as the reasonable person standard—extensive disclosures can be understood as a condition for the existence of consent, even though no argument can show such special duties would be necessary in a state of nature, and despite the fact that being informed is not usually a required feature of consent in non-medical contexts. Indirect justification could also be used to show the basis of other standards in general and basic rights, even some that do not endow physicians with duties to inform, so long as these can be understood as fulfilling the basic purpose of law. Standards not clearing this bar—such as the subjective standard, on the Kantian view—cannot be justified even indirectly, however. Insofar as such standards run contrary to the moral purposes that give the state authority, they should be considered illegitimate.





## Works Cited

- Arrow, Kenneth. 1963. "Uncertainty and the Welfare Economics of Medical Care." *The American Economic Review* 53 (5): 941-973.
- Beauchamp, Tom L., and James F. Childress. 2001. *Principles of biomedical ethics*. 5th ed. New York, N.Y.: Oxford University Press.
- . 2013. *Principles of biomedical ethics*. 7th ed. New York, NY: Oxford University Press.
- Dranseika, Vilius, Jan Piasecki, and Marcin Waligora. 2016. "Relevant Information and Informed Consent in Research: In Defense of the Subjective Standard of Disclosure." *Science and Engineering Ethics* 23 (1): 215-225.
- Faden, Ruth R., and Tom L. Beauchamp. 1986. *A history and theory of informed consent*. New York: Oxford University Press.
- Kant, Immanuel. 1996. "The Doctrine of Right." In *The Metaphysics of Morals*, edited by Mary J. Gregor, 1-138. New York: Cambridge University Press. Original edition, 1797.
- Kristinsson, Sigurdur. 2007. "Autonomy and informed consent: A mistaken association?" *Medicine, Health Care and Philosophy* 10 (3): 253-264.
- MacDougall, D. Robert. 2019. "Sometimes Merely as a Means: Why Kantian Philosophy Requires the Legalization of Kidney Sales." *The Journal of Medicine and Philosophy* 44 (3): 314-334.
- Manson, Neil C., and Onora O'Neill. 2007. *Rethinking informed consent in bioethics*. Cambridge ; New York: Cambridge University Press.
- Miller, Franklin G., and Alan Wertheimer. 2010. "Preface to a Theory of Consent Transactions: Beyond Valid Consent." In *The Ethics of Consent: Theory and practice*, edited by Franklin G. Miller and Alan Wertheimer, 79-105. Oxford; New York: Oxford University Press.
- Miller, Franklin G., and Alan Wertheimer. 2011. "The Fair Transaction Model of Informed Consent: An Alternative to Autonomous Authorization." *Kennedy Institute of Ethics Journal* 21 (3): 201-218.
- O'Neill, Onora. 2003. *Autonomy and trust in bioethics*. Cambridge; New York: Cambridge University Press (Virtual Publishing).
- O'Neill, Onora. 2000. "Kant and the Social Contract Tradition." In *Kant actuel: Hommage à Pierre Laberge*, edited by François Duchesneau, Claude Piché and Guy Lafrance, 185-200. Montréal: Bellarmin.
- Ripstein, Arthur. 2009. *Force and freedom: Kant's legal and political philosophy*. Cambridge, Mass.: Harvard University Press.
- Sokol, Daniel K. 2015. "Update on the UK law on consent." *BMJ (Clinical research ed)* 350: h1481.
- Studdert, David M., Michelle M. Mello, Marin K. Levy, Russell L. Gruen, Edward J. Dunn, E. John Orav, and Troyen A. Brennan. 2007. "Geographic Variation in Informed Consent Law: Two Standards for Disclosure of Treatment Risks." *Journal of Empirical Legal Studies* 4 (1): 103-124.
- Taylor, James Stacey. 2005. "Autonomy and Informed Consent: A Much Misunderstood Relationship." *The Journal of Value Inquiry* 38 (3): 383-391.