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Informed Consent, Disclosure, and Understanding

Perhaps the most influential ethical principle in contemporary biomedical practice is that informed consent is required for therapy and research. And yet empirical research confirms what virtually every medical professional knows from experience: patients and research participants regularly fail to understand basic facts that are disclosed to them about the events in which they are agreeing to take part.¹ If they are required to understand

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1. Franz Ingelfinger, "Informed (But Uneducated) Consent," *New England Journal of Medicine* 287 (1972): 39–49; Angus Dawson, "What Should We Do about It? Implications of the Empirical Evidence in Relation to Comprehension and Acceptability of Randomization," in *Engaging the World: The Use of Empirical Research in Bioethics and the Regulation of Biotechnology*, eds. Soren Holm and Monique Jonas (Amsterdam: IOS Press, 2004), pp. 41–52; Ana Iltis, "Lay Concepts of Informed Consent to Biomedical Research: The Capacity to Understand and Appreciate Risk," *Bioethics* 20 (2006): 180–90; M. Mangset, R. Førde, J. Nessa, E. Berge, and T. Bruun Wyller, "I Don't Like That, It's Tricking People Too Much. . .': Acute Informed Consent to Participation in a Trial of Thrombolysis for Stroke," *Journal of Medical Ethics* 34 (2008): 751–56; James Flory, David Wendler, and Ezekiel Emanuel, "Empirical Issues in Informed Consent for Research," in *The Oxford Textbook of Clinical Research Ethics*, eds. Ezekiel Emanuel, Christine Grady, Robert A. Crouch, Reidar Lie, Franklin G. Miller, and David Wendler (New York: Oxford University Press, 2008), pp. 645–60; Amulya Mandava, Christine Pace, Benjamin Campbell, Ezekiel Emanuel, and Christine Grady, "The Quality of Informed Consent: Mapping the Landscape. A Review of Empirical Data from Developing and Developed Countries," *Journal of Medical Ethics* 38 (2016): 356–65.

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these disclosures, then this would mean malpractice is widespread. But if no feasible institutional reform would ensure comprehension, then insisting on it would foreclose valuable therapy and research.

This problem makes it important to determine how far consent-givers must understand information that must be disclosed to them. To frame this issue, let us define *valid consent* as the consent that successfully releases someone from a duty.² There are various candidates for necessary conditions for consent's validity. One is an "Understanding Condition"—the consent-giver must understand certain information. Another is a "Disclosure Condition"—the consent-receiver must disclose certain information.³ In this article, I will address the following questions: Is there an Understanding Condition or a Disclosure Condition for valid consent? If there is either type of condition, what information is covered by it?

To pinpoint the disagreement in the philosophical literature about how to answer these questions, let us introduce some terms. A "Description Understanding Condition" is the condition that someone gives valid consent to an action only if they understand a rudimentary description of this action. A "Context Understanding Condition" is the condition that someone gives valid consent to an action only if they understand the action's purposes, risks, and benefits, as well as similar information concerning relevant alternative courses of action. If someone posits both a Description Understanding Condition and a Context Understanding Condition, then they posit a "Comprehensive Understanding Condition." Likewise, a "Comprehensive Disclosure Condition" is the condition that a consent-giver gives valid consent only if a consent-receiver (or the institution of which the consent-receiver occupies a role) discloses to the consent-giver the nature, purpose, risks, and benefits of the action, along with similar information about

2. On this terminology, someone's consent can be invalid in the sense that it is normatively inefficacious. The terminology of valid and invalid consent is standard in bioethics. Within the criminal law, the term "consent" is commonly used to refer to an act that is necessarily normatively efficacious. On that terminology, what I call "invalid consent" would be described as the absence of consent.

3. Within bioethics, a common view is that these are two of five necessary and sufficient conditions for validly giving consent. The other three conditions are that the consent-giver has sufficient *capacity* for giving consent, that they do so *voluntarily*, and that they give *consent*. See Tom Beauchamp, "Autonomy and Consent," in *The Ethics of Consent: Theory and Practice*, eds. Franklin Miller and Alan Wertheimer (Oxford: Oxford University Press: 2010), p. 56.

alternatives to the action.⁴ Using this terminology, we can state the three views that scholars have defended to date. First, some have denied that there is any Disclosure Condition, but claimed that there is a Comprehensive Understanding Condition, on the grounds that valid consent requires autonomous agency. Their thought is that for someone to autonomously authorize an action, they must understand the action's nature, purpose, risks, and benefits, and the alternatives to the action, but the understanding could come from a source other than disclosure.⁵ Second, some have argued that there is a Comprehensive Disclosure Condition and a Comprehensive Understanding Condition, and that these conditions are coextensive, on the grounds that valid consent presupposes successful communication between the consent-giver and the consent-receiver: this communication would involve a meeting of the minds where one party understands what the other must disclose about the action's nature, purpose, risks, and benefits, along with similar information about alternatives.⁶ Third, some have argued that there is a Comprehensive Disclosure Condition and a Description Understanding Condition, but have denied that there is a Context Understanding Condition. They claim that the very act of giving consent to an action requires grasping the rudimentary nature of this action. But regarding the action's purpose, risks, benefits, and alternatives, they hold that a consent-receiver need only take reasonable steps to disclose this information, even though these steps will not always ensure that the consent-giver understands this

4. Shaped by legal doctrine, institutional rules have converged on medical disclosure covering the following: "for a patient to be informed adequately according to legal standards, information must be given about the nature and purpose of the proposed treatment, its risks and benefits, and any available alternatives. These have come to be known as the *elements* of disclosure." Jessica Berg, Paul Appelbaum, Charles Lidz, and Lisa Parker, *Informed Consent: Legal Theory and Clinical Practice*, 2nd ed. (New York: Oxford University Press, 2001), p. 53.

5. For example, the consent-giver might themselves be a medical expert. This view does not deny that consent-receivers have duties to disclose. It denies that the discharge of these duties is necessary for someone's consent to be valid. See Ruth Faden and Tom Beauchamp, *A History and Theory of Informed Consent* (Oxford: Oxford University Press, 1986), pp. 248-55, 298-330; Robert Levine, *Ethics and Regulation of Clinical Research*, 2nd ed. (Baltimore: Urban & Schwarzenberg, 1986); Tom Beauchamp and James Childress, *Principles of Biomedical Ethics*, 6th ed. (New York: Oxford University Press, 2009); Beauchamp, "Autonomy and Consent," pp. 57-61, 65-69.

6. See Neil Manson and Onora O'Neill, *Rethinking Informed Consent in Bioethics* (Cambridge: Cambridge University Press, 2007), pp. 84-90.

information.⁷ The first two views imply cause for concern about consent-givers regularly misunderstanding disclosures, as this both limits the exercise of these consent-givers' autonomous agency and constitutes a failure of communication. But the third view suggests that this misunderstanding need not be a problem, so long as disclosure has taken place, and the consent-giver has a rudimentary grasp of the action to which they are giving consent.

While there are insights motivating these positions, each is oversimplified. In their place, I will defend the view that there are multiple informational conditions on valid consent, and these conditions are grounded in different rationales. In Section I, I argue that there is a "Comprehensive Facilitative Disclosure Condition" on the grounds that someone's consent is invalidated if it results from a consent-receiver failing to discharge a duty to assist the consent-giver by putting them in a sufficiently good position for giving consent. In Section II, I consider the case for positing a Description Understanding Condition on the grounds that granting someone permission to treat one in a certain way requires an implicit understanding of what one is permitting this person to do. While I am inclined to think that there is a Description

7. Gopal Sreenivasan holds that consent-givers need only "comprehend both what it means to consent and a basic description of what they undergo—injections, for example." Sreenivasan holds that the "standard disclosure" retains its moral basis, but claims that it involves researchers taking "reasonable steps" that fall short of "whatever it takes to ensure comprehension." Gopal Sreenivasan, "Does Informed Consent to Research Require Comprehension?" *Lancet* 362 (2003): 2016–2018, at p. 2018. Joseph Millum and Danielle Bromwich endorse a "minimal" view of the Understanding Condition, according to which a consent-giver need only understand "(1) that he is giving consent; (2) how to exercise his right to give or refuse consent; and (3) to what he is being asked to give consent." They elaborate the third clause by saying that "knowing what one is consenting to means that the profferer and recipient of consent must share an understanding of how their normative relationship has been changed by the token of consent." Joseph Millum and Danielle Bromwich, "Understanding, Communication, and Consent," *Ergo* 5 (2018): 45–68, at p. 47. See also Danielle Bromwich and Joseph Millum, "Disclosure and Consent to Medical Research Participation," *Journal of Moral Philosophy* 12 (2015): 195–219; Joseph Millum and Danielle Bromwich, "Informed Consent: What Must Be Disclosed and What Must Be Understood?" unpublished manuscript. Tom Walker claims that "a doctor or researcher . . . only needs to ensure that her patient or research participant understands what she is going to do as picked out by those ways of describing it where it would be wrong to do something so described without consent specifically for doing that." Tom Walker, "Informed Consent and the Requirement to Ensure Understanding," *Journal of Applied Philosophy* 29 (2012): 50–62, at p. 54. David Wendler argues that researchers must disclose the fact that a study involves randomization, but research participants need not understand that it does. David Wendler, "Must Research Participants Understand Randomization?" *American Journal of Bioethics* 9 (2009): 3–8.

Understanding Condition, I conclude that the case for this condition is much weaker than has been thought, in light of a novel objection to positing this condition: it seems possible to consent to a surprise without grasping the rudimentary nature of the action that constitutes the surprise. In Section III, I argue that there is a Context Understanding Condition, on the grounds that someone's consent is invalid when it results from their not being in a sufficiently good position for giving consent, where what counts as a sufficiently good position is not limited by the assistance that the consent-receiver can offer. Finally, in Section IV, I compare the information covered by each condition. I argue that while some information is covered by both the Facilitative Disclosure Condition and the Context Understanding Condition, neither condition subsumes the other. In other words, neither is the information covered by the Facilitative Disclosure Condition a subset of the information covered by the Context Understanding Condition, nor is the information covered by the Context Understanding Condition a subset of the information covered by the Facilitative Disclosure Condition. In addition, I argue that the value of transparency provides an independent rationale for consent-receivers possessing duties of disclosure. The duties of disclosure grounded in the transparency rationale cover information that is not covered by either the Facilitative Disclosure Condition or the Context Understanding Condition. However, the transparency rationale does not ground a necessary condition for valid consent.

Before we start, let me make two brief methodological points. First, while I focus on biomedical consent in order to engage with the bioethics literature, I intend my central claims to hold for consent to activities outside of biomedical contexts. Second, my interest is in the moral power of consent that we have as persons, irrespective of the time or place that we inhabit. Accordingly, I discuss consent at the level of normative ethics, and I will neither presuppose any country's institutional framework nor address the design of codes or institutions. Nevertheless, I hope my discussion will be indirectly relevant for this design, insofar as it is a virtue in codes or institutions to prohibit people from acting on morally invalid consent.

I. THE FACILITATIVE DUTY RATIONALE FOR THE FACILITATIVE DISCLOSURE CONDITION

The claim that there is a Disclosure Condition is the claim that someone's consent is valid only when the consent-receiver has disclosed certain

information to them. Conceptually, it is important to distinguish the idea that there is a Disclosure Condition from the idea that a consent-receiver has a “duty to disclose” certain information. The former concerns whether someone’s consent creates new permissions, and the latter concerns the pre-existing duties of another agent. At the beginning of our inquiry, it should be an open question whether the consent-receiver’s breach of these duties necessarily invalidates consent. I will defend a nuanced answer to this question: some duties of disclosure need to be discharged in order for someone’s consent to be valid, while other duties of disclosure need not. I will postpone discussing the duties that do not need to be discharged for consent to be valid until Section III, and I will begin by developing my rationale for the “Facilitative Disclosure Condition” that I will endorse. This rationale appeals to the duties that the consent-receiver owes the consent-giver.

My first step is to consider why our choices affect how others may treat us, drawing on Thomas Scanlon’s view of the significance of choice.⁸ Consider an abbreviated version of an example of Scanlon’s:

Hazardous Waste. Officials have dug up hazardous waste, in order to relocate it. Pedestrian chooses to take a shortcut through the excavation site, and suffers an injury from the waste.

Officials’ actions have causally contributed to Pedestrian’s harm. But the causation is mediated by Pedestrian’s choice. Does this transfer responsibility for the harm from Officials to Pedestrian? One of Scanlon’s insights is that we cannot answer this question simply by looking at Pedestrian’s psychology when they made their choice.⁹ In other words, it is not enough to look at Pedestrian’s beliefs and motivations. We must also consider the background events. Did Officials have a good reason for digging up the waste? Did they take reasonable steps to minimize the danger? Did they publicize the risks? These questions make clear that Officials have “facilitative duties” to put Pedestrian in a sufficiently good position to choose whether to enter the site.

8. Thomas M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), pp. 256–67.

9. Except where gender is relevant, throughout this article, I use “they” as a singular gender-neutral pronoun both for hypothetical characters and for scholars. For a defense of gender-neutral pronouns, see Robin Dembroff and Daniel Wodak, “He/She/They/Ze,” *Ergo* 5 (2018): 371–406.

Whether Officials discharge these duties bears on the moral significance of Pedestrian's choice. Accordingly, we should adopt the following principle:

Facilitative Duty Principle. If X has a duty to facilitate Y's decision-making, and X's breach of this duty explains either why Y makes a certain choice or engages in certain behavior, then X cannot appeal to this choice or behavior in order to justify interfering with Y's personal domain.

By "personal domain," I mean the area over which someone has authority, including their person and property, and I intend "interference" to be interpreted broadly. This principle implies that Officials can justify causally contributing to Pedestrian's harm only if the harm does not result from their failure to put Pedestrian in a sufficiently good position to decide whether to enter the site.

This picture also fits consent. When someone gives consent, they attempt to release someone from a duty not to perform an action.¹⁰ Whether this attempt succeeds typically depends on whether the consent-receiver has discharged their facilitative duties toward the consent-giver. If the attempt results from the consent-receiver breaching these duties, then the consent-receiver cannot justify performing the action by appealing to the attempt.

As you might expect, the consent-receiver's facilitative duties include a duty to disclose relevant information.¹¹ Just as Officials must publicize the risks of the excavated waste, so a physician must disclose an operation's risks to a patient. Consider:

10. It is controversial whether this authorization consists in a mental choice or behavior that expresses this choice. My formulation of the Facilitative Duty Principle covers both possibilities. For recent work on this topic, see Larry Alexander, "The Ontology of Consent," *Analytic Philosophy* 55 (2014): 102-11; Tom Dougherty, "Yes Means Yes: Consent as Communication," *Philosophy & Public Affairs* 43 (2015): 224-53; Victor Tadros, *Wrongs and Crimes* (Oxford: Oxford University Press, 2016), pp. 205-09; Neil Manson, "Permissive Consent: A Robust Reason-Changing Account," *Philosophical Studies* 173 (2016): 3317-34; Kimberly Kessler Ferzan, "Consent, Culpability, and the Law of Rape," *Ohio State Journal of Criminal Law* 13 (2016): 397-439; Renée Jorgensen Bolinger, "Moral Risk and Communicating Consent," *Philosophy & Public Affairs* 47 (2019): 179-207.

11. I take this to be roughly what Walker intends with their claim that disclosure improves a consent-giver's ability to make an informed choice about whether to give consent. Walker, "Informed Consent," 51.

Uninformed. Physician fails to disclose that prostate removal will cause sterility. Although Patient is unwilling to become sterile, he signs the consent form and undergoes the operation.¹²

Physician wrongs Patient by removing his prostate. Physician cannot successfully appeal to Patient's consent because this results from Physician failing to put Patient in a sufficiently good position to decide whether to consent. Generalizing from this case, the Facilitative Duty Principle allows us to derive a "Facilitative Disclosure Condition." This is the condition that consent is invalidated in virtue of resulting from a consent-receiver's failure to discharge their facilitative duty to disclose information.

Let me emphasize a point about the principle. Suppose a physician breaches a duty to disclose information. The physician thereby wrongs the patient. But the information could be irrelevant to the patient's decision-making. If the information is irrelevant, then the Facilitative Duty Principle does not furnish the patient with the complaint that they consented because of the physician's failure to disclose. The patient would have a separate complaint that the physician acted negligently, by taking the risk that the information made a difference to the patient's decision-making. However, the wrong of being treated negligently is different from the wrong of being treated in a way that is against one's expressed will.

The Facilitative Duty Principle attractively allows for a unified explanation of cases that involve consent (e.g., *Uninformed*) and cases that do not (e.g., *Hazardous Waste*). Another advantage is that the principle also speaks to other conditions for valid consent. To discharge their facilitative duties, a consent-receiver must neither coerce a consent-giver, nor incapacitate them. Consider:

Prison. Innocent has been unjustly arrested for engaging in political protest. Officer threatens Innocent with unmerited imprisonment unless Innocent takes part in a research study. The threat causes Innocent to take part.¹³

12. This case is loosely based on *Bang v. Charles T. Miller Hospital*, 251 Minn. 427, 88 N.W. 2d 186 (1958).

13. As well as threats, it may be that consent is invalidated by other proposals such as offers. According to a popular approach, the coerciveness of a proposal is determined with reference to a certain baseline: if rejecting the proposal puts someone below the baseline, then the proposal is coercive. If rejecting the proposal has no effect, but accepting the proposal puts someone above the baseline, then the proposal is not coercive. For a classic account of coercion partly in terms of a "moralized baseline" defined in terms of the situation that would obtain if people discharged their duties, see Robert Nozick, "Coercion,"

Sedative. Physician gives Patient a sedative to relieve their anxiety. Known side effects are that people think less clearly and are less concerned about risks. These side effects cause Patient to agree to an operation that Physician proposes.

Both cases involve invalid consent, and the Facilitative Duty Principle can explain why. In *Prison*, Official subjects Innocent to illegitimate coercion, and in *Sedative*, Physician reduces Patient's capacity to consent. By doing so, each consent-receiver breached their facilitative duties, and the breaches cause the consent. Accordingly, the Facilitative Duty Principle entails that the consent is invalid. To be clear, as I will discuss in the next section, the Facilitative Duty Principle cannot explain *all* the ways in which consent is invalidated by coercion or a lack of capacity. But we need not assume that a single principle does all the explanatory work, and it counts in favor of the Facilitative Duty Principle that it gives a plausible and unified treatment of how certain types of nondisclosure, incapacity, and coercion invalidate consent.

The Facilitative Duty Principle also has attractive implications for the extent of the information that must be disclosed in order for someone's consent to be valid. Since our facilitative duties are circumscribed by what we can reasonably be expected to do, the Facilitative Disclosure Condition is limited to the information of which the consent-receiver can reasonably be expected to be aware.¹⁴ Compare the following cases:

1900 Enema. In 1900, Researcher gives Patient a radium enema. Researcher does not know of the dangers of the radium being

in *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel*, eds. Sidney Morgenbesser, Patrick Suppes, and Morton White (New York: St. Martin's Press, 1969), pp. 440-72. For a classic nonmoralized baseline account of coercive offers, see David Zimmerman, "Coercive Wage Offers," *Philosophy & Public Affairs* 10 (1981): 121-45.

14. If our facilitative duties are circumscribed by the costs of disclosure, then this would provide another limit to the Facilitative Disclosure Condition. Candidates include costs to people's privacy, and opportunity costs, e.g., physicians' time can be spent on other medically beneficial activities besides disclosure. For discussion of how privacy interests can limit duties of disclosure, see Bromwich and Millum, "Disclosure and Consent to Medical Research Participation," 206; Hugh Lazenby and Iason Gabriel, "Permissible Secrets," *The Philosophical Quarterly* 68 (2018): 273-77.

radioactive. To the best of their knowledge, they disclose all of the enema's risks, as well as all other medically relevant information.¹⁵

2000 Enema. In 2000, Researcher gives Patient a radium enema. Researcher is aware of the dangers of the radium being radioactive, but fails to disclose this.

The 1900 Researcher has no duty to disclose dangers that the human race has not discovered. But it is reasonable to demand that the 2000 Researcher discloses these dangers, given that they are aware of these dangers. As a result, only the 2000 Patient could appeal to the Facilitative Duty Principle to complain that their consent was invalidated by the researcher's failure to carry out their facilitative duty.

We can use the Facilitative Duty Principle to address the extent to which consent-givers must understand information that consent-receivers are required to disclose. The Facilitative Duty Principle entails duties of disclosure, which are duties to take reasonable steps. Requiring these reasonable steps falls short of requiring that the consent-receiver makes every possible effort, let alone guaranteeing a consent-giver's understanding. These points have implications for studies in which consent-giver comprehension is not universally achieved. In the United Kingdom and Australia, when enrolling human subjects for low-risk studies (e.g., in psychology or sociology), it is usually sufficient to gain ethical approval, with respect to informing participants, that these participants are provided with "participant information sheets" that explain central information about the study. For some studies, providing these sheets exhausts researchers' moral duties to disclose information. But as every researcher is aware, these sheets will not be read carefully by all participants. For example, some participants may judge that the costs of reading outweigh the benefits. That is a predicament that many of us are familiar with: we tick the box saying that we have read and understood contracts' terms and conditions, when everyone knows that we have not. When the terms and conditions are of reasonable length, we assume responsibility for our ignorance. A similar principle applies for consent:¹⁶

15. Thanks to an anonymous reviewer for this case.

16. This is the so-called *waiver exception* to the necessary condition that valid consent be informed. Faden and Beauchamp, *A History and Theory of Informed Consent*, pp. 38–39. For

Voluntary Ignorance Principle. There are some facts F, such that

- (i) a consent-receiver has a facilitative duty to disclose F; and
- (ii) if the consent-receiver has discharged this facilitative duty, but the consent-giver has chosen not to learn from this disclosure, then their consent is not thereby invalidated by their failing to understand F.

This principle has a rationale in the following argument. When the consent-giver is responsible for their own ignorance, then this ignorance is no impediment to the consent-receiver's ability to justify their behavior by appealing to the consent. The consent-giver would be unable to challenge this justification by complaining that they consented because they did not understand a fact that the consent-receiver had a duty to disclose. This complaint would fall flat since the failure of understanding can be attributed to the consent-giver in virtue of their responsibility for their own ignorance.

But what about cases in which the consent-giver is trying, but failing, to comprehend a fact?¹⁷ Across a wide population, this scenario is inevitable, as people vary in their comprehension skills. This scenario is made more likely when a treatment plan is composed of multiple procedures, and when consent-givers are under acute stress, e.g., when making significant medical decisions.

To answer this question, we should distinguish cases according to whether the consent-receiver is innocently unaware that the consent-giver has failed to understand the disclosure. If the consent-receiver is innocently unaware, and they have taken all reasonable steps to ensure this understanding, then they have discharged their facilitative duties. Consequently, the consent-giver would be unable to appeal to the Facilitative Duty Principle to claim that their consent was invalid. It is worth reflecting on why a consent-receiver might be innocently

appreciating the importance of the waiver exception, I am indebted to Gopal Sreenivasan's keynote lecture, "Waiver or Understanding? A Dilemma for Autonomists about Informed Consent," at the 2016 Society for Applied Philosophy Conference. Compare the *Hazardous Waste* case. Suppose Officials put up a sign that begins "Warning. . ." and proceeds to specify the risks of the waste. But suppose that Pedestrian only reads the first word, before deciding to take the shortcut anyway. Pedestrian fails to understand the risks. But Pedestrian cannot complain that this is Officials' fault.

17. These cases bring into play both the Facilitative Disclosure Condition and the separate necessary condition for valid consent that the consent-giver has a certain degree of competence.

unaware of the consent-giver's failure to understand. Sometimes, the consent-giver will have failed to advertise their lack of understanding. Normally, this failure would further absolve the consent-receiver from the charge that they had failed in their facilitative duties.

Trickier are cases in which the consent-receiver is aware that the consent-giver has tried, but failed, to understand the disclosure. Often, the consent-receiver will then have a duty to take further steps to continue with the disclosure. This does not mean that initially they were required to take these further steps. In this respect, the reasonable steps required by facilitative duties are context-specific. A relevant part of the context is the consent-receiver's evidence concerning how much the consent-giver has understood. For example, for a generic participant in a low-risk study, reasonable steps may simply amount to giving them an information sheet. But if a specific consent-giver has flagged that they have not understood the sheet, then reasonable steps may include discussing the sheet's content.

Even so, there is no guarantee that further efforts will be successful, and a consent-receiver is not obliged to continue the conversation indefinitely. But if this explanation has failed, then there is a question of whether the consent-receiver can rely on the consent. I will postpone a full answer to this question until the end of the next section, when we will have considered the grounds for an Understanding Condition for valid consent. But for now, I want to highlight the possibility that *some* types of misunderstanding can be benign, so long as the consent-giver can take responsibility for their lack of understanding. If it becomes clear to the consent-giver that they cannot grasp certain information, and yet they still wish to persist with a procedure, then they can assume the risks that accompany their ignorance of this information. This is captured by the following principle:

Assumed Risk Principle. There are some facts F, such that

- (i) a consent-receiver has a facilitative duty to disclose F; and
- (ii) if the consent-receiver has discharged this facilitative duty, the consent-giver has attempted but failed to understand this disclosure, but the consent-giver has assumed the risks associated with their failing to understand F, then their consent is not invalidated by their failing to understand F.

By assuming this risk, the consent-giver would absolve the consent-receiver from responsibility. I flag that the principle only says that this is possible for *some* facts, and it does not say that this is possible for *all* facts. We will return to this point when it becomes relevant to our subsequent discussion of which types of understanding are required for valid consent.

Someone may object to the Assumed Risk Principle on the following grounds. Normally, to assume a risk, we need some understanding of the risk. Consider the assumption of risks associated with sports. For example, contact sports can cause concussions that lead to brain damage. Participants typically assume these risks by understanding that the sport can lead to this injury: with the risk in view, they agree to expose themselves to it. But this cannot be how things go for consent to risks that are out of view. Consequently, there may seem to be a special problem with the assumption of risks pertaining to ignorance. Suppose that someone has first-order ignorance of a certain fact pertaining to an interaction to which they are giving consent. For example, a novice scuba diver might be unaware that deep sea diving increases the pressure to which a diver is subject. This first-order ignorance would seem to give rise to a higher-order ignorance of the risks associated with this fact. For example, if the diver is unaware that deep sea diving takes place under pressure, then it would seem impossible for them to be aware of the risks caused by this pressure. And if the consent-giver has this higher-order ignorance of the risks, then it may seem that they cannot assume these risks. So it might seem that consent-givers cannot assume risks associated with ignorance.

To respond to this objection, we should distinguish ways that we can be aware of features of an action to which we give consent. If someone struggles to understand the nature of an operation's potential side effects, then they can still have the existential knowledge that there are potentially bad outcomes. They can also have knowledge about how likely and how bad these outcomes are. For example, a consent-receiver can still communicate that an operation has a large chance of minor side effects, even without managing to get across what these side effects are. In this way, a consent-giver can at least have some knowledge of the existence and rough size of risks and benefits associated with various options, even if they do not fully grasp what these risks, benefits, and options are. This knowledge could be enough for them to take responsibility for their ignorance of the nature of the risks.

II. THE DESCRIPTION UNDERSTANDING CONDITION

In the last section, I argued that the Facilitative Duty Principle implies the Facilitative Disclosure Condition for valid consent, but the principle does not imply that consent-givers must understand the information covered by this condition. This leaves open the possibility that there still is an Understanding Condition that covers part or all of this information, as this condition might be grounded in another principle.

Indeed, everyone agrees that there is some sort of Understanding Condition for valid consent. The controversy breaks out over what this condition covers. Some scholars hold that validly consenting to an action requires only a rudimentary grasp of the action. That is, they posit a Description Understanding Condition. Other scholars hold that giving valid consent to an action also requires understanding this action's purpose, risks, and benefits, and similar information about any alternative options. That is, they also posit a Context Understanding Condition. I will use the term "Descriptionists" to refer to scholars who propose that there is a Description Understanding Condition but not a Context Understanding Condition. Descriptionists hold that a consent-giver must have a basic grasp of "both what it means to consent and a basic description of what they will undergo—injections, for example."¹⁸ They defend this view on the grounds that the "very act of consent arguably entails a bare minimum of comprehension."¹⁹ Without this bare minimum, the consent-giver would not understand "how the normative boundaries between [them] will be redrawn."²⁰

But why would the very act of consent to an action require understanding the rudimentary nature of the action? I see two answers that the Descriptionist can give. First, some people view consent as a normative power by means of which we give others permissions partly in virtue of willing that they have these permissions. On this view, by giving you consent to entering my study, I would be giving you permission to enter my study partly in virtue of willing that you have this permission. This view implies that consent would necessarily be given

18. Sreenivasan, "Does Informed Consent to Research Require Comprehension?" 2018.

19. *Ibid.* Similarly, Walker claims "someone cannot consent to a doctor or researcher doing X (and whatever they say should not be taken to have consented to X) unless they understand that what the doctor or researcher is going to do is X." Walker, "Informed Consent and the Requirement to Ensure Understanding," 54.

20. Millum and Bromwich, "Understanding, Communication, and Consent," 56. Millum and Bromwich specify the redrawing of moral boundaries in terms of rights, stating that the Description Understanding Condition requires "mutual understanding between him and the recipient of consent regarding how his rights claims against her are to be changed," 66.

intentionally: one consents to an action only if one is attempting to consent to this action. Plausibly, there is a general epistemic condition for intentional action: if one is unaware that one is performing an action, then one is not performing that action intentionally. Applying this general condition to the aforementioned view of consent as a normative power, it follows that intentionally giving someone a permission to perform an action requires understanding that one is giving them a permission to perform this action. In turn, this entails that one understands which action this is. I will call this the “Intentionality Rationale” for the Description Understanding Condition. Second, if someone consents, then there is a further question of which specific actions they are giving consent to. To answer this question, the Descriptionist might appeal to the consent-giver’s understanding of their act of consent-giving: the actions to which they give consent are the actions that they take themselves to be giving to consent to. On this view, without understanding the nature of someone’s action, the consent would not be appropriately *targeted* at the consent-receiver’s action. Although the consent-giver might be giving consent to *some* action, they are not be giving consent to *that* action if they cannot grasp what that action is.²¹ I will call this the “Targeting Rationale” for the Description Understanding Condition.

To flesh out the Description Understanding Condition, we need to say more about what understanding would be required. For a start, Descriptionists state that for someone to give valid consent, they must understand that they are giving consent. In addition, they say that someone must have a basic understanding of the action to which they give consent. What does this understanding consist in? One option is that this understanding consists in accurate beliefs about the token action that is performed.²² But this option is untenable. Consider:

21. As Millum and Bromwich put the idea, “where the requestor of consent proposes to the profferer of consent that she ϕ , to successfully consent he must understand that she is going to ϕ , not do something else. The person granting consent must understand what he is consenting to.”

Millum and Bromwich, “Understanding, Communication, and Consent,” 49. See also Millum and Bromwich, “Informed Consent.” For discussion of this idea in the context of deceiving people into sex, see Rollin Perkins, *Perkins on Criminal Law* (New York: Foundation Press, 1957), p. 856; Tom Dougherty, “Sex, Lies, and Consent,” *Ethics* 123 (2013): 717–44.

22. Beliefs play a key role in prominent discussions of the attitudes necessary for informed consent. For example, Walker adopts the following definition: “Whilst [understanding] is rarely defined in the literature, in this context it is generally taken that a patient or research participant understands information if they have acquired relevant knowledge. For example, a patient understands what is to be done to him if he knows what is to be done to him.”

Tube. Nurse explains to Patient that Physician will perform a biopsy that involves inserting a tube into Patient's esophagus and removing cells from their stomach lining. Patient replies, "You've made a mistake. The last time I had a tube inserted, this was an optical lead for taking photos of my stomach. But let's not waste time clearing up your confusion. I am happy to consent either to a biopsy or to the insertion of an optical lead." Nurse was correct: the proposed procedure was a biopsy.

Patient falsely believes that Physician will not perform the action of removing cells from their stomach lining. This is a false belief about a rudimentary feature of the procedure, and a feature that is relevant to how Patient is redrawing their normative boundaries with Physician. But this false belief does not preclude Patient from giving valid consent to a biopsy, since Patient has made explicit that they consent to either a biopsy or a scope. That is enough to ensure that Patient consents to the biopsy.

This shows that the requisite understanding is not a matter of the consent-giver's beliefs about the token action that the consent-receiver performs. So what is required? In the *Tube* case, what matters is that Patient can conceive of a possible action.²³ This does not require accurate predictions but instead requires the concepts and imaginative faculties necessary for mentally representing the possibility. Once Patient has conceived of this action, they are able to communicate that they consent to an action of this type. That makes it the case that Patient consents to the biopsy. These features are also present when a consent-giver trusts a disclosure:

Trust. Nurse discloses Physician will perform a biopsy. Patient trusts Physician, and accepts that the procedure will be a biopsy. Patient communicates that they consent to the biopsy.

Since knowledge entails belief, to require knowledge is to require belief. Walker, "Informed Consent," 52. Similarly others hold that for someone's consent to be suitably informed about the properties of an action, they must have a "true belief" or at least a "justified belief" that the action has these properties. See, respectively, Beauchamp, "Autonomy and Consent," 68-69, and Faden and Beauchamp, *A History and Theory of Informed Consent*, p. 251.

23. Similarly, for Patient to understand that this action has certain risks and benefits, and to understand that there are alternatives to it, the Patient would need to be able to conceive of these risks, benefits, and alternatives.

In the *Trust* case, Patient is also contemplating a possible action, and consenting to it. It happens that Patient also *believes* that Physician will perform this action. But this belief is incidental to the fact that Patient validly consents to the action. What grounds the fact that Patient validly consents to that action is that they are successfully conceiving of the relevant type of action.

While the Description Understanding Condition has been universally accepted, it faces a novel objection.²⁴ Someone can seek another person's consent to an action, while referring to this action using a phrase that does not specify the action's rudimentary nature. For example, suppose Taylor says to Cameron, "I'd like to surprise you by doing something to you unannounced. May I?" Cameron agrees to this. This agreement seems an "act of consent": Cameron seems to be intentionally consenting, and Cameron seems to be consenting to certain actions that would constitute the surprise. Yet it also seems that Cameron has virtually no grasp of the nature of the act. If so, then the very act of consent does not require understanding a rudimentary description of the relevant action: without this understanding, Cameron *intentionally* consents to an action of Taylor's, and their consent is *targeted* at this action. Or at least, if the act of consent only requires understanding the action as "a surprise," then the Description Understanding Condition becomes vacuous.

Some Descriptionists may actually welcome this objection, as they often aim to play down the role of an Understanding Condition with respect to informed consent. Still, there is a way for a Descriptionist to reply to this objection. In realistic cases, people implicitly understand the types of action that a surprise might involve. Their understanding will cover a broad class of actions, and they will not know which of these will be performed. Plausibly, if Cameron agrees to a surprise, then they are consenting to any member of this class of actions. To support this view, imagine that the surprise was a punch. While Cameron would no doubt concede that the punch was a surprise, it is likely that they will reasonably complain that this is not what they agreed to, on the grounds that this was not what they had in mind by a "surprise." This would be explained by the view that Cameron's implicit understanding determines what they give consent to. But if this implicit understanding requires a rudimentary grasp of the types of action that would constitute the permitted surprises, and the actions to which Cameron consents are determined by this implicit

24. Thanks to an anonymous reviewer for this objection and the case of the surprise.

understanding, then the surprise case does not pose a problem for the Descriptionist.

In turn, the objection might be pressed by adding the stipulation that the surprise is a novel experience. Perhaps, the surprise is that Taylor gently strokes Cameron's forearm tendon in a way that causes their fingers to involuntarily contract. Assume that Cameron has never had this experience and lacked even an implicit understanding of the nature of this action: Cameron had no idea that such an action is possible. Nonetheless, there is some temptation to think that by consenting to the surprise, Cameron consented to the action. That said, this temptation could be resisted. The Descriptionist could dig in that it is impossible to consent to a novel experience, on the grounds that the novelty precludes someone from conceiving of the moral permission that they are granting. The Descriptionist could allow that the action is permissible on the grounds that the person wants to undergo a new experience. Normally, it is not good enough to lay hands on someone just because this is something that they want: one must also seek their consent. But the Descriptionist could insist that a special case is when consent to the action is impossible. For this case, they can say that it is enough to be guided by another person's desires. Accordingly, the Descriptionist could argue that by agreeing to the surprise, Cameron would be resolving that they want to undergo a new experience. Thus, while the Descriptionist would be denying that it is possible to consent to a new action, the Descriptionist could still accommodate the claim that Cameron can make a new action permissible by agreeing to a surprise.

My inclination is to think that the Descriptionist's reply to the objection holds up. But the debate between the Descriptionist and the objector strikes me as delicately balanced, and I do not see any straightforward way to resolve it. Consequently, I am tentative in endorsing the Description Understanding Condition, and I conclude that either the condition is surprisingly vacuous or the case for the condition is weaker than it has usually been thought.

III. THE CONTEXT UNDERSTANDING CONDITION

Having considered the case for a Description Understanding Condition, let us turn to the vexed question of whether there is a Context Understanding Condition. This question is independent of the question of whether there is a Description Understanding Condition. By definition, a Description Understanding Condition and a Context Understanding

Condition cover different bodies of information. Moreover, there are principled ways to endorse one condition while denying the other. For example, someone might hold that to give valid consent to a surprise, a consent-giver need not grasp the rudimentary nature of the action that constitutes the surprise but does need to be aware of any risks of harm imposed by the surprise.

To determine whether there is a Context Understanding Condition, let us return to the question of why consent and choices are morally significant. In Section 1, we saw that a consent-receiver's facilitative duties imply that they must neither incapacitate nor coerce a consent-giver. This is not the only way that incapacitation and coercion can invalidate consent. Independently of what the consent-receiver can do to aid the consent-giver, the consent-giver must have a certain degree of capacity and freedom. If a patient is a child or has a serious cognitive disability, then they may lack the capacity for giving valid consent to a procedure, even though the consent-receiver can do nothing to improve their capacity. Similarly, if a consent-giver is subject to coercion from a third party, then this coercion can invalidate their consent, even if the consent-receiver is unable to prevent the coercion.²⁵ Putting these results together, valid consent requires a

25. Third-party duress brings up several important issues that are orthogonal to our topic of what a consent-giver must understand in order to give valid consent. There are clear cases in which consent is invalidated by third-party coercion. If a physician watches a patient sign a consent form while a third party holds a gun to the patient's head, then it is clear that the patient's consent is invalid. There are unclear cases in which the consent-receiver is ignorant of the coercion. For example, the third party could have issued their threat before the patient enters the hospital. To analyze this case, we need to engage with the difficult question of whether a consent-receiver's evidence can determine whether they wrong someone by acting without valid consent. In an unpublished manuscript, "Coerced Consent with an Unknown Future," I engage with these epistemic issues, arguing that someone's consent can be invalidated by third-party duress, even when the consent-receiver is unaware of the duress. For helpful discussion, I am indebted to an anonymous reviewer, who drew an analogy with excuses in the criminal law: ordinarily, if an agent makes an unavoidable mistake of fact, and unintentionally harms someone, then the agent has an excuse (in criminal law terms), but nonetheless still commits a wrong against the person whom they harm. For discussion of third-party duress, see Franklin Miller and Alan Wertheimer, "Preface to the Theory of Transactions: Beyond Valid Consent," in *The Ethics of Consent*, eds. Franklin Miller and Alan Wertheimer (Oxford: Oxford University Press, 2010), pp. 79-105; Joseph Millum, "Consent Under Pressure: The Puzzle of Third-Party Coercion," *Ethical Theory and Moral Practice* 17 (2014): 113-27; Tom Dougherty, "Why Does Duress Undermine Consent?" *Noûs*, forthcoming; Mollie Gerver, "Valid Consent and Third-Party Coercion," unpublished manuscript; Hallie Liberto, "Coercion, Consent, and Moral Debilitation," unpublished manuscript.

minimal threshold of capacity and freedom from duress, and this threshold is not derived from the consent-receiver's duty to put the consent-giver in a better position to make their choice. This fact about choice is not limited to consent. For example, someone must reach a threshold of freedom and capacity to abandon property or sign a contract.

Consequently, the Facilitative Duty Principle must be supplemented with the following principle:

Absolute Position Principle. If X knows that Y's choice or behavior is explained by the fact that Y is not in a sufficiently favorable position to make this choice or engage in this behavior, then X cannot appeal to this choice or behavior in order to justify interfering with Y's personal domain.

I call this the "Absolute Position Principle" since the principle focuses on the position that Y is in, and the principle concerns a threshold that is not relative to what X can do to affect Y's position. In this respect, it differs from the Facilitative Duty Principle, which focuses on what X can do to *improve* Y's position. For the purposes of interpreting the Absolute Position Principle, what counts as a sufficiently favorable position would depend on the particular choice or behavior. For example, the degree of sobriety for getting tattoos would differ from that for riding roller coasters.

Since the Absolute Position Principle is distinct from the Facilitative Duty Principle, it needs a different rationale. The most promising rationale emerges from considering why consent is needed in the first place. Consent enters the scene because of two aspects of our moral lives. First, we need protection from the ways that others might treat us, and this protection comes in the form of a default perimeter of rights against their interfering with our persons or property. Second, we need to be able to relax this protection in order to interact with others in valuable ways. Since valid consent is the means by which we toggle this protection on or off, it must strike a balance between these twin goals of protecting us and enabling us to engage in valuable interactions. Set the bar too low for what counts as valid consent, and we have insufficient protection. Set the bar too high, and we miss out on valuable interactions with others. The right balance involves determining what counts as a position for giving consent that, from an absolute point of view, is a sufficiently good position for

making this choice. To require this is to endorse the Absolute Position Principle.

Thus, I take the Absolute Position Principle to enjoy two sorts of support. First, it has abductive support from its ability to explain how, e.g., third-party duress and irremediable incapacitation can invalidate consent. Second, it has a plausible rationale that focuses on our need for protection. The Absolute Position Principle has implications for how informed a consent-giver must be in order to give valid consent. Whether a consent-giver is in a sufficiently good position will depend on their knowledge. To be in a sufficiently good position for making a choice, they need to know the action's possible consequences and know about the alternative courses of action. Therefore, the Absolute Position Principle gives rise to a Context Understanding Condition that differs from the Description Understanding Condition that would be grounded in the Intentionality Rationale or the Targeting Rationale.

We can find further support for the Context Understanding Condition, grounded in the Absolute Position Principle, by considering cases like the following:

No Shared Language. Mortar fire has partially destroyed a shelter and Refugee is trapped. Medic has three options. First, Medic can rescue Refugee from the rubble, but this will impose a 50% risk of paralysis from spinal damage. Second, Medic can wait for Engineers to arrive, who could rescue Refugee safely. But if Medic waits, then there is a 10% chance that meanwhile the shelter collapses, killing Refugee. Third, Medic could buttress the remaining structure with a beam. But this would increase the load on Refugee's foot, crushing it. Because Refugee and Medic do not share a language, Medic can communicate neither the risk of paralysis nor the nature, risks, and benefits of the other options. But through gestures, Medic does communicate the option of moving Refugee. With a thumbs-up gesture, Refugee communicates their consent to Medic moving them.

Given the communicative limitations, Medic fully discharges their facilitative duties: given what Medic is able to do, Medic takes all reasonable steps to help Refugee decide how to proceed. However, this attempt fails to make Refugee understand the alternative options and their risks.

Because Refugee lacks this understanding, Medic's action is one to which the requirement to receive consent does not apply in its usual way.²⁶ There are familiar analogies. For example, there is John Stuart Mill's case of someone who is about to step onto a bridge, unaware that it will collapse.²⁷ Suppose that you can restrain the bridge-walker, but there is no time for you to seek their consent first. Even without their consent, you would be justified in restraining them. Similarly, consider a variant of the *No Shared Language* case in which Refugee is unconscious. In these analogous cases, the agents cannot receive valid consent in time for acting upon it. Given the agents cannot receive valid consent, they cannot guide their behavior by this consent. However, there are significant costs to inaction, and so that option cannot win by default. Instead, the agents must act in the other parties' best interests.²⁸ In Mill's case, it is in the bridge-walker's best interests that you restrain them, and so this is what you must do, even though you lack their valid consent for this. The central elements of this analysis also apply to the original version of the *No Shared Language* case. In that case, there is no way for Refugee to acquire relevant information. The moral significance of their ignorance is nuanced. On the one hand, Refugee's ignorance may not impede their dissent from having a moral effect. For example, a thumbs-down may make it harder for Medic to justify moving them. On the other hand, Refugee's ignorance does mean that they are insufficiently informed to give valid consent to being moved: the thumbs-up is not enough to justify Medic in moving them. Putting these points together, dissent can be morally efficacious under conditions that are less demanding than those under which consent is morally efficacious.²⁹ Because the conditions for Refugee's consent being efficacious are not met, even though Refugee can give a thumbs-up

26. Thanks to an anonymous reviewer for this way of characterizing the decision, as well as for suggesting the two analogies that I go on to discuss.

27. John Stuart Mill, *On Liberty*, Cambridge University Press Edition, ed. Stefan Collini (New York: Cambridge University Press, 2013), p. 102.

28. Plausibly, these interests would not be limited to health but would concern personal preferences and values.

29. This position has plausible implications for other cases. Suppose that someone is so intoxicated that they cannot validly consent to consuming anti-nausea medication. On welfare grounds, medical staff might be permitted to give them the medication if they request it. But it does not follow that medical staff would be permitted to force feed the patient the medication if they refuse it. The degree of intoxication that renders dissent morally inefficacious is greater than the degree of intoxication that renders consent morally inefficacious.

to the option of Medic moving them, it remains impossible for Medic to receive *valid consent* from Refugee. In the respect that valid consent is impossible, the case is similar to the version of the case in which Refugee is unconscious and Mill's case of the bridge-walker. Given valid consent is impossible, Medic's behavior must be guided by what is in Refugee's best interests.

For our purposes, what matters is *why* Medic could not justify moving Refugee by appealing to Refugee's communicating consent with body language. For this consent to be morally valid, Refugee would need to understand that moving them involves the risk of paralysis, and they would need to understand that other courses of action are available. However, Medic is unable to disclose these facts, and so neither the Facilitative Disclosure Condition, nor the Facilitative Duty Principle, would apply to these facts. By definition, the Description Understanding Condition concerns only the rudimentary nature of Medic's action of moving Refugee (which Refugee anyway grasps), and so the Description Understanding Condition does not explain why Refugee must understand these facts about the risks and alternatives. Instead, to explain why Refugee must understand these facts in order to validly consent, we need to posit a Context Understanding Condition grounded in the Absolute Position Principle.

IV. COMPARING THE INFORMATION COVERED BY THESE CONDITIONS

In Section I, I argued that there is a Facilitative Disclosure Condition grounded in the Facilitative Duty Principle. In Section II, we considered an inconclusive case for a Description Understanding Condition. In Section III, I argued that there is a Context Understanding Condition, grounded in the Absolute Position Principle. How do these conditions relate to each other? Do they cover the same bodies of information?³⁰ Does one cover a body of information that is narrower than the other? We must answer these questions to address our central topic of the extent to which a consent-giver must understand what a consent-receiver has a duty to disclose.

It is easy to say how the coverage of the Description Understanding Condition compares to the coverage of the other conditions. On the one

30. By saying that an Understanding Condition "covers" a fact, I mean that the condition implies that a consent-giver must understand this fact in order to give valid consent; similarly, a Disclosure Condition "covers" a fact if the condition implies that the consent-receiver must disclose this fact to the consent-giver in order for the consent to be valid.

hand, the Description Understanding Condition covers different information from that covered by the Context Understanding Condition. On the other hand, the information that would be covered by a Description Understanding Condition is necessarily less than the information covered by the Facilitative Disclosure Condition. A consent-receiver always has a facilitative duty to disclose the rudimentary nature of an action, in order to put a consent-giver in a sufficiently good position to decide whether to consent.³¹ But in addition this facilitative duty would extend to disclosing other information, e.g., concerning the risks of the action.

This brings us to how the coverage of the Facilitative Disclosure Condition compares to the coverage of the Context Understanding Condition. One possibility is that the Facilitative Disclosure Condition is at least as broad as the Context Understanding Condition in the sense that the following conditional holds:

For any fact F, if the Context Understanding Condition covers fact F, then the Facilitative Disclosure Condition covers F.

But we already know that this conditional is not true from examining the *No Shared Language* case: Refugee needs to understand the risks of being moved from the rubble in order to validly consent to being moved. Therefore, these risks are covered by the Context Understanding Condition. However, Medic has no duty to disclose these risks, given the language barrier makes this disclosure impossible. Therefore, these risks are not covered by the Facilitative Disclosure Condition. Therefore, the facts about these risks are counterexamples to the conditional claim that if the Context Understanding Condition covers a fact, then the Facilitative Disclosure Condition also covers this fact.

The converse possibility is that the Context Understanding Condition is at least as broad as the Facilitative Disclosure Condition in the sense that the following conditional holds:

31. This point would not be undermined by the case of consent to a surprise. If someone consents to a surprise, then they would be waiving their right to be informed of the rudimentary nature of the action and releasing the consent-receiver from their facilitative duty to inform them of its nature.

For any fact F, if the Facilitative Disclosure Condition covers fact F, then the Context Understanding Condition covers F.

I deny this conditional for the following reasons. First, the Facilitative Disclosure Condition plausibly covers the rudimentary nature of the relevant action, but by definition the Context Understanding Condition does not cover this information. Second, the Facilitative Disclosure Condition also covers other information that is not covered by the Context Understanding Condition. By consulting our intuitions about cases in which disclosure is impossible, such as the *No Shared Language* case, we can work out a body of information that is covered by the Context Understanding Condition. This body of information is limited to central and significant pieces of information, such as the existence of major risks and benefits, along with alternative options. But this body of information may not exhaust everything that the consent-giver would find helpful in making their decision. In the case of medical therapy, this additional information might include the specific nature of minor side effects for medical treatment. In the case of research, it may include the purposes of a study. Consider any such additional fact, F_i , that is not covered by the Context Understanding Condition. Since this fact would be helpful for the consent-giver when making their decision, there is a *pro tanto* case in favor of the consent-receiver having a facilitative duty to disclose F_i . Suppose, as is surely possible, that there is no countervailing reason not to disclose F_i . Since there is no countervailing reason, the *pro tanto* case wins the day, and the consent-receiver has an all things considered facilitative duty to disclose F_i . Therefore, the Facilitative Duty Condition covers F_i . But by assumption, F_i is not covered by the Context Understanding Condition. Therefore, F_i is covered by the Facilitative Duty Condition and F_i is not covered by the Context Understanding Condition. Therefore, we must reject the conditional claim that if the Facilitative Disclosure Condition covers a fact, then the Context Understanding Condition also covers that fact.

We can use this conclusion to return to an issue that we left hanging at the end of Section I. We had considered whether a consent-receiver may rely on consent when they have carried out all reasonable steps to disclose information, but the consent-receiver is aware that these steps have failed to achieve understanding. We noted that the Assumed Risk Principle entails that the consent-giver could take responsibility for

their failure to understand *some* facts. Now we can see why it is implausible to claim that the consent-giver can take responsibility for their failure to understand *any* fact. This is because some facts may be covered by the Context Understanding Condition. For example, in the *No Shared Language* case, Refugee cannot assume responsibility for their ignorance of the existence and size of risks and benefits of moving them from the rubble, or for their ignorance of alternative options.³² But for facts that are not covered by the Context Understanding Condition, it is plausible that the consent-giver can voluntarily assume responsibility for being ignorant of these facts.

So we have seen that the coverage of the Facilitative Disclosure Condition does not subsume the coverage of the Context Understanding Condition. And we have seen that conversely the coverage of the Context Understanding Condition does not subsume the coverage of the Facilitative Disclosure Condition. Now let us ask: how does the information covered by these conditions relate to the information covered by a consent-receiver's duties of disclosure? For familiar reasons, the Context Understanding Condition covers information that is not covered by a consent-receiver's duties of disclosure. In the *No Shared Language* case, in order for Refugee to give valid consent, they must understand the consequences of the various options. However, Medic cannot disclose this information, and so Medic has no duty to disclose this information. On the other hand, it is easy to see that all the information covered by the Facilitative Disclosure Condition is also covered by the consent-receiver's duties of disclosure. This is because if information is covered by the Facilitative Disclosure Condition, then the consent-receiver has a facilitative duty to disclose this information.

This leaves the question of whether duties of disclosure cover information that is not covered by either the Context Understanding Condition or the Facilitative Disclosure Condition. The answer is that a consent-receiver's duties of disclosure sometimes cover information that is not covered by either the Facilitative Disclosure Condition or the Context Understanding Condition. This is because independently of aiding the consent-giver, there are other reasons why consent-receivers have duties

32. As we noted in Section I, this is consistent with holding that Refugee can assume responsibility for knowledge of the nature of these risks, so long as they are aware of their rough magnitude.

of disclosure. Disclosure makes biomedical practice transparent, in ways that facilitate holding professionals accountable for their behavior. This helps constrain the asymmetry of power that physicians and researchers have over patients and research participants, respectively,³³ thereby providing the latter with protection from malpractice.³⁴ Furthermore, transparency helps build public trust in biomedical practice.³⁵ These are all good reasons why physicians and researchers have duties to disclose information to patients and research subjects. But these reasons are not connected to the goal of helping patients and research participants make informed choices.

When a duty of disclosure is grounded in the value of transparency, and the duty is not grounded in the consent-giver's interest in making an informed decision about whether to consent, the failure to discharge

33. Bromwich and Millum claim that the need to prevent the consent-receiver from illegitimately controlling the consent-giver is the only rationale for a Disclosure Condition for valid consent. Given that I hold that the Facilitative Duty Principle provides a separate rationale, I disagree. I also think that Bromwich and Millum overemphasize the goal of preventing illegitimate control as a rationale for disclosure. Suppose that a researcher does not provide participation information sheets because they believe that research subjects never read them. The researcher fails in their duty to disclose this information, but they are not "controlling" the subjects' behavior or, as Bromwich and Millum claim, committing "fraud" (which would imply deception). By analogy, if a professor lazily creates a sloppy course description that does not properly describe their course, then the students may reasonably complain that the professor's negligence has improperly influenced their choices. But the professor is neither "controlling" their behavior nor committing "fraud." Bromwich and Millum, "Disclosure and Consent," pp. 200–05. See also Danielle Bromwich and Joseph Millum, "Lies, Control and Consent: A Response to Dougherty and Manson," *Ethics* 128 (2018): 455–57.

34. The protection of research subjects from abuse has been a central motivation for the development of informed consent practices since the Nuremberg trials. See Faden and Beauchamp, *A History and Theory of Informed Consent*, pp. 153–57; Manson and O'Neill, *Rethinking Informed Consent*, pp. 2–4. Plausibly, justice itself requires that people stand in relations of social equality, and social equality requires minimizing the unequal power that individuals enjoy as the result of occupying institutional positions. See John Rawls, *A Theory of Justice*, Revised Edition (Cambridge, Mass.: Belknap Press, 1999), pp. 194–200; Elizabeth Anderson, "What is the Point of Equality?" *Ethics* 109 (1998): 287–337; Niko Kolodny, "Rule Over None II: Social Equality and the Justification of Democracy," *Philosophy & Public Affairs* 42 (2014): 287–336.

35. As Manson and O'Neill note, "Even if the patient does not understand what is disclosed, or understands it poorly, he may (reasonably) infer that the clinician is trustworthy simply because 'she is not trying to hide anything'. . . [In addition] the systematic use of informed consent procedures in medical and research practice can provide assurance to third parties that action that would otherwise be seriously wrong is routinely prevented." Manson and O'Neill, *Rethinking Informed Consent*, p. 32.

this duty does not invalidate consent. To illustrate, consider a non-medical case:

Concealed Donation. Candidate is running for office. Campaign finance rules imply that they must publicly disclose donations to their campaign. Candidate does not disclose a donation from the Illuminati Foundation. Neighbor invites Candidate over for dinner, but would have been unwilling to do so if Neighbor knew that Candidate took money from the Illuminati Foundation.

In *Concealed Donation*, Candidate has committed a wrong by failing to disclose a source of campaign funding. This wrong causally explains why Neighbor consented to Candidate's presence in their home. But intuitively Candidate is not a victim of trespass any more than they would be in the following case:

Concealed Membership. Acquaintance is a member of the Illuminati Foundation. Neighbor invites Acquaintance over for dinner, but would have been unwilling to do so if Neighbor knew that Acquaintance was a member of the Illuminati Foundation.

Just as Acquaintance would have Neighbor's valid consent to be in their home in *Concealed Membership*, Candidate would have Neighbor's valid consent in *Concealed Donation*. Nevertheless, Candidate has a duty to disclose donations to their campaign. So why does Candidate's failure to discharge this duty not invalidate Neighbor's consent? I propose the following answer: Candidate's duty of disclosure is grounded in the public's interest in knowing who funds their politicians, and this is unrelated to Neighbor's interest in determining whom they invite into their home.

Things are different when a duty of disclosure is grounded in a consent-giver's interest in having information that is relevant to their decision to consent. For example, a research participant might have strong views about complicity, and not wish to have any connection with tobacco companies.³⁶ To put this participant in a good position to give consent, a researcher could be required to disclose that the study is funded by a

36. Thanks to an anonymous reviewer for this example and for suggesting exploring the connection with research funding.

tobacco company.³⁷ If the researcher failed to disclose this, then the Facilitative Disclosure Condition could imply that the participant's consent is invalid.³⁸ The possibility of invalidity arises because the disclosure duty is grounded in the consent-giver's interest in making their choices well.

From this, I draw the following conclusions. In order for a consent-giver to complain that a breach of a duty of disclosure renders their consent invalid, this duty must be at least partly grounded in their interest in making an informed decision about whether to consent. But if the consent-giver is entitled to complain about the consent-receiver relying on their consent only when this consent was the result of the consent-receiver failing to discharge their facilitative duties, the result of the consent-giver failing to grasp the rudimentary nature of the action in question, or the result of the consent-giver being in an inadequately good position for giving consent, then the Facilitative Disclosure Condition, the Description Understanding Condition, and the Context Understanding Condition exhaust the informational necessary conditions for valid consent. Consequently, we have completed our investigation into the necessary conditions for valid consent.

Our final remaining task is to consider what our discussion in this section implies for the fact that consent-givers regularly fail to understand information that is disclosed to them. We saw that consent-receivers' duties of disclosure cover more information than is covered by the Understanding Conditions for valid consent. For example, there is a public interest in biomedical research being transparent, and this can explain why, e.g., researchers must declare to research participants the funding sources of research and any conflicts of interest. But the Understanding Conditions do not imply that a consent-giver must understand this information in

37. This would depend on whether the duties of disclosure are determined by the perspective of the actual researcher, the perspective of a reasonable researcher, the perspective of the actual research participant, the perspective of a generic research participant, or a different perspective. These perspectives have different implications concerning the information that is sufficiently relevant to the consent-giver's decision whether to consent. The task of choosing between these perspectives goes beyond this scope of the article.

38. While I find it plausible that the consent would be invalidated, establishing this result would require a detour into the ethics of tobacco-funded studies. What matters for our purposes is the conditional claim that if the Facilitative Disclosure Condition implies that the consent is invalidated by ignorance of this information, then this would be explained by the Facilitative Duty Principle, which concerns the consent-giver's interest in making their choice well.

order to give valid consent. Consequently, when a consent-giver fails to understand information that the consent-receiver has a duty to disclose, this failure does not necessarily entail that the consent is invalid. If this information is covered only by the consent-receiver's duties of disclosure, and not by the Understanding Conditions, then the consent-giver's failure to understand this information does not invalidate their consent.

V. CONCLUSION

Let me briefly summarize our results. There are multiple grounds for duties of disclosure. One ground is that the consent-receiver has a duty to disclose information for transparency that serves goals that are independent of helping the consent-giver choose well. This ground does not yield a necessary condition for valid consent. But a necessary condition does follow from the separate ground that the consent-receiver has facilitative duties to put the consent-giver in a better position to decide whether to consent. We can state this necessary condition and its rationale as follows:

There is a Facilitative Disclosure Condition grounded in the Facilitative Duty Principle. Roughly, consent is valid only if it does not result from the consent-receiver breaching a facilitative duty to disclose information to the consent-giver for the sake of putting them in a better position to decide whether to consent.

This is not the only necessary condition for valid consent with respect to information. In addition, there is the following necessary condition concerning what the consent-giver must understand:

There is a Context Understanding Condition grounded in the Absolute Position Principle. Roughly, someone validly consents only if they are in a sufficiently good position for deciding whether to consent, and this requires that they have understood certain information. This includes understanding the risks and benefits of the action, as well as the alternative options.

This Context Understanding Condition differs from the Description Understanding Condition that we would endorse if we accepted the following claim:

There is a Description Understanding Condition grounded in the Intentionality Principle and/or the Targeting Principle. Roughly, someone validly consents to an action only if they understand the rudimentary nature of this action.

While a Description Understanding Condition has been universally endorsed, we noted that it faces a novel objection concerning cases in which someone agrees to another person performing a new type of action. We also noted that there is a plausible, but not decisive, reply to this objection. Since this dispute is delicately balanced, I endorse the Description Understanding Condition only tentatively. Finally, these conditions cover different bodies of information. Both the Facilitative Disclosure Condition and the Context Understanding Condition cover information (e.g., about risks) that is not covered by the Description Understanding Condition. But the information covered by the Facilitative Disclosure Condition is not a subset of the information covered by the Context Understanding Condition, and vice versa.

I will end by returning to the question of how concerned we should be that patients and research subjects regularly fail to understand information that is disclosed to them. At the outset, we noted that we get a straightforward answer to this question from the positions that have been defended to date. According to the position that valid consent requires a robust degree of understanding for the sake of autonomous agency,³⁹ and the position that valid consent requires successful communication,⁴⁰ invalid consent is common in contemporary medical practice. Meanwhile, according to the position that valid consent requires only disclosure and understanding the rudimentary nature of the action to which consent is given, we have no reason to be concerned in this respect.⁴¹ By contrast, according to the position that I have defended, there is no easy answer to this question. We cannot assume that these consent-givers lack

39. Faden and Beauchamp, *A History and Theory of Informed Consent*, pp. 248-55, 298-330; Levine, *Ethics and Regulation of Clinical Research*; Beauchamp and Childress, *Principles of Biomedical Ethics*; Beauchamp, "Autonomy and Consent," pp. 57-61, 65-69.

40. Manson and O'Neill, *Rethinking Informed Consent*, pp. 84-90.

41. Sreenivasan, "Does Informed Consent to Research Require Comprehension?"; Millum and Bromwich, "Understanding, Communication, and Consent"; Bromwich and Millum, "Disclosure and Consent to Medical Research Participation"; Walker, "Informed Consent and the Requirement to Ensure Understanding"; Wandler "Must Research Participants Understand Randomization?"

understanding that is necessary for their consent to be valid. It could be that they are failing to understand information that the consent-receiver has a duty to disclose in light of the value of transparency or the Facilitative Duty Principle, but this information is not covered by either the Description Understanding Condition or the Context Understanding Condition. If that scenario obtains, then we have no reason to consider their consent invalid. But equally we cannot optimistically assume that their consent is valid simply because they understand the rudimentary nature of the research or therapy. Even if there is a Description Understanding Condition that is met, the Context Understanding Condition may not be met. Since neither blanket pessimism nor blanket optimism is warranted, we need to look more closely both at the types of information that these consent-givers fail to understand, and the specific contours of each of the Disclosure and Understanding Conditions. Since limning these contours would require investigating the specific interests that are relevant to the particular type of consent that is being sought, this task goes beyond what I have hoped to achieve in this article. Still, our inquiry has unearthed a way to approach this future research. To determine the scope of the Facilitative Disclosure Condition, we should consider what, in light of everyone's interests, can reasonably be demanded of consent-receivers to help consent-givers make their choices. And to determine the scope of the Context Understanding Condition, we should consider what a consent-giver must understand in order for their consent to be valid in cases where communication is impossible, such as the *No Shared Language* case.