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Book review

Consent in the law

By Deryck Beyleveld and Roger Brownsword, Oxford: Hart Publishing, 2007. 406pp.
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Reviewed by William Lucy
Professor of Law, University of Manchester

Deryck Beyleveld and Roger Brownsword's new book provides an ambitious and thorough account of the role of consent in the law and, also, as a possible basis for law's authority. Given only a slight familiarity with the previous work of its authors, the volume's thoroughness and ambition will come as no surprise. The volume does, however, contain some surprises, two of which are particularly worth noting. One surprise, at least to those of us with our noses to the grindstone of a narrow area of legal doctrine, is the near ubiquity of consent in various areas of legal doctrine. The book serves a useful role just by reminding us of this. A second surprise is the complexity of the notion of consent itself, for Beyleveld and Brownsword are intent on determining the normative power of the notion, including the conditions under which that power can be realised, who can realise it and why it should be thought normatively significant. This, too, is a valuable contribution to our thinking about a fundamental feature of the juristic landscape.

Most of the book – three of the four parts – is concerned with delineating the notion of consent and its role in law. Part one outlines what Beyleveld and Brownsword regard as the best available normative foundation for the notion of consent and the principal functions consent has in the law. Part two is mainly concerned with questions about the adequacy of consent and tackles, inter alia, the issues of who can give consent and the circumstances in which it is valid. Part three examines the issue of the necessity and sufficiency of consent, particularly in relation to private and public wrongs. Part four addresses the question of whether or not consent can ever be considered the basis of legal and political authority. Each part is almost unfailingly interesting, informative and rich in insight. And this judgment can, of course, stand perfectly consistently with another, namely, that the central idea of the book is very familiar.

That idea is found in part one and consists of Alan Gewirth's argument providing a dialectically necessary foundation for morality.[1] Beyleveld and Brownsword have invoked this argument before and it shows, but not in a bad way.[2] The statement of the argument in chapter 2 is as crisp and clear (save for a few sentences that rival Henry James or David Foster Wallace for length and obscurity) as one could hope. The lodestar of the argument is the principle of generic consistency (PGC) 'which requires all "agents" to act in accordance with the "rights" of all agents to the "generic conditions of agency"' (p. 39).[3] Each term in quotes is unpacked by Beyleveld and Brownsword. 'Agents' are beings capable of agency and this class is both more and less inclusive than might be assumed: some but not necessarily all human beings are members of the class but so, too, are some non-human beings (pp. 34–35 and 98–111). One reason for this, say Beyleveld and Brownsword, is that there are compelling rational grounds for agents to adopt a precautionary principle conferring the benefit

1 The starting point is Gewirth (1978).

2 Two book-length examples are Beyleveld and Brownsword (1986, 2001).

3 All quotations from *Consent in the Law* include original emphases and exclude all original footnotes.

of the PGC upon ostensible agents, just in case they actually are genuine agents (pp. 52–55). This principle is necessary in part because there is no sure-fire algorithmic means of determining whether other beings are agents. It is also in part the result of a valuation that the harm done by denying the benefit of the PGC to an agent is far more worrisome than the harm done by conferring that benefit upon a non-agent.

What, then, is 'it' that the PCG confers or protects? It grants to all agents rights, understood as protected spheres of choice (pp. 85–88), to the generic conditions of agency. These conditions 'consist of what vulnerable agents need, *irrespective of what their purposes might be*, in order to be able to act at all or in order to be able to act with general chances of success. Needs in the former category are "basic" generic needs [or goods]... [while] [n]eeds in the latter category are divided into non-subtractive and additive generic needs [or goods]' (p. 39). Interference with basic generic goods either makes action impossible or diminishes an agent's chance of being able to act, while interference with or diminution of non-subtractive goods undermines an agent's capacity to act. Interference 'with an additive generic good will affect the agent's capacity to increase its capacity to act' (p. 40).

A sceptical response to this part of the argument about the PGC is: so what? Why does it matter that the PGC guarantees all agents the generic conditions of agency? Besides being interesting in and of itself, the PGC is significant because of the structure of the argument that supports it. The argument is dialectically necessary, which means in part that it is an argument that anyone who regards themselves as an agent must accept on pain of contradiction. If I regard myself as an agent, then I must accept that I need the generic conditions of agency. Must I also accept that other agents need these conditions and should be guaranteed them? Yes, say Gewirth and Beyleveld and Brownsword. This answer rests on this argument: 'I must hold that I have the generic rights for the self-sufficient reason that I am an agent. But it follows purely logically from "the fact that I am an agent is by itself sufficient for me to have the generic rights" that "the fact that X is an agent is by itself sufficient for X to have the generic rights." Consequently, I contradict that I am an agent if I do not consider that all agents have the generic rights. Since the reasoning I must accept in relation to myself all other agents must accept in relation to themselves, it follows that all agents contradict that they are agents if they do not accept that all agents have the generic rights, which is to say that the *PGC* is dialectically necessary' (p. 43).[4] Its rational power is one reason why Gewirth's argument matters and what makes it salient in contemporary moral philosophy.

Scepticism about this argument need not, however, take the form of doubts about its rational power. Faced with the dialectically necessary argument supporting the PGC, and the non-dialectically necessary alternatives, a sceptic need not succumb to self-contradiction. Rather, they could simply ask this question: what on earth has the PGC got to do with law and, in particular, the role of consent in law? We need not suppose an all-pervasive scepticism about morality and moral philosophy to envisage a lawyer raising this question. It is a question which Beyleveld and Brownsword spend much of their book attempting to answer. The answer has two principal parts.

The first part might seem perverse, given the position just set out. For there is an undeniable sense in which the PGC has nothing to do with the general analysis of consent offered by Beyleveld and Brownsword. Their analysis holds, inter alia, that 'the function of consent seems to be twofold: in one kind of case the consenting agent A is precluded from raising a complaint about the conduct of the recipient agent B (B's "wrongdoing" as it would otherwise be); and, in the other kind of case, A is precluded from denying that ... she is bound by the rules (the rights and obligations) to which ... she has consented' (p. 60). Consent operates differently in these two different roles, it being a shield in the former and a sword in the latter (p. 60). Furthermore, consent is, for Beyleveld and

4 Each step of the argument is expanded and defended against myriad criticisms in Beyleveld (1991).

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Brownsword, a procedural rather than a substantive justification, is agent-relative in its effect and, when operating as a shield, 'justifies by way of negating a wrong rather than by way of overriding a right' (p. 61). The two different functions of consent map onto two different legal possibilities, namely, the creation of new legal relations and the modification of existing legal relations. These two different legal possibilities can be made perspicacious by means of the Hohfeldian analysis of rights (pp. 64–85).

Taken together, these strands of analysis lead Beyleveld and Brownsword to conclude that 'the essential function of consent in the law is threefold: namely to provide a procedural justifying reason to be relied upon by the recipient of the consent, agent B, in relation to:

(1) agent A's legal empowerment of B . . . ;
(2) agent A's self-limitation or denial . . . ; and
(3) agent A's self-limitation and/or empowerment, where A exercises a legal power whether to change the relationship with B or to engage an institutional rule-set' (p. 83).

In this admittedly very compressed statement of Beyleveld and Brownsword's analysis, the PGC is conspicuous by its absence. The analysis presumably stands or falls by its resonance (or lack of it) with the ordinary understandings, intuitions and experience of lawyers and laypersons. To this lawyer and layperson, the analysis is both accurate and enlightening, capturing some of what is familiar while illuminating much that is inchoate and vague in ordinary thought. It is therefore an aid to clarity of thought and action. But does this mean that the PGC and the general Gewirthian framework that Beyleveld and Brownsword sketch so scrupulously, and cling to with such determination, is redundant?

No. For while the PGC may do little or no work in identifying the idea – consent – under discussion, it could do a great deal when we come to apply or 'operationalise' that idea. This is the second part of Beyleveld and Brownsword's response to the lawyer-sceptic. For if the PGC elucidates matters such as, for example, the conditions under which consent can be valid, who should be regarded as capable of giving valid consent, and so on, then it is far from otiose. And it is no surprise to find the PGC and the precautionary principle being invoked by Beyleveld and Brownsword to discharge just these, among other, tasks (see, for example, pp. 101–111, 127–54 and 159–70). In thus utilising the general Gewirthian framework to inform an understanding of the law, Beyleveld and Brownsword are providing practical illustrations of the way in which the PGC can justify. Claims that 'the *PGC* is capable of justifying prescriptions directly or indirectly' (p. 55), and that justifications of the former kind 'can be deduced from the *PGC* in the circumstances of its application' (p. 55), while justifications of the latter type are '(i) outcomes of decision-making procedures that are justified directly by the *PGC*; and (ii) not contrary to what the *PGC* justifies directly' (p. 56), are clear enough. But they cast little light on the actual process of justifying a position one way or another in a particular context. It is this latter task that is really the main burden of Beyleveld and Brownsword's book. Their answer to the lawyer-sceptic is not therefore a quick and easy one: it is, rather, found in the bulk of the book itself.

A sustained engagement with this book would examine the position arrived at on each of the salient issues consent presents in the law in light, not just of the PGC, but of the existing law itself. Only then would the pragmatic force of the PGC, as well as the reformatory impact of the arguments of the book, be plain. Pending such a sustained analysis, what other observations might help in our assessment of *Consent in the Law*? Two nagging questions arise about the book's aim and ambition. Both might sound sceptical but they need not be so intended. The first question is this: are all other meta-ethical and ethical positions more inert than Gewirth's in the face of the issues raised in unpacking the

5 By 'meta-ethical' I mean a position about, inter alia, the truth-conditions and cognitive status of specific ethical claims or more general ethical theories. An ethical claim or theory is either a general or quite specific view about what is right

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notion of consent?[5] It might seem so, since the Gewirthian framework is the only one in which Beyleveld and Brownsword are interested. This interest might well arise from the view that this framework is unique among meta-ethical frameworks in providing detailed pragmatic guidance on issues like, for example, the adequacy and legitimacy of consent. This view is not, however, defended in *Consent in the Law*, and there is little textual evidence to suggest that Beyleveld and Brownsword espouse it.[6] So if the Gewirthian framework is not in this sense unique, why rely upon it? This question becomes especially acute if other meta-ethical positions converge on solutions to particular pragmatic problems. So, for instance, it might be the case that one or more non-Gewirthian position generates the same or very similar answers to questions about the necessity and sufficiency of consent as does the Gewirthian position. In the face of this meta-ethical over-determination, what advantage does the Gewirthian framework have over others?

The second question is a reminder of the relative ubiquity of morally mundane or morally inert questions in law. It asks this: are all significant doctrinal choices morally significant? There is a sure sense in which they are: all such choices, when made by judges, are other-regarding. But there is another sense this question has, where the idea is to ask whether all significant doctrinal choices must be determined by some or other moral principle, moral theory or meta-ethical position. What seems obvious about some doctrinal legal questions – for example, whether expectation losses in contract should be determined by the cost of cure or difference in value measure – is not their amenability to solution by some or other moral principle. Rather, it is the double-edged fact that (1) morality is often silent on such questions yet (2) the dispute needs resolution one way or another. In such cases, the solution is unlikely to be a matter of moral right and wrong, but simply 'conventional': the significant thing is that a solution is picked (or chosen), the merits of the choice being morally underdetermined.[7] Thus, it is often said, the choice of which side of the road to drive on, or which system of weights and measures to adopt, is of this conventional kind. Beyleveld and Brownsword's Gewirthian framework is not necessarily incompatible with this point and, indeed, to some extent recognises it (pp. 56–57). But it still might be that the adoption of the framework in the first instance serves to marginalise and displace the possibility of legal-doctrinal moral mundanity. What might be at issue here is the starting point of the inquiry. Do we begin with the assumption that legal doctrine is morally significant (in the second sense) but that lawyers are either bad at seeing this or bad at responding to it? Or do we start by assuming that we address moral significance only *when* and *if* we (lawyers and judges) find it?

Questions like these take us far beyond *Consent in the Law*. But one of the book's many virtues is that it raises these, and many other, broad-ranging and interesting issues. It cannot therefore be judged anything other than a success.

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and wrong, or good and bad, in human conduct. Although generally misleading to do so, I here use the term 'meta-ethical' to refer to both. While meta-ethical positions need not as a general matter determine the content of ethical claims or theories, Gewirth's meta-ethical position obviously does determine his ethical theory.

6 See also Beyleveld and Brownsword (1986, pp. 150–58).

7 The term 'picking' is probably most appropriate: see Ullman-Margalit and Morgenbesser (1977).

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