

# Victimless Conduct and the *Volenti Maxim*: How Consent Works

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**Abstract** This article examines the normative force of consent, explaining how consent works its “moral magic” in transforming the moral quality of conduct that would otherwise constitute a wrong against the consenting person. Dempsey offers an original account of the normative force of consent, according to which consent (when valid) creates an *exclusionary permission*. When this permission is taken up, the moral quality of the consented-to conduct is transformed, such that it no longer constitutes a wrong against the consenting person. Building on this account of how consent works, Dempsey identifies two sets of cases in which consent fails to transform the moral quality of one’s conduct: cases in which one is consent-insensitive to the rational force of another’s consent, and cases in which one acts for sadistic reasons.

**Keywords** Consent · Harm · Wrongdoing · Justification

*Volenti non fit injuria*: “To one who consents, no wrong is done.”

One common thread that holds the category of so-called “vice crimes” together is that the targeted conduct is typically deemed to be victimless.<sup>1</sup> Insofar as the conduct at issue is victimless in the relevant sense, such offences are the proper target of a liberal critique grounded in the harm principle.<sup>2</sup> On most interpretations, this principle can be distilled into

<sup>1</sup> Vice crimes are typically understood to include conduct such as prostitution, gambling, and drug-related offences—although this list is not meant to be exhaustive. Other candidates for inclusion within the category of vice crimes are alcohol-related crimes during the Prohibition Era, as well as criminal laws prohibiting pornography, fornication, adultery, and same-sex sexual activity (Zimring and Harcourt 2007). See also, Peter de Marneffe’s contribution to this volume (de Marneffe 2012).

<sup>2</sup> As Stanton-Ife has observed, ‘it is a little misleading to speak of the ‘Harm Principle’ as one principle shared by all the leading thinkers associated with [it]’—but, like Stanton-Ife, I will do so by way of shorthand. (Stanton-Ife 2006) In its canonical exposition, J.S. Mill framed the harm principle as follows: ‘the only purpose for which power can be rightfully exercised over any member of a civilized community,