

WHAT DOES IT MEAN TO CONSENT?

Nancy Kim

ProFlowers Distinguished Professor of Law

California Western School of Law

Visiting Professor of Law

Rady School of Management, University of California, San Diego

<https://www.cwsl.edu/faculty-staff-and-campus-directories/faculty-and-staff-directory/n/nancy-s-kim>

https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=395016

What is consentability?

- Consentability has 2 meanings:
(1) it is possible to consent; and (2) it is legal to engage in the activity.

In many situations acts are deemed inconsentable because there is concern that the consent is invalid or “defective.” But what does that mean? And why do we allow consent to some things and not to others?

What does it mean to Consent?

Law views it as conclusion to be reached with moral and legal consequences

Reality is more complicated; consent is context-dependent, mutual, relational, and often incremental.

The Three Conditions of Consent

Figure 3-3 - CONSENT CONSTRUCTION /ASSESSING THE CONDITIONS OF CONSENT

Act/Manifestation of Consent

- Intentional?/Motive
 - Physical (Reflexive? Compelled?)
 - Cognitive (understand nature of the act)
- Other Party Knowledge/Behavior
 - Reasonable to assume manifests consent?

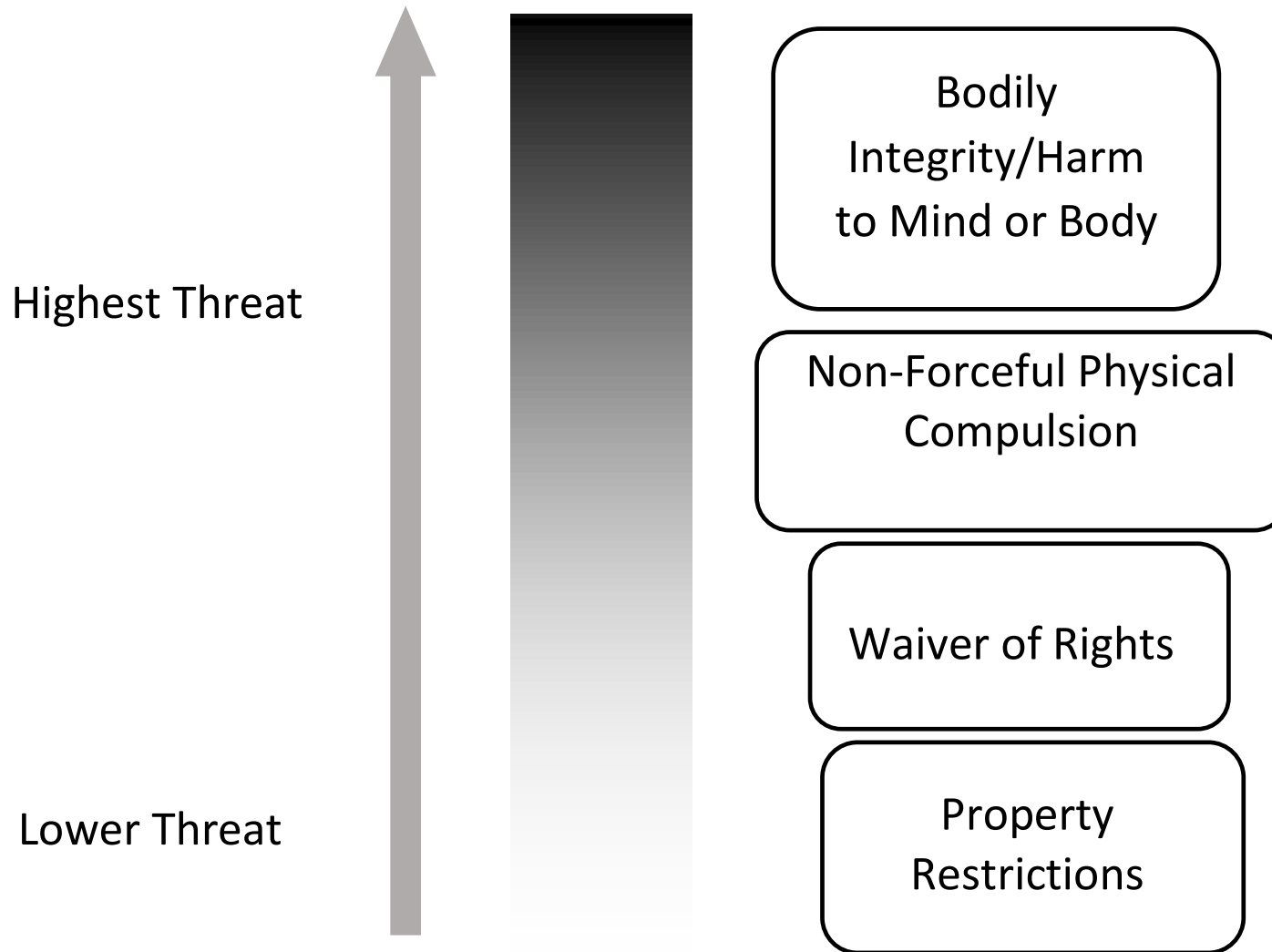
Knowledge

- Information
 - Other Party Knowledge/Behavior
 - Withholding information?
- Understanding
- Motive/Purpose
 - Cognitive capabilities
 - Other Party Behavior
 - Deceptive? Unfair?

Voluntariness

- Volitional
- Desire/Motive
- Other Party Knowledge/Behavior
 - Physical force? Coercion? Manipulation?

Figure 3-4 – HIERARCHY OF AUTONOMY INTERESTS



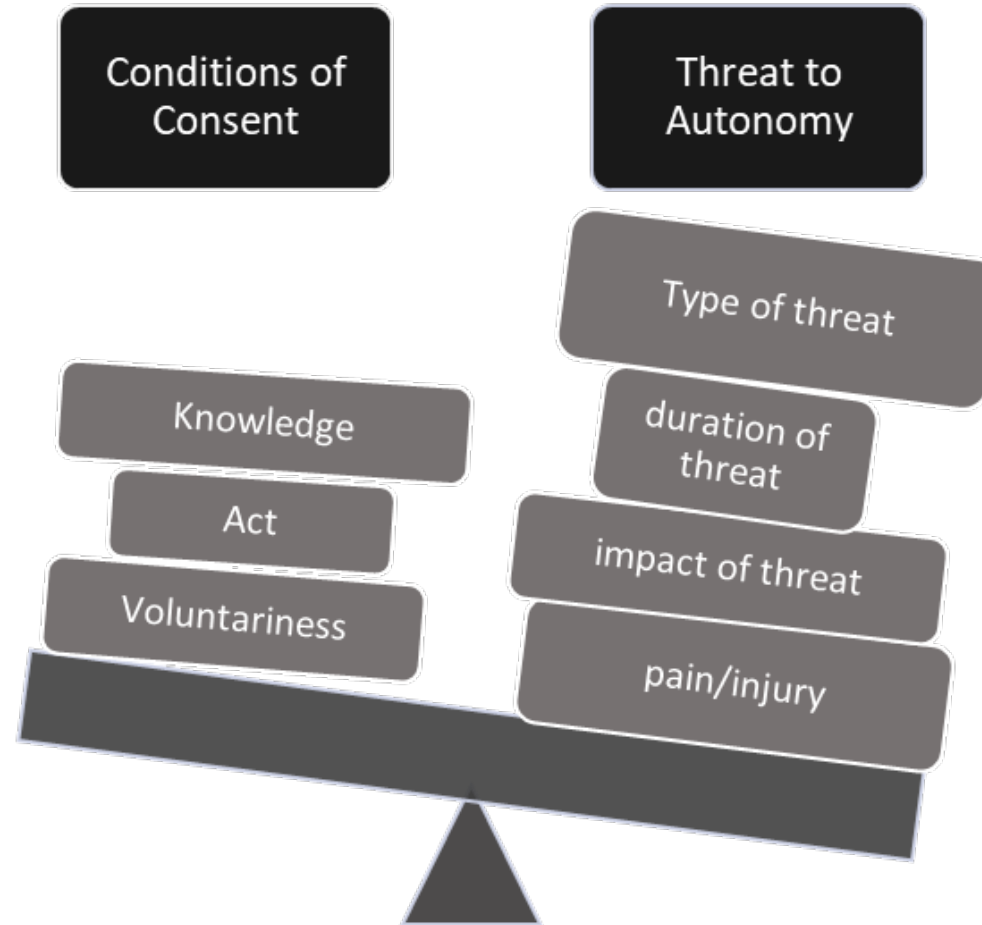
Threat level to autonomy depends upon factors

Figure 3-5 – RELEVANT FACTORS IN ASSESSING THREAT LEVEL TO AUTONOMY

		TYPE OF THREAT			
		HIGHEST LEVEL		LOWEST LEVEL	
		BODILY INTEGRITY/ HARM TO MIND AND/OR BODY	NON- FORCEFUL PHYSICAL COMPULSION	WAIVER OF RIGHTS	PROPERTY RESTRICTIONS
Factors to Consider	Duration		Duration of compulsory service or exposure	Duration of waiver	Duration of restriction
	Impact/severity of threat (Permanence/irreversibility, diminishment v. enhancement)		Condition/nature of threat	Type of Right/Importance	Type of restriction
	Pain		Degree of physical exertion or offensiveness	Likelihood of exercising right	Type of property/importance
	Availability of alternatives to bodily harm		Alternatives (Working conditions and degree of difficulty to avoid)	Availability of alternatives to waiver	Alternative compensation for restriction

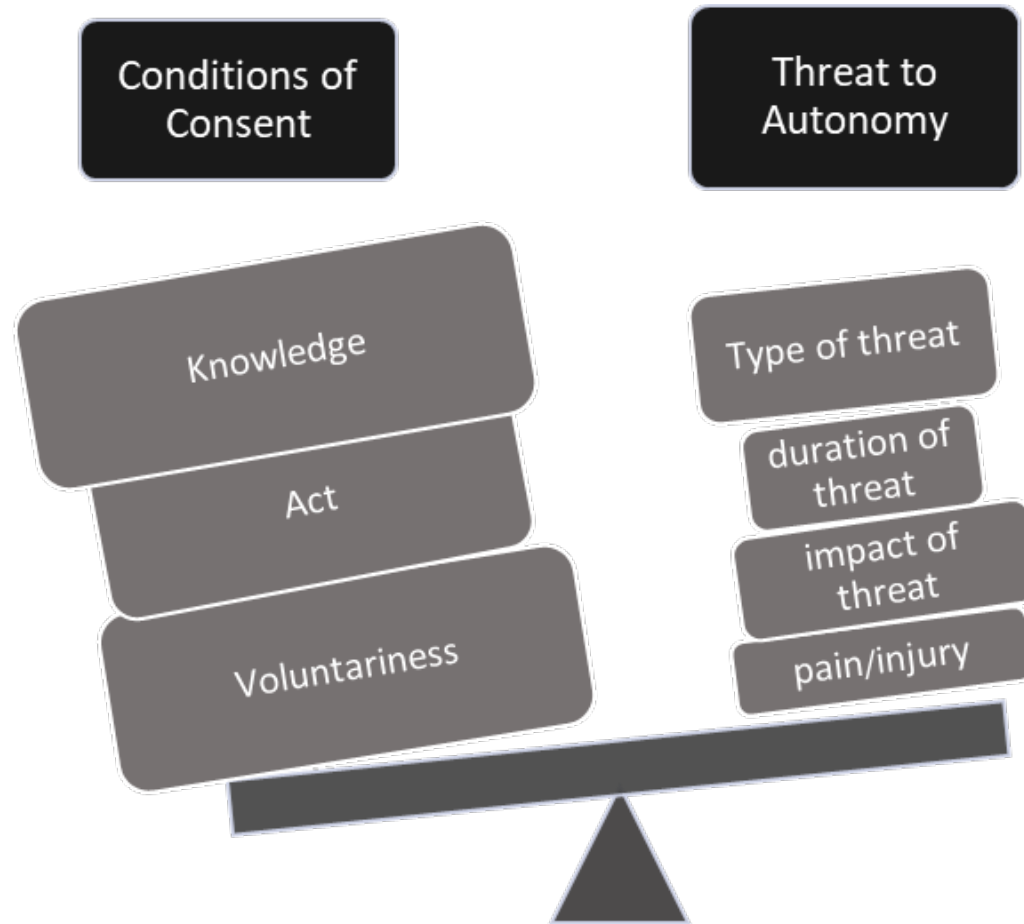
No Valid Consent

Figure 3-6 – Figure Showing No Valid Consent



Valid Consent

Figure 3-7 – Figure Showing Valid Consent



Defective Consent

- Manifestation of Consent but one or both of the other conditions are not sufficiently robust given the level of threat to autonomy.
- Ineffective

Recognition of defective consent in existing law (even if not expressly)

- Examples:
- Contract – duress, undue influence, mistake and unconscionability (allow consentor to avoid contract despite manifestation of consent)
- Criminal – severity of crime charge (reckless v. intentional)
- Tort – battery v. duty of care/negligence standard
 - e.g. physician who has failed to obtain consent has committed battery while one who has failed to obtain informed consent is liable under duty of care/negligence

Defective Consent

- Express recognition of category of defective consent might eliminate confusion over “valid” or “full” or “meaningful” consent categories
- Would apply where there is a “manifestation of consent” but one or more of the consent condition is insufficient given the autonomy interest.
- A finding of defective consent would mean no private ordering
 - regulatory agency or judiciary would determine substantive terms.

Application: GDPR and Consent

- Data protection as a fundamental right
- Applies to processing of personal data (with some exceptions, e.g. for personal activity; for public security)
- Companies/Organizations in EU or those processing data of EU subjects
- Consent is one important way (although not the only way) for businesses to comply
 - May be the easiest way for some companies (Exception: employers)

GDPR Article 4(11) - Definitions

- 'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her

GDPR Article 7

– Conditions for Consent

1. Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.
2. If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.
3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.
4. When assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.

GDPR - Recital 32 Conditions for consent

“Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject’s agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement. This could include ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context the data subject’s acceptance of the proposed processing of his or her personal data. Silence, pre-ticked boxes or inactivity should not therefore constitute consent. Consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, consent should be given for all of them. If the data subject’s consent is to be given following a request by electronic means, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided.”

How do GDPR
requirements
reflect
understanding
of consent?

- **MANIFESTATION OF CONSENT CONDITION**
 - STATEMENT OR “CLEAR AFFIRMATIVE ACTION”
 - SPECIFIC – Request for consent must be presented in a manner clearly distinguishable from the other matters; should be clear what data processing activities company intends to carry out, giving the subject opportunity to consent to each activity. Cannot explain uses as part of a single long paragraph with a single consent checkbox at the end.
 - UNAMBIGUOUS – silence does not count, neither do pre-ticked boxes or inactivity

How do GDPR
requirements
reflect
understanding
of consent?

VOLUNTARINESS CONDITION

- “FREELY GIVEN” - Cannot require consent as condition of service; Subject has to be able to say No.
 - Recital 42: “Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.”
 - Exception: if need data to provide service, such as credit card info to process transaction.
- **CONSENT CAN BE REVOKED** – and should be just as easy as obtaining consent.

How do GDPR
requirements
reflect
understanding
of consent?

- **KNOWLEDGE CONDITION**

- **INFORMED** – Intelligible and easily accessible form if written; subject must know your identity, what data processing activities you intend to conduct, purpose of the data processing, and that subject can withdraw consent at any time. Must also be described in plain language (“clean and plain language”)

GDPR compliance problems/defective consent

- Google fined \$57M (50Euros) for failing to give enough information to users on data consent policies and failing to give enough control over how information is used.
- Employers – should look to other lawful means (e.g. for performance of contract, compliance, legitimate interests) and *not consent* because of imbalance in relationship
 - E.g. Greece's data protection authority fined PWC for breaches in processing of employee data b/c due to bargaining imbalance, consent could not be freely given.

The Relationship of “Consent” to “Contract”

- Remember:
- Consent is necessary for Contract but Consent ≠ Contract
- Consent can be revoked *unless* parties have entered a Contract
 - A contract needs more than consent
 - A contract cannot be revoked (with some exceptions)

Under GDPR, consent ≠ contract

Under the GDPR, consent to processing of personal data is treated as *separate from the contract for the underlying service*. Therefore, consent may be withdrawn unless it is fundamental to the contract.

e.g. “Processing shall be lawful only if and to the extent that at least one of the following applies...processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract” (Art. 6 (1)(b))

e.g.: “When assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.” (Art. 7 (4)).

e.g. “Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.” (Recital 42)

e.g. “Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance.” (Recital 43).

Questions?

- nsk@cwsl.edu
- <https://www.cwsl.edu/faculty-staff-and-campus-directories/faculty-and-staff-directory/n/nancy-s-kim>
- https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=395016

Extras

CONSENTABILITY FRAMEWORK

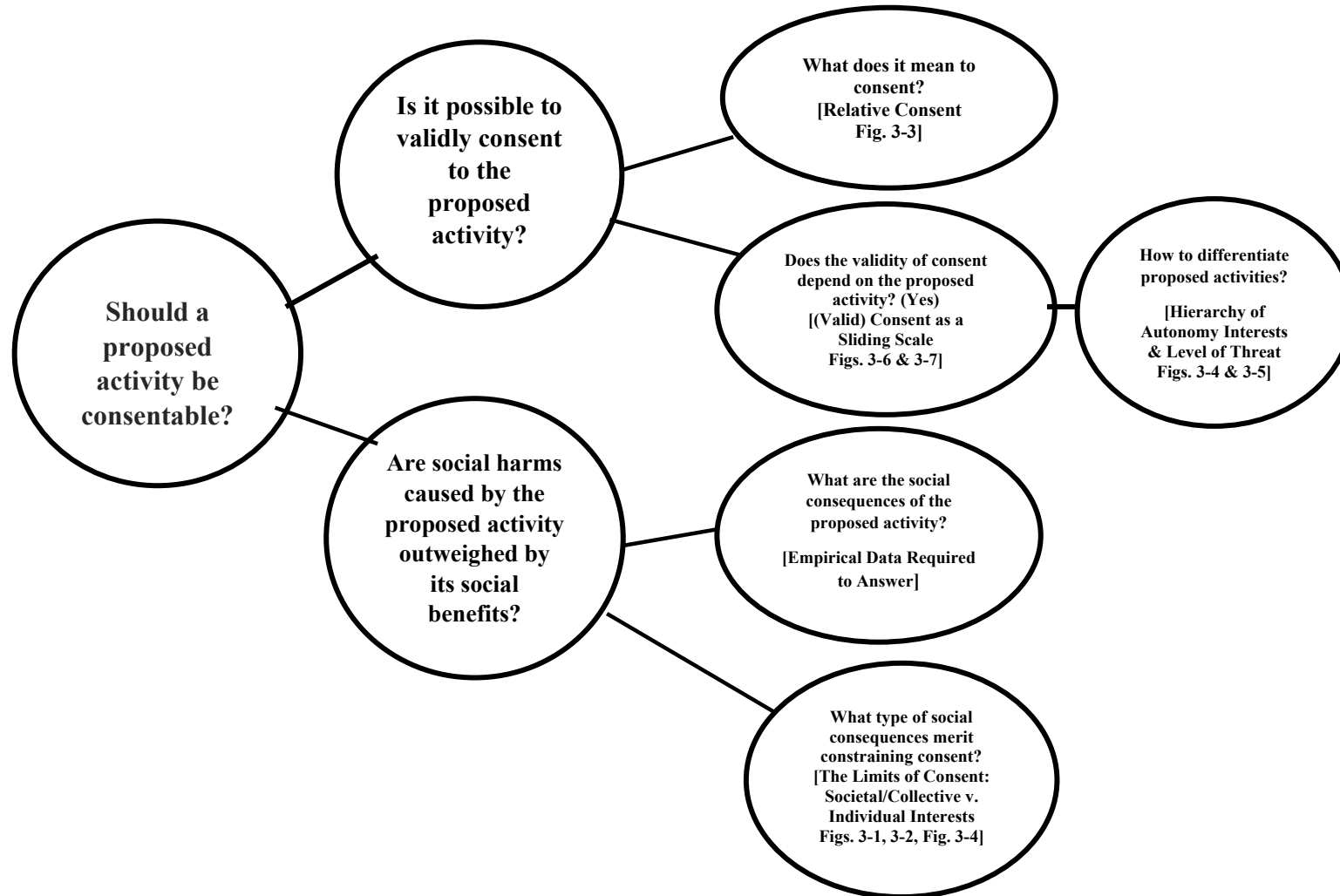


Figure 3-4 – HIERARCHY OF AUTONOMY INTERESTS

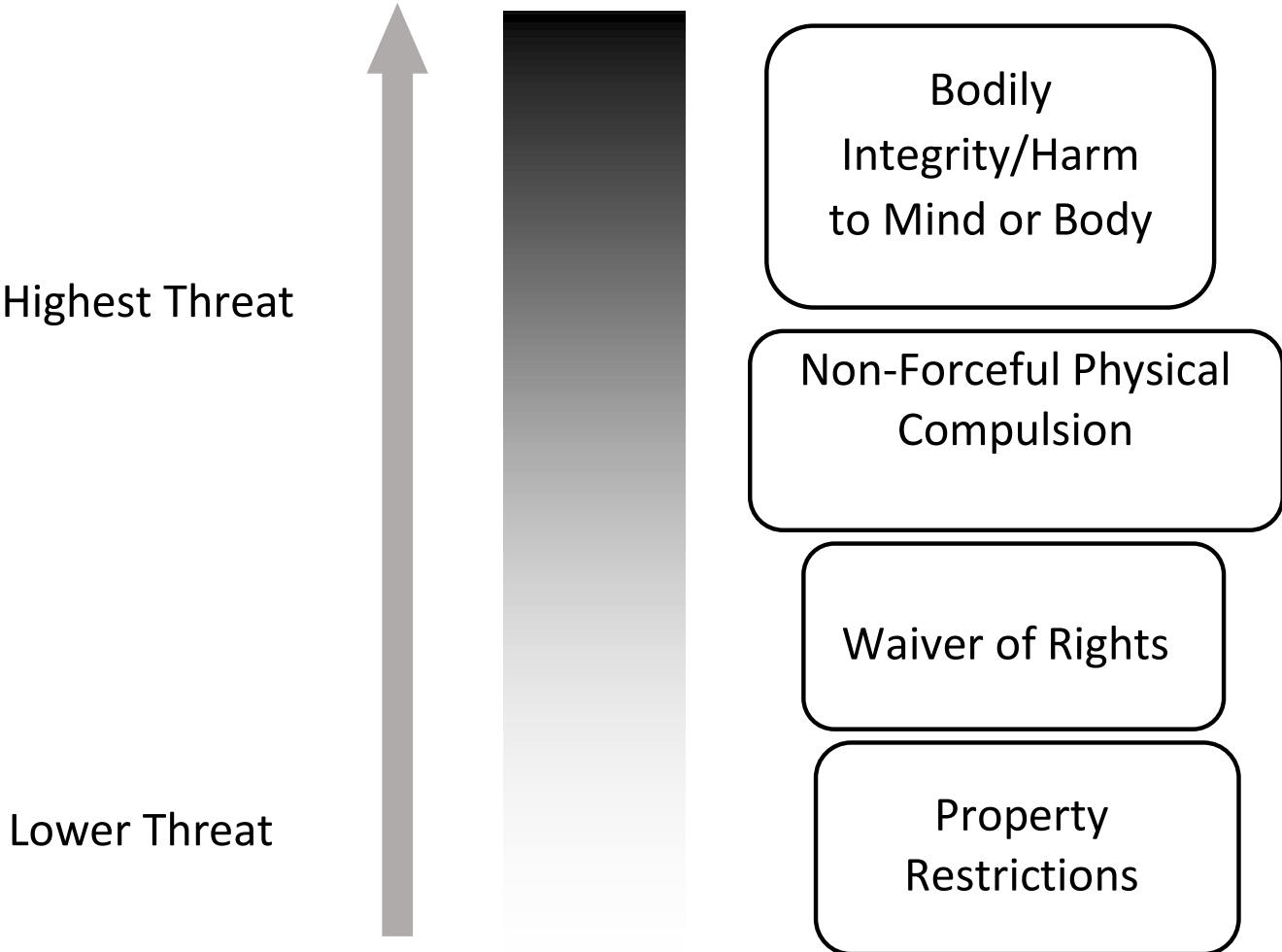


Figure 3-5 – RELEVANT FACTORS IN ASSESSING THREAT LEVEL TO AUTONOMY

		TYPE OF THREAT			
		HIGHEST LEVEL		LOWEST LEVEL	
Factors to Consider		BODILY INTEGRITY/ HARM TO MIND AND/OR BODY	NON- FORCEFUL PHYSICAL COMPULSION	WAIVER OF RIGHTS	PROPERTY RESTRICTIONS
	Duration		Duration of compulsory service or exposure	Duration of waiver	Duration of restriction
	Impact/severity of threat (Permanence/irreversibility, diminishment v. enhancement)		Condition/nature of threat	Type of Right/Importance	Type of restriction
	Pain		Degree of physical exertion or offensiveness	Likelihood of exercising right	Type of property/importance
	Availability of alternatives to bodily harm		Alternatives (Working conditions and degree of difficulty to avoid)	Availability of alternatives to waiver	Alternative compensation for restriction

Questions from chat window

- *John M: what evidence must be captured and what forms are accepted, to prove that consent has been properly achieved?*
 - Digital signature required?
 - Answer: in current case law re: online contracts in US, courts are requiring screen shots of web flows, in order to show “knowledge condition”, and not just accepting the evidence of the click. I.e. They’re requiring evidence of the user flow prior to the click. Expect more requirement of record-keeping. E.g. recent amazon case: “if you can show 30 instances of the user accessing the site...”
 - What kinds of evidence will be acceptable? Will access analytics be sufficient? Yes with a combination of representative screens that match those access dates.
- *Lisa: won't this have an unintended consequence of less online anonymity and more identification?*
 - Will SSI help counter/mitigate this? Hope so.
- *When will we get proof that Consent Receipt is adequate?*
 - In US law, they’ll accept Notice of being bound under terms.
 - Need Constructive Notice or Actual Notice:
 - If the user gets actual notice such as an email, that satisfies and is in fact stronger.

- John W: The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757465

Questions from chat window

- *Ken: Nancy, can you talk about the abuse of the [GDPR] legitimate interest option to avoid consent? E.g. kantara uses legitimate interest vs. consent.*
 - Role of Student
 - Is it correct to valorize consent over other forms of [GDPR] authority for personal data processing?

Questions from chat window

- *John W: ? With respect to balancing the threat to autonomy, how do you define that in a more collective sense. i.e. Social harms or impacts and the chilling effect.*

Questions – cont'd

- *John W: From an IT/Architecture case it appears that the notion of notice and consent was a way to relinquish control over personal information under the terms set out in the notice. That makes architectural sense for a single entity with a single database for a defined purpose. Doesn't make sense in a back-end API connected world is this a case where there is no consentability*

Questions – cont'd

- *John W: ? Communications Privacy Management theory [i.e. how consentability relates]*

Questions – cont'd

- *John W: ? Contextual framing problem with notice/consent*

Questions – cont'd

- *James A: Question: Is it fair to say that consent is NOT dead. We as a society simply need better ways to manage it, and supporting decisions by authorities and courts?*

Questions – cont'd

- *Mary H: Nancy: Do you think that legal regimes should then limit what can be done.. the same way that there are rights you cannot give away in other areas. For example, you cannot consent to sell your own organs?*
 - *How would something like that work.. in conjunction with a consent system*

Questions – cont'd

- *Lisa: Do you expect more litigation re: defective consent?*

Questions – cont'd

- *Lisa: Do you expect more litigation re: defective consent?*

Questions – cont'd

- *Lisa: Is there reason for optimism re: the recent judgements against Google and PCW? Ie. As legal precedent?*