

unknown factors, or because they are beyond the capacity of the subject to understand.

Any application of the concept of consent as a privacy-protecting test for scientific research is further complicated by the difficult factual problem of assessing, in each particular case, what constitutes consent. When is it informed; when is it freely given; who is entitled to give it? In research situations consent may be given by tacit acquiescence, by explicit oral avowal, by written statement, or it may be implied from the totality of the circumstances. While each of these methods of consent can raise troublesome issues, implied consent is by far the most difficult.

Obviously, in many situations, consent can be fairly implied. Certainly, public figures, particularly those who appeal to the public for elective office, have impliedly consented to the yielding up of some areas of private personality. The comings and goings of a Mayor or Governor, or Hollywood starlet, and a public evaluation and discussion of their strengths and weaknesses in their public roles, are proper subjects of news report, analysis, and research. Similarly when a client seeks occupational counseling from a psychologist, or a parent seeks educational guidance for his child, or when a patient seeks psychotherapy, he has consented to some probing, and revelation, of his private personality.⁵⁰ While the combination of circumstances that will warrant the implication of informed consent are myriad, restraint must be exercised not to imply such consent in the absence of reasonably compelling facts. Otherwise, the whole requirement of consent can too readily be rationalized away through implication.

Moreover, consent to the revelation of private personality for one purpose, or under one set of circumstances, is not license to publish or use the information so obtained for different purposes or under different conditions. This is especially so when the operative consent is implied or when it would be reasonable to assume that the initial consent would not have been given for the new purpose or the different situation. Further, varying degrees of consent must be recognized. Consent, however given, may be restricted in numerous ways—as to the methods to be used, the risks to be taken, the degree of information the subject wishes to give or receive, the type of data to be obtained, or the uses to which it may be put.

Another complicating factor in the concept of consent is the determination of whether consent has been freely given or coerced. Torture is an old and well-tried technique for extracting private information—and torture need not be physical. Mental anguish can be just as searing and difficult to endure. The prospect of release from suffering, therefore, is a powerful lever for access to the private area. Its uses for the manipulation of behavior or

50. See CRONBACH, *op. cit. supra* note 25, at 459-62.